# DAVID CROUZET *v.* FIRST BAPTIST CHURCH OF STONINGTON ET AL.
## (AC 42069)

Lavine, Prescott and Bright, Js.*

*Syllabus*

The plaintiff property owner sought to recover damages from the defendants, two churches, for alleged oil contamination of his property. Inspections by the Department of Energy and Environmental Protection revealed the presence of fuel oil in the soil and in the groundwater of the plaintiff's property. The department's report further indicated that the source of the fuel oil originated from an underground oil tank that had been removed from the defendants' property, but the report could not rule out a secondary source of oil contamination originating from the plaintiff's property. Although the defendants paid for some environmental remediation of the plaintiff's property pursuant to a contract, they declined to pay for additional remediation, despite recommendations by the department and the plaintiff's consultant that such additional remediation was necessary. During a trial to the court, the plaintiff and the defendants offered competing expert testimony as to the cause of the oil contamination that existed on the plaintiff's property, including potential sources of the contamination other than the defendants' underground storage tank. The trial court expressly rejected the testimony of several expert witnesses as not credible. The trial court subsequently concluded that the defendants demonstrated that there was a secondary source of the oil contamination of the plaintiff's property and, therefore, the plaintiff failed to prove his allegations that the defendants caused the pollution beneath the plaintiff's residence. The trial court rendered judgment in favor of the defendants, and the plaintiff appealed to this court, claiming that the court's determination that there was a secondary source of oil contamination in his basement was clearly erroneous and that the court's decision was based on speculation and was legally unsound. *Held* that the trial court improperly rendered judgment in favor of the defendants, as there was no credible evidence to support the court's finding that the defendants had established that there was a secondary source of the contamination on the plaintiff's property that emanated from beneath his basement, there was no expert who testified, with a reasonable degree of probability, that a secondary source of oil contamination existed in or beneath the plaintiff's basement, or that possible secondary sources identified by witnesses during the trial were likely the cause of the oil contamination on the plaintiff's property, and, therefore, that finding was clearly erroneous, and, accordingly, a new trial was ordered; even if there was some evidentiary basis for the court's secondary source

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

finding, such finding did not legally and logically support the court's ultimate conclusion that the plaintiff failed to prove that the defendants caused contamination beneath his house, as the existence of a secondary source of contamination in the plaintiff's basement was wholly unrelated to the question of whether the plaintiff had proven that the defendants were an additional source or the primary source of the contamination, and there no support in the record for the determination that the defendants had no responsibility for any contamination in the present case, the court's reliance on its secondary source finding as the basis for its conclusion that the plaintiff failed to meet his burden of proof was illogical and deprived the court's judgment of a sufficient legal foundation, as the existence of a secondary source of contamination may have impacted the damages to which the plaintiff may be entitled, but it did not mean that the plaintiff had failed to prove that the defendants were also a source of the contamination, as the questions of damages and causation, while related, are different, involve separate burdens of proof, and require independent analysis.

(*One judge dissenting*)

Argued December 4, 2019—officially released August 18, 2020

*Procedural History*

Action to recover damages for environmental contamination of certain of the plaintiff's real property, and for other relief, brought to the Superior Court in the judicial district of New London, and tried to the court, *Hon. Joseph Q. Koletsky*, judge trial referee; judgment for the defendants, from which the plaintiff appealed to this court. *Reversed*; *new trial.*

*Eric J. Garofano*, for the appellant (plaintiff).

*Benjamin H. Nissim*, with whom were *Proloy K. Das* and, on the brief, *Leonard M. Isaac* and *James J. Nugent*, for the appellees (defendants).

*Opinion*

BRIGHT, J. The plaintiff, David Crouzet, appeals from the judgment of the trial court rendered in favor of the defendants, First Baptist Church of Stonington and Second Congregational Church of Stonington, following a trial to the court in a factually complex case involving

environmental contamination. The question underlying all of the plaintiff's claims on appeal is what was the cause of the oil contamination in and around the plaintiff's residence and, in particular, to what extent fuel oil that leaked from the underground storage tank on the defendants' property migrated onto the plaintiff's property and infiltrated the plaintiff's basement. On appeal, the plaintiff claims that the court's finding of a secondary source of contamination in his basement is clearly erroneous and that the court's decision is based on speculation and is legally unsound. We agree and, accordingly, reverse the judgment of the trial court.

The following facts were presented to the trial court. The plaintiff owns property located at 50 Trumbull Avenue in Stonington (plaintiff's property), which he purchased in 2004. In preparation for his purchase, Coastal Home Inspection, LLC, performed a home inspection. In the report prepared following the inspection, the inspector noted, in relevant part, that there was minor oil seepage from the oil tank in the plaintiff's basement, coming from the filter and on top of the tank, that there was a strong odor of fuel oil, and that the oil line was unprotected.

The defendants, since 1951, have jointly owned the abutting property located at 48 Trumbull Avenue (defendants' property), on which their parsonage is located. The plaintiff's property is west and southwest of the defendants' property. In January, 2006, the defendants had a 550 gallon underground oil tank, which had been located approximately four feet from the plaintiff's property, removed, and they replaced it with a 275 gallon steel aboveground tank, which was placed in their basement.

After heavy rains in the spring of 2009, a neighbor noticed oil coming from a pipe that carried excess water from the plaintiff's basement sump pump to the walkway in front of the plaintiff's house, and he called the

fire department, which then shut off the sump pump. Eventually, the Department of Energy and Environmental Protection (department) became involved, and William Warzecha, the supervising environmental analyst for the department's remediation division, conducted an investigation of potential contamination at 48 and 50 Trumbull Street (properties). On May 23, 2011, Timothy Baird, an environmental analyst at the department, completed a limited subsurface investigation report, which was reviewed and approved by his supervisor, Aaron Green. In the report, Baird concluded that the department had found the presence of fuel oil in the soil and in the groundwater of the properties. The report posited that the oil being released from the sump pump in the plaintiff's basement originated from the underground oil tank that had been removed from the defendants' property. The report also provided that it could not rule out a secondary source for the soil contamination in the plaintiff's basement. Additionally, the report provided that a representative of the defendants had stated that, in early December, 2010, the defendants removed contaminated sand and gravel from their sump pit and used that material to fill in a hole on the property. The department requested that the defendants retain an environmental consultant to assist in further investigation and remediation of contamination on the properties.

The defendants hired Kropp Environmental Contractors (Kropp) to excavate the area where the underground storage tank had been located. In December, 2011, Kropp removed approximately ten tons of contaminated soil and placed it under a polyethylene cover on the paved driveway of the plaintiff's property. The defendants also hired Paul Burgess, LLC (Burgess), to investigate the properties and to develop a remediation plan. The plaintiff hired a senior licensed environmental professional, Martin Brogie, who worked for GEI Consultants, Inc. The defendants agreed to pay Brogie

to analyze the site and the environmental remediation activities.

