JACK E. LYNN ET AL. *v.* ROBERT J. BOSCO, SR., ET AL.
(AC 39172)

Prescott, Elgo and Norcott, Js.

Syllabus

The plaintiffs sought, inter alia, a declaratory judgment determining whether their preemptive rights as shareholders of stock in the defendant corporation, A Co., were violated in connection with the sale and distribution of 141 shares of A Co.'s treasury stock to the individual defendants, B, P, R and W, who constituted A Co.'s board of directors. In their complaint, the plaintiffs alleged that the individual defendants had breached their fiduciary duties to the plaintiffs by self-dealing and had violated the plaintiffs' preemptive rights as shareholders. The individual defendants moved to strike the complaint on the ground that the plaintiffs had failed to join a necessary party, A Co., as a defendant. In response, the plaintiffs filed a motion to cite in A Co. as a defendant for the purpose of notice only, which the trial court granted. The plaintiffs then filed an amended complaint, which named A Co. as a defendant but did not include any allegations against or seek relief from it. Thereafter, the trial court denied the motion to strike, and the individual defendants filed an answer, special defenses and a counterclaim, but did not assert a cross claim against or seek any relief from A Co. Halfway through the first day of the trial, the court, without objection, released A Co.'s counsel from attending the remainder of the proceedings because he had no active role in the litigation, as A Co. was not an adversarial party. Following the trial, the court rendered judgment in favor of the plaintiffs in part, finding that their preemptive rights had been violated by the sale of the shares of A Co.'s treasury stock to the individual

defendants and that B, P and W had engaged in self-dealing by awarding themselves bonuses in connection with that transaction. The court concluded that the plaintiffs were entitled to equitable relief and requested that the parties submit proposed remedies but did not indicate that they should address what role A Co. should play, if any, at the remedy stage. Thereafter, the court ordered, inter alia, that the subject transaction be set aside and that A Co. reimburse the present owners of the 141 shares of stock. On A Co.'s appeal to this court, *held* that the trial court did not have the authority to order equitable relief that imposed a remedy on A Co., as A Co. had no notice that such relief would enter against it, resulting in unfair surprise to it: the court's order was inconsistent with the issues as framed in the pleadings, which did not include any allegations of wrongdoing against A Co. or seek any relief from it, and with its finding that B, P and W had engaged in self-dealing in connection with the subject transaction, and there was nothing in the record that indicated that the parties litigated the case as if the court might order A Co. to reimburse the owners of the 141 shares of stock, as the conduct of counsel and the court during and immediately following the trial was consistent with the pleadings, in that they did not act as if the parties had made any allegations against or sought relief from A Co.; moreover, when the court, without objection, excused A Co.'s counsel on the first day of the trial, the parties effectively acknowledged that his presence was unnecessary given the posture of the case, and A Co. relied on the state of the pleadings in opting not to participate further in the trial.

Argued November 16, 2017—officially released May 29, 2018

Procedural History

Action for, inter alia, a declaratory judgment determining whether the plaintiffs' preemptive rights were violated in connection with the sale of certain shares of stock, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Robaina*, *J.*, granted the plaintiffs' motion to cite in Aerospace Techniques, Inc., as a defendant; thereafter, the named defendant et al. filed a counterclaim; subsequently, the matter was tried to the court, *Hon. Lois Tanzer*, judge trial referee; judgment in part for the plaintiffs on the complaint and on the counterclaim; thereafter the court, *Hon. Lois Tanzer*, judge trial referee, issued a certain order, from which the plaintiffs and the defendant Aerospace Techniques,

Inc., appealed to this court. *Appeal dismissed in part; judgment reversed in part; further proceedings.*

Richard P. Weinstein, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellants (defendant Aerospace Techniques, Inc., and plaintiffs).

Dale M. Clayton, for the appellee (defendant Richard B. Polivy).

Megan Youngling Carannante, with whom, on the brief, were *Eliot B. Gersten* and *Johanna S. Katz*, for the appellee (named defendant).

Opinion

ELGO, J. This case is about the propriety of a judicial remedy binding a company that had been cited in as a party by the plaintiffs, Jack E. Lynn and Jeffrey Lynn, for notice purposes only and against whom no allegations had been pleaded. The defendant Aerospace Techniques, Inc. (company),[1] appeals from the January 11, 2016 judgment of the trial court ordering the company to pay the owners of 141 shares of treasury stock issued to the defendants Clyde E. Warner,[2] Robert J. Bosco, Sr. (Bosco), Anthony Parillo, Jr., and Richard B. Polivy[3] in exchange for the return of the 141 shares to the

[1] The company was originally named as a defendant in this action but thereafter came under the control of the plaintiffs. The plaintiffs also appealed from the judgment of the trial court. At oral argument before this court, they conceded that they lacked standing to bring this appeal. See, e.g., *State* v. *Long*, 268 Conn. 508, 531–32, 847 A.2d 862 (setting forth test for aggrievement), cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004). We agree that they lack standing and, accordingly, dismiss the appeal as to the plaintiffs.

[2] Warner had purchased one of the 141 shares and was named as a defendant in the plaintiffs' complaint. Warner died during the pendency of the case, and the plaintiffs withdrew the complaint as to him after the court rendered judgment but before it ordered the remedy at issue.

[3] The plaintiffs also named Robert J. Bosco, Jr., as a defendant for notice purposes only, as discussed more fully in footnotes 7 and 20 of this opinion. We refer to him in this opinion as Bosco, Jr.

company. The company claims that the trial court acted beyond the scope of its authority by entering an order that imposed a remedy on the company, although neither party made any allegations against or sought relief from the company in the operative complaint. We agree and, accordingly, reverse the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. In 1965, Jack Lynn and two other individuals incorporated the company under the laws of Connecticut. Jack Lynn was chairman of the company's board of directors (board) from that time until 2011. In June, 2011, the board, then consisting of Jack Lynn, Bosco, and Warner, met.[4] The board voted to reaffirm Polivy as the company's corporate counsel. Bosco and Warner then voted for Bosco to replace Jack Lynn as chairman and for Bosco and Warner to replace Jack Lynn and Jeffrey Lynn in their respective positions as officers of the company. In October, 2011, Jack Lynn sent a letter to all shareholders of the company, indicating that he and Jeffrey Lynn needed thirty-nine shares of stock to exceed 50 percent ownership of the company, and offering to purchase the first forty-one shares offered to him. Later that month, at the annual shareholder meeting, Jack Lynn was removed from the board, which then was reconstituted with Bosco, Warner, Parillo, and Polivy as directors.

On December 8, 2011, shareholder Joseph R. Dube sent a letter to Bosco, offering to sell his 141 shares to Bosco if the company did not purchase them. At a board meeting on December 14, 2011, the board agreed to seek approval from its bank for the company to purchase Dube's shares and agreed to reissue the shares at $2000 per share, to be sold and distributed as follows: forty-seven shares to Bosco, forty-seven shares to Parillo, forty-six shares to Polivy, and one share to Warner

[4] Jeffrey Lynn and Parillo attended as observers.

(Dube transaction). The plaintiffs were not aware of the transaction. After receiving the bank's approval, the company paid Dube $100,000 and issued him a promissory note for the outstanding balance of $82,000 in exchange for his 141 shares of stock. Bosco, Parillo, and Polivy each provided a promissory note to the company in exchange for their respective allocation of the shares, agreeing to pay the company in three installments. As the first installment, Bosco and Parillo each promised to pay $32,900, and Polivy promised to pay $32,200. Warner paid the $2000 he owed in cash.

At the December 14, 2011 meeting, the board also agreed to award and pay performance bonuses of $32,900 to Bosco, $32,900 to Parillo, and $2000 to Warner.[5] During the repayment period for their promissory notes, the board awarded additional bonuses to Bosco, Parillo, and Warner of approximately $100,000 each. Polivy never received a bonus.[6]

In December, 2012, the plaintiffs filed a two count complaint against the remaining shareholders.[7] The

[5] On cross-examination at trial, Bosco could not explain how the board had determined the amount of each bonus, instead stating that the bonuses equaled the first installments by coincidence, because it was expedient that they be the same amount, and because the board felt that these amounts were appropriate. Warner, in response to being asked whether he had paid "for that one share of stock with cash," testified, "[n]o, I was given a bonus for that."

[6] The company nevertheless contends, in its brief to this court, that "the burden should have been on Polivy to assert a claim against [the company] for the return of [the] funds" he had paid for his shares.

[7] Between January and April, 2012, four of the company's other shareholders directly sold their shares to Bosco and Parillo (direct transactions). Following these transactions, the company's remaining shareholders were Jack Lynn, Jeffrey Lynn, Bosco, Bosco, Jr., Parillo, Polivy, and Warner. As noted in footnote 3 of this opinion, Bosco, Jr., was named as a defendant for notice purposes only. As a shareholder, Bosco, Jr., had an interest in the proceedings but because he had not "purchased any of the disputed shares," neither party made allegations against him or called him as a witness at trial. See also footnote 20 of this opinion.

plaintiffs claimed that Bosco, Parillo, Polivy, and Warner (individual defendants) (1) acquired stock from the company in violation of the plaintiffs' preemptive rights as stockholders and (2) breached their fiduciary duties to the plaintiffs by self-dealing and violating the plaintiffs' preemptive rights. The initial complaint did not name the company as a party.

In January, 2013, the individual defendants moved to strike the plaintiffs' complaint, arguing, in part, that "the plaintiffs fail[ed] to join a proper and necessary party defendant for the declarative judgment sought . . . . [The company] is a necessary party to any declaratory judgment regarding the preemptive rights held by its shareholders and any constructive trust that may (or may not) be created based on the defendants' alleged 'self-dealing.' Additionally, . . . [the company] is the entity which could grant and/or deny the plaintiffs preemptive rights, not the individual defendants." In response, the plaintiffs moved to add the company as a party defendant, arguing that although "the plaintiffs believe that the issue of whether [the company] is a necessary party may be debatable, in the interests of moving this case along the plaintiffs ask the court to grant their motion to cite in [the company] as a party defendant."

The court, *Robaina*, *J.*, granted the plaintiffs' motion, and the plaintiffs filed an amended complaint, naming the company as a defendant with respect to their claim of a violation of preemptive rights only.[8] The amended complaint did not include any allegations against or seek relief from the company. The court, *Hon. Jerry*

[8] The plaintiffs later filed a second amended complaint, which is the operative complaint in this case. It differed solely in the addition of a sentence clarifying that the transactions that had occurred between the four shareholders and Bosco and Parillo had occurred directly between them rather than through the company.

Wagner, judge trial referee, thereafter denied the individual defendants' motion to strike, noting in its memorandum of decision that they had conceded that their argument regarding the plaintiffs' failure "to join a proper and necessary party defendant was moot." In October, 2013, the individual defendants filed their answer to the plaintiffs' complaint, therein asserting several affirmative and special defenses, and a two count counterclaim against the plaintiffs. The individual defendants did not assert a cross claim against or seek any relief from the company.

In February, 2014, the company moved to strike the plaintiffs' complaint for failure "to state a cause of action against" it. The plaintiffs opposed the company's motion, noting that the company's "participation in this case is at the insistence of its board of directors," the individual defendants in this case. The plaintiffs noted that the complaint "merely identifies [the company] as an additional defendant in its count one in recognition of the fact that [the company] is, in essence, a mere stakeholder upon the plaintiff's claims, including for declaratory relief, to validate its preemptive rights in [the company's] stock . . . ." The plaintiffs clarified that the company "is not accused of wrongdoing since its actions were only by virtue of the actions of the individual defendants." The court, *Abrams*, *J.*, denied the company's motion to strike, and the company remained named as a defendant.

In May, 2014, the case proceeded to trial. At the commencement of the first day of the two day trial, the court, *Hon. Lois Tanzer*, judge trial referee, asked the parties about the status of the company's motion to strike. The plaintiffs' counsel explained that the motion had been denied and that the court had decided that "because it's a declaratory judgment action there doesn't need to be adversity against the [company], but it should have formal notice or be joined so the

[company] is here." The plaintiffs' counsel further stated: "I did speak to [Mark Block, the company's counsel]. It's my understanding that he's here to represent the [company], but I maintain we are not adverse to the [company]. It's my understanding he's not an active participant." Attorney Block clarified "that as an indispensable party, the [company] should be afforded an opportunity to participate in the proceedings," and therefore reserved that right. The court noted that it believed that the company was brought in so that it could "protect [its] interest." Halfway through the first day of the trial, Attorney Block stated: "[M]y appearance on behalf of the [company] was as a necessary party to a declaratory judgment act, and I have no active role in the litigation, and I've discussed the same with counsel. They have no objection to my being released from the rest of the trial since there's no active role I intend to take at this point." The parties did not object. The plaintiffs' counsel further stated that "it's just an added expense for the [company] which I think under the circumstances is not even necessary." The court released Attorney Block, and he was not present for the remainder of the trial.

Importantly, after the trial concluded on May 16, 2014, but before the court rendered judgment, Warner realigned himself with the plaintiffs, and, as a result, by October 10, 2014, the plaintiffs had become majority shareholders and regained control of the company's affairs. Prior to Warner's realignment, collectively, the plaintiffs held 950 shares, and the defendants held 1026 shares, of which 605 belonged to Warner. When Warner "teamed [up] with the [plaintiffs]," he and the plaintiffs became majority shareholders, together holding 1555 shares, and the remaining defendants holding 421 shares.

On November 4, 2014, the plaintiffs moved to reopen the evidence, arguing that this reorganization provided

them with "access [to] . . . some substantially damaging evidence which had otherwise been concealed and unknown to the plaintiffs and even to . . . Warner in regard to the conduct of Parillo, Polivy, and Bosco . . . ." Soon thereafter, Attorney Block moved to withdraw his appearance, noting that he had been "requested to enter an appearance on behalf of the company to protect the interests of the company although the only allegations were against the individual defendants," and that the reorganization put him "in the position of representing a corporation which is now suing its controlling shareholders . . . ."[9] As the company's controlling shareholders, the plaintiffs did not hire a new attorney to represent the company's interests. In February, 2015, the court held a hearing on the plaintiffs' motion to reopen. The plaintiffs argued that the new information would "demonstrate that the testimony given to the court was not . . . accurate, not forthright in regard to the financial conditions of the company." On March 23, 2015, the court denied the motion, reasoning that the evidence proffered related "to the credibility of testimony and evidence relating to the financial conditions of [the company] at the time of the events complained of in the pleadings and not related to issues of a substantive or material nature."

That same day, the court issued its memorandum of decision, in which it ruled in favor of the plaintiffs on count one of the complaint and for the individual defendants on count two.[10] At the outset, the court noted that the company and Bosco, Jr., were "named as defendants in count one only and only for the purpose

[9] Counsel for the individual defendants also withdrew his appearance because of the conflict created when Warner realigned himself with the plaintiffs.

[10] The court found for the plaintiffs on both counts of the individual defendants' counterclaim. Bosco filed an appeal from that judgment, which this court dismissed for lack of a final judgment because as of that time, the trial court had made only a finding of liability.

of notice." The court then found that the 141 shares of stock that the company reacquired from Dube and then sold to the individual defendants had been subject to preemptive rights. The court thus concluded that the Dube transaction violated the plaintiffs' preemptive rights.[11] The court also found that Bosco, Parillo, and Warner had engaged in self-dealing by awarding themselves bonuses in connection with the Dube transaction but that, nevertheless, the plaintiffs had failed to satisfy all of the elements for a cause of action for breach of fiduciary duty. Specifically, the plaintiffs did not show that they had suffered damages or that any such damages were caused by the individual defendants' actions. Upon determining that the plaintiffs were entitled to equitable relief for the violation of their preemptive rights, the court ordered all parties to submit proposed remedies regarding disposition of the 141 Dube shares, noting that "[a]side from the form of remedy, there are questions concerning whether payment or reimbursement by the plaintiffs and/or to the defendants will be required and, if so, at what per share price."

The plaintiffs, as well as Polivy and Parillo, filed proposed remedies. In April, 2015, the plaintiffs proposed that the 141 shares should be returned to the company as treasury stock and that the individual defendants should not receive payment for returning their shares because their "source of payment for the shares was the [company] itself through the self-dealing of the [individual] defendants." Additionally, the plaintiffs argued that "[i]n the event the court rejects this approach as to payment . . . the determination of whether or not payment is to be made to the [individual] defendants should await an adjudication of the [other] case" pending between these parties. See *Lynn* v. *Bosco*, Superior

[11] The court reasoned that this issue previously had been decided by Judge Wagner on the individual defendants' January, 2013 motion to strike, and that, as that ruling was on a matter of law and was not clearly erroneous, it became the law of the case.

Court, judicial district of Hartford, Docket No. CV-14-6063040-S (Lynn II).[12] In July, 2015, Parillo proposed "that the [c]ourt order rescission of the [individual] defendants' purchase of the Dube shares from [the company], with the shares returned to [the company's] treasury and [the company] simultaneously returning the consideration the [individual] defendants paid for these shares." Similarly, Polivy proposed that, upon his return of his shares to the company, the company should pay

[12] In June, 2014, following the close of evidence, the plaintiffs in the present case (*Lynn I*) initiated *Lynn II* against the individual defendants, as a derivative action on behalf of the company. *Lynn* v. *Bosco*, supra, Superior Court, Docket No. CV-14-6063040-S. We properly may take judicial notice of that pleading. See *State* v. *Joseph*, 174 Conn. App. 260, 268 n.7, 165 A.3d 241, cert. denied, 327 Conn. 912, 170 A.3d 680 (2017); see also *Karp* v. *Urban Redevelopment Commission*, 162 Conn. 525, 527, 294 A.2d 633 (1972) ("[t]here is no question . . . concerning our power to take judicial notice of files of the Superior Court, whether the file is from the case at bar or otherwise"); *Folsom* v. *Zoning Board of Appeals*, 160 Conn. App. 1, 3 n.3, 124 A.3d 928 (2015) (taking "judicial notice of the plaintiff's Superior Court filings in . . . related actions filed by the plaintiff"). The plaintiffs' initial complaint alleged, in part, that the individual defendants engaged in self-dealing in connection with the Dube and direct transactions, to "the special loss and damage of the [company]."

In July, 2014, the individual defendants moved to transfer *Lynn II* from the judicial district of Hartford to the judicial district of Middlesex or, in the alternative, to the judicial district of New Britain for consolidation with *Lynn I*. The individual defendants also moved to stay *Lynn II*, pending the trial court's decision in *Lynn I*. In October, 2014, the court, *Miller*, *J.*, transferred *Lynn II* to the judicial district of New Britain but did not consolidate it with *Lynn I*, and also stayed *Lynn II* until thirty days following the decision in *Lynn I*.

In May, 2015, after the plaintiffs became majority shareholders of the company, they cited in the company as an additional party plaintiff in *Lynn II*, so that it could pursue the action directly. The plaintiffs remained plaintiffs in *Lynn II* until they withdrew from the action in August, 2017, leaving the company as the sole plaintiff.

The company has since amended the complaint in *Lynn II* to allege, essentially, that the individual defendants (1) breached their fiduciary duties to the company by self-dealing in connection with the Dube and direct transactions and by otherwise manipulating the company's affairs, (2) assisted each other in breaching their fiduciary duties, (3) were unjustly enriched, and (4) violated the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq.

him the $92,000 he paid out of his personal funds for the shares. The plaintiffs responded that if the court ordered the company to return the $92,000 to Polivy, that money should be held in escrow until *Lynn II* was resolved.

In December, 2015, the court held a hearing on the issue. In response to Polivy's and Parillo's proposed remedies, the plaintiffs argued that "there are no allegations in this case against the [company] and the idea of [the court] just being able to award money or order money from the [company] to be paid to one of the defendants without the [company] being named and given an opportunity to appear in regard to those issues . . . would be improper in this case." The plaintiffs suggested that the appropriate remedy would be for the court "to void the . . . transfer to the individual defendants and then the individual defendants can pursue the [company]" for reimbursement.

On January 11, 2016, the court ordered that (1) the Dube transaction be set aside, (2) the 141 shares be restored to the company's treasury, (3) the company reimburse the owners of the 141 shares, and (4) whether to leave the 141 shares as treasury stock or to sell them be decided at the discretion of the board.

In response, counsel for the company filed an appearance on January 26, 2016, and a motion for the court to reconsider paragraph 3 of its order, reminding the court that the company had been "named as a party only for notice purposes in the litigation pursuant . . . to the demand of the defendants" and that there had been no "allegations made against the [company] or any request for relief sought against the [company]." Polivy, Parillo, and Bosco objected to that motion. Following a hearing, the court sustained their objections and denied the company's motion to reconsider, reasoning that "the relief sought did include equitable relief

and that's the way the order was fashioned. Also, with respect to notice for [the company] in this case, for notice purposes, and there was actual and constructive notice." The plaintiffs and the company appealed from the court's January 11, 2016 order.[13]

On appeal, the company claims that the trial court acted beyond the scope of its authority by entering an order that imposed a remedy on the company despite the fact that none of the pleadings contained any allegations against or sought relief from the company. In response, Bosco and Polivy[14] argue that the court did not err because the plaintiffs had asked for declaratory judgments concerning ownership rights to the company's stock and equitable relief and that the remedy granted was within this prayer for relief.[15] We agree with the company.

[13] Notably, in May and June, 2017, Polivy and Bosco moved for summary judgment in *Lynn II*, arguing that *Lynn II* "is barred by the doctrine of res judicata" because "[a]ll claims advanced in *Lynn II* . . . are from the same transaction and were or could have been litigated in *Lynn I*." In September, 2017, the court, *Moll, J.*, denied Polivy's and Bosco's motions, noting that "[the company] was named as a defendant for notice purposes only" and finding that "Polivy and Bosco . . . failed to demonstrate that the Lynns as then minority shareholders and [the company] were in privity at the relevant time in *Lynn I* . . . ."

[14] Although an appearance was filed in this appeal on behalf of Parillo, that appearance was withdrawn on July 13, 2017. Parillo has not filed a brief in the present appeal.

[15] Bosco claims, in his appellate brief, that this court should dismiss this appeal for lack of aggrievement and, alternatively, as moot. Before reaching the merits of the company's appeal, we must first address these claims, as they relate to the subject matter jurisdiction of this court. *Council* v. *Commissioner of Correction*, 286 Conn. 477, 487, 944 A.2d 340 (2008); *Seymour* v. *Seymour*, 262 Conn. 107, 110, 809 A.2d 1114 (2002).

First, Bosco claims that the plaintiffs and the company were not aggrieved because in "determining the ownership of the Dube shares of [the company's] stock," the plaintiffs got the relief they requested. As previously noted, at oral argument before this court, the plaintiffs' counsel conceded that the plaintiffs do not have standing. See footnote 1 of this opinion. We reject this claim as it applies to the company because the company has demonstrated "a possibility . . . that some legally protected interest . . . has been adversely affected" by the court ordering it to pay the individual defendants.

We begin by setting forth the applicable standard of review and relevant law. "Any determination regarding the scope of a court's subject matter jurisdiction or its authority to act presents a question of law over which our review is plenary." *Tarro* v. *Mastriani Realty, LLC*, 142 Conn. App. 419, 431, 69 A.3d 956, cert. denied, 309 Conn. 912, 69 A.3d 309 (2013). Generally, "it is clear that [t]he court is not permitted to decide issues outside of those raised in the pleadings." (Internal quotation marks omitted.) *Moulton Brothers, Inc.* v. *Lemieux*, 74 Conn. App. 357, 361, 812 A.2d 129 (2002); see also *Stafford Higgins Industries, Inc.* v. *Norwalk*, 245 Conn. 551, 575, 715 A.2d 46 (1998) ("ordinarily a court may not grant relief on the basis of an unpleaded claim"); *Willametz* v. *Guida-Seibert Dairy Co.*, 157 Conn. 295, 302, 254 A.2d 473 (1968) ("[i]t is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint" [internal quotation marks omitted]). When reviewing the court's decisions regarding the interpretation of pleadings, "[t]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general

(Internal quotation marks omitted.) See *State* v. *Long*, supra, 268 Conn. 531–32 (setting forth test for standing's aggrievement requirement).

Second, Bosco claims that the company paid him the amount ordered by the court and that this payment constituted a satisfaction of judgment that renders this appeal moot. "[T]he filing of a satisfaction of judgment does not render an appeal moot when there is a possibility of restitution or reimbursement . . . ." (Citation omitted.) *G Power Investments, LLC* v. *GTherm, Inc.*, 141 Conn. App. 551, 561, 61 A.3d 592 (2013). Here, as the company's counsel argued at oral argument, such actions as the company's participation in preargument conferences and filing of a brief indicate that the company did not intend to abandon this appeal. Because this court could order restitution, this appeal is not moot. See, e.g., *Wells Fargo Bank, NA* v. *Cornelius*, 131 Conn. App. 216, 220, 26 A.3d 700, cert. denied, 302 Conn. 946, 30 A.3d 1 (2011). Additionally, we are mindful of the fact that the court's order of damages levied on a party against whom no allegations were made, if left unresolved by this court, would inject further uncertainty upon the pending litigation in *Lynn II*, where the court already has denied motions for summary judgment on the issue of res judicata. See footnote 13 of this opinion.

theory upon which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Internal quotation marks omitted.) *Provenzano* v. *Provenzano*, 88 Conn. App. 217, 225, 870 A.2d 1085 (2005).

"Pleadings have an essential purpose in the judicial process." (Internal quotation marks omitted.) *Abdo* v. *Abdulrahman*, 144 Conn. App. 574, 581, 74 A.3d 452 (2013). For instance, "[t]he purpose of the complaint is to put the defendants on notice of the claims made, to limit the issues to be decided, and to prevent surprise." (Internal quotation marks omitted.) *KMK Insulation, Inc.* v. *A. Prete & Son Construction Co.*, 49 Conn. App. 522, 526, 715 A.2d 799 (1998). "[T]he concept of notice concerns notions of fundamental fairness, affording parties the opportunity to be apprised when their interests are implicated in a given matter." (Internal quotation marks omitted.) *Grovenburg* v. *Rustle Meadow Associates, LLC*, 174 Conn. App. 18, 82–83, 165 A.3d 193 (2017). "Whether a complaint gives sufficient notice is determined in each case with reference to the character of the wrong complained of and the underlying purpose of the rule which is to prevent surprise upon the defendant." (Internal quotation marks omitted.) *Tedesco* v. *Stamford*, 215 Conn. 450, 459, 576 A.2d 1273 (1990).

"[I]t is imperative that the court and opposing counsel be able to rely on the statement of issues as set forth in the pleadings. . . . [A]ny judgment should conform to the pleadings, the issues and the prayers for relief." (Internal quotation marks omitted.) *Abdo* v. *Abdulrahman*, supra, 144 Conn. App. 581; see also *Kawasaki*

Kisen Kaisha, Ltd. v. *Indomar, Ltd.*, 173 Conn. 269, 272, 377 A.2d 316 (1977). "[A] plaintiff may not allege one cause of action and recover upon another." *Fountain Pointe, LLC* v. *Calpitano*, 144 Conn. App. 624, 642, 76 A.3d 636, cert. denied, 310 Conn. 928, 78 A.3d 147 (2013). "The requirement that claims be raised timely and distinctly . . . recognizes that counsel should not have the opportunity to surprise an opponent by interjecting a claim when opposing counsel is no longer in a position to present evidence against such a claim." *Swerdloff* v. *AEG Design/Build, Inc.*, 209 Conn. 185, 189, 550 A.2d 306 (1988).

"[G]enerally . . . the allegations of the complaint provide the measure of recovery, and . . . the judgment cannot exceed the claims pleaded, including the prayer for relief. . . . These requirements . . . are based on the principle that a pleading must provide adequate notice of the facts claimed and the issues to be tried. . . . The fundamental purpose of these pleading requirements is to prevent surprise of the defendant. . . . The purpose of these general pleading requirements is consistent with the notion that the purpose of specific pleading requirements . . . is to promote the identification, narrowing and resolution of issues before the court." (Citations omitted; internal quotation marks omitted.) *Todd* v. *Glines*, 217 Conn. 1, 9–10, 583 A.2d 1287 (1991).

"[If] the plaintiffs' prayer for relief seeks not only a declaratory judgment but also general equitable relief, the plaintiffs are entitled to invoke the long arm of equity to receive whatever relief the court may from the nature of the case deem proper. Any relief can be granted under the general prayer which is consistent with the case stated in the complaint and is supported by the proof provided the defendant will not be surprised or prejudiced thereby." (Internal quotation marks omitted.) *Pamela B.* v. *Ment*, 244 Conn. 296,

308–309, 709 A.2d 1089 (1998); see also *Total Aircraft, LLC* v. *Nascimento*, 93 Conn. App. 576, 580–81, 889 A.2d 950, cert. denied, 277 Conn. 928, 895 A.2d 800 (2006). Nevertheless, "[a]n equitable proceeding does not provide a trial court with unfettered discretion. The court cannot ignore the issues as framed in the pleadings." *Warner* v. *Brochendorff*, 136 Conn. App. 24, 34, 43 A.3d 785, cert. denied, 306 Conn. 902, 52 A.3d 728 (2012).

In the present case, the pleadings were not framed in a way that apprised the company that the court might order a remedy that would require it to pay the individual defendants.[16] The initial complaint did not name the company as a defendant. The plaintiffs only later cited in the company as a defendant in response to the motion to strike filed by the individual defendants. That motion focused on the court's inability to issue a declaratory judgment in the absence of the company.[17] The individual defendants did not argue that the company was a

[16] In addition to claiming that the court exceeded its authority in entering an order against the company when none of the pleadings contained any allegations against or sought relief from the company, the company claims that the court's entry of the order violated its procedural due process rights to notice and an opportunity to be heard. With respect to this alternative claim, the company argues that it lacked "notice that relief could be entered against it in the form of required payments to the defendants" because "[the company] was only a nominal party against whom no claims had been made" and no party "had asserted a prayer for relief seeking any relief from" the company. Although we agree with the company as to its principal claim and, thus, need not reach this alternative ground, these claims nevertheless underscore the fact that pleading requirements are, at their core, a notice issue. See, e.g., *Todd* v. *Glines*, supra, 217 Conn. 9–10; *KMK Insulation, Inc.* v. *A. Prete & Son Construction Co.*, supra, 49 Conn. App. 525.

[17] In cases in which the plaintiffs seek a declaratory judgment, "[a]ll persons who have an interest in the subject matter of the requested declaratory judgment that is direct, immediate and adverse to the interest of one or more of the plaintiffs or defendants in the action shall be made parties to the action or shall be given reasonable notice thereof." Practice Book § 17-56 (b). "This rule is not merely a procedural regulation. It is in recognition and implementation of the basic principle that due process of law requires that the rights of no man shall be judicially determined without affording him a day in court and an opportunity to be heard." (Internal quotation

necessary party with respect to the court's ability to grant any of the other relief requested. Even when broadly construed, the amended complaint did not contain any allegations against the company. See *Provenzano* v. *Provenzano*, supra, 88 Conn. App. 225 ("pleadings must be construed broadly and realistically" [internal quotation marks omitted]).

In response to the company's motion to strike for failure to state a cause of action against the company, the plaintiffs argued that the complaint "merely identifies [the company] as an additional defendant" because the company is "a mere stakeholder upon the plaintiff's claims, including for declaratory relief . . . ." The plaintiffs did not argue that their complaint sought relief from the company. The only reference to the company in the plaintiffs' prayer for relief was their request for "a determination as to whether or not the stock of [the company] is subject to preemptive rights notwithstanding that said stock was acquired from treasury shares." The other requested remedies were for declaratory judgments concerning the disposition of the stock in question and the general prayer for "[s]uch legal or equitable relief as the court deems appropriate." Similarly, the individual defendants' answer, affirmative defenses, and counterclaim did not seek any relief from the company.

Although "[a]ny relief can be granted under the general prayer [for equitable relief] which is consistent with the case stated in the complaint and is supported by the proof"; (internal quotation marks omitted) *Pamela B.* v. *Ment*, supra, 244 Conn. 308; "[t]he court

marks omitted.) *Kolenberg* v. *Board of Education of Stamford*, 206 Conn. 113, 124, 536 A.2d 577, cert. denied, 487 U.S. 1236, 108 S. Ct. 2903, 101 L. Ed. 2d 935 (1988) (interpreting Practice Book (1988) § 390 [now § 17-55] which provided "that the court will not render a declaratory judgment 'unless all persons having an interest in the subject matter of the complaint are parties to the action or have reasonable notice thereof' ").

cannot ignore the issues as framed in the pleadings." *Warner* v. *Brochendorff*, supra, 136 Conn. App. 34. Here, the court ordered equitable relief that was inconsistent with the issues as framed in the pleadings and inconsistent with the court's finding that Bosco, Parillo, and Warner engaged in self-dealing, resulting in unfair surprise to the company.[18] Throughout the trial, the attorneys and the court relied "on the statement of issues as set forth in the pleadings"; (internal quotation marks omitted) *Abdo* v. *Abdulrahman*, supra, 144 Conn. App. 581; which did not involve any potential wrongdoing on the part of the company.

Nor is there anything in the record that indicates that the parties litigated as if the court might order the company to reimburse the individual defendants. See *Stafford Higgins Industries*, *Inc.* v. *Norwalk*, supra, 245 Conn. 575 ("a court may, despite pleading deficiencies, decide a case on the basis on which it was actually litigated"). The conduct of the attorneys and the court during and immediately following the trial was consistent with the pleadings, in that they did not act as if the parties had made any allegations against or sought relief from the company. At the start of the trial, the plaintiffs maintained that they were "not adverse to the [company]." The individual defendants did not indicate that they were adverse to the company or that they would later seek relief from the company. The court acknowledged the company's right to participate so that it could "protect [its] interest," and, because the

[18] On appeal, the company claims, in the alternative, that the remedy was inequitable in light of the court's finding that Bosco, Parillo, and Warner engaged in self-dealing by awarding themselves bonuses to pay for the Dube shares. "An equitable award may be found to be error only if it is based on factual findings that are clearly erroneous . . . or if it is the result of an abuse of discretion." (Citation omitted.) *LaCroix* v. *LaCroix*, 189 Conn. 685, 689–90, 457 A.2d 1076 (1983). Because we reverse the judgment on other grounds, we need not address whether the court abused its discretion in fashioning this order.

company had no reason to believe its interests would be adversely affected, it acted accordingly. For instance, the company had no reason to file any counterclaims, present any evidence, or cross-examine any of the witnesses. After attending the morning of the first day of trial, Attorney Block requested to be released from the remainder of the trial because he did not intend to take an "active role in the litigation." The parties did not object, and the court released him. Throughout the trial, the parties made no allegations against the company.

Immediately following trial, the plaintiffs regained control of the company, causing Attorney Block to withdraw as counsel for the company. The plaintiffs moved to reopen the evidence, arguing that the reorganization provided them with access to financial information that had "been concealed or unknown to the plaintiffs . . . ." Following a hearing, at which the company was not represented by legal counsel, the court denied the plaintiffs' motion, reasoning that the company's financial conditions were not "of a substantive or material nature."[19] This denial, in addition to the conduct of the

[19] Polivy and Bosco, in their respective briefs to this court, argue that the individual defendants were "entitled to a return of the purchase price paid for [the Dube] stock" because "[t]he plaintiffs . . . failed to present any evidence to establish that [the company] . . . would suffer damage if it were found liable for the return of the funds . . . ." In making this argument, Polivy and Bosco omit the undisputed fact that the individual defendants had been in control of the company throughout the trial and that after the plaintiffs gained control of the company, the court denied the plaintiffs' motion to reopen the evidence because the court did not consider the company's finances to be material. The court's unwillingness to hear evidence of the company's finances demonstrates that the court did not anticipate taking the company's finances into account when fashioning its order. Additionally, Polivy and Bosco's argument underscores the importance of the parties receiving notice of the claims to be decided so that they can present evidence relevant to those claims.

Notably, the court in *Lynn II* heard argument from Polivy and Bosco that res judicata barred the company's claims because "[a]ll claims advanced in *Lynn II* . . . are from the same transaction and were or could have been litigated in *Lynn I*." As that court found, and consistent with this court's

parties and the court during the trial, further support the contention that the court's order surprised the company, particularly in light of the language the court used in its memorandum of decision regarding the trial.

As the court emphasized in its memorandum of decision, the company and "Bosco, Jr., are named as defendants in count one only and only for the purpose of notice." As with the company, the parties did not assert any allegations against Bosco, Jr.[20] Bosco, Jr., had been named as a defendant so that he could receive notice of the proceedings and not for the purpose of being bound by any court order. By classifying both the company and Bosco, Jr., as defendants "only for the purpose of notice," the court implied that the company, likewise, would not be bound by any order without the opportunity to be heard. Consistent with the absence of any allegations against the company in the pleadings, the parties' conduct at trial, and the court's classification of the company as a defendant for notice purposes, the court did not find that the company committed any wrongdoing.

In its memorandum of decision, the court also found that the individual defendants violated the plaintiffs'

holding herein, the company was never a plaintiff in this case or in privity with the plaintiffs and, therefore, had no opportunity to pursue these claims.

[20] On the second day of the trial, the following colloquy occurred:

"The Court: . . . Counsel still in agreement with regard to the court's excusing Attorney Block for [the company]?

"[The Defendants' Counsel]: Yes, Your Honor.

"[The Plaintiffs' Counsel]: Yes, Your Honor.

"The Court: All right. Anything before we begin?

"[The Defendants' Counsel]: Along those same lines, I just wanted to point out . . . Bosco, Jr., was named as a defendant and not identified by either party as a witness. We haven't had him here because he owns three shares and he didn't purchase any of the disputed shares.

"[The Plaintiffs' Counsel]: The allegations are the same in the complaint. It was merely to give him notice of the proceedings because he was a stockholder and in theory has an interest in the proceedings, but we didn't make any allegations against . . . Bosco, Jr. He's not required as far as we're concerned."

preemptive rights and that Bosco, Parillo, and Warner engaged in self-dealing by awarding themselves bonuses in connection with the Dube transaction. The court concluded that the plaintiffs were entitled to equitable relief and requested that the parties submit proposed remedies. Specifically, the court noted that "[a]side from the form of the remedy, there are questions concerning whether payment or reimbursement by the plaintiffs and/or to the defendants will be required and, if so, at what per share price." Although the company was named as a defendant, the court observed that the company was a party for notice purposes only and did not indicate that the proposed remedies should address what role the company should play, if any, at the remedy stage.

Nevertheless, in response to the court's request for proposed remedies, Parillo and Polivy proposed that the court order the company to reimburse the individual defendants. This was the first mention of that potential remedy, essentially asking the court to ignore the general rule that "the judgement cannot exceed the claims pleaded, including the prayer for relief." *Todd* v. *Glines*, supra, 217 Conn. 9. In opposing this proposed remedy, the plaintiffs' counsel argued that, "the idea of Your Honor just being able to award money or order money from the [company] to be paid to one of the defendants without the [company] being named and given an opportunity to appear in regard to those issues . . . would be improper in this case. . . . [T]here were no allegations by any of the defendants against the [company] saying that in the event this court decides to somehow order a rescission, what, if anything, the [company's] obligations to these individuals would be."[21] Polivy's

[21] The plaintiffs' counsel suggested that, in light of the court's finding that Bosco, Parillo, and Warner paid for these shares with bonuses they received through self-dealing and of issues outstanding in *Lynn II* concerning the propriety of Polivy's legal fees, the individual defendants should pursue the company directly for the amount each paid for the Dube shares.

counsel replied that the court had "decided to provide equitable relief, [a]nd in providing equitable relief the court is free to really fashion any kind of remedy that does equity," including ordering the reimbursement to the individual defendants.

Although the court had the authority to provide equitable relief by virtue of the plaintiffs' general prayer for equitable relief, "an equitable proceeding does not provide a trial court with unfettered discretion" to order relief against a party who was without notice of the claims against it. *Warner* v. *Brochendorff*, supra, 136 Conn. App. 34. "The court cannot ignore the issues as framed in the pleadings." Id. The parties' pleadings did not frame the issues in terms of the company's wrongdoing or obligation to provide them with a remedy. Here, the first mention of this potential remedy did not occur until the court held its hearing on proposed remedies in December, 2015. The issuance of an order of relief against the company, in the absence of notice of a claim against it, is inconsistent with the fundamental purpose of pleading requirements, namely, "to prevent surprise of the [party] . . . ." *Todd* v. *Glines*, supra, 217 Conn. 10.

With no prior notice of any claims against it, the company was forced to have counsel file an appearance on its behalf and a motion for reconsideration on January 26, 2016, fifteen days after the court's order of relief. In its motion, the company reminded the court that it had been "named as a party only for notice purposes in the litigation" and that "[n]o claims were made against [the company]." The company also reminded the court of the plaintiffs' "motion to reopen the evidence so as to present [the company's] grave financial state," which the court denied. The company argued that it was not in a financial situation where it could

obey the court's order and that "reconsideration is warranted to allow [the company] to address what is effectively a claim and request for relief directed to it." As the plaintiffs' counsel argued at a hearing on the motion, "without a complaint against [the company], without allegations, [the company] never had a chance to put on its own evidence, to put on a claim of recoupment or setoff or counterclaim." Nevertheless, the court denied the company's motion, stating that "the relief sought did include equitable relief and that's the way the order was fashioned. Also, with respect to notice for [the company] in the case, for notice purposes, and there was actual and constructive notice."

Notice of the ongoing litigation, however, is distinct from notice that the litigants are making a claim against or seeking relief from a party. As evidenced by the pleadings as well as the conduct of the parties, the company had no notice that such relief would enter against it. Since May 5, 2014, when Attorney Block was excused during the first day of evidence, the parties had effectively acknowledged that the presence of counsel for the company was unnecessary given the posture of the case. Given that the company relied on the state of the pleadings and opted not to participate in the trial, we conclude that the court did not have the authority to order relief against the company. Accordingly, further proceedings are necessary.[22]

The judgment is reversed only as to the court's order that the company reimburse the present owners of the Dube shares and the case is remanded for further proceedings according to law. The appeal is dismissed as to the plaintiffs.

In this opinion the other judges concurred.

[22] We also refer this matter to the chief administrative judge of the civil division to consider transfer to the Complex Litigation Docket for consolidation with the litigation pending in *Lynn II*.

SHARON CLEMENTS *v.* ARAMARK CORPORATION ET AL.
(AC 39488)

Keller, Prescott and Bright, Js.

Syllabus

The plaintiff appealed to this court from the decision of the Workers' Compensation Review Board, which affirmed the decision of the Workers' Compensation Commissioner dismissing the plaintiff's claim for certain disability benefits and determining that the plaintiff's head injury was noncompensable under the Workers Compensation Act (§ 31-275 et seq.) because it did not arise out of her employment. While at work for the defendant A Co. the plaintiff became lightheaded, passed out and fell backward on asphalt, hitting her head on the ground. After being taken to the hospital, the plaintiff suffered from cardiac arrest. The plaintiff had a history of, inter alia, cardiac disease, and was diagnosed with certain injuries related thereto and a concussive head injury. The commissioner determined that the plaintiff's head injury did not arise out of her employment with A Co. but was caused by the heart related episode. The board affirmed the commissioner's decision, concluding that the plaintiff submitted no evidence to the commissioner that her employment contributed to the fall that led to her head injury or that the injury would not have occurred had she been somewhere else at the time. The plaintiff claimed that the board improperly concluded that her head injury did not arise out of her employment because her fall was caused by her personal infirmity rather than a workplace condition. *Held* that the board improperly affirmed the commissioner's decision holding that the plaintiff's head injury was noncompensable; although the plaintiff, due to a personal infirmity, fell backward and hit her head on the ground on the premises of A Co. and the personal infirmity that caused her to fall did not arise out of her employment, the resultant injuries that were caused by her head hitting the ground at her workplace did arise out of her employment and, thus, were compensable.

Argued January 24—officially released May 29, 2018

Procedural History

Appeal from the decision by the Workers' Compensation Commissioner for the Second District dismissing the plaintiff's claim for certain disability benefits, brought to the Workers' Compensation Review Board, which affirmed the commissioner's decision, and the

plaintiff appealed to this court. *Reversed*; *judgment directed.*

Gary W. Huebner, for the appellant (plaintiff).

Dominick C. Statile, with whom, on the brief, was *Tushar G. Shah*, for the appellee (defendants).

Opinion

BRIGHT, J. The principal issue in this appeal is the compensability, under the Workers' Compensation Act (act), General Statutes § 31-275 et seq., of an injury to an employee that occurred on an employer's premises when the employee became lightheaded, fell, and hit her head while walking to her work station before the start of her shift. The plaintiff, Sharon Clements, appeals from the decision of the Workers' Compensation Review Board (board) affirming the decision of the Workers' Compensation Commissioner for the Second District (commissioner) in favor of the defendant employer, Aramark Corporation (defendant), and the employer's insurer, Sedgwick CMS, Inc. The plaintiff claims that the board erred in holding that, because the plaintiff's fall was caused by her personal infirmity, rather than a workplace condition, her resultant head injury did not arise out of and in the course of her employment within the meaning of the act. We agree and, accordingly, reverse the decision of the board.