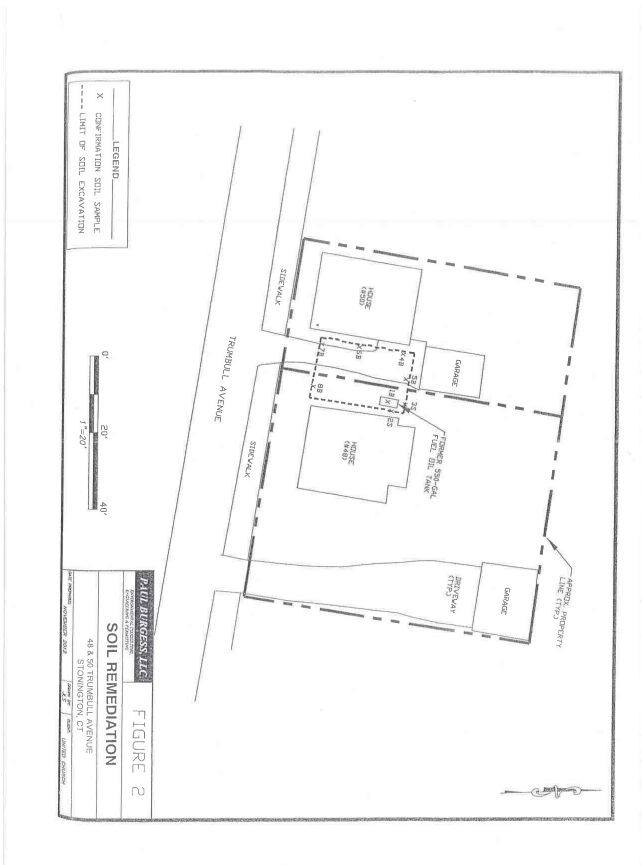
After Burgess prepared its soil remediation plan, the plaintiff and the defendants entered into a contract, dated September 26, 2012, giving the defendants the authority to perform remediation work on the plaintiff's property in accordance with the soil remediation plan. The contract stated that the soil remediation plan required "the disturbance of both the surface and subsurface of the [properties] and include[d] the further investigation, excavation and replacement of an undetermined amount of contaminated soil and other associated remediation activities . . . [and that the defendants were] prepared to proceed with the [r]emediation [w]ork in accordance with the [s]oil [r]emediation [p]lan . . . ."

In the contract, the parties acknowledged that their written agreement did not include remediation of the soil beneath the plaintiff's home, but it provided that they agreed "to continue to pursue in good faith further environmental assessment of the [plaintiff's property] as may be required by the [department] . . . ." The contract also addressed secondary sources, providing: "In the event that a secondary source of subsurface soil contamination is discovered during the course of the [r]emediation [w]ork, the [defendants] shall notify [the plaintiff] immediately in writing. If said secondary source is located on or beneath the [plaintiff's property], the [defendants] shall allow [the plaintiff] or his contractors or agents to inspect, confirm and remediate such findings, prior to completing its obligations hereunder. The [defendants] shall have no obligation whatsoever to remediate any soil impacted by a secondary source originating on or beneath the [plaintiff's property] or on or beneath any land other than the [defendants' property]."

The defendants hired Service Station Equipment, the company that had removed their underground tank, to

remediate the contaminated soil. Service Station Equipment excavated soil from October 8 through 12, 2012, to a depth of approximately eight feet, beginning at the location of the former oil tank, extending slightly east toward the parsonage, extending north to approximately three feet from the plaintiff's garage and west to approximately three feet from the plaintiff's home, then extending south along the length of both the plaintiff's home and the parsonage toward the street sidewalk, in the form of a large rectangle that ran between and along the two properties.[1] The approximate distance between the location of the former underground

[1]



tank and the east wall of the plaintiff's home is between sixteen and twenty feet. Due to concerns about the structural integrity of the foundations of the plaintiff's home and garage, as well as the sidewalk, the excavation was not extended closer to those structures. Evidence of soil contamination, including odors and elevated organic vapor readings, was noted from approximately five and one-half feet to eight feet below the ground throughout the excavation area. No oil product was observed on the soils or in the groundwater at the time of excavation.

Soil samples were collected, however, and testing of the samples confirmed the existence of contamination that exceeded the department remediation criteria. A hydrocarbon fingerprint analysis also was conducted on several samples, all of which indicated the presence of No. 2 fuel oil. Approximately 122 tons of excavated contaminated soil were taken from the properties to Phoenix Soil in Waterbury for thermal treatment. Portions of the properties, however, still contained contaminated soil because excavation did not extend closer to the plaintiff's home or the garage, or to the sidewalk, due to concerns about structural integrity.

Brogie, the plaintiff's licensed environmental professional, produced a report for the plaintiff and the defendants on January 7, 2014, following the conclusion of the defendants' remediation efforts. In his report, Brogie discussed the reports and findings of the department and Burgess, and he presented the results of his later inspection and testing of the plaintiff's basement and the areas adjacent to the plaintiff's home foundation and garage, which had not been remediated. Brogie concluded that there remained significant concentrations of petroleum in the soil near the home and the garage and that the fuel oil impacts below the home were consistent with the exterior release of petroleum.

In the report, Brogie concluded that the source of the contamination under the home and in the soil adjacent to the home and garage was the defendants' former

underground oil tank. The report also provided that "[s]ome contributory source from the previous fuel oil aboveground tank/line within the [plaintiff's home] cannot be completely ruled out. However, significant releases from these aboveground systems are rare and, given the significant nature and extent of the known release, a potential subject site source/release would be relatively inconsequential . . . ." Brogie suggested that the recommendations from the department be completed; these included connecting the plaintiff's sump pump discharge to a filtration system or to the sanitary sewer system, provided the town was amenable, and enhancing the ventilation in the basement of the home to eliminate the odors. Brogie also opined that the petroleum would degrade over time, but that it would take tens of years for the petroleum to be at a safe level. He further opined that the cost of excavation and disposal of the remaining contaminated soil could exceed the value of the plaintiff's property. The defendants declined to pay for any additional remediation costs, including those recommended by the department. The plaintiff testified that during periods of heavy rains, when the water table rises, he continues to see signs of fuel oil contaminated groundwater coming up through the soil beneath the basement floor, into the sump pump area, causing significant odors.

The plaintiff commenced the action against the defendants on March 8, 2016. In an amended complaint, filed on August 6, 2018, the plaintiff alleged ten causes of action, five against each defendant for the ongoing contamination of the soil, groundwater, and the basement on the plaintiff's property: liability pursuant to General Statutes § 22a-16,[2] trespass, private nuisance, liability

[2] General Statutes § 22a-16 provides: "The Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the superior court for the judicial district wherein the defendant is located, resides or conducts business, except that where the state is the defendant, such action shall be brought in the judicial district of Hartford, for declaratory and

under General Statutes § 22a-452,[3] and breach of contract. The evidentiary portion of the trial before the court was held over four days, beginning on August 21, 2018, and concluding on August 24, 2018, with final arguments on August 28, 2018.

During the trial, the plaintiff testified that when he was considering the purchase of 50 Trumbull Avenue,

equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity, acting alone, or in combination with others, for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction provided no such action shall be maintained against the state for pollution of real property acquired by the state under subsection (e) of section 22a-133m, where the spill or discharge which caused the pollution occurred prior to the acquisition of the property by the state."

[3] General Statutes § 22a-452 provides: "(a) Any person, firm, corporation or municipality which contains or removes or otherwise mitigates the effects of oil or petroleum or chemical liquids or solid, liquid or gaseous products or hazardous wastes resulting from any discharge, spillage, uncontrolled loss, seepage or filtration of such substance or material or waste shall be entitled to reimbursement from any person, firm or corporation for the reasonable costs expended for such containment, removal, or mitigation, if such oil or petroleum or chemical liquids or solid, liquid or gaseous products or hazardous wastes pollution or contamination or other emergency resulted from the negligence or other actions of such person, firm or corporation. When such pollution or contamination or emergency results from the joint negligence or other actions of two or more persons, firms or corporations, each shall be liable to the others for a pro rata share of the costs of containing, and removing or otherwise mitigating the effects of the same and for all damage caused thereby.