The following undisputed facts, which are set forth in the commissioner's decision or are ascertained from uncontested portions of the record, are relevant to our consideration of the issue on appeal. The plaintiff, while employed by the defendant, served as a mess attendant at the Coast Guard Academy in New London (academy). Her duties included serving food and beverages, and cleaning up after meals. She typically worked during both breakfast and lunch. On the morning of September 19, 2012, the plaintiff drove to work, parked her vehicle

at the academy at approximately 5:40 a.m., and exited her vehicle. She walked a short distance from her vehicle to a building. The path was short, not uphill or inclined in any way. The plaintiff did not trip. The plaintiff testified that, after entering the building and walking down a hallway, she "went through the door to go out to get into the next building," where she became lightheaded and passed out, falling backward "on the [asphalt],"[1] and hitting her head on the ground. No one witnessed her fall. After she was discovered by coworkers, someone called for assistance. Members of the New London Fire Department arrived and found the plaintiff "lying on the ground" with "a bump on the back of her head," "unable to sign [a] consent form because of her level of consciousness . . . ." The plaintiff was taken to Lawrence + Memorial Hospital (hospital). Hospital reports indicate that the plaintiff suffered from a syncopal episode and that she was diagnosed with ecchymosis and swelling.[2] A treating physician, Neer Zeevi, and hospital records, indicate that the plaintiff's syncope likely was cardiac or cardiogenic in etiology.

While in the emergency room, the plaintiff suffered from cardiac arrest. During her stay in the hospital,

[1] In its brief, the defendant concedes that "[t]he facts as stated by the [plaintiff] are undisputed with the exception of references made regarding the locus of the [plaintiff's] fall giving rise to the subject claim. The [plaintiff] has averred that her fall occurred on 'concrete' giving rise to the subject injury. No facts were found as to the actual nature of the surface upon which the [plaintiff] fell. As such, no finding of fact in the record supports reference to the surface as concrete." We note, however, that the board repeatedly stated in its decision that the ground was concrete.

During oral argument before this court, the plaintiff stated that it did not make a difference to her claim whether the ground was concrete or some other material.

[2] Stedman's Medical Dictionary (28th Ed. 2006) p. 1887, defines "syncope" as the "[l]oss of consciousness and postural tone caused by diminished cerebral blood flow." "Ecchymosis" is defined as "[a] purplish patch caused by extravasation of blood into the skin . . . ." Stedman's Medical Dictionary (28th Ed. 2006) p. 606.

the plaintiff had a pacemaker inserted. In a discharge summary report, John Nelson, a neurologist, opined: "Apparently she had significant head trauma secondary to her fall. While in the emergency department, she again lost consciousness and was seen to have asystole[3] on monitoring. [Cardiopulmonary resuscitation (CPR)] was initiated and the patient had return of spontaneous rhythm and blood pressure shortly afterwards. Per the [emergency room] physician, CPR was reportedly begun within [twenty] seconds on onset of asystole and was only carried out for approximately [ten] seconds before the patient experienced spontaneous return of rhythm." (Footnote added.)

The plaintiff has a history of cardiac disease, hypertension, hyperlipidemia, hypothyroidism, and an irregular heartbeat. She also has a family history of coronary disease. Her discharge records set forth, inter alia, the following diagnosis: asystolic arrest, cardiogenic syncope with concussive head injury, and hypothyroidism. On the basis of these findings, the commissioner determined that "the [plaintiff's] injury did not arise out of her employment with the [defendant], but was caused by a cardiogenic syncope."

The plaintiff appealed from the commissioner's decision to the board. She claimed, in relevant part, that the commissioner had misapplied the law and improperly determined that her injury did not arise out of her employment. The board disagreed, concluding that "[t]here is no question that the [plaintiff] has been left with a significant disability as a result of the concussive injury which is the subject of this appeal. Nevertheless, the [plaintiff] provided the . . . commissioner with no evidence [that] would substantiate the claim that her employment contributed in any fashion to the fall [that]

[3] Stedman's Medical Dictionary (28th Ed. 2006) p. 172, defines "asystole" as the "[a]bsence of contractions of the heart."

led to the injury or that the injury would not have occurred had the claimant been somewhere else at the time." Accordingly, the board affirmed the decision of the commissioner, ruling in favor of the defendant. This appeal followed.

We begin by setting forth the standard of review applicable to workers' compensation appeals. "The commissioner has the power and duty, as the trier of fact, to determine the facts . . . and [n]either the . . . board nor this court has the power to retry facts. . . . The conclusions drawn by [the commissioner] from the facts found [also] must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . [I]t is well established that, in resolving issues of statutory construction under the act, we are mindful that the act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation. . . . Accordingly, [i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act. . . . [T]he purposes of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes." (Citations omitted; internal quotation marks omitted.) *Hart* v. *Federal Express Corp.*, 321 Conn. 1, 18–19, 135 A.3d 38 (2016).

"Our scope of review of the actions of the board is similarly limited. . . . The role of this court is to determine whether the review [board's] decision results from

an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them." (Internal quotation marks omitted.) *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 77, 86, 144 A.3d 1075 (2016).

The plaintiff states that "[t]his appeal asks the court to determine whether the correct standard of law was applied to the facts as found by the trial commissioner." She claims that the board erred in holding that, because the plaintiff's fall at work was caused by her personal infirmity, rather than a workplace condition, her resultant head injury did not arise out of and in the course of her employment. She argues that her head injury was caused by her head striking the ground at her place of employment, not by any personal infirmity. The personal infirmity that caused her fall, she argues, did not involve a head injury; rather, the head injury for which she is seeking benefits resulted from her head hitting the ground at her workplace. Accordingly, she argues, the board erred in concluding that her head injury did not arise out of and in the course of her employment.

It is beyond dispute that the plaintiff's head injury was caused by her head hitting the ground *after* her fall. The plaintiff concedes that the fall, itself, was the result of a personal infirmity. The defendant contends that the plaintiff's head would not have hit the ground if she had not fallen as a result of a personal infirmity. Consequently, it argues, the injuries did not arise out of, or occur in the course of, her employment and are not compensable under the act.

We begin our analysis with the relevant language of the act. Section 31-275 provides in relevant part: "(1) 'Arising out of and in the course of his employment' means an accidental injury happening to an employee . . . originating while the employee has been engaged

in the line of the employee's duty in the business or affairs of the employer upon the employer's premises . . . ." From this language our Supreme Court has derived a two part test.

"It is well settled that, because the purpose of the act is to compensate employees for injuries without fault by imposing a form of strict liability on employers, to recover for an injury under the act a plaintiff must prove that the injury is causally connected to the employment. To establish a causal connection, a plaintiff must demonstrate that the claimed injury (1) arose out of the employment, and (2) in the course of the employment." (Internal quotation marks omitted.) *Spatafore* v. *Yale University*, 239 Conn. 408, 417–18, 684 A.2d 1155 (1996). "Proof that the injury arose out of the employment relates to the time, place and circumstances of the injury. . . . Proof that the injury occurred in the course of the employment means that the injury must occur (a) within the period of the employment; (b) at a place the employee may reasonably be; and (c) while the employee is reasonably fulfilling the duties of the employment or doing something incidental to it." (Citation omitted; internal quotation marks omitted.) Id., 418. [4] Although both factors of this

[4] In its appellate brief, the defendant, after setting forth the two factor causal connection test, specifically concedes that "[h]ere, *the only disagreement is whether the injury arose out of the employment*." (Emphasis added.) Despite this very clear statement, however, when Judge Keller made a statement during appellate oral argument to the effect that the parties had agreed that the plaintiff's injury had occurred *in the course of her employment*, the defendant's counsel stated: "*I don't agree to that. I never said that.*" (Emphasis added.) We reject counsel's baseless assertion in light of the defendant's clear statement in its appellate brief. In addition, we thoroughly have reviewed the certified record in this case and have found that the defendant specifically told the commissioner in its trial brief that "[t]his incident occurred when [the plaintiff] arrived at her place of employment, walked from her car to the front door, and then fell to the ground. As such, *the* [*defendant*] *concede*[*s*] *that the injury occurred while in the course of her employment*. Any argument raised by the [plaintiff] in regard to the timing, location, incident to employment, or the mutual benefit doctrine must be disregarded by the [c]ommissioner, as . . . those facts only empower

two part test appear to merge into a single test of work-relatedness, "the phrase 'arising out of,' specifically, has been construed as referring to injury causation . . . whereas 'in the course of' relates to the time, place, and circumstances of the injury." *Birnie* v. *Electric Boat Corp.*, 288 Conn. 392, 407–408, 953 A.2d 28 (2008). Because the defendant concedes that the second factor of the test has been met; see footnote 4 of this opinion; we consider only whether the plaintiff's head injury arose out of her employment.

The plaintiff argues that her head injury arose out of her employment because it occurred on the premises of her employer when she hit her head on the ground before the start of her morning shift. The plaintiff primarily relies on *Savage* v. *St. Aeden's Church*, 122 Conn. 343, 189 A. 599 (1937), to support her claim. The defendant argues that the plaintiff's injury was caused by her fall, which did not arise out of her employment, but was the result of a personal infirmity. It further argues that *Savage* is inapposite because "the injury in question [in that case] was caused by a 'hazard' that existed as a condition of the employment, [namely,] working on a ladder." On the basis of our Supreme Court's decision in *Savage*, we agree with the plaintiff.[5]

a finding that the accident occurred 'in the course of employment' and are immaterial in determining the dispositive issue at bar: whether the injury arose out of the employment." (Emphasis added.) In light of these clear concessions, we conclude that the defendant, in fact, has conceded the second factor despite its protestation during appellate argument. Accordingly, we do not address it.

[5] Although the workers' compensation statutes at the time of the *Savage* decision differ from the present statutes, neither the parties nor the board made any argument that the difference in the statutes affects the applicability or value of the *Savage* case. We conclude that the precedential value of *Savage* on this particular issue remains intact because *Savage* remains good law, having been cited or quoted recently by our Supreme Court. See *Sullins* v. *United Parcel Service, Inc.*, 315 Conn. 543, 552, 108 A.3d 1110 (2015); *Blakeslee* v. *Platt Bros. & Co.*, 279 Conn. 239, 246, 902 A.2d 620 (2006).

In *Savage*, the plaintiff brought a workers' compensation claim on behalf of the decedent, an employee of the defendant church, who had been found in the basement recreation room at the rectory, "lying flat on his back, his overalls partly on, a painter's cap by his head, and on the pool-table near by his bag with the paint brushes he expected to use in his work at the rectory. He had apparently fallen backward on the concrete floor and fractured his skull. The commissioner found that the proximate cause of his death was the fracture of his skull upon the concrete floor, and that the cause of his fall was unknown, though he also found that . . . he [had previously suffered] from a cystolic murmur at the apex of his heart. He further found that the fatal injury arose out of and in the course of the employment." *Savage* v. *St. Aeden's Church*, supra, 122 Conn. 345.

Our Supreme Court explained that it did not appear to be questioned that the decedent's injury was suffered in the course of his employment: "So far as appears it occurred within the period of the employment, at a place where [the decedent] might reasonably be, and while he was reasonably fulfilling the duties of the employment or doing something incidental to it." Id. What was questioned, however, was whether the injury arose out of the decedent's employment with the church. Id. The plaintiff alleged that the proximate cause of the decedent's injury was "the fracture of his skull on the concrete floor which resulted from his fall." Id., 346. As in the present case, the defendants in *Savage*, however, argued that because the fall was due to causes unrelated to the employment, namely a heart attack or a fainting spell, "the resulting injury was not due to a hazard of the employment . . . ." Id. The court determined that this was a question of proximate causation. Id.

Looking to the case of *Gonier* v. *Chase Companies, Inc.*, 97 Conn. 46, 115 A. 677 (1921), our Supreme Court

explained that "an injury received in the course of the employment does not cease to be one arising out of the employment merely because some infirmity due to disease has originally set in action the final and proximate cause of the injury. The employer of labor takes his workman as he finds him and compensation does not depend upon his freedom from liability to injury through a constitutional weakness or latent tendency. Whatever predisposing physical condition may exist, if the employment is the immediate occasion of the injury, it arises out of the employment because it develops within it." (Internal quotation marks omitted.) *Savage* v. *St. Aeden's Church*, supra, 122 Conn. 346–47.

Our Supreme Court, in addressing the defendants' argument in *Savage*, an argument that is strikingly similar to the argument advanced in the present case, namely, that the fall did not arise out of the employment because it was due to some personal infirmity and not some defect in the floor or other dangerous condition of employment, explained: "An injury which occurs in the course of the employment ordinarily arises out of the employment, because the fact that the employee is in the course of his employment is the very thing which subjects him to the risks which are incident to the employment. . . . An act or omission for the exclusive benefit of the employee or of another than the master [however] is not ordinarily a risk incident to the employment. . . . [W]hen an employee voluntarily departs from his duties . . . his injuries result from his own act and have their origin in a risk which he has created and which has no causal connection with his employment. . . . Also, of course, death from natural causes, although occurring in the course of the employment, has no causal connection with it, as would have been the case here if a heart attack had been the direct cause of [the decedent's] death rather than the fall to the concrete floor. But, aside from situations such as these,

where the injury arises from a cause which has no connection with the employment, *an injury arising in the course of the employment ordinarily is the result of a risk incident to the employment*." (Citations omitted; emphasis added.) Id., 347–48.

The court further explained: "The hazard is peculiar to the employment because it is incidental to and grows out of the conditions of the employment and not because it should be foreseen or expected, or because it involves danger of serious bodily injury. We have never held that the conditions of the employment must be such as to expose the employee to extraordinary risks in order to entitle him to compensation in case of injury. The risk may be no different in degree or kind than those to which he may be exposed outside of his employment. The injury is compensable, not because of the extent or particular character of the hazard, but because it exists as one of the conditions of the employment." Id., 348–49.

In the present case, the defendant argues in its appellate brief that the board correctly determined that *Savage* is distinguishable from the present case because "the injury [in *Savage*] was caused by a 'hazard' that existed as a condition of the employment, in that case, working on a ladder." We disagree. Our Supreme Court in *Savage* did not determine that the decedent in that case had fallen off a ladder. Rather, the court determined that the decedent had been *standing on the ground*, not on the ladder, when he fell backward and hit his head. See *Savage* v. *St. Aeden's Church*, supra, 122 Conn. 350.

The court explained that a "hazard" exists where an accident occurs incident to the employment; the accident, itself, is the hazard. See id., 348, 349 ("It is not necessary that the place where the employee is working be in itself a dangerous one. It is enough if it turns out that there was a hazard from the fact that the

accident happened."). In comparing the facts surrounding the *Savage* employee's injury to the injury of the employee in *Gonier* v. *Chase Companies, Inc.*, supra, 97 Conn. 54, 58 (decedent's "employment brought him upon . . . scaffolding," and "as he stood up to continue his work he became faint and fell" and died), our Supreme Court explained in *Savage* that "[t]he decision [to award benefits in *Gonier*] would have been the same had the fall [in *Gonier*] been, *as in the present case, simply to the floor upon which the employee was standing*." (Emphasis added.) *Savage* v. *St. Aeden's Church*, supra, 122 Conn. 350. Clearly then, the court in *Savage* stated that the employee had been standing upon the floor when he fell. See id.

Our Supreme Court reaffirmed its reasoning in *Savage* in the case of *Blakeslee* v. *Platt Bros. & Co.*, 279 Conn. 239, 902 A.2d 620 (2006). In *Blakeslee*, the plaintiff was injured when three coworkers attempted to restrain him while he was suffering a grand mal seizure. Id., 240–41. The commissioner determined, and the board agreed, that the injuries were not compensable because they arose out of the seizure, which did not arise out of the plaintiff's employment. Id., 241–42. Our Supreme Court, citing *Savage*, rejected the board's conclusion. Id., 245–46. In doing so, the court opined that "it is evident that the commissioner and the board began with a single proposition from which all other conclusions inexorably followed, namely, that, if the plaintiff's seizure was a noncompensable injury, any injuries causally connected thereto similarly must be noncompensable. This essential proposition, however, cannot be sustained." Id., 245. The court further relied on the language it first set forth in *Savage* and held that "[c]ompensibility also may not be denied simply because the plaintiff could have been exposed to a similar risk of injury from the administration of aid had he suffered the seizure outside of work. [A]n injury may arise out

of an employment although the risk of injury from that employment is no different in degree or kind [from that] to which [the employee] may be exposed outside of his employment.[6] The injury is compensable, not because of the extent or particular character of the hazard, but because it exists as one of the conditions of the employment." (Footnote added; internal quotation marks omitted.) Id., 246.

We conclude that the board and the commissioner have made a similar error in the present case to the one they made in *Blakeslee*.[7] They concluded that, because the plaintiff's personal infirmity, which caused her to faint and fall, was a noncompensable injury, the injury resulting from her head striking the ground also must be noncompensable.[8] On the basis of our Supreme Court's decisions in both *Blakeslee* and *Savage*, we disagree with this conclusion.

[6] We recognize that our Supreme Court and this court, at times, have made statements that appear to be inconsistent with this statement. For example, in *Labadie* v. *Norwalk Rehabilitation Services, Inc.*, 274 Conn. 219, 238, 875 A.2d 485 (2005), our Supreme Court quoted *Larke* v. *Hancock Mutual Life Ins. Co.*, 90 Conn. 303, 310, 97 A. 320 (1916), for the proposition that "conditions that arise out of employment are 'peculiar to [it], and not such exposures as the ordinary person is subjected to.' " Neither in *Savage*, which came after *Larke*, nor in *Blakeslee*, which came after *Labadie*, did the court apply this proposition. To the contrary, the court held in both cases that the injury was compensable even though the risk the employee faced was no greater than what he would have been exposed to outside of work.

[7] We also note that the board relied upon the *dissent*, rather than the majority, in *Blakeslee* v. *Platt Bros. & Co.*, supra, 279 Conn. 259–60 (*Sullivan, J.*, dissenting), to support its conclusion. Taking guidance from Justice Sullivan's discussion of Professor Arthur Larson's framework designating risks as personal or neutral to assess compensability, it appears that the board overlooked the statement in the majority opinion that our Supreme Court "has not heretofore adopted this framework" and the fact that it "decline[d] to so in" that case. *Blakeslee* v. *Platt Bros. & Co.*, supra, 251 n.9.

[8] The defendant points out that the board has reached the same conclusion in other cases involving injuries resulting from an employee's medical condition unrelated to his employment. In those cases the board also distinguished *Savage* on the misunderstanding that the plaintiff in *Savage* fell from a ladder. We certainly are not bound by those decisions.

In the present case, as in the *Savage* case, the plaintiff, due to a personal infirmity, fell backward and hit her head on the ground at her place of employment. Although the personal infirmity that caused her to fall did not arise out of her employment, the resultant injuries that were caused by her head hitting the ground at her workplace did arise out of her employment. Accordingly, the board improperly affirmed the commissioner's decision holding otherwise.

The decision of the Workers' Compensation Review Board is reversed and the case is remanded to the board with direction to sustain the plaintiff's appeal.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MICHAEL A. HEARL (AC 39463)

Sheldon, Keller and Eveleigh, Js.

Syllabus

The defendant, who had been convicted of nineteen counts of the crime of cruelty to animals in violation of statute (§ 53-247 [a]), appealed to this court. The defendant had moved his goat cheese manufacturing business to a farm, where he leased one half of a barn to house his herd of goats. Wind, rain and snow could enter the barn because it did not have fully enclosed walls. The defendant hired workers to care for the herd and initially visited the farm frequently, but his visits became less frequent with time. The state Department of Agriculture began an investigation after it became aware of concerns about the health of the goats. A department inspector observed, inter alia, manure in the barn, inadequate bedding, hay that was soiled and wet, and a feeding rack that was not filled with hay. The goats exhibited signs of cold stress and were shivering and coughing, and pregnant does were not receiving proper care. In derogation of common herd management practices, the goats were not separated by age, breed, milking status or pregnancy status, but instead roamed the barn as one unsorted unit. The department inspector also observed dead goats piled in a manger where young goats would play on top of the carcasses, thereby exposing them to infectious materials. A department veterinarian also observed multiple emaciated goats, and saw that the goats were not receiving adequate nutrition and sporadically received water. The herd also was riddled with internal

parasites, and goat carcasses were strewn throughout the barn. The defendant thereafter contacted a private veterinarian, K, and asked her to euthanize a goat in order to perform a necropsy and determine what the goats were suffering from. K performed necropsies on two goats and determined, inter alia, that they were suffering from muscle wasting, serious atrophy of fat and loss of fat stores, and that certain presumed neurological signs were the result of weakness related to their poor nutritional state. K instructed the defendant about feeding the goats and told him that heat lamps needed to be installed in the barn. The department inspector thereafter returned to the farm and observed that no changes had been made since her last visit. Heat lamps that were then in the barn were not being used. Goats were huddled together for warmth, two abandoned newborn kids were wet and in unsanitary conditions, and another baby goat had been trampled to death. The department inspector visited the farm again the next day and observed that two heat lamps had been installed for the entire herd. The heat lamps were inadequate to provide warmth for all the goats. The department's recommendation to provide shelter from the wind also had not been heeded, it did not appear that the goats had been fed and the overall condition of the herd continued to decline. The department thereafter seized the surviving goats, two of which later died. *Held*:

1. The evidence was sufficient to support the defendant's conviction of cruelty to animals, as the jury reasonably could have concluded that the defendant confined or had charge or custody of the goats, and failed to give them proper care or food, water and shelter: there was ample evidence to support a finding that the defendant confined or had charge or custody of the goats, as the defendant negotiated the lease for the barn and held himself out as the owner and caretaker of the goats, he frequently cared for the goats when he first brought them to the barn, he purchased hay and arranged for and paid K, a veterinarian, to euthanize certain goats, and the defendant had an extensive conversation with K about what was necessary to feed the herd and keep the kids warm; moreover, the defendant was the only person who asked the department about how to dispose of dead goats in the barn, there was no evidence that he ever advised the department to discuss the care of the goats with someone other than himself, and there was ample evidence to support the inference that the goats did not receive proper care or, alternatively, that they did not receive adequate food, water and shelter, as the goats were starving, riddled with parasites and diseases when they were confiscated, and they were not properly sorted while housed in the barn, where conditions were unsanitary and inadequate to provide them shelter from the elements.
2. The defendant could not prevail on his claim that the trial court improperly declined to instruct the jury on criminal negligence; our Supreme Court has recently determined that general intent, rather than criminal negligence, is the appropriate mens rea for the "unjustifiably injures" clause

of § 53-247 (a), and the defendant conceded that the legislature did not include specific intent provisions in the relevant portion of § 53-247 (a).

3. The defendant could not prevail on his unpreserved claim that § 53-247 (a) is unconstitutionally vague as applied to his conduct, which was based on his assertion that the terms "charge" and "custody" in § 53-247 (a) did not provide notice that he bore the responsibility of caring for the goats and, therefore, what proper care was required of him; given that the plain meaning of the relevant portion of § 53-247 (a) is that a person who bears the responsibility of care for an animal must give that animal proper care, the record contained ample evidence that a reasonable person in the defendant's position would know that he bore the responsibility of caring for the goats and, thus, could face criminal liability for failing to do so, the terms "charge" and "custody" limit criminal liability to those who have the responsibility to care for an animal, and the defendant's vagueness challenge was further undermined by the evidence that he had notice that his conduct violated the law, as representatives from the department informed him prior to the time of his arrest that his treatment of the goats violated the animal cruelty statute.

4. The defendant could not prevail on his unpreserved claim that his conviction of nineteen charges of animal cruelty violated the prohibition against double jeopardy because the phrase "any animal" in § 53-247 (a) refers to a species of animal, rather than to an individual animal; the phrase "any animal" was not ambiguous, as the plain meaning of the singular word "animal" is that § 53-247 (a) was intended to create a per animal unit of prosecution, the legislature decided to use the singular "animal," rather than the plural "animals," and did not use the term "species" or the phrase "class of animal," and, therefore, although the defendant's conduct in mistreating the animals occurred over the same period of time and consisted of the same general acts, because each of the charged offenses pertained to a different, identifiable goat, the defendant's abuse and maltreatment of each goat constituted a separate crime.

Argued December 7, 2017—officially released May 29, 2018

Procedural History

Substitute information charging the defendant with nineteen counts of the crime of cruelty to animals, brought to the Superior Court in the judicial district of Litchfield, geographical area number eighteen, and tried to the jury before *Matasavage, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Jon L. Schoenhorn, with whom, on the brief, was *Ariel R. MacPherson*, for the appellant (defendant).

Gregory L. Borrelli, deputy assistant state's attorney, with whom, on the brief, were *David S. Shepack*, state's attorney, and *Devin T. Stilson*, supervisory assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Michael A. Hearl, appeals from the judgment of conviction, rendered following a jury trial, on nineteen counts of animal cruelty in violation of General Statutes § 53-247 (a).[1] The defendant claims that (1) the evidence adduced at trial was insufficient to sustain his conviction, (2) the trial court did not provide the jury with a proper instruction on the required mental state to prove a violation of § 53-247 (a), (3) § 53-247 (a) is unconstitutionally vague as applied to his conduct, and (4) his conviction and sentencing on nineteen separate counts of animal cruelty violates the constitutional prohibitions against double jeopardy. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. In the fall of 2013, the defendant and Tara Bryson, his business partner, moved their goat cheese manufacturing business, Butterfield Farm (business), to Hautboy Hill Farm (farm) in the town of Cornwall. In May, 2014, the defendant and Bryson relocated a herd of goats to the farm from Massachusetts. The defendant and Bryson negotiated an oral lease with Allyn H. Hurlburt III, the owner of the farm, to house the goats in Hurlburt's barn. Hurlburt made it clear that the lease covered only the rental of the barn space and was not a boarding lease. In a boarding lease, the lessor agrees to provide

[1] The trial court sentenced the defendant to ten years incarceration, execution suspended after forty months, followed by three years of probation.

care for the animals in addition to the space to house them. The barn the defendant moved the goats into was an open style barn, which means that it did not have fully enclosed walls. As the farm was located on an exposed hill with little topographical protection from the elements, cold winds would gust through the open walls of the barn. Previously, Hurlburt used the barn to house 100 dairy cattle. Hurlburt had remodeled the barn such that it had a ridge vent in the roof. This modification of the barn was suitable for dairy cattle, which produce a great deal of heat. This modification, however, was not suitable for goats, and it permitted rain and snow to enter the barn.

Donald Betti rented the other half of the barn in order to store his prized dairy cattle, and he had the opportunity to observe the goats frequently. During the summer of 2014, the defendant visited the farm frequently. The defendant's visits, however, became less and less frequent with time. The defendant and Bryson hired Kim Lamarre and Kyle Brimmer to care for the herd. Betti, through his observations of the herd, became increasingly concerned about the health of the goats. In July, 2014, Betti alerted Chris Stroker, a state milk inspector, to his concerns about the health of the goats. On September 17, 2014, the state Department of Agriculture (department) suspended the business' permit to produce milk in order to make cheese and instructed that produced milk be given to the kid goats. Betti's concerns were not alleviated, and in October, 2014, he e-mailed Elizabeth Hall, an agriculture and marketing inspector for the department, about the health of the goats. In particular, he was concerned about the presence of sore mouth, a type of fungal infection, in some of the baby goats. Betti observed that the condition of the goats continued to deteriorate during the fall. The goats appeared emaciated and mortality rates increased. Betti observed that the goats had

a sickly appearance and that there was a high mortality rate, especially among the babies, but he observed that the goats did not appear to be under the care of a veterinarian.

On December 22, 2014, an animal control officer visited the farm and filed a complaint with the department. In response, the department began an investigation into the conditions on the farm and, on December 23, issued a quarantine order due to the morbidity and mortality rates among the herd. At the time of issuing the quarantine order, the department was unsure if the condition of the goats was attributable to disease or poor herd management.

Hall became involved with the investigation of the defendant's goats in December, 2014. On December 23, 2014, Hall made her first visit to the farm. She observed an accumulation of manure throughout the "cold, open barn," and inadequate bedding. There was a small amount of low quality[2] hay available for food. Hall described one goat as "depressed. She had her head down. She wasn't acting as inquisitive as most trouble-making goats are. She was very dull and lifeless." In addition, the goats were exhibiting signs of cold stress and shivering on a relatively mild 38 degree day. The feeding rack was not filled with hay. In derogation of common herd management practices, the goats were not separated by age, breed, milking status, or pregnancy status; instead, the goats roamed the barn as one unsorted unit.

On December 26, 2014, Hall returned to the farm to assess if there were any changes with respect to feeding

[2] Hall testified that the quality of hay depends on when it is cut. The first cut in the spring is higher quality and contains higher amounts of protein. The summer cut, the type Hall found at the farm, is lower quality and contains more waste.

or the conditions generally. She observed a downed[3] buck named Grover Cleveland in the center alley of the barn. In the three days since Hall's prior visit, Grover Cleveland had moved only a couple of feet by wriggling around on the ground; he was covered in his own urine and his fur had been worn away from paddling like a dog in an attempt to pull himself onto his chest. The hay in the barn remained soiled and wet. The feeding rack was not filled with hay.

On December 26, 2014, Dr. Bruce Sherman, a veterinarian with the department, joined Hall at the defendant's farm. Sherman observed multiple downed and emaciated goats. For example, Sherman saw a downed, white saanen[4] doe that "had a poor body condition . . . ." This goat was emaciated, as indicated by its prominent vertebral processes and visible ribs. Sherman further observed that, "[t]he doe had been [downed] for quite a period of time. . . . [I]t had been . . . paddling, [which means that it had been] laying on its side moving its legs and in doing so moved . . . away what little hay and bedding that was there. There was a pile of fecal material behind it, indicating that the goat hadn't received any palliative care or nursing care to move it or try to get it up. . . . [T]he head of this animal had been moving back and forth and moving the hay away, and sort of digging into the soil underneath it."

Sherman further observed that conditions on the farm were inadequate. The goats were not receiving adequate nutrition and sporadically received water. Does did not have enough energy during the last trimester of pregnancy and, as a result, gave birth to underweight kids

[3] Katherine Kane, a veterinarian, explained during her testimony that the term "downed" refers to goats that are either quadriplegic or paraplegic.

[4] Saanen goats are "a Swiss breed of white or light color usu. hornless short-haired dairy goats." Webster's New International Dictionary (3d Ed. 2002).

with low survival rates. Many of the goats were too weak to get up, and the barn did not provide adequate shelter from the weather. The goats were not separated into groups, a necessity for proper herd management. This allowed the remaining vigorous bucks to push out the smaller and weaker goats on the occasions when food was available. The barn also lacked a creep feeder, which is designed for adolescent goats to have a free choice of nutrients and to keep the adults out. Moreover, the herd was riddled with internal parasites and there were carcasses strewn throughout the barn.

On December 28, 2014, Hall observed that conditions in the barn had not changed. The goats were not doing well and were not receiving adequate food or water. Hall noticed that more goats were coughing and exhibiting signs of cold stress. She also discovered more mortalities and that Grover Cleveland had not changed his location since her last visit. Dead goats were piled in a manger near where the hay was stored. The young goats had access to this area and would "play . . . on top of [the carcasses]," exposing them to infectious materials. The feeding rack remained empty. Hall also noticed that there was a pregnant doe that was not receiving proper care. Sound farming practices dictate that expecting does be kept in a sanitized, dry area and that there should be a heat lamp for the newborns. The defendant was not providing these conditions at the farm.

On December 29, 2014, three members of the department—Hall, Sherman, and Wayne Kasacek—had a conference call with the defendant and Bryson. The members of the department implored the defendant to take corrective actions in order to improve the conditions of the goats. Specifically, they recommended that a veterinarian assess the entire herd and provide feeding instructions. The defendant told the department that the goats had a condition known as meningeal worm.

Sherman told the defendant that meningeal worm would not account for the morbidity and the mortality rates in the herd. In response, the defendant became combative and stated that he knew that the goats had meningeal worm because he "talked to a lot of farmers and had done research himself . . . ."

On December 29, 2014, after speaking with representatives of the department, the defendant contacted a veterinarian, Dr. Katherine Kane. The defendant requested that Kane euthanize a goat in order to perform a necropsy. On December 30, Kane arrived to euthanize one animal.[5] Kane did not intend to remain at the farm for a long period of time, but she did so because the defendant was present and asked her many questions. The defendant informed her that the goats were suffering from meningeal worm[6] and that he had been treating them with fenbendazole. Kane, skeptical that the goats were suffering from meningeal worm, informed the defendant that meningeal worm could only be diagnosed with a necropsy, and that he and Bryson should not be "pouring more medication down all these animals." Kane also recommended that a second, healthier goat that the defendant and Bryson did not administer medicine to also be euthanized so that a necropsy could be performed on it. Ultimately, Kane euthanized Grover Cleveland and a doe. The preliminary results of the necropsy performed on Grover Cleveland revealed "muscle wasting, serious atrophy of fat and loss of fat stores . . . . It is likely . . . the presumed neurologic signs were the result of weakness related to a poor nutritional state." The final diagnosis, dated January

[5] Kane learned when she arrived at the farm that Sherman wanted to speak with her to apprise her of the situation before her visit and that it was Sherman who requested the necropsy. The defendant did not tell Kane this because, in his words, he did "not respect authority . . . ."

[6] Kane explained that meningeal worm is a parasite of white-tailed deer. It can cause neurological deficits in other animals. It is quite rare in goats.

16, 2015, identified Grover Cleveland's ailments as coccidiosis,[7] nematodiasis,[8] emaciation (muscle wasting and serious atrophy of fat),[9] and splenic extramedullary hematopoiesis.[10] Meningeal worm was not found during the necropsy. On the basis of the preliminary results of the necropsies, Kane instructed the defendant how much the goats should be fed and that heat lamps needed to be installed.

On January 7, 2015, Hall returned to the farm. Hall observed that, despite the discussions that had occurred between the defendant and the department concerning the condition of the goats, no changes had been made since her last visit. It was a cold day and the goats were huddled together for warmth in a pen with a fiberglass calf hutch because the barn did not have adequate bedding. By huddling together, the goats' respiration increased the humidity in this small hutch. The increased humidity caused their hair to become even more matted and made it more difficult for the

[7] Kane explained that coccidia are protozoal parasites that can cause severe illness. They are transmitted through fecal contamination and can be treated with sulfa drugs, a portion of proper herd management.

[8] Kane testified that nematodes are gastrointestinal parasites of goats. It is a common parasite of goats and requires good management to treat it. Nematodes can cause anemia and ill-thrift, which is essentially "[n]ot doing well . . . ."

[9] Kane described this as "[m]uscle wasting; when you are not intaking enough calories you will start to burn your own muscle, start to digest your own muscle. And so an animal that has been starved has no muscle left because they've used all that protein to subsist and serious atrophy of fat, you'll use your fat even before you use your muscle. Any fat stores you have and in a normal individual there's fat stores, normal fat stores in various places of the body even if the animal is not fat and you expect to see in places throughout the body when there is severe starvation that fat is used by the body and serious atrophy it is turned into a liquid to turn into energy for the body to function."

[10] Kane testified that splenic extramedullary hematopoiesis occurs in a heavily parasitized animal that cannot produce enough red blood cells from its bone marrow. In order to compensate, the spleen, which is the storage area for red blood cells, begins to produce more red blood cells.

goats to stay warm. There were heat lamps in the barn, but they were not being used, despite the department's recommendation to do so. There were two abandoned newborn kids that were still wet and in very unsanitary conditions. Another baby had been trampled to death.

Hall returned to the farm on January 8, 2015. At this point, two heat lamps had been installed for the entire herd. The heat lamps were woefully inadequate to provide warmth for all the goats, and does were fighting with each other to get into one of the warm areas. The department's recommendation to provide shelter from the wind had not been heeded. The overall condition of the herd continued to decline, and it did not appear that the goats had been fed. One doe had symptoms of cacheous lymphadenitis, which is a ruptured lymph gland. Despite the highly contagious nature of this disease, the affected doe remained with the rest of the herd. The goats also did not have access to drinking water. The tub, which provided them access to fresh water, had frozen because the water heater in the tub was either broken or turned off.

Hall visited the farm again on January 9, 2015, but found no improvement in the goats' care. Hall made her final three visits to the farm on January 11, 2015. On this day, Hall arrived just before 7 a.m. and stayed until 9:30 a.m. She saw Betti arrive to care for his cows and told him to call her if anyone came to attend to the goats. Hall returned at 4 p.m. and saw the defendant and Bryson arrive with a bale of hay. Fifteen minutes after arriving, the defendant and Bryson left the farm in the company van without caring for the goats. Hall came back to the farm for a third time that day at 5:45 p.m. to see if anyone had attended to the goats. Hall discovered that nothing had been done to care for the herd that day and became distraught. She began to give the goats hay and water with the help of Betti. The goats that were able to stand approached Hall anxiously

as she fed them and were fighting amongst themselves for water. As Hall left the farm at 7:30 p.m., Brimmer arrived.

The department seized the seventy-four surviving goats on January 16, 2015. Dr. Mary Jane Lis, a veterinarian with the department, assessed each goat and assigned each one a body score. The body score is a visual score on a scale of one to five that assesses the health of an individual goat—a goat that receives a score of one is very thin and emaciated, and a score of five would be assigned to an obese goat. The average score of the herd was two and one-half[11] and Lis assigned nineteen goats a score of one.[12]

Two of the goats that received a score of one died within one week of the department seizing the herd. Necropsies were performed on these two goats, a male saanen and a female nubian.[13] The causes of death for the male saanen included chronic suppurative bronchopneumonia and pleuritis,[14] chronic lymphoplasmacytic tracheitis,[15] pulmonary nematodiasis, and emaciation. The female nubian died from interstitial neutrophilic and lymphocytic histiocytic pneumonia, pulmonary nematodiasis, centrilobular hepatocellular atrophy,[16]

[11] The average score of 2.5 was buoyed by the kids, and it does not account for the forty-seven goats that perished before the department confiscated the herd.

[12] The mistreatment of the nineteen goats that received scores of one is the basis for the nineteen separate counts of animal cruelty against the defendant.

[13] Nubian goats are "a breed of large, long-eared North African goats having a Roman nose and predominantly brown or black hair: noted for their rich milk." Random House Webster's Unabridged Dictionary (2d Ed. 2001).

[14] There was evidence that chronic suppurative bronchopneumonia and pleuritis is a type of pneumonia that afflicts the lungs and the lining of the thoracic cavity and made it difficult for the goat to breathe.

[15] Kane testified that chronic lymphoplasmacytic tracheitis is the inflammation of the trachea.

[16] Kane explained that centrilobular hepatocellular atrophy refers to atrophy, necrosis, and congestion of the cells in the liver.

and serous atrophy of fat, which is an indication of chronic malnutrition or starvation.

Lis tested the seventeen surviving seized goats with body scores of one for caprine arthritis encephalitis, caseous lymphadenitis, and Johne's disease. Caprine arthritis encephalitis is a preventable virus that impacts the longevity of a goat. It causes arthritis and decreases the production of milk. Only one of the seventeen goats tested negative for this disease. Caseous lymphadenitis is bacterial disease that causes boils or abscesses. Fourteen of the seized goats tested positive for this disease. Johne's disease is a bacterial disease that renders a goat unable to absorb nutrients. Three of the seventeen goats tested positive for this disease.

The seventeen confiscated goats that received body scores of one were all extremely emaciated when the department took possession of them. One goat was described as a "walking frame . . . of bones," and many of the others were so thin that Lis could feel every one of their vertebrae when palpating them and their entire rib cages were visible. Their hooves were overgrown, which made walking difficult and painful. They each suffered from a variety of ailments and conditions, which included abscesses, lice, dermatitis, missing hair, difficulty breathing, and swelling and edema in both ears. Some goats had necrosis in the ear margins as a result of untreated ear infections. One goat, named Sasquatch, had been improperly dehorned.

By May, 2015, the condition of the confiscated goats had improved dramatically under the department's care. A weigh-in on May 20, 2015, revealed that the seventeen goats gained an average of 19.2 pounds.[17]

[17] The goats that tested positive for Johne's disease were not able to recover as well as the other goats. By May, 2015, one goat with this ailment had lost weight, despite the department's efforts, and another diseased goat gained only 3.6 pounds.

They appeared to have a "sassy" demeanor, and their overall appearance had improved. Additional facts will be set forth as necessary.

I

First, the defendant claims that the evidence adduced at trial was insufficient to sustain his conviction of animal cruelty. We disagree.

"The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating

evidence, the [jury] is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [jury] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Ordinarily, intent can only be inferred by circumstantial evidence; it may be and usually is inferred from the defendant's conduct. . . . Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [jury], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [jury's] verdict of guilty." (Citations omitted; internal quotation marks omitted.) *State* v. *Campbell*, 328 Conn. 444, 503–505, A.3d (2018).

Section 53-247 (a) provides in relevant part: "Any person who . . . having impounded or *confined any animal*, fails to give such animal proper care . . . or, *having charge or custody of any animal* . . . fails to provide it with proper food, drink or protection from the weather . . . shall, for a first offense, be fined not more than one thousand dollars or imprisoned not more than one year or both . . . ." (Emphasis added.)

Thus, to obtain a conviction in the present case, the state bore the burden of proving beyond a reasonable doubt that the defendant confined the goats and failed to give them proper care or that the defendant had charge or custody of the goats and failed to provide proper food, drink, or protection from the weather. See General Statutes § 53-247 (a). The defendant does not

argue that the evidence was insufficient to establish either that the goats did not receive proper care or that the goats were not given adequate food, water, and shelter. Instead, he argues that the evidence was insufficient to prove that *he* confined, or had charge or custody of, the goats. As Connecticut case law has not addressed what constitutes "confinement" or "charge or custody" for the purpose of supporting a conviction for a violation of § 53-247 (a), the sufficiency issue presents a preliminary issue of statutory interpretation.

"The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case . . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning . . . [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Footnote omitted; internal quotation marks omitted.) *State* v. *Leak*, 297 Conn. 524, 532–33, 998 A.2d 1182 (2010). "Issues of statutory construction raise questions of law, over which we exercise plenary review." (Internal quotation marks omitted.) *State* v. *Fernando A.*, 294 Conn. 1, 13, 981 A.2d 427 (2009).

We begin our plain meaning analysis of the statute by noting that the legislature did not define the terms "charge," "custody," or "confinement." Thus, we turn to the dictionary entries for common definitions of these terms. The term "charge" is defined as "a duty or responsibility laid upon or entrusted to one" or "anything

or anybody committed to one's care or management." Random House Webster's Unabridged Dictionary (2d Ed. 2001). The term "custody" is defined as "keeping; guardianship; care." Id. An individual with charge or custody of an animal must give that animal adequate food, water, and shelter from the elements. On the basis of the foregoing definitions, in the context of the statute, the terms "charge" and "custody" must necessarily describe when an individual has a duty to provide care for an animal. Thus, this clause of § 53-247 (a) punishes individuals who, having the responsibility to care for an animal, fail to do so. Last, "confined" is defined as "limited or restricted." Id. Affording the animal cruelty statute its plain meaning, we conclude that it applies when someone limits an animal's ability to roam. By keeping an animal in a set location, responsibility then attaches to provide adequate care for that animal.

The trial court instructed the jury in a manner consistent with our interpretation of § 53-247 (a). The court gave helpful examples[18] of what the terms "confined," "charge," and "custody"[19] mean in the context of the statute. The court instructed the jury as follows: "The state must prove that [the defendant] first, confined the

[18] The defendant argues that the court's instruction misled the jury because it did not differentiate between "charge or custody" and "confinement." Insofar as the defendant is now, on appeal, folding into his insufficiency claim an instructional error claim that the court's charge misled the jury on the elements the state must prove to support a conviction pursuant to § 53-247 (a), we decline to address that argument. Pursuant to Practice Book § 67-4 (d) claims must be divided into separate parts, and each point must include a separate brief statement of the appropriate standard of review in order to be adequately briefed. As the defendant has not provided this, we decline to review any claim of instructional error with regard to the court's instruction on the elements of § 53-247 (a). See *Carmichael* v. *Stonkus*, 133 Conn. App. 302, 308, 34 A.3d 1026, cert. denied, 304 Conn. 911, 39 A.3d 1121 (2012).

[19] We are not concluding that the court's jury instruction provided an exhaustive list of what the terms "confined," "charge," and custody" mean in the context of § 53-247 (a).

particular goat at issue, and, second, failed to give that particular goat proper care. . . .

"Confined means to hold within a location or to keep within limits. Proper care means that degree of care that a person of ordinary intelligence would provide to an animal to maintain its well-being under any reasonable standard. . . .

"Under the second claim, the state must prove the following elements beyond a reasonable doubt. The state must prove that [the defendant], first, had charge or custody of a particular goat at issue, and, second, failed to give that goat proper food, drink, or protection from the weather. . . .

"Charge means to have an obligation or duty or to be entrusted with the care, custody, or management of something. Custody means immediate charge and control exercised by a person or authority. Proper means that which is fit, suitable, adapted, or correct."

Resolving the defendant's sufficiency claim requires us to determine whether the evidence, construed in the light most favorable to sustaining the verdict, supports a reasonable inference that the defendant bore responsibility for caring for the goats or kept the goats within the confines of the barn.

We begin our assessment of the evidence by observing that there was ample evidence to support an inference that the goats did not receive proper care or, alternatively, that they did not receive adequate food, water, and shelter. The defendant does not appear to dispute this obvious fact. When the goats were confiscated, they were starving and riddled with parasites and diseases. The department's investigation revealed that conditions in the barn were wholly inadequate to provide them shelter from the elements and were unsanitary. Inside the barn, the goats were not properly

sorted. Moreover, the evidence reveals that the goats did not receive adequate food or water.