"(b) No person, firm or corporation which renders assistance or advice in mitigating or attempting to mitigate the effects of an actual or threatened discharge of oil or petroleum or chemical liquids or solid, liquid or gaseous products or hazardous materials, other than a discharge of oil as defined in section 22a-457b, to the surface waters of the state, or which assists in preventing, cleaning-up or disposing of any such discharge shall be held liable, notwithstanding any other provision of law, for civil damages as a result of any act or omission by him in rendering such assistance or advice, except acts or omissions amounting to gross negligence or wilful or wanton misconduct, unless he is compensated for such assistance or advice for more than actual expenses. For the purpose of this subsection, 'discharge' means spillage, uncontrolled loss, seepage or filtration and 'hazardous materials' means any material or substance designated as such by any state or federal law or regulation.

"(c) The immunity provided in this section shall not apply to (1) any person, firm or corporation responsible for such discharge, or under a duty to mitigate the effects of such discharge, (2) any agency or instrumentality of such person, firm or corporation or (3) negligence in the operation of a motor vehicle."

he became aware, from the inspection report, that there was a small fuel oil leak at the top of the oil tank in the basement and that the oil line was on the dirt floor, which was improper. The report also indicated a strong odor of fuel oil. The plaintiff stated that he did not recall seeing any oil or smelling it during his own walk through of the house and basement. He stated that, after he purchased 50 Trumbull Avenue in 2004, he renovated the house and changed the heating system, installing a new boiler in the basement on a raised concrete pad, and that he had temporarily used the old oil tank and fuel line, but later installed a new tank. He also stated that he removed the old boiler from that raised concrete pad, temporarily leaving it on the dirt floor in the basement. He testified that, in 2005, he also hired a contractor to lower the basement floor to allow for more headroom, and to build a new concrete basement floor. The plaintiff stated that, during the renovation in 2005, he noticed that, after a significant rainfall, there was a black oil film on top of water in the basement, which remained on the floor once the water had receded.[4] The plaintiff stated that he called his contractor, who informed him that he would take care of it, and the contractor pumped out the water from the basement into the backyard before installing the concrete floor. The plaintiff also had a sump pit and pump installed in the basement. The plaintiff testified that much of the soil that had been removed from the basement during the 2005 renovation was put into dumpsters, and the rest of it was spread behind the garage. He also stated that the basement frequently smelled like oil, especially after a substantial rain, and that he would see stains appearing on the new concrete floor. He would also see drops of water coming through the

[4] The plaintiff conceded that, in 2009, he had stated that the oil color had been purple, but that the photograph that he viewed during his testimony had clearly showed that it was black.

stone foundation in the basement, but he did not see oil in those drops. In 2009, after moving to California, the plaintiff rented out 50 Trumbull Avenue. The plaintiff further stated that it was in 2009 that a neighbor saw oily water coming from the discharge from the plaintiff's sump pump, and the neighbor called the fire department; the plaintiff, thereafter, hired someone to investigate the cause of the oily water.

Brogie, the plaintiff's licensed environmental professional, also testified at the trial. He testified that he has been investigating contaminated sites in Connecticut for approximately twenty-eight years, and that he first was engaged to provide services to the plaintiff early in 2012 to develop a remediation plan. He explained that, in this case, there is a very close distance between the plaintiff's house and the parsonage, and that the slow moving groundwater flows in a southwesterly direction on the parcels, traveling from the defendants' former underground oil tank to the plaintiff's house. He also stated that because the groundwater table on the properties has only a very shallow slope, the contaminants move very slowly and tend to spread out broadly. Specifically, he stated that "the oil move[s] through [the] sandy, gravelly material in the direction of the groundwater flow and spread out pretty broadly and extended from the street all the way back to the [plaintiff's] garage and then right directly to the their house and underneath it." Brogie stated that he reviewed various reports, including the department's, and that they "all seemed to be in agreement [with] what had happened, that there was a release from the former underground storage tank at the [defendants' property] and that it had moved across the driveway and impacted the [plaintiff's] property." Brogie was asked whether he had observed any evidence of contamination coming from the plaintiff's garage or his home, to which he responded, "No." Brogie further testified about a visit to the properties he

made in the spring of 2017 and some associated photographs that had been taken and also about additional soil testing of the properties that he had completed in May, 2017.[5]

When asked if he had reached a conclusion on the basis of this additional testing, Brogie responded in the affirmative and explained that his conclusion was "that there was a release of heating oil adjacent to the northwest corner of the 48 Trumbull residential property; that the contamination traveled in the direction of groundwater, generally southwest and west-southwest, toward the [plaintiff's] residence at number 50 and down toward the street and beyond; and the contamination went under the [plaintiff's] residence, at least three quarters of it, the eastern side and the southern half, perhaps; and that, during periods of very heavy rain and certainly during the spring, groundwater comes up, makes contact with that slab, and produces oil inside the building, and it's responsible for the significant odors inside the building as well." Brogie also acknowledged that he had reported that "[s]ome contributing source from previous fuel oil aboveground tank, flashline within . . . residence cannot be completely ruled out." He then went on to explain the meaning of that statement: "Well, the fact that there was a fuel oil delivery system in that basement means that there was oil in that basement at—and for a period of time. There hasn't been any evidence that there was any kind of a significant release in there, and I felt it only fair and scientifically appropriate to indicate that we can't completely rule out that there might be, you know, some oil in that basement floor as a result of that system even though we haven't really found any evidence of it yet, in my opinion."

[5] Because the only expert the court found persuasive was Burgess, we have provided summaries of the testimony of the other experts for context, but have given a detailed exposition of Burgess' testimony.

Brogie then was asked if he could opine to a "reasonable degree of certainty" whether there had been a spill at the plaintiff's home, and he responded: "Certainly. Since the time of this report and with the information that I've come into contact with over the last couple of weeks, absolutely I say with a reasonable degree of certainty there was no kind of any—any kind of significant release from that system whatsoever in the basement, if any at all, to the dirt."

Brogie also rendered an opinion on the parsonage, stating: "[B]ased on testing that I've recently come to understand from the defendants' expert, some very, very high concentrations indicating pure product are present beneath that building and immediately outside of it. So I would hope that that contamination would get remediated in addition to [the plaintiff's] property." He then explained that if this additional remediate did not occur, the contamination would continue to migrate to the plaintiff's property.

Warzecha, a supervising environmental analyst for the department's remediation division, testified that he has taken part in thousands of fuel oil release investigations, and he discussed in detail the department's investigation and report. He explained that the department took soil borings from many locations on the properties, including below the plaintiff's basement floor and from the plaintiff's and the defendants' sump pumps, and that its investigation concluded that "there was a significant source of fuel oil contamination on and emanating from 48 Trumbull Avenue in Stonington." He stated that the department opined that this was the source of the contamination under 50 Trumbull Avenue, and he explained the several factors that led to that conclusion, including: the groundwater flow direction from northeast to southwest, with the highest point being at the defendants' property flowing down to its lower point at the plaintiff's property; the significant concentration of fuel oil detected in the

groundwater; the presence of free-floating fuel oil that was found on the water table near the former underground storage tank location; and the concentration of contamination in the soil at that site. Warzecha acknowledged that the department was aware of a previous report by the plaintiff of possible "purple" oil discharging into the east side of the plaintiff's basement in 2005. He also acknowledged that he was aware of the home inspection report prepared for the plaintiff before the plaintiff purchased 50 Trumbull Avenue, and he testified that the report did not change the department's opinion about the source of the contamination. Warzecha further acknowledged that he was aware of a letter sent by the defendants to Service Station Equipment, with a copy to the department, in which the defendants conceded that "we know we were responsible for causing the leak."