There was ample evidence to support a finding that the defendant confined, or had charge or custody of, the goats. Hurlburt testified that the defendant brought the goats to the barn and that the defendant negotiated an oral lease for half the barn. Betti testified that he first met the defendant in the fall of 2013 when the defendant came to the farm to inspect the property in order to move his and Bryson's cheese-making business there. Betti testified that during the summer of 2014, after the defendant and Bryson brought the goats to the farm, the defendant arrived frequently to care for the goats, but the frequency of the defendant's visits decreased with time. Brimmer testified that the defendant came by occasionally to care for and feed the goats. Mark Ustico, a local part-time farmer, testified that the defendant contacted him to purchase hay because the defendant was "in a pinch."

There was evidence before the jury of the defendant's interactions with the department that supported the finding that the defendant confined, or had charge or custody of, the goats. The department learned through its investigation of the herd that the defendant played an active role in the management of the goats. Lis testified that, during a conference call on December 23, 2016, with members of the department, the defendant "took the lead on telling me what was being done with the management of the goats" and that he "predominated the conversation" about the mortality rates in the herd. Sherman testified that on December 29, 2014, members of the department conducted another conference call with the defendant and Bryson concerning the recommendations made by the department. During the call, Sherman told the defendant that the condition of the herd remained "very poor" and that something needed to be done. The defendant responded by saying

that the herd suffered from meningeal worm, and that he knew this because he had spoken with other famers and had prior experience with this parasite in a different herd in Massachusetts. Kasacek testified that during this phone call the defendant identified himself as the owner of the goats, told the department that the goats suffered from meningeal worm, and became combative when discussing the quarantine. By the end of the call, Kasacek believed that the department had convinced the defendant to do something about the goat's health because the defendant stated that he " 'had to get to work . . . .' " Sherman also testified that a third conference call involving the department, the defendant, and Bryson occurred on January 6, 2015. During this conversation, the department provided detailed instructions on how to care for the goats and stressed that the goats' nutrition was inadequate. Lis testified that Hall's observations at the farm were inconsistent with the representations made by the defendant on the conference call. Kasacek testified that the department, the defendant, and Bryson had a fourth conference call on January 7, 2015, because the department was concerned about the goats due to upcoming cold weather. Kasacek also testified that he had phone conversations with the defendant about what to do with dead goats in the barn and that when he called the defendant to inform about the seizure, the defendant asked, "what [is] to become of [my] goats . . . ?" During Hall's January 11, 2015 visit, she observed that the defendant arrived at the farm to deliver hay, but left the farm shortly after and did not provide the goats any care.

There was yet additional evidence of the defendant's interactions with Kane that supported the inference that the defendant was responsible for the herd. Kane testified that it was the defendant who contacted her on December 29, 2015, to request that a necropsy be performed. This was compelling evidence, for it would

be reasonable to infer that the defendant would only have the authority to order the euthanization of the animals if he had charge and custody of them. Kane met the defendant at the farm to inspect the goats on December 30, 2016. Kane testified that the defendant opened an account with her business in his name and used his credit card to pay her to euthanize two goats. Kane also recalled that the defendant and Bryson had been giving the goats fenbendazole without a diagnosis because the defendant believed the herd suffered from meningeal worm. On January 8, 2016, Kane told the defendant that the preliminary diagnosis from the necropsy "seemed to be emaciation . . . ." In addition to providing the defendant with the preliminary results, Kane and the defendant had an extensive conversation about what was necessary to feed the herd and keep the kids warm. Kane also testified that the defendant called her when the state confiscated the herd and said that the "state was seizing *his* animals . . . ." (Emphasis added.) There was no evidence that the defendant ever advised the department to discuss the care of the goats with someone other than himself.

In arguing that the evidence did not support a finding of confinement, or charge or custody, the defendant asserts that ownership is not the equivalent of confinement. This argument is not persuasive. Although ownership does not necessarily support a finding of confinement when the owner has hired someone else to care for an animal; *State* v. *Yorczyk*, 167 Conn. 434, 438–39, 356 A.2d 169 (1974); it can still be probative evidence that the defendant bore the responsibility of caring for the goats and authorizing their confinement. The defendant told members of the department that he was the owner of the goats and became involved in the department's investigation of the herd. During the investigation, the defendant gave the department the impression that he was there to care for "his" goats

and that he would follow their instructions to improve herd management. Moreover, there was evidence that the defendant was not an absentee owner who left the goats in the hands of others. Cf. *State* v. *Yorczyk*, supra, 438–39. Instead, the evidence reflects that the defendant was both responsible for and in charge of the management of the goats. Brimmer, the hired help, testified about how the defendant sporadically came to the farm to tend to the goats and delivered hay to the farm.

The defendant asserts that it was Bryson alone who confined the goats.[20] First, we note that no authority limits liability under the statute to a single actor when the facts demonstrate that more than one person may have confined the goats or had charge or custody of them. Second, we observe that the evidence supported a reasonable inference that the defendant and Bryson jointly confined, or had charge or custody of, the goats. The defendant and Bryson both brought the goats to the farm and executed the oral lease for the barn space where the goats were confined. Additionally, they identified themselves as co-owners and participated in conference calls together with members of the department. Third, there was evidence to support the inference that the defendant acted independently at times to represent himself as the person who was responsible for caring for the goats. The defendant communicated with members of the department without Bryson. The defendant also arranged for Kane to perform a necropsy, paid for her services, and contacted her about the results of the necropsies. He was also the only person who asked the department about how to dispose of the dead goats that were piled inside the barn.

We conclude our analysis by noting that we, as a reviewing court, must examine the evidence in its totality, viewed in the light most favorable to sustaining the

[20] We take judicial notice of the file in which Bryson was also charged with animal cruelty for her role in the failure to provide proper care for the goats. She pleaded guilty on June 3, 2016.

jury's finding of guilt, to determine whether the jury reasonably could have determined that the state satisfied its burden of proof. The state, by presenting testimony of department members, Betti, Hurlburt, and Kane, introduced evidence to support the inference that the defendant held himself out as the owner and caretaker of the goats. Department members' descriptions of conditions in the barn and of the poor health of the goats supported the inference that the goats did not receive proper care. Thus, the jury reasonably could have concluded that the defendant, having confined, or having charge or custody of, the goats, failed to give the goats proper care or food, water, and shelter.

II

Second, the defendant claims that the court should have instructed the jury on criminal negligence.

Our analysis begins with the standard of review. "When reviewing the challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . .

"It is . . . constitutionally axiomatic that the jury be instructed on the essential elements of a crime charged. . . . The due process clause of the fourteenth amendment protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is

charged. . . . Consequently, the failure to instruct a jury on an element of a crime deprives a defendant of the right to have the jury told what crimes he is actually being tried for and what the essential elements of those crimes are. . . .

"[I]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . The test is whether the charge as a whole presents the case to the jury so that no injustice will result. . . . We will reverse a conviction only if, in the context of the whole, there is a reasonable possibility that the jury was misled in reaching its verdict. . . . A jury instruction is constitutionally adequate if it provides the jurors with a clear understanding of the elements of the crime charged, and affords them proper guidance for their determination of whether those elements were present. . . . An instruction that fails to satisfy these requirements would violate the defendant's right to due process of law as guaranteed by the fourteenth amendment to the United States constitution and article first, § 8, of the Connecticut constitution. . . . The test of a charge is whether it is correct in law, adapted to the issues and sufficient for the guidance of the jury. . . . The primary purpose of the charge is to assist the jury in applying the law correctly to the facts which they might find to be established. . . . The purpose of a charge is to call the attention of the members of the jury, unfamiliar with legal distinctions, to whatever is necessary and proper to guide them to a right decision in a particular case." (Internal quotation marks omitted.) *State* v. *Johnson*, 165 Conn. App. 255, 287–89, 138 A.3d 1108, cert. denied, 322 Conn. 904, 138 A.3d 933 (2016).

The issue of the requisite mens rea applicable to the relevant portion of § 53-247 (a) is a question of statutory interpretation, which receives plenary review. See *State*

ex rel. Gregan v. *Koczur*, 287 Conn. 145, 152, 947 A.2d 282 (2008).

"In determining [whether a crime] requires proof of a general intent [or] of a specific intent, the language chosen by the legislature in enacting a particular statute is significant. When the elements of a crime consist of a description of a particular act and a mental element not specific in nature, the only issue is whether the defendant intended to do the proscribed act. If he did so intend, he has the requisite general intent for culpability. When the elements of a crime include a defendant's intent to achieve some result additional to the act, the additional language distinguishes the crime from those of general intent and makes it one requiring a specific intent." (Internal quotation marks omitted.) *State* v. *Roy*, 173 Conn. 35, 45, 376 A.2d 391 (1977).

The following procedural history is relevant to this claim. The defendant preserved this claim by filing a request to charge on March 11, 2016. In this request to charge, the defendant submitted the following jury instruction on criminal negligence: "A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." The state filed an objection, arguing that, the mens rea required for a conviction under § 53-247 (a) is general intent.

With respect to intent, the court instructed the jury in relevant part as follows: "Now, general intent is the intent to engage in conduct. Thus, it's not necessary for the state to prove that the defendant intended the precise harm or the precise result which eventuated.

Rather, the state is required to prove that the defendant intentionally and not inadvertently or accidentally engaged in his actions. In other words, the state must prove that the defendant's actions were intentional, voluntary and knowing rather than unintentional . . . involuntary and unknowing.

"Now, what a person's intention was is usually a matter to be determined by inference. No person is able to testify that they looked in another's mind and saw therein certain knowledge or a certain purpose or intention to do harm to another. Because direct evidence of the defendant's state of mind is rarely available, intent is generally proved by circumstantial evidence. The only way a jury can ordinarily determine what a person's conduct was at any given time is by determining what that person's conduct was and what the circumstances were surrounding that conduct and from that infer what their intention was.

"To draw such an inference is a proper function of a jury, provided, of course, that the inference drawn complies with the standards for inferences as explained in connection with my instruction on circumstantial evidence. The inference is not a necessary one. You're not required to infer a particular intent from the defendant's conduct or statements, but it is an inference that you may draw if you find it reasonable and logical. I again remind you that the burden of proving intent beyond a reasonable doubt is on the state."

Recently, our Supreme Court addressed whether general intent or criminal negligence is the appropriate mens rea for the "unjustifiably injures" clause[21] of § 53-247 (a) and stated in relevant part: "Section 53-247 is

[21] The unjustifiably injures clause of § 53-247 (a) provides in relevant part: "Any person who . . . unjustifiably injures any animal . . . shall, for a first offense, be fined not more than one thousand dollars or imprisoned not more than one year or both, and for each subsequent offense, shall be guilty of a class D felony." General Statutes § 53-247 (a).

comprised of subsections (a) through (e). Subsections (b) through (e) each include explicit specific intent terms, specifically, 'maliciously and intentionally,' 'knowingly,' and 'intentionally,' that apply to all of the acts proscribed by the particular subsection. . . . In contrast, § 53-247 (a) lacks a mens rea term that applies to every proscribed act listed therein and, instead, contains some clauses that include a specific intent term and others that do not. . . . This differing structure strongly supports a conclusion that the legislature did not intend for all of the acts proscribed by § 53-247 (a) to be accompanied by the same mens rea. Additionally, unlike the [unjustifiably injures] clause, in other clauses of § 53-247 (a), the adverb 'unjustifiably' appears in conjunction with additional language that clearly requires specific intent. Specifically, the clause under which the defendant was convicted refers to any person who 'unjustifiably injures any animal,' but other portions of subsection (a) later refer to any person who 'unjustifiably administers any poisonous or noxious drug or substance to any domestic animal or unjustifiably exposes any such drug or substance, with intent that the same shall be taken by an animal . . . .' " (Citations omitted; emphasis omitted.) *State* v. *Josephs*, 328 Conn. 21, 27–28, 176 A.3d 542 (2018).

"This plainly indicates that, in § 53-247 (a), 'unjustifiably' means something different from 'intentionally' and that the legislature will include specific intent language along with the word 'unjustifiably' when it intends for a specific intent to apply. . . . The legislature's differing treatment of these two clauses within the same subsection convinces us that the 'unjustifiably injures any animal' clause, under which the defendant was charged, requires only a general intent. . . .

"The defendant argues that we should read a specific intent requirement into the prohibition in § 53-247 (a)

against 'unjustifiably injur[ing]' an animal because subsection (b) of § 53-247 punishes 'maliciously and intentionally' maiming, mutilating, torturing, wounding or killing an animal . . . . [T]here is a clear reason for an additional mens rea element in subsection (b), namely, the punishment imposed by subsection (b) is more severe than that imposed by subsection (a). . . .

"[T]he plain and unambiguous language of the clause in § 53-247 (a) that the defendant was charged with violating required only a general intent when read in the context of the entirety of subsection (a) and within § 53-247 as a whole. Accordingly, the trial court properly concluded that the state was not required to prove that the defendant possessed the specific intent to injure Wiggles."[22] (Citations omitted.) Id., 28–30.[23]

In the present case, the relevant language of § 53-247 (a) is, "[a]ny person . . . having impounded or confined any animal, [who] fails to give such animal proper care . . . or, having charge or custody of any animal . . . fails to provide it with proper food, drink or protection from the weather . . . shall, for a first offense, be fined not more than one thousand dollars or imprisoned not more than one year or both, and for each subsequent offense, shall be guilty of a class D felony." General Statutes § 53-247 (a). The defendant concedes that the legislature did not include specific intent provisions in the relevant portion of § 53-247 (a). Thus, in accordance with *State* v. *Josephs*, supra, 328 Conn. 21, we conclude

[22] The defendant in *Josephs* shot a cat named Wiggles with a BB gun. *State* v. *Josephs*, 328 Conn. 21, 24, 176 A.3d 542 (2018).

[23] We do not fault either party for failing to cite to *Josephs* in their briefs, as this appeal was argued December 17, 2017, and *Josephs* was officially released on January 30, 2018. The defendant's claim was an unanswered question at the time briefs were filed, which our Supreme Court has now addressed in *Josephs*. Pursuant to Practice Book § 67-10, the state filed a citation of supplemental authorities after oral argument to this court to provide notice that the decision was released and that it was relevant to the issues raised in this appeal. The defendant did not respond.

that the mens rea required for a conviction under the relevant portion of § 53-247 (a) is general intent and that the trial court did not err by declining to instruct the jury on criminal negligence.

III

Third, the defendant claims that § 53-247 (a), when applied to his conduct, is unconstitutionally vague.[24]

The defendant correctly acknowledges that he did not preserve this claim at trial. The defendant argues, however, that the claim is reviewable under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) Id.; see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*).

The defendant's claim meets the first two prongs of *Golding* and is, therefore, subject to review. First, the record is adequate to review because it reflects both that the defendant was convicted under § 53-247 (a) and contains the basis of his conviction. See *State* v. *Rocco*, 58 Conn. App. 585, 589, 754 A.2d 196, cert. denied, 254 Conn. 931, 761 A.2d 757 (2000). Second, a claim that a statute is unconstitutionally vague implicates a

[24] The defendant is not making a facial challenge to § 53-247 (a).

defendant's fundamental due process right to fair warning. Id. We conclude, however, that the defendant's claim fails to satisfy the third prong of *Golding* because the alleged constitutional violation does not exist.[25]

We begin by setting forth the relevant legal principles. "The determination of whether a statutory provision is unconstitutionally vague is a question of law over which we exercise de novo review." *State* v. *Winot*, 294 Conn. 753, 758–59, 988 A.2d 188 (2010). "The void for vagueness doctrine is a procedural due process concept that originally was derived from the guarantees of due process contained in the fifth and fourteenth amendments to the United States constitution. . . . The constitutional injunction that is commonly referred to as the void for vagueness doctrine embodies two central precepts: the right to fair warning of the effect of a governing statute or regulation and the guarantee against standardless law enforcement. . . .

"If the meaning of a statute can be fairly ascertained a statute will not be void for vagueness since [m]any statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties. . . . For statutes that do not implicate the especially sensitive concerns embodied in the first amendment, we determine the constitutionality of a statute under attack for vagueness by considering its applicability to the particular facts at issue. . . .

"In challenging the constitutionality of a statute, the defendant bears a heavy burden. To prevail on his vagueness claim, [t]he defendant must demonstrate beyond a reasonable doubt that the statute, as applied to him, deprived him of adequate notice of what conduct the statute proscribed or that he fell victim to arbitrary

[25] The defendant has not specified whether his vagueness claim is under the federal or state constitution. Accordingly, our review of the defendant's claim is limited to the protections of the federal constitution.

and discriminatory enforcement. . . . The proper test for determining [whether] a statute is vague as applied is whether a reasonable person would have anticipated that the statute would apply to his or her particular conduct. . . . The test is objectively applied to the actor's conduct and judged by a reasonable person's reading of the statute . . . .

"If the language of a statute fails to provide definite notice of prohibited conduct, fair warning can be provided by prior judicial opinions involving the statute . . . or by an examination of whether a person of ordinary intelligence would reasonably know what acts are permitted or prohibited by the use of his common sense and ordinary understanding." (Internal quotation marks omitted.) *State* v. *Pettigrew*, 124 Conn. App. 9, 24–25, 3 A.3d 148, cert. denied, 299 Conn. 916, 10 A.3d 1052 (2010).

As stated previously, § 53-247 (a) provides in relevant part: "Any person . . . who, having impounded or confined any animal, fails to give such animal proper care . . . or, having charge or custody of any animal . . . fails to provide it with proper food, drink or protection from the weather . . . shall, for a first offense, be fined not more than one thousand dollars or imprisoned not more than one year or both . . ."

The defendant asserts that the ambiguity in the terms "charge" and "custody" did not provide notice that he bore the responsibility of caring for the goats and, "therefore, what 'proper care' was required of *him*."[26] (Emphasis in original.) We agree with the defendant

[26] The defendant also argues that the statute is impermissibly vague because it does not contain a mens rea provision. As discussed in part II of this opinion, our Supreme Court, in *Josephs*, has concluded that the "plain and unambiguous" language of § 53-247 (a); *State* v. *Josephs*, supra, 328 Conn. 29; makes clear that the mens rea standard is general intent. Id. Thus, the defendant's arguments pertaining to mens rea warrant no further discussion.

that these terms may be susceptible to some degree of interpretation. See *State* v. *Josephs*, supra, 328 Conn. 32 ("unjustifiably injures" in § 53-247 [a] susceptible to differing interpretations); *State ex rel. Gregan* v. *Koczur*, supra, 287 Conn. 157 ("proper care" and "proper food" as used in § 53–247 [a] are susceptible to wide range of interpretations and could be vague as applied to some situations); *Bethlehem* v. *Acker*, 153 Conn. App. 449, 472, 102 A.3d 107 (concluding phrase proper "protection from the weather" susceptible to some degree of interpretation), cert. denied, 315 Conn. 908, 105 A.3d 235 (2014). Our review of the record in the present case, however, reveals that an objective reading of § 53-247 (a) provides definite notice that the defendant's conduct violated the statute.

Thus, we now turn to whether these terms "charge" and "custody," as used in § 53-247 (a), provide sufficient notice to a reasonable person as to when criminal liability attaches for failing to provide adequate care for an animal. As the statute provides, a person violates § 53-247 (a) when, having "charge or custody of any animal," he fails to give that animal "proper food, drink or protection from the weather . . . ." General Statutes § 53-247 (a). For the reasons discussed in part I of this opinion, the plain meaning of the relevant portion of § 53-247 (a) is that a person who bears the responsibility of caring for an animal must give that animal proper care. The record contains ample evidence that a reasonable person in the defendant's position would know that he bore the responsibility of caring for the goats and, thus, could face criminal liability for failing to do so. In review, the defendant brought the goats to the farm and negotiated an oral lease with Hurlburt to house the goats in the barn. He was engaged in a business that used the goats' milk to make cheese. The evidence reflects that, initially, the defendant came to the farm frequently to provide care for the goats. Moreover, he

represented himself to the members of the department as the owner of the goats and as someone responsible for their care. Last, the defendant contacted Kane when the department instructed that the goats be examined by a veterinarian and continued to communicate with her after her visit.

The state argues that § 53-247 (a) is not susceptible to arbitrary enforcement because the statute only subjects individuals who have "charge" or "custody" of an animal to criminal liability for failing to give that animal proper care. We agree with the state because, contrary to what the defendant argues, the terms limit criminal liability to those who have the responsibility to care for an animal. As the evidence reflects, a reasonable person in the defendant's position would know that his conduct fell within the statute's prohibited conduct and that he could face criminal liability for his improper treatment of the goats. Rather than creating a risk of standardless law enforcement, the terms "charge" and "custody" limit who may be prosecuted under § 53-247 (a).

The defendant's vagueness challenge is further undermined by the evidence that he had notice that his conduct violated the law. A "defendant's special knowledge may undermine his . . . vagueness challenge . . . ." *State* v. *Jason B.*, 248 Conn. 543, 567, 729 A.2d 760, cert. denied, 528 U.S. 967, 120 S. Ct. 406, 145 L. Ed. 2d 316 (1999). In the present case, representatives from the department informed the defendant prior to the time of his arrest that his treatment of the goats violated the animal cruelty statute. Sherman advised the defendant that his conduct was in violation of the animal cruelty statute, and the defendant responded by stating that "he was familiar with the law . . . ." Kane informed the defendant that the goats' nutrition needed to be improved. Members of the department told the defendant to provide heat lamps and shelter from the wind.

The record reflects, however, that the defendant did not act on this instruction. Instead, the defendant allowed the condition of the goats to continue to deteriorate.

IV

Last, the defendant claims that his conviction of nineteen charges of animal cruelty violated the prohibition against double jeopardy under the state and federal constitutions because the term "any animal" in § 53-247 (a) refers to a species of animal, not an individual animal.[27]

The defendant correctly acknowledges before this court that he failed to present this claim, in any form, before the trial court. The defendant argues, however, that the claim is reviewable under *State* v. *Golding*, supra, 213 Conn. 239–40. See part III of this opinion. Insofar as the defendant's claim is based on a violation of the prohibition against double jeopardy afforded under the state and federal constitutions, the claim is reviewable under *Golding* because the record is adequate for review and the claim is of constitutional magnitude. See, e.g., *State* v. *Chicano*, 216 Conn. 699, 704–705, 584 A.2d 425 (1990), cert. denied, 501 U.S. 1254, 111 S. Ct. 2898, 115 L. Ed. 2d 1062 (1991), overruled in part on other grounds by *State* v. *Polanco*, 308 Conn. 242, 261, 61 A.3d 1084 (2013); *State* v. *Kurzatkowski*, 119 Conn. App. 556, 568, 988 A.2d 393, cert. denied, 296 Conn. 902, 991 A.2d 1104 (2010). The defendant claims that he was convicted and sentenced for nineteen counts for one offense in a single trial. "A defendant

[27] Although this claim presents an issue of first impression, in a prior case, this court affirmed a defendant's conviction of multiple counts of animal cruelty for one course of action that affected multiple animals. See *State* v. *Acker*, 160 Conn. App. 734, 739, 125 A.3d 1057 (2015) (defendant charged with sixty-three counts of animal cruelty, each count based on his conduct toward distinct dog, and convicted of fifteen counts), cert. denied, 320 Conn. 915, 131 A.3d 750 (2016).

may obtain review of a double jeopardy claim, even if it is unpreserved, if he has received [multiple] punishments for [multiple] crimes, which he claims were one crime, arising from the same transaction and prosecuted at one trial . . . .'' (Internal quotation marks omitted.) *State* v. *Urbanowski*, 163 Conn. App. 377, 386–87, 136 A.3d 236 (2016), aff'd, 327 Conn. 169, 172 A.3d 201 (2017).

Thus, we turn to an evaluation of the defendant's claim to determine whether a double jeopardy violation exists and deprived him of a fair trial.[28] ''A defendant's double jeopardy challenge presents a question of law over which we have plenary review.'' (Internal quotation marks omitted.) Id., 387. The double jeopardy clause of the fifth amendment to the United States constitution provides: ''nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .'' U.S. Const., amend. V. ''This constitutional guarantee prohibits . . . multiple punishments for the same offense in a single trial.'' (Internal quotation marks omitted.) *State* v. *Wright*, 319 Conn. 684, 689, 127 A.3d 147 (2015). ''The defendant on appeal bears the burden of proving that the prosecutions arefor the same offense in law and fact.'' (Internal quotation marks omitted.) *State* v. *Miranda*, 260 Conn. 93, 120–21, 794 A.2d 506,

[28] The defendant alleges a violation of his rights under the state and federal constitutions. The defendant has not provided an independent state constitutional analysis of his vagueness claim. As a result, the state claim is deemed abandoned and review is limited to federal constitutional provisions. See *State* v. *Jarrett*, 82 Conn. App. 489, 498 n.5, 845 A.2d 476, cert. denied, 269 Conn. 911, 852 A.2d 741 (2004). In addition, we observe, and the defendant concedes, that this court and our Supreme Court have held that with respect to the protection against double jeopardy, the state constitution does not afford greater protection than that afforded by its federal counterpart. See, e.g., *State* v. *Michael J.*, 274 Conn. 321, 354, 875 A.2d 510 (2005) (''Connecticut appellate courts never have held that the double jeopardy guarantees implied in the state constitution exceed those embodied in the federal constitution'').

cert. denied, 537 U.S. 202, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002).

The United States Supreme Court has "recognized that the Double Jeopardy Clause consists of several protections: It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. . . . These protections stem from the underlying premise that a defendant should not be twice tried or punished for the same offense. . . . The Clause operates as a bar against repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent." (Citations omitted; internal quotation marks omitted.) *Schiro* v. *Farley*, 510 U.S. 222, 229–30, 114 S. Ct. 783, 127 L. Ed. 2d 47 (1994).

"The proper double jeopardy inquiry when a defendant is convicted of multiple violations of the *same* statutory provision is whether the legislature intended to punish the individual acts separately or to punish only the course of action which they constitute." (Emphasis in original.) *State* v. *Rawls*, 198 Conn. 111, 121, 502 A.2d 374 (1985). "The issue, though essentially constitutional, becomes one of statutory construction." (Internal quotation marks omitted.) *State* v. *Knight*, 56 Conn. App. 845, 855, 747 A.2d 13 (2000). Therefore, the question before us becomes whether the legislature in enacting § 53-247 (a) intended to authorize multiple convictions for cruelty towards each goat or one conviction for the cruel treatment of the nineteen goats.

Whether § 53-247 (a) was intended to create a per animal unit of prosecution is a question of statutory interpretation, which is a question of law subject to plenary review. As previously stated, "[t]he meaning of

a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . [E]very case of statutory interpretation . . . requires a threshold determination as to whether the provision under consideration is plain and unambiguous. This threshold determination then governs whether extratextual sources can be used as an interpretive tool. . . . [O]ur case law is clear that ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation." (Citations omitted; internal quotation marks omitted.) *State* v. *Richard P.*, 179 Conn. App. 676, 684–85, A.3d , cert. denied, 328 Conn. 924, A.3d (2018).

The defendant argues that § 53-247 (a) is ambiguous because the phrase "any animal" is subject to multiple interpretations. The phrase "any animal," however, is not ambiguous. The legislature's decision to use the singular "animal," rather than the plural "animals," is crucial to our analysis. The plain meaning of the singular word "animal" is that our animal cruelty statute was intended to create a per animal unit of prosecution. In addition, the legislature did not use the term "species" or the phrase, "class of animal."

In the present case, although the defendant's conduct in mistreating the animals occurred over the same period of time and consisted of the same general acts, each of the charged offenses pertained to a different, identifiable goat. The state filed one count for each of the nineteen goats that received a body score of one when the department evaluated the herd after it was removed from the defendant's custody. The record supports the proposition that each goat needed to be fed

and watered separately. Each goat was starving; some were so severely deprived of nutrients that they could not move and were left to wallow in their own feces. The defendant failed to provide each goat with veterinary care for their various injuries and wounds. The record reveals that each goat suffered different, individualized ailments and contains photographs depicting each goat's suffering. The defendant's separate abuse and maltreatment of each goat supports the nineteen separate counts filed by the prosecutor. Simply put, the defendant's cruelty to each goat constituted a separate crime.

Even if we assume, arguendo, that the statute is ambiguous, we would still reach the conclusion that the § 53-247 (a) delineates a per animal unit of prosecution. "When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation . . . ." (Internal quotation marks omitted.) *State* v. *Rodriguez-Roman*, 297 Conn. 66, 75, 3 A.3d 783 (2010).

Comparing § 53-247 (a) to other statutes supports our conclusion that the legislature intended to adopt a per animal unit of prosecution. The legislature has passed other legislation that expressly contains provisions that apply to groups of one or more animals, collectively. General Statutes § 29-108a provides in relevant part: "The terms 'animals' and 'animal,' as used in this chapter and in [§ 53-247] . . . shall include all brute creatures and birds." Failure to afford the term "animal" and "animals" different meaning would render the statutory language surplusage. See *State* v. *Pommer*, 110 Conn. App. 608, 614, 955 A.2d 637, cert. denied, 289 Conn. 951, 961 A.2d 418 (2008). Additionally, in General Statutes

§ 53-252[29] the term "animals" is used to describe one offense for transporting one or more animals by train. The use of the term "animals" in other statutes reveals that when a particular statute is intended to refer to a group of animals, collectively, the term "animals" is used. Thus, the legislature uses the plural, "animals," when it intends to, and that suggests that the failure to use that term in § 53-247 (a) was purposeful. See *Hartford/Windsor Healthcare Properties, LLC* v. *Hartford*, 298 Conn. 191, 205, 3 A.3d 56 (2010).

Moreover, "[t]he manifest purpose of [§ 53-247 (a)] is to ensure that no impounded or confined animal . . . is exposed by its caretaker to conditions harmful to its health or well-being." *State* v. *Acker*, 160 Conn. App. 734, 746, 125 A.3d 1057 (2015), cert. denied, 320 Conn. 915, 131 A.3d 750 (2016). The underlying intent of the statute supports the conclusion that it effectuates a per animal unit of prosecution. Given that the core purpose of the statute is to protect animals, it is consistent with the intent of the statute to conclude that the cruel treatment of each individual animal constitutes a separate violation.

[29] General Statutes § 53-252 provides: "No railroad company, in transporting *animals*, shall permit them to be confined in cars more than twenty-eight consecutive hours, except when transported in cars in which *they* have proper food, water, space and opportunity for rest, without unloading them for food, water and rest, for at least five consecutive hours, unless prevented by storm or other accidental cause; and, in estimating such confinement, the time during which the animals have been confined, without such rest, on connecting roads from which *they* are received, shall be included. *Animals* so unloaded shall be properly fed, watered and sheltered during such rest by the owner or person having their custody or, on his neglect, by the railroad company transporting them, at his expense; and such company shall, in such case, have a lienupon such *animals* for food, care and custody furnished and shall not be liable for any detention of them for such purpose. Any such company or the owner or custodian of such *animals*, who does not comply with the provisions of this section, shall be fined not more than five hundred dollars. The knowledge and acts of agents of, and of persons employed by, such company, in regard to *animals* transported, owned or employed by it or in its custody, shall be held to be its acts and knowledge." (Emphasis added.)

Additionally, shifting views on the purpose for animal cruelty statutes during the nineteenth century, when the phrase "any animal" was codified in an early form of the animal cruelty statute, supports interpreting § 53-247 (a) to effectuate a per animal unit of prosecution. Prior to the enactment of animal cruelty statutes, "[g]iven the limited view of animal rights, cruelty to animals as such was not recognized as a criminal offense at common law." M. Livingston, "Desecrating the Ark: Animal Abuse and the Law's Role in Prevention," 87 Iowa L. Rev. 1, 22 (2001). In the early nineteenth century, early forms of animal cruelty statutes were enacted to protect property interests in animals by criminalizing the mistreatment of economically valuable animals belonging to another person. Id., 24. By the mid-nineteenth century, however, "there were tentative legislative impulses toward criminal penalties for animal cruelty, regardless of whether the perpetrator's actions affected someone else's property interests. An 1821 Maine statute forbade the cruel beating of horses or cattle, without regard to ownership, and subjected the offender to a fine of between two and five dollars or a jail term of up to thirty days. A similar 1829 New York enactment added sheep to the list of protected animals and prohibited the cruel beating or torture of such animals, regardless of whether they belonged to the defendant or another party. Following this early lead . . . Connecticut . . . adopted similar anticruelty provisions by [1875],[30] expanding the Maine and New York

[30] General Statutes (1875 Rev.) tit. 20, c. 8, § 14, contained the phrase "any animal" and provided in relevant part: "Every person who over-drives, drives when over-loaded, overworks, tortures, deprives of necessary sustenance, mutilates, or cruelly beats or kills *any animal*, or causes it to be done; and every person who, having the charge or custody of any such animal inflicts unnecessary cruelty upon it, or unnecessarily fails to provide it with proper food, drink or protection from the weather, or who cruelly abandons, or carries it in an unnecessarily cruel manner, shall be fined not more than two hundred and fifty dollars, or imprisoned not more than one year, or both." (Emphasis added.)

acts to include other animals." (Footnote added; footnotes omitted; internal quotation marks omitted.) Id., 26. At that time, animal cruelty legislation was passed "as incident to the progress of civilization, and as the direct outgrowth of that tender solicitude for the brute creation which keeps pace with man's increased knowledge of their life and habits, laws, such as the one under consideration, have been enacted by the various states having the common object of protecting these dumb creatures from ill treatment by man. Their aim is not only to protect these animals, but to conserve public morals, both of which are undoubtedly proper subjects of legislation. With these general objects all right-minded people sympathize." *Waters* v. *People*, 23 Colo. 33, 35, 46 P. 112 (1896).

The trend associated with animal cruelty statutes—from no liability at common law to criminalizing animal cruelty to protect sentient animals in the interest of morality—supports concluding that § 53-247 (a) effectuates a per animal unit of prosecution. In order to maximize the protection of animals and preserve public morals, the term "any animal," read in light of the societal shifts when this phrase was adopted in an early form of our animal cruelty statute, must attach separate criminal liability for each mistreated animal. Thus, in the present case, § 53-247 (a), which contains many similarities to the animal cruelty statute enacted in 1874, should be interpreted to protect each of the nineteen goats from ill treatment. In the present case, the defendant's nineteen separate charges for the cruel treatment of nineteen different goats did not violate the prohibition against double jeopardy.

The judgment is affirmed.

In this opinion the other judges concurred.

CHRISTIAN PEREZ ET AL. *v.* UNIVERSITY OF CONNECTICUT ET AL.
(AC 38829)

DiPentima, C. J., and Lavine and Prescott, Js.

Syllabus

The named plaintiff, P, sought to recover damages from the defendant state of Connecticut for personal injuries he sustained following a slip and fall on the campus of the University of Connecticut. After the claims commissioner denied P's claim, the General Assembly authorized P to bring this action pursuant to statute (§ 4-159 [b] [1] [B] [ii]). The trial court granted the state's motion to strike the matter from the jury list on the basis of the statute (§ 4-160 [f]) that provides that "such actions shall be tried to the court without a jury." Thereafter, the matter was tried to the court, which rendered judgment in favor of the state. P appealed to this court claiming that the trial court improperly granted the state's motion to strike his action from the jury list. *Held*:

1. P's claim that he had a constitutional right to a jury trial under article first, § 19, of the Connecticut constitution was unavailing: to be entitled to a jury trial under article first, § 19, of the state constitution, the cause of action alleged must be the same or similar in nature to an action that could have been tried to a jury in 1818 and it must be brought against a defendant who was suable at common law in 1818, and given the common-law principle that the state cannot be sued without its consent and is entitled to sovereign immunity, P failed to establish that he would have been able to bring the present action seeking money damages against the state prior to 1818 and, therefore, the state constitution did not afford him a constitutional right to a jury trial in this case; moreover, the fact that a litigant was able to bring an action against a municipality prior to 1818 did not support P's claim that he had a right to a jury trial in the present case, as a municipality and the state are fundamentally different entities, and towns have no sovereign immunity and are capable of suing and being sued.
2. P could not prevail on his claim that he had a right to a jury trial pursuant to §§ 4-159 (c) and 4-160 (c), which was based on his claim that those statutes mandate that a litigant who is granted permission by the General Assembly to bring an action against the state pursuant to § 4-159 has the same rights as would a theoretical litigant who brought that action against a private person: it was clear from the plain language of § 4-159 (c) that the legislature did not intent to confer the right to a jury trial on P, or any other litigant authorized to bring a claim under § 4-159, which does not use the phrase "jury trial" or refer to a litigant's personal rights, but merely addresses the standard under which the General Assembly will decide whether to waive sovereign immunity; moreover,

P's claim regarding § 4-160 (c) was undermined by the fact that a separate subsection of that same statute, namely, § 4-160 (f), expressly provides that actions brought against the state pursuant to § 4-159 shall be tried to the court, and the interpretation of § 4-160 (c) suggested by P was unreasonable because it would compel a result contrary to the plain language of § 4-160 (f), which evinced a clear legislative intent that actions brought against the state pursuant to the General Assembly's waiver of sovereign immunity must be tried to the court, not a jury.

Argued February 13—officially released May 29, 2018

Procedural History

Action seeking to recover damages for personal injuries sustained by the named plaintiff as a result of the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Bellis*, *J.*, dismissed the action as to the plaintiff Kleber O. Perez; thereafter, the court, *Arnold*, *J.*, dismissed the action as to the named defendant; subsequently, the court, *Hon. George N. Thim*, judge trial referee, granted the state's motion to strike the action from the jury list; thereafter, the matter was tried to the court, *Hon. Edward F. Stodolink*, judge trial referee; judgment for the state, from which the named plaintiff appealed to this court. *Affirmed.*

Lee Samowitz, for the appellant (named plaintiff).

Michael McKenna, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (state).

Opinion

PRESCOTT, J. The issue in this appeal is whether the plaintiff Christian Perez[1] has the right to a jury trial in a negligence action for monetary damages against

[1] The trial court granted the defendants' motion to dismiss the action as to the plaintiff Kleber O. Perez and he did not participate in this appeal. Our references in this opinion to the plaintiff are to Christian Perez.

the defendant, the state of Connecticut.[2] The plaintiff was authorized to bring his action against the state by the General Assembly pursuant to General Statutes § 4-159 (b) (1) (B) (ii). Following a trial to the court, judgment was rendered in favor of the state. The plaintiff now appeals from the judgment, claiming that the court improperly granted the state's motion to strike his action from the jury list.[3] We affirm the judgment of the court.

The following facts and procedural history are relevant to the resolution of this appeal. On July 15, 2009, the plaintiff filed a claim with the Office of the Claims Commissioner against the state. The claim related to an incident that occurred on the University of Connecticut campus in Storrs on February 22, 2009. On that day, the plaintiff, then a full-time student at the University of Connecticut, fell on ice and injured his knee in a

[2] The plaintiff initially brought an action against both the state of Connecticut and the University of Connecticut. The defendants, however, filed a joint motion to dismiss the action against the University of Connecticut for lack of subject matter jurisdiction. The defendants argued that Connecticut law does not permit the University of Connecticut to be named as a defendant in such actions. The court subsequently granted the defendants' motion, concluding that the University of Connecticut is an agent of the state and, therefore, that the state was the real party in interest. That determination has not been challenged in this appeal.

[3] We note that our Supreme Court is considering a similar claim in *Smith* v. *Rudolph*, SC 20008. The plaintiff in that case was driving to work on the morning of October 23, 2012, when he was hit by a passenger bus owned by the state of Connecticut Department of Transportation and driven by William Rudolph. The defendant moved to strike the plaintiff's action from the jury list, arguing that General Statutes § 52-556, pursuant to which the plaintiff was authorized to bring his action against the state, did not grant him the right to a jury trial. The trial court granted the defendant's motion and the case was tried to the court. The plaintiff appealed the court's order striking the action from the jury list and our Supreme Court transferred the appeal from this court to itself. On appeal, the plaintiff claims that § 52-556 permits a jury trial in an action against the state and that to construe the statute otherwise violates article first, § 19 of the state constitution. *Smith* was argued on March 27, 2018.

parking lot reserved for media vehicles near Gample Pavilion.

On June 22, 2012, the claims commissioner held a formal hearing on the plaintiff's claim. The claims commissioner subsequently denied the plaintiff's claim against the state on October 26, 2012. Pursuant to General Statutes § 4-158 (b), the plaintiff requested review by the General Assembly of the claims commissioner's denial of his claim.[4] On May 20, 2013, the General Assembly reviewed the plaintiff's claim, vacated the claims commissioner's denial, and adopted a resolution authorizing the plaintiff to "institute and prosecute to final judgment an action against the state to recover damages as compensation for injury to [his] person" pursuant to § 4-159 (b) (1) (B) (ii).[5]

On February 20, 2014, the plaintiff filed an action against both the University of Connecticut and the state of Connecticut in the judicial district of Fairfield seeking monetary damages. The plaintiff's action against the University of Connecticut subsequently was dismissed.[6] On February 10, 2015, the plaintiff filed a revised complaint against the remaining defendant, the state. Count one of the revised complaint alleged that the state had

[4] General Statutes § 4-159 (a) provides in relevant part: "Not later than five days after the convening of each regular session and at such other times as the speaker of the House of Representatives and president pro tempore of the Senate may desire, the Office of the Claims Commissioner shall submit to the General Assembly . . . (2) all claims for which a request for review has been filed pursuant to subsection (b) of section 4-158 . . . ."

[5] General Statutes § 4-159 (b) provides in relevant part: "The General Assembly shall:

"(1) With respect to a decision of the Claims Commissioner ordering the denial or dismissal of a claim pursuant to subdivision (1) of subsection (a) of section 4-158:

"(A) confirm the decision; or

"(B) vacate the decision and, in lieu thereof, (i) order the payment of the claim in a specified amount, or (ii) authorize the claimant to sue the state . . . ."

[6] See footnote 2 of this opinion.

acted negligently in failing to properly clear the snow and ice in the parking lot in which the plaintiff fell. Count two alleged that the state had acted with reckless disregard for the safety and welfare of University of Connecticut students.

In response to the plaintiff's revised complaint, the state denied that it had acted negligently or recklessly with respect to the conditions in the parking lot on the day the plaintiff was injured. The state also alleged as a special defense that the plaintiff was contributorily negligent in causing his injuries.

On July 2, 2015, the plaintiff claimed the action to the jury trial list. On July 6, 2015, the state filed a motion to strike the plaintiff's action from the jury list. In its accompanying memorandum, the state argued that the plaintiff had no right to a jury trial in an action against the state where sovereign immunity had been waived pursuant to § 4-159 because General Statutes § 4-160 (f) expressly provides that "[i]ssues arising in such actions shall be tried to the court without a jury."

In response to the state's motion to strike the plaintiff's action from the jury list, the plaintiff argued that the "actions" referenced in § 4-160 (f) did not include an action authorized by the General Assembly pursuant to § 4-159. The plaintiff further argued that § 4-159 (c) granted him the right to a jury trial. That subsection provides: "The General Assembly may grant the claimant permission to sue the state under the provisions of this section when the General Assembly deems it just and equitable and believes the claim to present an issue of law or fact under which the state, *were it a private person*, could be liable." (Emphasis added.) General Statutes § 4-159 (c).

Specifically, the plaintiff argued that if his action were brought against a private person, he would undeniably have a right to a jury trial and, thus, he has a right to

a jury trial against the state because it must be treated as if it were a private person. The plaintiff further argued that §§ 4-160 (f) and 4-159 (c) must be construed in this manner because a contrary construction would violate his constitutional right to a jury trial under article first, § 19, of the state constitution.

On July 7, 2015, the court, *Hon. George N. Thim*, judge trial referee, heard oral argument on the state's motion to strike the plaintiff's action from the jury list. The court subsequently granted the state's motion, concluding that § 4-160 (f) barred a trial by jury in this action. The court reasoned that the language in subsections (c) and (d) of § 4-160 clearly indicated that the phrase "such actions" in § 4-160 (f) included actions authorized by the General Assembly pursuant to § 4-159.[7]

A trial to the court was conducted by the *Hon. Edward F. Stodolink*, judge trial referee, immediately thereafter. On December 2, 2015, the court rendered judgment for the state on both counts of the plaintiff's complaint. On January 26, 2016, the plaintiff filed the present appeal, challenging Judge Thim's ruling on the state's motion to strike the plaintiff's action from the jury list.

On appeal, the plaintiff claims that the court improperly granted the state's motion to strike his action from the jury list because, contrary to the plain language in § 4-160 (f), he has a constitutional right to a jury trial under article first, § 19, of the Connecticut constitution. The plaintiff also claims that §§ 4-159 (c) and 4-160 (c) grant him the right to a jury trial.

I

We first address the plaintiff's constitutional claim. The plaintiff claims that he has a constitutional right

[7] Section 4-160 (c) explicitly refers to actions authorized by the General Assembly pursuant to § 4-159.

to a jury trial under article first, § 19, of the Connecticut constitution, which provides, in relevant part, that "[t]he right of a trial by jury shall remain inviolate . . . ." Specifically, he argues that because a plaintiff had a right to a jury trial in a negligence action seeking monetary damages at the time of the adoption of the constitutional provision, he has a right to a jury trial in this negligence action seeking monetary damages against the state of Connecticut. We disagree.