Ross Aiello, whose great-grandfather built 48 Trumbull Avenue and whose family lived there at the time he was born, testified that Harold Reynolds owned 50 Trumbull Avenue pre-World War II, and that Reynolds worked on automobiles as a hobby, specifically his 1936 Ford sedan. He further testified that, after World War II, Reynolds would change his oil in the dirt driveway and that "[it] seem[ed] to him that when [he] pulled the plug, [he] just drained it onto the ground. And, you, know, they didn't use containers, I don't recall, back in that time."

Keith Filban, the husband of the parson at 48 Trumbull Avenue, testified that the Sollenbergers were the previous tenants of 50 Trumbull Avenue, and that, when Paul Sollenberger needed help getting his washing machine out of the basement, he assisted him. Filban stated that when he went into the basement, he noticed a puddle of oil on the dirt floor, which was approximately two and one-half feet in diameter, and a stream of oil coming from a fitting on the boiler that appeared

clear in color. When asked when this occurred, Filban stated that he thought it was October, 2015.

John Babin, a former tenant of 50 Trumbull Avenue in the late 1980s or 1990, testified that, on a number of occasions, he saw the pipe to the oil tank "backflush" when it was being filled, causing fuel oil to spill all over the ground. He acknowledged, however, that he never told the homeowner about this, that he had a problem with alcohol during this period of his life, and that he was home only "once every two months."

Paul Burgess, the defendants' expert, testified that he was contacted by the defendants to develop a remediation plan, as had been requested by the department, and that he oversaw the implementation of that plan. He stated that he also had reviewed the report by Brogie and that he disagreed with some of the conclusions in the report. Burgess testified that he had received information that suggested to him the existence of an alternative source of contamination at 50 Trumbull Avenue. He explained that Brogie had told him that the plaintiff's contractor, who had been working on the basement, had observed a purple oil flowing into the basement that looked fresh. Burgess further explained that the dyeing of oil took place after 1993, so that information was interesting to him. He further explained, however, that "as the project developed, I—and we actually conducted the remediation on number 48 and 50 on the exterior part, I didn't observe any oil or any—also—nor oil that had that dye in it during the excavation. . . . [Therefore] it indicated the potential for a secondary source that could have occurred on the [plaintiff's] property based on that observation and others—other facts." Burgess acknowledged that Warzecha, from the department, had concluded in an e-mail that "[he] ha[d] not seen any information to date suggesting there's a secondary source of pollution originating from [the plaintiff's] own property."

Burgess then addressed his March 14, 2012 remediation plan. He explained that when he first became involved with this project, Kropp already had dug a test pit in the area where the underground tank had been located, and that "they reported they had . . . indication of contaminated soil and stopped, and then they asked for my involvement going forward." Burgess further explained that "you have on the surface—or, you know, starting from ground level downward to a certain depth, you have clean soil that is not impacted, and that soil would be excavated, stockpiled separately, and not have to be disposed." He also explained that indicators of contamination include, "[f]uel oil odors, organic vapor analyzer meter . . . [which detects] volatile organic vapors . . . [and] in this case, you [could] see stained soil," which "was a grey, darkish color layer . . . approximately five and a half to eight feet below ground surface [and] had an odor to it."

Burgess was asked about his written preliminary draft review of Brogie's January 7, 2014 report in which Brogie had stated, in part, that there was fuel oil contamination immediately below the basement floor, which could have come from several sources, including possible releases interior to the building. The defendants' attorney pointed out that, on the court exhibit of Burgess' draft, there was a handwritten notation that said "location of the oil tank and oil supply line at 50." Burgess was asked whether the location of the old oil tank and supply line would be a consideration as an alternative source of contamination in the plaintiff's basement, to which Burgess responded, "Yes." Burgess then testified that the department had performed oil and groundwater testing in the basement near where the old oil tank had been located, and that he believed that the report revealed that "the groundwater at the designation . . . BB (1) . . . had the—by far the highest levels of total petroleum hydrocarbons anywhere else on

the site, including the location of the former tank at the parsonage property at 48 Trumbull . . . [and that this] amongst other facts suggested to [him] that there was likely a secondary source near that location."

Burgess contradicted Brogie's conclusion that significant releases of oil from aboveground systems are rare, by stating that they happen "a lot." He also testified that the Extractable Total Petroleum Hydrocarbons (ETPH) concentration levels "were consistently less in the soil, the remaining soil, that had been excavated on the exterior portion of the foundation wall. They were less than what Martin Brogie . . . had found when he did his sampling below the basement floor of the [plaintiff's] property, and that didn't make sense to me from the perspective of the source originating only from the parsonage property . . . [b]ecause I would not expect the soils below the basement floor to be that substantially higher than on the outside if they originated—if the oil originated from the outside." When asked why that was significant, Burgess stated: "Because we did sampling near the former tank at the parsonage and that—and then the concentrations of ETPH decrease in the direction of the [plaintiff's] property to outside and near the basement wall and then increased substantially below the floor. And to me, that was one factor that suggested there was a secondary source in his basement as opposed to contributing from the [defendants'] property."

Burgess also explained that he "looked at the aromatic volatile organic compounds [(AVOC)] as another indicator of what the ETPH data was showing, and they can be—they are minor constituents of fuel oil. And the AVOC data showed the trends consistent with the total petroleum hydrocarbon data. In other words, the levels were higher near the original parsonage tank; they reduced to levels outside the [plaintiff's] basement wall, then some of the samples below the basement

slab shot back up and were higher than outside. So I was trying—I was looking to see if there was a consistent trend, and there was."

When Burgess was asked by the defendants' attorney whether he had come to a conclusion about the origin of the contamination underneath the plaintiff's basement he responded: "I came to a conclusion about the—some—I came to some conclusions about the oil that was observed coming through his basement walls, yes. . . . For various facts, it did not make sense to me that that material, that oil, originated from the parsonage property." He then was asked whether he had made a determination from where that contamination came, and he responded: "No."

During cross-examination, Burgess agreed that fuel oil is dyed red, not purple. He also agreed: the report of purple oil was from 2005; the defendants removed their underground storage tank in January, 2006; the first time he was on-site was in 2012, which was seven years after the report of purple oil and six years after the tank was removed from the church property; the groundwater flow in this area is generally southwest going from 48 toward 50; both properties are contaminated; the contamination levels of both properties exceed the department's criteria, the department found free oil product underneath the former storage tank grave at the church property; and that the department had determined that the source of the contamination at 50 Trumbull was the underground storage tank at 48 Trumbull. Burgess did state, however, that he thought that the department also had stated that it could not rule out a secondary source. Burgess acknowledged that the last time he was at the site was 2013, and that his last report about the site was February, 2014. Burgess also acknowledged that he concluded only that it was possible that there had been a fuel oil release at 50 Trumbull and that there potentially was a secondary

source of contamination at 50 Trumbull. Burgess also acknowledged that he was unaware that Brogie later had done additional testing for contamination around the plaintiff's garage.

Plato Doundoulakis, a licensed environmental professional and principal scientist from Atlas Environmental Company, also called as an expert witness by the defendants, testified that he believed that the contamination of the plaintiff's basement came from the plaintiff's basement and that he did not think that "it was possible for the contamination to have originated at the parsonage, the contamination in the basement." He stated that he came to this conclusion because, "[i]n order for the contamination to get from the parsonage . . . to the [plaintiff's] basement, you'd need a—some way, some migration pathway. The only migration pathway that's been identified there is the surface of the groundwater table. The groundwater table would have to rise up and intersect with the [plaintiff's] basement in order for that oil to be pushed into the basement, and that does not occur."

Doundoulakis also opined that the fuel oil contaminants found in the plaintiff's basement were different from the contaminants found on the defendants' property. He explained that he examined the range of carbon from those samples, which showed that the sample from the plaintiff's basement showed a No. 4 fuel oil, and the sample from the defendants' property showed a No. 2 fuel oil. He also stated that another basis for his opinion that the contamination in the basement originated therein was that "[t]here was free product found underneath the parsonage's underground storage tank, or near it, and there was free product found in [the plaintiff's] basement, but none in between. There was a disconnection between those two release areas."[6]

[6] The plaintiff's attorney objected to some of Doundoulakis' testimony, arguing that it was new information that he had not seen or heard previously and that had not been disclosed. Doundoulakis admitted at this time that he had not prepared a report. The court then stated that it would limit his

During cross-examination, Doundoulakis admitted that he had stated in his deposition, taken only one week earlier, that he had taken only one measurement and did not know the seasonal high groundwater elevation under the plaintiff's property. He also admitted that, although he had tested the age of the oil under the defendants' basement, he had not tested the age of the oil under the plaintiff's basement. Additionally, Doundoulakis admitted that he had sent an e-mail to someone that stated that he did not test any of the samples under the plaintiff's basement because he already had good data and did not want to give the other side anything it could use. Last, Doundoulakis acknowledged that during his deposition he had admitted that he did not know where the release of oil in the plaintiff's basement actually occurred, and he did not know the cause of that release.

Following Doundoulakis' testimony, the plaintiff recalled Brogie to the witness stand. Brogie explained in detail the pathways for the contaminant migration on the properties: "In terms of pathways for contaminant migration at this particular site, the primary pathway is through the coarse sand and gravel material that's found five feet below the surface; four and a half feet to five feet below the surface is where it starts. And being coarse material, it's easy for groundwater to move through it rapidly and certainly easy for a product such as heating oil to move through that material rather rapidly and without any abatement until it reaches some kind of a structure. And in this particular case, groundwater is an important component to the pathway and the migration of those materials as well. . . . [O]n the perimeter of the Burgess excavation from 2012 there's a very, very high concentration indicative of pure product on the north wall of his excavation, 17,200 at eight feet, just two feet, seven inches, from the garage. Not

testimony to what he had discussed during his deposition. Ultimately, the court rejected Doundoulakis' testimony in its entirety.

much further away, about eight feet from the northwest corner of the excavation, [is] boring GEI 100 that I installed myself back in 2017 and at a depth of seven to eight feet where in my profile I encountered the highest concentration—I had a concentration of fifty-nine hundred parts per million. There were odors of fuel oil there. My photoionizing detector indicated elevated volatile organic readings. And I felt very comfortable that I was in the fuel oil plume that originated from the parsonage given the material that it was in, the sand and gravel; the depth at which I encountered; and the odors which I noted.

"Further, I did an additional boring further to the northwest. I didn't find anything, so I felt very confident that I delineated the edge of the contamination. Given . . . Burgess' very high concentration on the north side of the excavation and my findings north of the house, it was very apparent that that plume came down to the back of the residence of [the plaintiff], that there's petroleum contamination behind the house that—resulting from the release of the heating oil UST over at the parsonage. And based on the observations, along that west wall, it appears that the heating oil contamination from the parsonage extends from north of [the plaintiff's] house, all along the east wall of [the plaintiff's] house, and continuing south."

On August 28, 2018, following closing arguments, the court issued a brief oral decision in which it rendered judgment in favor of the defendants. Specifically, the court's entire ruling was as follows: "Both—. . . Doundoulakis and . . . Brogie . . . were both such partisan advocates—now, this court has had experience with many experts who, no matter how partisan they may be, at least manage to project at least a veneer of impartiality. So the court intends to disregard both the testimony of . . . Doundoulakis and the testimony of . . . Brogie . . . which the court expressly rejects.

That leaves—the only credible witnesses are Warzecha and Burgess. While . . . Warzecha was credible, his data was outdated and outweighed by . . . Burgess' testimony, but even that does not overcome the fact that the defense has shown a secondary source exists beneath the basement property owned by the plaintiff, and therefore [the court] finds the plaintiff has failed to prove the allegations that defendant has caused the pollution beneath his house.

"It is therefore unnecessary to reach the defendant's special defenses. Judgment will enter for defendants—defendant on all counts."

The plaintiff thereafter filed a motion for articulation, requesting specifically that the court explain what data from Warzecha was outdated and specifically arguing that Warzecha had testified that he had read all the reports produced up to the present time, including new evidence that had been revealed to him only one week before trial, and that Burgess had not testified to having seen this information. The court responded: "The court's reference to . . . Warzecha's testimony as 'outdated' was solely a reference to his credibility. Since he was taken out of turn with an attorney general present who had filed an appearance moments before . . . Warzecha's testimony. Immediately after his testimony, he and the [assistant attorney general] departed and they were not in the courtroom when evidence was presented, which the court credited in finding that the existing contamination beneath the plaintiff's property was there long before the plaintiff purchased his property."[7] This appeal followed.

On appeal, the plaintiff claims that the court's finding of a secondary source of contamination in his basement

[7] We find the court's articulation puzzling. The order of the witnesses should have no bearing on their credibility, neither should the fact that they did not remain in the courtroom to hear other witnesses' testimony.

is clearly erroneous and that the court's decision is based on speculation and is legally unsound. He argues, first, that there was no expert testimony to support the court's finding that the defendants had proven the existence of a secondary source of the contamination, originating in the plaintiff's basement. Second, he argues, even if an expert sufficiently opined that a secondary source existed in the plaintiff's basement, there was no testimony that identified that source. Third, he argues that the existence of a secondary source necessarily means that there exists a primary source, and the relevant experts were in agreement that the primary source of contamination on the properties originated from the underground oil tank that had been removed from the defendants' property. Fourth, the plaintiff argues, regardless of the other arguments, the court's decision is legally unsound because proving the existence of a secondary source would not establish that the plaintiff "therefore" failed to prove that the defendants were the primary source of the contamination that remained on his property, both under his home and in the soil outside of his home. We agree that the court's finding of a secondary source being responsible for the subject contamination is clearly erroneous and that its conclusion is legally unsound, requiring a remand for a new trial. See *O'Connor* v. *Larocque*, 302 Conn. 562, 578 n.12, 31 A.3d 1 (2011) (judgment may be reversed if it is legally or logically inconsistent with facts found, or is so illogical or unsound, or so violative of the plain rules of reason, as to be unwarranted in law); *Buckley* v. *Webb*, 143 Conn 309, 315, 122 A.2d 220 (1956) (it is impossible for appellate court to sustain judgment that is illogical).