The plaintiff's claim presents a question of law over which we exercise plenary review. See *Bysiewicz* v. *Dinardo*, 298 Conn. 748, 788 n.38, 6 A.3d 726 (2010). Article first, § 19, of our state constitution "has been consistently construed by Connecticut courts to mean that if there was a right to a trial by jury at the time of the adoption of the provision, then that right remains intact." *Skinner* v. *Angliker*, 211 Conn. 370, 373–74, 559 A.2d 701 (1989). "Accordingly, in determining whether a party has a right to a trial by jury under the state constitution . . . the court must ascertain whether the action being tried is similar in nature to an action that could have been tried to a jury in 1818 when the state constitution was adopted. This test requires an inquiry as to whether the course of action has roots in the common law, and if so, whether the remedy involved was one in law or equity. If the action existed at common law and involved a legal remedy, the right to a jury trial exists and the legislature may not curtail that right either directly or indirectly." Id., 375–76.

In *Skinner*, however, our Supreme Court concluded that "to entitle one to a right to a jury trial, it is not enough that the nature of the plaintiff's action is legal rather than equitable; the action must also be brought *against a defendant who was suable at common law in* [*1818*]." (Emphasis added; internal quotation marks omitted.) Id., 378. Thus, article first, § 19, of the state constitution grants a litigant the right to a jury trial only

if the cause of action alleged is (1) the same or similar in nature to an action that could have been tried to a jury in 1818, and (2) brought against a defendant who was suable at common law in 1818.

In Connecticut, "[w]e have long recognized the common-law principle that the state cannot be sued without its consent. . . . The doctrine of sovereign immunity protects the state, not only from ultimate liability for alleged wrongs, but also from being required to litigate whether it is so liable." (Internal quotation marks omitted.) *Henderson* v. *State*, 151 Conn. App. 246, 256, 95 A.3d 1 (2014). "In its pristine form the doctrine of sovereign immunity would exempt the state from suit entirely, because the sovereign could not be sued in its own courts . . . ." (Internal quotation marks omitted.) *Skinner* v. *Angliker*, supra, 211 Conn. 377.

The plaintiff argues that, prior to 1818, "negligence cases against governmental officials or against a government entity [for monetary damages] were tried to a jury." The plaintiff, however, provides no authority, nor are we aware of any, that supports his assertion. Rather, the plaintiff cites only to cases in which the defendant is a municipality or a municipal employee. See *Calkins* v. *Hartford*, 33 Conn. 57 (1865) (negligence action against city of Hartford); *Drake* v. *Chester*, 2 Conn. 473 (1818) (action against sheriff of Hartford county); *Ackley* v. *Chester*, 5 Day 221, 221 (1811) (action against sheriff of Hartford county); *Duryee* v. *Webb*, 8 F. Cas. 136 (D. Conn. 1810) (No. 4198) (action against sheriff of Windham county), reprinted in *Palmer* v. *Gallup*, 16 Conn. 555, 558 n.(a) (1844); *Swift* v. *Berry*, Superior Court, 1 Root 448 (1792) (action against town).

A municipality and the state are fundamentally different entities. Our Supreme Court has long held that there are "inherent differences in the nature of the governmental immunity enjoyed by municipalities as contrasted with the sovereign immunity enjoyed by the

state. Governmental immunity, which applies to municipalities, is different in historic origin, scope and application from the sovereign immunity enjoyed by the state. A suit against a municipality is not a suit against a sovereign. Towns have no sovereign immunity, and are capable of suing and being sued . . . in any action. . . . Municipalities do, in certain circumstances, have a governmental immunity from liability. . . . But that is entirely different from the state's sovereign immunity from suit . . . ." (Emphasis omitted; internal quotation marks omitted.) *Vejseli* v. *Pasha*, 282 Conn. 561, 573, 923 A.2d 688 (2007). Thus, the fact that a litigant was able to bring suit against a municipality prior to 1818 does not support the plaintiff's claim that he has a right to a jury trial in the present case.

Our conclusion that the plaintiff has no constitutional right to a jury trial is supported by prior decisions of our Supreme Court. In *Skinner*, our Supreme Court concluded that "there was no right of jury trial in an action brought against the state pursuant to General States § 31-51q for violation of the first amendment rights of an employee who had been discharged after complaining that he had witnessed other members of the staff abusing patients at a state mental hospital . . . [because] [n]o principle of common law, prior to 1818, *allowed actions against the state* for wrongful discharge or related claims and . . . it cannot be maintained that under the common law in 1818 a jury trial was a matter of right for persons asserting a claim against the sovereign." (Emphasis in original; internal quotation marks omitted.) *Canning* v. *Lensink*, 221 Conn. 346, 351, 603 A.2d 1155 (1992) (discussing *Skinner*).

Similarly, in *Canning*, our Supreme Court concluded that there was no right to a jury trial in a wrongful death action brought pursuant to General Statute § 19a-24 against state employees in their official capacity,

reasoning that "because the doctrine of sovereign immunity barred actions against the state prior to the adoption of the state constitution in 1818, there is no constitutional right of jury trial in civil actions based on statutes effectively waiving such immunity in particular situations." Id., 353. In the present case, like in *Skinner* and *Canning*, the plaintiff has not established that he would have been able to bring the action he now alleges against the state prior to 1818. Therefore, article first, § 19, of the state constitution does not afford him a constitutional right to a jury trial in this case.[8]

II

The plaintiff next claims that §§ 4-159 (c) and 4-160 (c) grant him the right to a jury trial. Specifically, he argues that the language in §§ 4-159 (c) and 4-160 (c) mandates that a litigant who is granted permission by the General Assembly to bring an action against the state pursuant to § 4-159 has the same rights as would a theoretical litigant who brought that action against a private person. The plaintiff asserts that, because a litigant who brings a negligence action for monetary damages against a private person has the right to a jury trial, so too does he. We disagree.

Whether §§ 4-159 (c) and 4-160 (c) confer upon the plaintiff the right to a jury trial presents an issue of statutory interpretation over which we exercise plenary review. See *Miller* v. *Egan*, 265 Conn. 301, 327, 828 A.2d

[8] The plaintiff also claims on appeal that § 4-160 (f) is unconstitutional because it conflicts with article first, § 19, of the state constitution, which declares that "[t]he right of a trial by jury shall remain inviolate." Arguably, this claim is not preserved. Even if it is preserved, it is without merit in light of our conclusion that article first, § 19, grants the plaintiff no such right in an action brought pursuant to an authorization by the General Assembly under § 4-159. Thus, we determine that § 4-160 (f), which governs actions brought pursuant to § 4-159, does not conflict with article first, § 19, of the state constitution.

549 (2003). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and ambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 527, 93 A.3d 1142 (2014).

Section 4-159 (c) provides that "[t]he General Assembly may grant the claimant permission to sue the state under the provisions of this section when the General Assembly deems it just and equitable and believes the claim to present an issue of law or fact under which the state, were it a private person, could be liable." The plaintiff argues that because the legislature chose to equate the state to a "private person," it thereby granted to him the same rights he would have if the defendant were a private person, including the right to a jury trial.

It is clear from the plain language of § 4-159 (c), however, that the legislature did not intend to confer upon the plaintiff, or any other litigant authorized to bring a claim under § 4-159, the right to a jury trial. "When the state, by statute, waives its immunity to suit . . . the right to a jury trial cannot be implied, but rather, must be affirmatively expressed." (Internal quotation marks omitted.) *Canning* v. *Lensink*, supra, 221 Conn. 354; accord *Skinner* v. *Angliker*, supra, 211 Conn. 381. Nowhere in § 4-159 (c) does the legislature use the phrase "jury trial," nor does the statute reference a litigant's personal rights. Rather, § 4-159 (c) merely addresses the standard under which the General Assembly will decide whether to waive sovereign immunity.

In other words, the reference to a private person in the statute only pertains to the preliminary determination made by the legislature in deciding whether to grant permission to sue, i.e., whether it is just and equitable and whether the state could be held liable if it were a private person. The language cannot be fairly construed as a grant to the plaintiff of all the rights he would have had if the action were brought against a private person rather than the state.

The plaintiff further argues that similar language in § 4-160 (c) compels the same result. Section 4-160 (c) provides: "In each action authorized by the Claims Commissioner pursuant to subsection (a) or (b) of this section or by the General Assembly pursuant to section 4-159 or 4-159a, the claimant shall allege such authorization and the date on which it was granted, except that evidence of such authorization shall not be admissible in such action as evidence of the state's liability. The state waives its immunity from liability and from suit in each such action and waives all defenses which might arise from the eleemosynary or governmental nature of the activity complained of. *The rights and liability of the state in each such action shall be coextensive with and shall equal the rights and liability of private persons in like circumstances.*" (Emphasis added.)

Although this language is somewhat more suggestive of the result the plaintiff seeks, his argument regarding § 4-160 (c) is completely undermined by the fact that a separate subsection of that same statute, namely, § 4-160 (f), expressly provides that "such actions" brought against the state pursuant to § 4-159 shall be tried to the court, not a jury. To interpret § 4-160 (c) as conferring a right to a jury trial when § 4-160 (f) expressly prohibits it would be nonsensical. It is a well established tenet of statutory construction that, "if possible, the component parts of a statute should be construed harmoniously in order to render an overall reasonable interpretation."

(Internal quotation marks omitted.) *Board of Education* v. *State Board of Education*, 278 Conn. 326, 333, 898 A.2d 170 (2006). "[C]onsistent with the aforementioned principle, the legislature is always presumed to have created a harmonious and consistent body of law . . . . [T]his tenet of statutory construction requires [this court] to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction. . . . [T]he General Assembly is always presumed to know all the existing statutes and the effect that its action or non-action will have upon any one of them." (Internal quotation marks omitted.) Id., 333–34.

The interpretation of § 4-160 (c) suggested by the plaintiff is unreasonable because it would compel a result contrary to the plain language of § 4-160 (f).[9] The legislature's intent is clear: Actions brought against the state pursuant to the General Assembly's waiver of sovereign immunity must be tried to a court, not a jury. The mere fact that the language of § 4-160 (c) dictates that the state's liability for damages shall be equal to the liability of a private person does not mean that the language can be stretched to address the manner in which that liability shall be determined, that is, by jury or court trial. The legislature's inclusion of subsection (f) in § 4-160 eliminates any question regarding its intent that actions, like the one the General Assembly permitted the plaintiff to bring, shall be tried to the court

[9] At various points throughout these proceedings, the plaintiff argued that § 4-160 (f) does not apply to an action brought pursuant to § 4-159. The plaintiff now argues, however, that § 4-160 (c) does apply to an action brought pursuant to § 4-159. The plaintiff cannot cherry pick which subsections of § 4-160 apply to his action. Sections 4-159 and 4-160 are part of a broader statutory scheme, often referred to as the Claims Commissioner statutes, and must be read together. Cf. *Board of Education* v. *State Board of Education*, supra, 278 Conn. 333.

rather than a jury. We, therefore, reject the plaintiff's claim that he has a statutory right to a jury trial.

The judgment is affirmed.

In this opinion the other judges concurred.

ANGELO TEDESCO, TRUSTEE *v.* RESMIJE AGOLLI ET AL. (AC 40123)

Lavine, Keller and Bear, Js.

Syllabus

The substitute plaintiff, T, sought to foreclose a mortgage on certain real property owned by the defendants F Co. and A, who was a member of F Co. A and F Co. filed an answer and special defenses, and later stipulated that T was the owner and holder of the note and mortgage, and that the note was in default. The trial court, following a trial to the court, concluded that F Co. and A had not met their burden of proof on their special defenses and rendered judgment in favor of T as to liability. The court subsequently rendered judgment of foreclosure by sale in favor of T, and F Co. and A appealed to this court. They claimed, inter alia, that the trial court improperly found that A had the authority to bind F Co. to the mortgage at issue. *Held* that the trial court properly rendered judgment of foreclosure by sale in favor of T, and that court having thoroughly addressed the arguments raised in this appeal in its memorandum of decision rendering judgment in favor of T as to liability, this court adopted the trial court's well reasoned memorandum of decision as a proper statement of the relevant facts, issues and applicable law.

Argued March 14—officially released May 29, 2018

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., brought to the Superior Court in the judicial district of Waterbury, where Scott Tedesco, trustee of the Angelo P. Tedesco Money Purchase Pension Plan was cited in as a plaintiff; thereafter, Scott Tedesco, trustee of the Heritage Builders of Waterbury, LLC, 401 (k) Profit Sharing Plan was substituted as the plaintiff; subsequently, the matter

was tried to the court, *Dooley*, *J.*; judgment for the substitute plaintiff as to liability; thereafter, the court, *Lager*, *J.*, granted the motion for a judgment of foreclosure filed by the substitute plaintiff and rendered judgment of foreclosure by sale, from which the named defendant et al. appealed to this court. *Affirmed.*

Justin J. Garcia, for the appellants (named defendant et al.).

Jeremy S. Donnelly, for the appellee (substitute plaintiff Scott Tedesco, trustee of the Heritage Builders of Waterbury, LLC, 401 (k) Profit Sharing Plan).

Opinion

PER CURIAM. The defendants, Resmije Agolli and Fikri Development, LLC (Fikri),[1] appeal from the judgment of foreclosure by sale rendered in favor of the substitute plaintiff, Scott Tedesco, trustee of the Heritage Builders of Waterbury, LLC, 401 (k) Profit Sharing Plan.[2] On appeal, the defendants challenge the trial court's findings with respect to the dates of disassociation and removal of Gina Antonios as member and Joseph Antonios as manager of Fikri.[3] The defendants also claim that the court improperly found that Agolli,

[1] The complaint also named GMA Real Estate Portfolio, LLC, as a defendant. Its involvement in the case is not relevant to this appeal and, thus, the term defendants refers to Agolli and Fikri.

[2] Following the death of Angelo Tedesco, the named plaintiff who commenced this action, Scott Tedesco, trustee of the Angelo P. Tedesco Money Purchase Pension Plan, was substituted as the plaintiff. The note and mortgage were later transferred to the Heritage Builders of Waterbury, LLC, 401 (k) Profit Sharing Plan. On February 17, 2015, Scott Tedesco, trustee of the Heritage Builders of Waterbury, LLC, 401 (k) Profit Sharing Plan was substituted as the plaintiff. For the purpose of this appeal, the term plaintiff refers to Scott Tedesco in his capacity as trustee of the Heritage Builders of Waterbury, LLC, 401 (k) Profit Sharing Plan.

[3] Fikri was formed in 2007 for the purpose of developing certain parcels of real property in Waterbury, and was formerly owned by Agolli and her late husband, Fikri Agolli.

as a member of Fikri, had the authority to bind Fikri to the mortgage at issue in the present case.

Angelo Tedesco, as trustee of the Angelo P. Tedesco Money Purchase Pension Plan, served a complaint seeking foreclosure of a mortgage on several parcels of real property in favor of the Angelo P. Tedesco Money Purchase Pension Plan. He alleged that he was the holder of the note and mortgage. The defendants filed an answer in which they denied all of the plaintiff's substantial allegations against them, and they asserted five special defenses. The defendants later stipulated that the plaintiff was the owner and holder of the note, and that the note was in default. The defendants also limited their special defenses to lack of consideration, duress, and no meeting of the minds.

Following a trial to the court, the court found that the defendants had not met their burden of proof on the remaining special defenses and it rendered judgment in favor of the plaintiff as to liability. The court subsequently rendered judgment of foreclosure by sale in favor of the plaintiff.

After examining the record and the briefs and considering the arguments of the parties, we are persuaded that the court correctly rendered judgment of foreclosure by sale in favor of the plaintiff. The issues raised by the defendants were resolved properly in the trial court's thorough and well reasoned memorandum of decision rendering judgment in favor of the plaintiff as to liability. We therefore adopt that memorandum of decision as the proper statement of the relevant facts, issues and applicable law. See *Tedesco* v. *Agolli*, Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. CV-12-6016130-S (June 21, 2016) (reprinted at 182 Conn. App. 294). It would serve no useful purpose for us to repeat the discussion contained therein. See *Seminole Realty, LLC* v. *Sekretaev*,

162 Conn. App. 167, 169, 131 A.3d 753 (2015), cert. denied, 320 Conn. 922, 132 A.3d 1095 (2016).

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

APPENDIX

ANGELO TEDESCO, TRUSTEE *v.* RESJIMI AGOLLI ET AL.*

Superior Court, Complex Litigation Docket at Waterbury
File No. CV-12-6016130-S

Memorandum filed June 21, 2016

Proceedings

Action to foreclose a mortgage on certain real property owned by named defendant et al. *Judgment for plaintiff as to liability.*

Jeremy S. Donnelly, for the substitute plaintiff Scott Tedesco, trustee of the Heritage Builders of Waterbury, LLC, 401 (k) Profit Sharing Plan.

Justin J. Garcia, for the named defendant et al.

Opinion

DOOLEY, J.

PRELIMINARY STATEMENT

This is an action to foreclose a mortgage covering several parcels of real property located in Waterbury, Connecticut, each of which is owned by the defendant Fikri Development, LLC (Fikri). The properties at issue are: (1) 3743 East Main Street; (2) 3496 East Main Street; (3) 51 Matteson Road; and (4) 3514 Main Street. The defendant Resjimi Agolli (Agolli) is currently the sole member of Fikri. The defendants assert several special

* Affirmed. *Tedesco* v. *Agolli*, 182 Conn. App. 291, A.3d (2018).

defenses to the foreclosure action. Trial was conducted over the course of three days in May, 2016. The court heard testimony from seven witnesses and admitted numerous documents into evidence. Simultaneous trial briefs were submitted on June 1, 2016. The court has considered the testimony and evidence introduced, the arguments set forth in the parties' memoranda, the authorities cited therein, and renders this decision based thereupon. For the reasons set forth below, judgment will enter in favor of the plaintiff as to liability.

FACTUAL FINDINGS

"In a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . It is within the province of the trial court, as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence." (Citation omitted; internal quotation marks omitted.) *Cadle Co.* v. *D'Addario*, 268 Conn. 441, 462, 844 A.2d 836 (2004). The court makes the following factual findings by a fair preponderance of the evidence, unless otherwise indicated, based upon the better, more credible evidence presented.[1]

Agolli came to the United States in 1967 from what is now Macedonia as a young woman newly married to Fikri Agolli. She and her husband settled in the Waterbury area where they raised three children. Eventually, Agolli's husband owned and operated a diner in Waterbury, at which Agolli sometimes worked. As the children grew, they helped in the diner as well. Ultimately, each of the children pursued careers of their own. In

[1] The court does not attempt to include in this decision all of the evidence relied upon in the court's factual findings. The court has considered all of the evidence admitted. The reference to any subset of the evidence presented should not be construed as identifying the exclusive basis for the court's finding, and the court's failure to identify or mention specific evidence should not give rise to an inference that such evidence has not been considered.

2006, Agolli's husband was diagnosed with cancer, an illness to which he would eventually succumb. Agolli could not run the diner on her own and so arranged to sell it. At the time, there was an interested buyer for the diner but his interest was contingent upon a zoning change being made. The buyer paid Agolli $7500 per month as consideration for not selling the diner to someone else. Ultimately, the putative purchaser did not obtain the zone change and terminated the option to purchase. Thereafter, Agolli located a buyer and sold the diner for $375,000.

During his life, Agolli's husband had purchased numerous parcels of undeveloped property in the Waterbury area. After his passing, Agolli became the owner of these parcels.

Joseph Antonios was a local mortgage broker who ran his own business, Metro Mortgage. He also owned and operated The Private Mortgage Fund, LLC (The PMF), which financed mortgage loans. Fesnik Agolli (Nik), Agolli's son, worked for Antonios' mortgage brokerage business for approximately fourteen years. He is presently a police officer for the city of Waterbury. During the time that Nik Agolli worked for Metro Mortgage, Antonios became well known to and a friend of the Agolli family. He would often accompany Nik Agolli to Agolli's home for dinner. The Agollis liked and trusted Antonios. In 2007, Antonios began discussions with Agolli about developing her properties so that they would generate cash flow for Agolli.[2] Fikri was formed and Agolli transferred all of her real estate holdings into Fikri, to include her personal residence. Agolli was a 50 percent member; Antonios' wife, Gina, was a 50

[2] Nik Agolli testified that Antonios approached he and his mother, while Antonios testified that the Agollis approached him. The court need not determine which account is accurate in this litigation.

percent member; and Antonios was made the manager.[3] The arrangement called for Antonios, as the manager, to develop the properties. The operating agreement gave Antonios broad and largely unfettered authority to act on behalf of Fikri.

Between 2008 and 2010, Antonios borrowed hundreds of thousands of dollars on behalf of Fikri, securing these loans with the properties Agolli had transferred into Fikri. Some of these loans were financed by the Angelo P. Tedesco Money Purchase Pension Plan (ATMPPP). Angelo Tedesco was a local property developer. He had a business relationship with Antonios, and would, at times, provide the funds through which The PMF extended loans. In 2008, Antonios arranged for The PMF to loan Fikri $750,000. This debt was secured by a mortgage on the four properties at issue here, as well as Agolli's personal residence located at 375 Maybrook Road, Waterbury, Connecticut, and an undeveloped parcel of land located on Austen Road in Waterbury, Connecticut. In 2010, Tedesco, as Trustee of the ATMPPP, agreed to take an assignment of this note and mortgage. In connection therewith, Agolli, on behalf of Fikri, signed a Note and Mortgage Modification Agreement, to include a new Promissory Note dated January 12, 2010 (exhibit B). This transaction closed on or about January 12, 2010. The Promissory Note contained a 10 percent interest rate and a payment schedule of interest only for twelve months with the principal due in full on January 12, 2011.

No discernible progress was made in the development of the properties. As a result, the properties did not generate any cash flow with which to service the

[3] Gina Antonios did not personally invest in Fikri and was largely uninvolved or passive with respect to Fikri's activities. The purpose of Gina's involvement in, and the structure of Fikri, remains unclear.

enormous debt which had been taken on by Fikri.[4] Fikri defaulted under the terms of the January, 2010 Note.

By service of a writ of summons and complaint filed September 3, 2010, Angelo Tedesco as Trustee of the ATMPPP commenced a foreclosure action against Agolli and Fikri.[5] Fikri and Agolli were represented by Attorney Timothy Sullivan of Mahaney, Geghan & Sullivan. Attorney Sullivan was a childhood friend of Nik Agolli and had known the Agolli family for many years. Nik Agolli asked Attorney Sullivan to defend the foreclosure with the primary objective being the securing and safeguarding of Agolli's personal residence on Maybrook Road in Waterbury, Connecticut.