"The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such

findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record. . . . Therefore, the trial court's conclusions must stand unless they are legally or logically inconsistent with the facts found or unless they involve the application of some erroneous rule of law material to the case." (Citations omitted; internal quotation marks omitted.) *MSO, LLC* v. *DeSimone*, 313 Conn. 54, 62, 94 A.3d 1189 (2014); see also *Zaniewski* v. *Zaniewski*, 190 Conn. App. 386, 395, 210 A.39 620 (2019) ("[t]he trial court's decision must be based on logic applied to facts correctly interpreted" (emphasis omitted)).

First, we agree with the plaintiff that the court's finding that the defendants have "shown a secondary source exists beneath the basement property owned by the plaintiff" is clearly erroneous because there was no expert who testified, with a reasonable degree of probability, that a secondary source of fuel oil contamination existed in or beneath the plaintiff's basement, or that the possible secondary sources identified by witnesses during the trial are likely the cause of the oil contamination on the plaintiff's property.

As stated previously in this opinion, the question underlying all of the plaintiff's claims is what was the cause of the oil contamination in and around the plaintiff's residence and, in particular, to what extent fuel oil that leaked from the underground storage tank on the defendants' property migrated onto the plaintiff's property and infiltrated the plaintiff's basement. Because contamination cases such as the present case generally involve issues that go "beyond the field of ordinary knowledge and experience of the trier of fact," expert testimony typically is required to establish the cause or causes of contamination claimed by a plaintiff.

*Fort Trumbull Conservancy, LLC* v. *New London*, 135 Conn. App. 167, 183 n.11, 43 A.3d 679, cert. denied, 307 Conn. 905, 53 A.3d 220 (2012).[8] Recognizing this requirement, the parties offered competing expert testimony as to the cause of the oil contamination that exists on the plaintiff's property. In addition, the defendants offered evidence of potential sources of the contamination other than the defendants' underground storage tank, including the spilling of motor oil on the ground after World War II, occasional spilling of heating oil during tank fillings on the plaintiff's property in the late 1980s or 1990, leaking of oil from the top of the plaintiff's

[8] In setting forth the parties' respective burdens of proof for statutory environmental claims, our Supreme Court has suggested that expert testimony, at a minimum, is required to rebut a plaintiff's prima facie showing of pollution attributable to the defendant. "Statutes such as the [Environmental Protection Act, General Statutes §§ 22a-14 through 22a-20] are remedial in nature and should be liberally construed to accomplish their purpose. . . . Although the ultimate burden of proof never shifts from the plaintiff, the [Environmental Protection Act] contemplates a shifting of the burden of production. . . . The plaintiff must first make a prima facie showing that the conduct of the defendant, acting alone, or in combination with others, has, or is reasonably likely unreasonably to pollute, impair, or destroy the public trust in the air, water or other natural resources of the state . . . ." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Manchester Environment Coalition* v. *Stockton*, 184 Conn. 51, 57–58, 441 A.2d 68 (1981), overruled in part on other grounds by *Waterbury* v. *Washington*, 260 Conn. 506, 556, 800 A.2d 1102 (2002).

"Once a prima facie case is shown, the burden of production shifts to the defendant. Under § 22a-17, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. . . . [T]he nature of the evidence necessary to rebut [the] plaintiff's showing will vary with the type of environmental pollution, impairment or destruction alleged and with the nature and amount of the evidence proffered by the plaintiff. In some cases, no doubt, testimony by expert witnesses may be sufficient to rebut [the] plaintiff's prima facie showing. While in other actions the defendant may find it necessary to bring forward field studies, actual tests, and analyses which support his contention that the environment has not or will not be polluted, impaired or destroyed by his conduct. Such proofs become necessary when the impact upon the environment resulting from the defendants' conduct cannot be ascertained with any degree of reasonable certainty absent empirical studies or tests." (Citation omitted; internal quotation marks omitted.) Id., 60.

oil tank when he purchased the property, and the leaking of oil from a fitting on the boiler in the plaintiff's basement in or around October, 2015. The question for us is whether the court's factual finding that the defendants had shown that a secondary source of the contamination on the plaintiff's property existed below the basement of his residence is clearly erroneous in light of the expert testimony and the factual bases for such testimony.

In answering this question we bear in mind that "[e]xpert opinions must be based upon reasonable probabilities rather than mere speculation or conjecture if they are to be admissible in establishing causation. . . . To be reasonably probable, a conclusion must be more likely than not. . . . Whether an expert's testimony is expressed in terms of a reasonable probability . . . does not depend upon the semantics of the expert or his use of any particular term or phrase, but rather, is determined by looking at the entire substance of the expert's testimony." (Internal quotation marks omitted.) *Weaver* v. *McKnight*, 313 Conn. 393, 421–22, 97 A.3d 920 (2014); see *Struckman* v. *Burns*, 205 Conn. 542, 554–55, 534 A.2d 888 (1987).

In the present case, the only expert fully credited by the trial court was Burgess.[9] He testified in relevant part that Brogie had told him that the plaintiff's contractor, who previously had been working on the basement, had observed a purple oil flowing into the basement that looked fresh. Burgess stated that this information

[9] As noted previously in this opinion, the court rejected fully the expert testimonies of Brogie and Doundoulakis. Although the court found Warzecha to be credible, it found his opinions "outdated," apparently because he testified before Burgess. In any event, the court's finding that there was a secondary source of pollution beneath the plaintiff's basement could not have been based on Warzecha's testimony because his opinion was that the pollution emanated from the defendants' property. Furthermore, although Warzecha acknowledged that Burgess had raised the possibility of a second source, he had not identified any such source.

was interesting because the dyeing of oil took place after 1993. He further explained that he did not observe any oil that had that dye during the excavation. This, he stated, "indicated the *potential* for a secondary source that could have occurred on the [plaintiff's] property . . . ." (Emphasis added.) Burgess was asked whether the location of the old oil tank and supply line in the plaintiff's basement *would be a consideration* as an alternative source of contamination, and he responded, "Yes." Burgess testified that the department had performed oil and groundwater testing in the basement near where the old oil tank had been located, and that he believed the report revealed that "the groundwater at the designation . . . had the—by far the highest levels of total petroleum hydrocarbons anywhere else on the site, including the location of the former tank at the parsonage property at 48 Trumbull . . . [and that this] amongst other facts *suggested to* [*him*] *that there was likely a secondary source near* that location." (Emphasis added.) He also stated that the higher level of contaminants in the basement "was one factor *that suggested* there was a secondary source in [the] basement as opposed to contributing from the parsonage property." (Emphasis added.) When Burgess was asked by the defendants' attorney whether he had come to a conclusion about the origin of the contamination under the plaintiff's basement, he responded: "I came to some conclusions about the oil that was observed coming through his basement walls, yes. . . . For various facts, it did not make sense to me that that material, that oil, originated from the parsonage property." He then was asked whether he had made a determination from where that contamination came, and he responded: "No." Furthermore, Burgess did not opine that any spillage of motor oil after World War II, backwash from filling the tank on the plaintiff's property in the late 1980s, leakage from the top of the plaintiff's

boiler when he purchased the property or from a fitting on the plaintiff's boiler in 2015 were likely the cause of the oil contamination on the plaintiff's property.