Although it is not clear precisely when the relationship between Agolli and Antonios soured, following the filing of the foreclosure action, the determination was made to remove both Joseph and Gina Antonios from any further involvement with Fikri. Also during this time period, Agolli spoke directly with Angelo Tedesco

[4] Antonios' conduct, as manager of Fikri, is the subject of a civil action captioned *Fikri Development, LLC, et al.* v. *The Private Mortgage Fund, LLC, et al.*, which is pending on this court's docket at CV-12-6013458. Therein, Fikri alleges that Antonios defrauded Fikri, borrowing against the property only to divert the funds to his own personal use. This trial does not require a determination as to where the money went or to what purposes it was put by Antonios. Although Fikri asserted Antonios' fraudulent conduct as a defense in this foreclosure, the court previously determined that there was no genuine issue of material fact that Tedesco was not a knowing participant in any such chicanery. Therefore, Antonios' purported fraud against Fikri and Agolli cannot be visited upon the plaintiff by way of special defense to this foreclosure. See *Chase Manhattan Mortgage Corp.* v. *Machado*, 83 Conn. App. 183, 850 A.2d 260 (2004) (fraud by a third party upon a mortgagor does not invalidate a mortgage as against the mortgagee unless the mortgagee in some way participated in or knew of the fraud).

[5] The foreclosure action was filed in Waterbury Superior Court and was captioned *Angelo Tedesco, Trustee* v. *Resjimi Agolli et al.*, Docket No. CV-10-6006609. This court is permitted to and does therefore take judicial notice of the file in that matter. See *Jewett* v. *Jewett*, 265 Conn. 669, 678 n.7, 830 A.2d 193 (2003); *Wasson* v. *Wasson*, 91 Conn. App. 149, 157, 881 A.2d 356, cert. denied, 276 Conn. 932, 890 A.2d 574 (2005).

in an effort to resolve the foreclosure and satisfy Fikri's debt to the ATMPPP. She testified that she asked him whether he intended to leave her "out on the street" with nothing. Agolli wanted Tedesco to accept $500,000 from the anticipated sale of one of the parcels of property in full satisfaction of Fikri's debt.

Attorney Sullivan eventually worked out a resolution of the foreclosure action with Tedesco, who was represented by Attorney Paul Margolis. The debt would be refinanced as follows. Fikri would consummate the sale of property located on Austen Road, Waterbury, Connecticut, from which $290,000 would be paid to Tedesco to pay down the outstanding Fikri debt. Fikri would sign a new Promissory Note in the reduced amount of approximately $571,000. The new Note would bear interest at 5 percent, instead of the previous interest rate of 10 percent. The new Note would be secured by the four properties at issue here, but Agolli's personal residence would no longer be on the mortgage, protecting her home in the event of future default. The new Note required no payments for approximately six months, to give Fikri time to either sell or develop the property, in a fashion that would permit Fikri to stay current on its debt obligations.

Attorney Sullivan testified that he had regular communications with Nik Agolli, Suzi (Agolli) Zenko, as well as Agolli herself, regarding the terms of the refinance and settlement of the pending foreclosure. He testified that he sent all draft documents to Suzi because she is an attorney. Although there were a few discussions with Antonios, Attorney Sullivan was aware that Antonios was being removed from Fikri and he took his direction from the Agollis. Consistent with Attorney Sullivan's testimony, Antonios denied that he was the architect of the refinance or that he negotiated its terms

on behalf of Fikri.[6] He was being removed from Fikri, so that limited his involvement to participating in the execution of the negotiated agreement as necessary.

However, Nik Agolli and Agolli testified that Attorney Sullivan never discussed the terms of the refinance with them until the morning of the closing. Agolli further testified that she believed Tedesco had accepted her proposal to resolve Fikri's debt by the payment of $500,000 from the proceeds of the Austen Road sale, contingent upon his receipt and review of the purchase and sale contract. She testified that she asked Attorney Sullivan to send the contract to Tedesco and that she believed he had done so. Based upon these discussions, Agolli testified that she believed that the closing which occurred was not a refinance at all, but a resolution of Fikri's debt to Tedesco. She testified that she was "surprised" to learn that she would be asked to sign a new Note or that there would continue to be mortgages on some of her property. Her testimony is not credited. To accept this testimony would be to completely ignore or discredit the testimony of Attorney Sullivan, Antonios, and Attorney Margolis,[7] each of whom had the same understanding of how this refinance came to pass, and whose understanding is entirely consistent with the documents created and signed by Agolli on behalf of Fikri.

[6] Notwithstanding this testimony, the defendants maintain in their posttrial submission that this court should, as a factual finding, conclude that Antonios, in collusion with Tedesco, was the person responsible for the negotiated terms of the settlement and refinance. This is but one example of the defendants' proposed findings of fact having little or no support in the evidence presented.

[7] The defendants argue that the testimony of both Attorney Sullivan and Attorney Margolis was not credible. They snidely suggest the testimony suffered from "convenient" lapses of memory and/or was self-serving to conceal their own exposure for what the defendants suggest was legal malpractice on their part. The defendants, however, presented no credible evidence to rebut the testimony of Attorneys Sullivan and Margolis and indeed, the court found their testimony forthright and believable.

On July 26, 2011, the closing on the refinance of the Fikri debt occurred in various stages at Attorney Sullivan's office. Present at various times was Agolli, Nik Agolli, Suzi (Agolli) Zenko, Attorney Sullivan, Attorney Margolis, Joseph Antonios and perhaps others.[8] Fikri sold property located on Austen Road, Waterbury, Connecticut, to a disinterested purchaser. The sale proceeds were used to pay off encumbrances on that property, leaving approximately $290,000 for the paydown of the Tedesco debt.[9] Gina and Joseph Antonios were removed from Fikri. The principals had already agreed that Agolli would become the only member of Fikri owning a 100 percent interest and Antonios would be removed as manager. To accomplish this shift, Antonios was to be given a mortgage in the amount of $88,000 secured by the four properties at issue here, though his mortgage was subordinated to the Tedesco note and mortgage. The debt subordination agreement (exhibit 4) was signed by Agolli, on behalf of Fikri, and Antonios and provided to Tedesco's counsel prior to the closing of the refinance. At this juncture, Antonios left Attorney Sullivan's office.

Thereafter, Agolli, individually and on behalf of Fikri, executed the documents necessary to effectuate the settlement with Tedesco and the refinance of the debt. These include the Promissory Note (exhibit 1) at issue in this foreclosure and the Open End Mortgage Deed, Security Agreement and Fixture Filing (exhibit 2), which secured the Note. She understood that Fikri would remain indebted to Tedesco under the terms of the new Note and refinance. She understood that she

[8] The events in question occurred almost five years ago and none of the witnesses questioned were completely confident in their recollection as to who was present at what time during the course of the day on July 26, 2011.

[9] Two of the mortgages paid off on the Austen Road property were paid to Antonios related entities. Those mortgages total approximately $233,000. The validity of those mortgages and Antonios' entitlement to those funds will be determined in the fraud case brought by Fikri against Antonios.

was, at that time, the sole member of Fikri and that she was binding Fikri under the terms of the agreement.

As agreed, Tedesco filed a withdrawal of the foreclosure action on July 27, 2011,[10] indicating thereon that the dispute had been "resolved by discussion of the parties on their own." During this time, though it is not clear precisely when, Angelo Tedesco was diagnosed with cancer. Prior to his passing, Scott Tedesco, his son, became the Trustee of the ATMPPP. The note and mortgage were thereafter transferred to the current plaintiff, the Heritage Builders of Waterbury, LLC, for which Scott Tedesco is also the Trustee. The plaintiff remains in possession of the Note, signed by Agolli on behalf of Fikri.

The first payment under the Note was due February 1, 2012. Fikri failed to make that payment and each payment due thereafter. The Note is in default.

DISCUSSION

"In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 392, 89 A.3d 392, cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014).

Here, based upon the facts found above, the plaintiff has established its prima facie case. The plaintiff is the current holder of the Note and Mortgage Deed securing the Note and the Note is in default. The defendants do

[10] It is worth noting that the defendants had been defaulted for failure to disclose a defense and the plaintiff had filed a motion for judgment by strict foreclosure, which, if granted, would have resulted in Agolli losing her home.

not dispute these findings and there are no conditions precedent to foreclosure which have been identified as unmet.

The defendants rely instead upon several special defenses: no meeting of the minds; duress and lack of consideration. Each will be discussed in turn.

"A valid special defense at law to a foreclosure proceeding must be legally sufficient and address the making, validity or enforcement of the mortgage, the note or both. . . . Where the plaintiff's conduct is inequitable, a court may withhold foreclosure on equitable considerations and principles. . . . [I]f the mortgagor is prevented by accident, mistake or fraud, from fulfilling a condition of the mortgage, foreclosure cannot be had . . . ." (Internal quotation marks omitted.) *Fidelity Bank* v. *Krenisky*, 72 Conn. App. 700, 705–706, 807 A.2d 968, cert. denied, 262 Conn. 915, 811 A.2d 1291 (2002). The principle that a special defense must relate to the making, validity or enforcement of the note or mortgage "was . . . considered to include events leading up to the execution of the loan documents . . . ." (Internal quotation marks omitted.) *TD Bank, N.A.* v. *M.J. Holdings, LLC*, 143 Conn. App. 322, 328, 71 A.3d 541 (2013).

The defendants bear the burden of proving their special defenses. See *Emigrant Mortgage Co.* v. *D'Agostino*, 94 Conn. App. 793, 802, 896 A.2d 814, cert. denied, 278 Conn. 919, 901 A.2d 43 (2006). Although the defendants may rely upon more than one special defense, they need only establish one in order to defeat a finding of liability. See *Union Trust Co.* v. *Jackson*, 42 Conn. App. 413, 417, 679 A.2d 421 (1996).

A

Lack of Consideration

"To be enforceable, a contract must be supported by valuable consideration. . . . The doctrine of consideration is fundamental in the law of contracts, the general

rule being that in the absence of consideration an executory promise is unenforceable." (Citation omitted; internal quotation marks omitted.) *Connecticut National Bank* v. *Voog*, 233 Conn. 352, 366, 659 A.2d 172 (1995). "[C]onsideration is [t]hat which is bargained-for by the promisor and given in exchange for the promise by the promisee . . . . [T]he doctrine of consideration does not require or imply an equal exchange between the contracting parties. . . . Consideration consists of a benefit to the party promising, or a loss or detriment to the party to whom the promise is made." (Internal quotation marks omitted.) *Thoma* v. *Oxford Performance Materials, Inc.*, 153 Conn. App. 50, 56, 100 A.3d 917 (2014). "Consideration . . . requires intent by the parties to incur benefits or detriments at the time an agreement is entered into." Id., 57. "Whether an agreement is supported by consideration is a factual inquiry reserved for the trier of fact . . . ." (Internal quotation marks omitted.) *Viera* v. *Cohen*, 283 Conn. 412, 442, 927 A.2d 843 (2007).

The court concludes that the Note and Mortgage Deed were supported by consideration and are therefore enforceable.

First, both the Note and the Mortgage Deed contain an acknowledgement by the defendants that both are signed upon receipt of consideration. The Note states that it is given "FOR VALUE RECEIVED." The Mortgage Deed provides: "KNOW YE, that Fikri Development, LLC . . . (the 'Mortgagor') for the consideration of One Dollar ($1.00) and other valuable consideration received to the Mortgagor's full satisfaction . . . does hereby give, grant . . . ." Declarations such as these are generally sufficient to satisfy the consideration requirements of a binding contract. See *Milford Bank* v. *Phoenix Contracting Group, Inc.*, 143 Conn. App. 519, 529–30, 72 A.3d 55 (2013).

Even absent these declarations, the evidence established that the defendants, in fact, received good and valuable consideration for the Note and Mortgage Deed. First and foremost, Angelo Tedesco withdrew the pending foreclosure action for which no defense had been asserted and which was poised to go to judgment. Furthermore, the debt was restructured at a lower interest rate; the Note allowed for a six month grace period during which no payments would be due; and the mortgage deed no longer extended to Agolli's personal residence, removing any risk that she would lose her home in the event of a future default. The defendants' arguments to the contrary are not persuasive.[11]

B

Duress

"The classical or common law definition of duress is any wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without his volition. . . . The defendant must prove: [1] a wrongful act or threat [2] that left the victim no reasonable alternative, and [3] to which the victim in fact acceded, and that [4] the resulting transaction was unfair to the victim. . . . The wrongful conduct at issue could take virtually any form, but must induce a fearful state of mind in the other party, which makes it impossible for [the party] to exercise his own free will." (Citation omitted; internal quotation marks omitted.). *Chase Manhattan Mortgage Corp.* v. *Machado*, 83 Conn. App. 183, 189–90, 850 A.2d 260 (2004).

The defendants presented no evidence to support this special defense. The defendants do not identify any

[11] For the first time, in their posttrial brief, the defendants assert that Tedesco released Fikri from all debt, as evidenced by exhibit E, a release of the 2010 Tedesco mortgage dated July 14, 2011, which was prepared in connection with the July 26, 2011 closing. The defendants never asserted any purported release as a special defense. It will not be further addressed.

wrongful act or threat by Tedesco. Agolli did not testify that she felt any fear or threat at the closing as a result of any conduct by Tedesco or otherwise. Agolli did not testify that her free will was overborne. The resulting transaction, as noted above, was not unfair to Fikri or Agolli and indeed provided an opportunity for Fikri to right its ship and for Agolli to keep her home from foreclosure.

Agolli testified that she did not like the deal. Nik Agolli testified that in his opinion, his mother "had no choice." The testimony derives from the viewpoint that Antonios had defrauded Agolli and Fikri leaving her "with no choice" but to proceed with the refinance.[12] This is insufficient. See *Chase Manhattan Mortgage Corp.* v. *Machado*, supra, 83 Conn. App. 190 ("[w]e will not invalidate a mortgage agreement against the mortgagee unless it participated in the alleged duress or had reason to know of its existence"). The question is whether Tedesco's conduct placed Agolli under duress. It did not.[13] See *Noble* v. *White*, 66 Conn. App. 54, 59, 783 A.2d 1145 (2001) ("[w]here a party insists on a contractual provision or a payment that he honestly believes he is entitled to receive, unless that belief is without any reasonable basis, his conduct is not wrongful and does not constitute duress or coercion under Connecticut law"). Further, even if Agolli consented to the transaction under protest, which does not appear to be the case, this does not establish duress. See id.,

[12] Indeed, the defendants argue that it was Antonios who "eliminated Mrs. Agolli's free will."

[13] The defendants claim that "Mr. Antonios and Mr. Tedesco created a trap for Mrs. Agolli with only one result possible for Mrs. Agolli and Fikri: loss of her land" is without support in the evidence. This court has previously determined that there was no genuine issue of material fact that Tedesco was neither involved in nor aware of any treachery on the part of Antonios. The evidence at trial did not alter this conclusion. Indeed, if Tedesco's nefarious goal was to ultimately take Agolli's land, he would simply have done so by way of the first foreclosure.

citing *Smedley Co.* v. *Lansing*, 35 Conn. Supp. 578, 579, 398 A.2d 1208 (1978); see also *Twachtman* v. *Hastings*, Superior Court, judicial district of Tolland, Docket No. CV-95-57307-S (July 23, 1997) (*Hon. Harry T. Hammer*, judge trial referee) (20 Conn. L. Rptr. 145), aff'd, 52 Conn. App. 661, 727 A.2d 791 (consent secured by the pressure of financial circumstance is not sufficient to establish duress), cert. denied, 249 Conn. 930, 733 A.2d 851 (1999).

The defendants failed to prove the special defense of duress.

C

No Meeting of the Minds

Last, the defendants claim that there was no meeting of the minds as between Agolli and Tedesco with respect to the Note and Mortgage Deed. The argument is twofold. The defendants claim that Agolli could not legally bind Fikri at the time she executed the Note and Mortgage Deed purporting to do so. The defendants also claim that she did not have an adequate understanding of the transaction.

"In order for an enforceable contract to exist, the court must find that the parties' minds had truly met. . . . If there has been a misunderstanding between the parties, or a misapprehension by one or both so that their minds have never met, no contract has been entered into by them and the court will not make for them a contract which they themselves did not make." (Internal quotation marks omitted.) *Milford Bank* v. *Phoenix Contracting Group., Inc.*, supra, 143 Conn. App. 527–28. " 'Meeting of the minds' is defined as 'mutual agreement and assent of two parties to contract to substance and terms. It is an agreement reached by the parties to a contract and expressed therein, or as the equivalent of mutual assent or mutual obligation.'

Black's Law Dictionary (6th Ed. 1990). This definition refers to fundamental misunderstandings between the parties as to what are the essential elements or subjects of the contract. It refers to the terms of the contract, not to the power of one party to execute a contract as the agent of another." *Sicaras* v. *Hartford*, 44 Conn. App. 771, 784, 692 A.2d 1240, cert. denied, 241 Conn. 916, 696 A.2d 340 (1997).[14]

When an agreement is reduced to writing and signed by all parties, the agreement itself is substantial evidence that a meeting of the minds has occurred. See *Tsionis* v. *Martens*, 116 Conn. App. 568, 577–78, 976 A.2d 53 (2009) ("[i]n light of the fact that a contract existed in written form that was signed by both parties, the plaintiffs' argument that a meeting of the minds did not occur is contrary to the evidence provided to the court"); see also *Reid* v. *Landsberger*, 123 Conn. App. 260, 268, 1 A.3d 1149 ("[b]ecause the agreement existed in written form and was signed by all parties, [the defendant's] argument that a meeting of the minds did not occur is not supported by the evidence, at least where there is no mutual mistake as to the fundamental promises"), cert. denied, 298 Conn. 933, 10 A.3d 517 (2010).

Nonetheless, the defendants argue that Agolli was inadequately advised as to the terms of the settlement and refinance by Attorney Sullivan; that Attorney Sullivan did not explain the content of the documents; that her lack of proficiency in reading and writing English

[14] The court had previously questioned whether the defendants' special defense of no meeting of the minds, as pleaded by the defendants, included the argument that Agolli could not bind Fikri. As a factual matter, it was first raised in the defendants' opposition to the plaintiff's motion for summary judgment. As noted at that time, this allegation does not appear in the defendants' special defenses. However, insofar as the issue was briefed without objection on this basis by the plaintiff, the court addressed the issue in the motion for summary judgment. Indeed, it was this argument as to which the court found a genuine issue of material fact and on which the court heard evidence at trial.

prevented her from understanding the documents she signed. As noted previously, the court credited Attorney Sullivan's testimony that he not only negotiated the terms of the settlement and refinance with input from, and at the direction of, Agolli as well as her children, but also that he explained the closing documents to Agolli. Perhaps Agolli had hoped for a different outcome but she was represented by counsel, she was involved in the negotiation; counsel explained the documentation to her and she understood and agreed to the terms of the refinance. The special defense on this basis is therefore not proven.

The defendants next argue that Agolli did not have the authority to bind Fikri. At the summary judgment phase of this litigation, the defendants relied upon the inconsistencies in the dates which appeared in the various closing documents to raise a genuine issue of material fact as to whether Joe and Gina Antonios were removed from Fikri prior to Agolli's signing of the Note and Mortgage Deed in which she purports to act on behalf of Fikri as its sole member. As a factual matter, that argument was laid to rest by, *inter alia*, Agolli's testimony:

"Q. [By Attorney Donnelly]: Now, I want to bring you back, again, to that July 26th, 2011 closing. Do you understand?

"A. Yes.

"Q. Okay, Now your home was removed; we've been over that, correct?

"A. Yes.

"Q. In addition, the interest rate was lowered from 10 percent to 5 percent on the loan, correct?

"A. Yes. Uh-huh.

"Q. And you're aware that. Also, on that date, you were able to remove Mr. Antonios and Mrs. Antonios from being involved in Fikri Development, correct?

"A. Yes.

"Q. All right. So, the removed—they were removed on that day.

"A. Yes.

"Q. And after—and you signed those loan documents representing Fikri Development, correct?

"A. Yes. . . .

"Q. Well, I will rephrase. So, you just stated that Mr. and Mrs. Antonios were removed from the company, true?

"A. Yes.

"Q. Okay, so you were the only remaining member at the time you signed the documents that you signed on July 26th.

"A. Yes.

"Q. Okay, so, by doing so you represented to my client that you had the ability to sign for Fikri Development, correct?

"A. Yes." (May 12, 2016 transcript, pp. 18–19.)

Agolli's testimony is entirely consistent with the testimony of Antonios, Attorney Sullivan and Suzi Zenko[15] as well as the executed closing documents.

[15] Suzi Zenko testified as follows:

"Q. With respect to the July 26, 2011 closing, what was the result of that closing: in essence, what did that closing accomplish?

"A. We got rid of Joe.

"Q. Okay. How did you get rid of Joe?

"A. I mean, it was—he was removed. He withdrew from the LLC. Him and Gina were out."

Faced with this testimony, the defendants argue that Attorney Sullivan, Joseph Antonios and Gina Antonios failed to comply with the procedures in the Connecticut Limited Liability Company Act, General Statutes § 34-100 et seq. (the Act), or the Operating Agreement in effectuating Antonios' removal as manager and Gina Antonios as a member. Thus, they argue, Agolli could not legally bind Fikri.[16]

This argument is largely premised on "facts" which are not supported by the body of evidence. The defendants assert that "[n]one of the formalities necessary for Fikri to validly execute documents were ever followed." Attorney Sullivan was not questioned about such "formalities," the requirements of the Act, or even what he did or did not do to effectuate the removal of Joe and Gina Antonios. The defendants assert further that "Mrs. Antonios never provided written notice to Fikri," as required under the Act. Mrs. Antonios was asked whether she gave written notice. She replied that she did not recall. This is not evidence from which the court can infer that no written notice was given. The defendants aver that "Mrs. Agolli and Mrs. Antonios never voted to remove Mr. Antonios as manager." The court recalls neither testimony nor documentary evidence to support this assertion. Ironically, the defendants aver that "there is no evidence Mrs. Agolli ever even spoke with Mrs. Antonios about removal of Mr. Antonios." It is likely there was no evidence because

[16] The broadest possible reading of the defendants' special defenses does not include such a claim, nor is this claim arguably within the scope of the issues addressed in the summary judgment motion. "Pleadings are intended to limit the issues to be decided at the trial of a case and [are] calculated to prevent surprise. . . . [The] purpose of pleadings is to frame, present, define, and narrow the issues, and to form the foundation of, and to limit, the proof to be submitted on the trial . . . . It is axiomatic that the parties are bound by their pleadings." (Internal quotation marks omitted.) *Brye* v. *State*, 147 Conn. App. 173, 177, 81 A.3d 1198 (2013). Notwithstanding, the court addresses the argument.

this issue was not adequately raised prior to trial. However, the lack of evidence as to whether the procedural mechanisms necessary to removal were complied with inures to the defendants' detriment. The defendants bear the burden of proof with respect to their special defense. See *Emigrant Mortgage Co.* v. *D'Agostino*, supra, 94 Conn. App. 802.

In any event, and most importantly, the evidence is both overwhelming and consistent that the removal of Joseph and Gina Antonios occurred prior to the closing on the refinance.

For all of the foregoing reasons, the defendants failed to prove the special defense of no meeting of the minds.

Judgment will enter in favor of the Plaintiff as to liability.