Much of Burgess' testimony involving a secondary source of contamination in the plaintiff's basement clearly is speculative and based on conjecture. A close review of that testimony, however, reveals that he did opine that the high level of contaminants found beneath the plaintiff's basement "suggested" to him that there was "*likely* a secondary source near that location." (Emphasis added.) Burgess admitted, however, that he could not identify that source or from where it originated. At no time did Burgess testify to a reasonable degree of probability, or words to that effect, that the contamination in the plaintiff's basement was caused by a source other than the defendants' underground storage tank. Our law regarding expert opinion is clear: "An expert's opinion may not be based on surmise or conjecture." *Weaver* v. *McKnight*, supra, 313 Conn. 410. Testimony that certain facts suggested to the expert a likely secondary or additional cause of contamination that the expert could not identify does not clear this hurdle. We conclude that the only credited expert who opined with even a modicum of specificity that there *may have been* a secondary source of contamination in the plaintiff's basement relied on speculation and conjecture, not rendering a properly supported conclusion or a specific finding about this potential secondary source. Consequently, there was no credible evidence to support the court's finding that the defendants had established that there was a secondary source of the contamination on the plaintiff's property that emanated from beneath his basement, and, therefore, that finding was clearly erroneous.

Additionally, we agree with the plaintiff that, even if there was some evidentiary basis for the court's secondary source finding, such finding does not legally and

logically support the court's ultimate conclusion that the plaintiff failed to prove that the defendants caused the contamination beneath his house. First, there is no doubt that the court premised its conclusion that the plaintiff failed to prove causation on its secondary source finding. The court specifically held that "the defense has shown a secondary source exists beneath the basement property owned by the plaintiff, *and* [*the court*] *therefore finds* the plaintiff has failed to prove the allegations that [the] defendant has caused the pollution beneath his house." (Emphasis added.) The problem with this finding and conclusion is that the existence of a *secondary* source of contamination in the plaintiff's basement wholly is unrelated to the question of whether the plaintiff has proven that the defendants was an additional source or the primary source of such contamination.[10] The existence of a secondary source necessarily means that there exists a primary source. There was

[10] The dissent in the present case specifically states that the trial court "appears to have explicitly concluded that 'the plaintiff has failed to prove the allegations that [the] defendant caused the pollution beneath his house.' The court, however, muddied the waters by stating that a 'secondary source exists beneath the basement property owned by the plaintiff.' " We disagree with the dissent's conclusion that the court's use of the phrase "secondary source" somehow "muddied the waters" because it was unclear or ambiguous. The trial court first set forth its secondary source finding and then it explicitly stated "*therefore* . . . the plaintiff has failed to prove the allegations that defendant has caused the pollution beneath his house." (Emphasis added.) In light of the clear link the court explicitly set forth between its finding of a secondary source and its conclusion that the plaintiff "therefore" failed to prove his case, we simply cannot conclude, as the dissent does, that there is anything unclear or ambiguous in the court's brief explanation of its analysis.

The dissent goes on to suggest that the plaintiff should have requested that the trial court articulate what it meant by the term "secondary source" of contamination. We disagree that the plaintiff should have seen an ambiguity in the clear language of the court's findings that required some articulation. The words "secondary source" have a plain meaning, both generally and in the specific context of this case.

In this case, Burgess, the expert credited by the trial court, defined a secondary source as "an *additional* source other than what was identified on the parsonage property." (Emphasis added.) This definition is consistent

not one expert, credited or otherwise, who opined that the defendants had no responsibility for any contamination in this matter. In fact, it was Burgess who developed the remediation plan that was premised on oil migrating from the site of the defendants' removed underground storage tank onto the plaintiff's property. The court's reliance on its secondary source finding as the basis for its conclusion that the plaintiff failed to meet his burden of proof is illogical and deprives the court's judgment of a sufficient legal foundation. The existence of a secondary or additional source of contamination in the plaintiff's basement may impact the damages to which the plaintiff may be entitled, but it does not mean that the plaintiff has failed to prove that the defendants were *also* a source of the contamination. The questions of damages and causation, although related, are different, involve separate burdens of proof, and require independent analysis. The court improperly conflated the analyses of these elements to reach a legally improper conclusion. Put another way, the court's decision that "the defendant[s] ha[ve] shown a secondary source exists beneath the basement property owned by the plaintiff, and therefore finds the plaintiff has failed to prove the allegations that defendant[s] ha[ve] caused

with the common definitions provided by various dictionaries. For example, Merriam-Webster's Collegiate Dictionary defines secondary as "of second rank, importance, or value," and "not first in order of occurrence or development." Merriam-Webster's Collegiate Dictionary (11th Ed. 2012) p. 1121. The American Heritage College Dictionary defines secondary as "[o]f the second rank; not primary," "[i]nferior," "[m]inor; lessor." American Heritage College Dictionary (2d Ed. 1985) p. 1107. Black's Law Dictionary defines secondary as, "[o]f a subsequent, subordinate, or inferior kind or class; generally opposed to 'primary.' " Black's Law Dictionary (5th Ed. 1979) p. 1212. We do not read any ambiguity in the court's use of the phrase "secondary source," and we conclude that it would be unfair and unreasonable to impose on the plaintiff an obligation to argue to the trial court that the meaning of this phrase was ambiguous and in need of clarification before taking an appeal. The words are clear and unambiguous, and we conclude that the plaintiff acted properly in relying on the court's chosen words when he pursued his appeal.

the pollution beneath his house'' amounts to logical fallacy; it is a non sequitur.[11]

Finally, the court's finding that the defendants proved a secondary source of the pollution *in the plaintiff's basement*, has no bearing on the allegations of the plaintiff's complaint regarding the pollution that continues to exist outside of his basement, in the areas that the defendants declined to remediate because of concerns about the structural integrity of the plaintiff's home foundation and his garage. For all of these reasons, we conclude that the court improperly rendered judgment in favor of the defendants.

The judgment is reversed and the case is remanded for a new trial.

In this opinion LAVINE, J., concurred.

PRESCOTT, J., dissenting. In this factually and legally complex action, brought by the plaintiff homeowner, David Crouzet, to recover for economic harm resulting from groundwater and soil contamination on his property that allegedly migrated from an adjoining property owned by the defendants, two churches,[1] the trial court heard competing expert and scientific testimony from numerous witnesses over the course of a five day trial to the court. Various experts and historical fact witnesses testified regarding potential alternative or secondary sources of the pollution on the plaintiff's property. One hundred and thirty exhibits were admitted at trial.

[11] "[A] [n]on [s]equitur [is] [s]ometimes called the 'fallacy of the consequent,' a non sequitur is an argument which is not really an argument but a series or propositions with a conclusion that has no logical connection to the premises. The term non sequitur means simply that the conclusion does not follow (logically) from the premises." (Emphasis omitted.) D. Lind, Logic & Legal Reasoning (2d Ed. 2007) § 5.2, p. 292.

[1] The defendants are First Baptist Church of Stonington and Second Congregational Church of Stonington.

Despite the complexity of this case, however, the trial court did not issue a written memorandum of decision setting forth its factual findings and its application of the law to those facts. Instead, the court rendered a short, oral ruling from the bench in favor of the defendants, the substance of which spans approximately one transcript page. The decision is devoid of any factual findings other than a brief, general comment on the credibility of certain expert testimony. It also contains no discussion of the applicable law.

Despite these obvious lacunae, the plaintiff, who has appealed from the court's judgment, filed a motion for articulation that was quite limited in scope. In response, the court's articulation was exceedingly brief and did little to explain the factual or legal basis for its judgment. If anything, the court's articulation further muddied the waters. Importantly, the plaintiff failed to file a motion for review with this court in order to remedy the reviewability issues engendered by the trial court's decision and articulation.

The meaning of the court's decision is not readily apparent to me. For the reasons I subsequently will set forth, a possible interpretation of the court's decision is simply that the plaintiff failed to meet his burden of persuasion on the critical issue of whether the environmental contamination of his property was caused by the defendants. Because our well settled standard of review requires me, under these circumstances, to construe the court's judgment in a manner to uphold it, rather than to undermine it; see *White* v. *Latimer Point Condominium Assn., Inc.*, 191 Conn. App. 767, 780–81, 216 A.3d 830 (2019); I respectfully dissent from the decision of the majority to reverse the judgment and remand the case for a new trial.

I begin with the facts and procedural history of the case. The majority opinion more than adequately

describes the evidence that was presented at trial and I see no need to repeat it wholesale here. It bears emphasis, however, that we know little regarding what facts the trial court concluded had been established by this evidence.

With respect to the procedural history, I first turn to the court's oral decision rendered immediately at the conclusion of closing arguments. After briefly discussing the disposition of some outstanding motions and the content of the closing arguments, the court's entire decision was as follows: "Both [Plato] Doundoulakis [the defendants' expert] and [Martin] Brogie [the plaintiff's expert] . . . were both such partisan advocates—now, this court has had experience with many experts who, no matter how partisan they may be, at least manage to project a veneer of impartiality. So the court intends to disregard both the testimony of . . . Doundoulakis and the testimony of . . Brogie, and the testimony of [William] Puckett [the plaintiff's contractor], which the court expressly rejects. That leaves—the only credible witnesses are [William] Warzecha [a state environmental analyst called by the plaintiff] and [Paul] Burgess [a licensed environmental consultant called by the defendants]. While . . . Warzecha was credible, his data was outdated and outweighed by . . . Burgess' testimony, but even that does not overcome the fact that the defense has shown a secondary source exists beneath the basement property owned by the plaintiff, and therefore finds *the plaintiff has failed to prove the allegations that defendant has caused the pollution beneath his house.*

"It is therefore unnecessary to reach the defendant's special defenses. Judgment will enter for defendants—defendant on all counts." (Emphasis added.)

The plaintiff filed this appeal on September 7, 2018. Shortly thereafter, on October 3, 2018, the plaintiff filed

a motion for articulation. The sole question posed by the plaintiff in his motion was "[w]hat data of . . . Warzecha's was outdated?" The motion for articulation did not ask the court to articulate what facts it found with respect to its apparent conclusion that the plaintiff had failed to meet his burden of persuasion that the defendants were the cause of the environmental contamination on his property. It also did not seek any articulation from the trial court on its use of the phrase "secondary source."

The court granted "in part" the motion for articulation. It articulated as follows: "Nothing in the court's decision implicates either the statute of limitations or the continuing course of conduct doctrine. The court's reference to . . . Warzecha's testimony as 'outdated' was solely a reference to his credibility. Since he was taken out of turn with an [assistant attorney general] present who had filed an appearance moments before . . . Warzecha's testimony. Immediately after his testimony he and the [assistant attorney general] departed and they were not in the courtroom when evidence was presented which the court credited in finding that the existing contamination beneath the plaintiff's property was there long before [the] plaintiff purchased his property."

The plaintiff did not file a motion for review, as was his right pursuant to Practice Book § 66-7, in which he could have asserted that the trial court's articulation was insufficient or otherwise improper. The plaintiff also did not seek any further articulation by the trial court after it issued its articulation. See Practice Book § 66-5. Moreover, the plaintiff took no steps, as was his right, to seek to compel the trial court to issue a memorandum of decision that complied with Practice Book § 64-1.[2] That provision obligates a trial court,

[2] Practice Book § 64-1, with limited exceptions not relevant here, requires that a trial court prepare a memorandum of decision whenever it renders an appealable final judgment, and provides in relevant part: "(a) . . . The

under the circumstances presented here, to issue a decision, either orally or in writing, which "shall encompass its conclusion as to each claim of law raised by the parties and the factual basis therefor." Practice Book § 64-1 (a).

On appeal, the plaintiff raises three claims of error, each of which makes reference to the trial court's use of the phrase "secondary source" in rendering judgment for the defendants.[3] In essence, the plaintiff argues that the court's use of the term "secondary source" either necessarily reflects unsound legal reasoning by the court that amounts to legal error or otherwise constitutes a clearly erroneous finding of fact because it is unsupported by any evidence in the record. I would

court's decision shall encompass its conclusion as to each claim of law raised by the parties and the factual basis therefor. If oral, the decision shall be recorded by a court reporter, and, if there is an appeal, the trial court shall create a memorandum of decision for use in the appeal by ordering a transcript of the portion of the proceedings in which it stated its oral decision. The transcript of the decision shall be signed by the trial judge and filed with the clerk of the trial court. . . .

"(b) If the trial judge fails to file a memorandum of decision or sign a transcript of the oral decision in any case covered by subsection (a), the appellant may file with the appellate clerk a notice that the decision has not been filed in compliance with subsection (a). . . . The appellate clerk shall promptly notify the trial judge of the filing of the appeal and the notice. The trial court shall thereafter comply with subsection (a)."

[3] The plaintiff's statement of the issues frames his claims as follows: "Did the trial court err in finding no liability against the defendants for contamination on the plaintiff's property when the defendants accepted responsibility for the pollution, which [the Department of Energy and Environmental Protection] concluded originated on the defendants' property, when no expert offered an opinion based on reasonable probability that there was a secondary source and no evidence established what the secondary source was? . . . Did the trial court err in finding no liability against the defendants when the existence of a secondary source does not relieve the defendants of liability and when the defendants are the primary source of the contamination of the plaintiff's property? . . . Did the trial court err in considering the existence of a secondary source of contamination under [the Connecticut Environmental Policy Act, General Statutes § 22a-14 et seq.] and common-law claims of trespass and nuisance when no apportionment claim was brought by the defendants?"

conclude that the record before us simply is inadequate to support either of these arguments and to conclude otherwise would require us to engage in conjecture that our appellate courts consistently have eschewed in conducting appellate review of a judgment rendered following a trial to the court.

In order to review a claim of error, it is axiomatic that this court must have an adequate record, and it is the responsibility of the party seeking to overturn a decision to provide that record on appeal. See *Breen* v. *Judge*, 124 Conn. App. 147, 160–61, 4 A.3d 326 (2010). "It is well established that [a]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification." Id., 161. "This court will neither speculate with regard to the rationale underlying the court's decision nor, in the absence of a record that demonstrates that error exists, presume that the court acted erroneously. . . . It is well settled that [we] do not presume error; *the trial court's ruling is entitled to the reasonable presumption that it is correct unless the party challenging the ruling has satisfied its burden* [*of*] *demonstrating the contrary*. . . . [If] the record can be read to support [a] court's conclusion that the plaintiff failed to meet his burden, the plaintiff has failed to demonstrate that the court erred." (Citations omitted; emphasis added; internal quotation marks omitted.) *White* v. *Latimer Point Condominium Assn., Inc.*, supra, 191 Conn. App. 780–81. In other words, we must "read an ambiguous record, in the absence of a motion for articulation, to support rather than to undermine the judgment." (Internal quotation marks omitted.) *Abington Ltd. Partnership* v. *Heublein*, 257 Conn. 570, 586 n. 29, 778 A.2d 885 (2001).

I first consider whether the court's use of the term "secondary source" *necessarily* reflects that the court's legal analysis was flawed. I am unconvinced.

It is undisputed that the plaintiff had the burden to prove that some or all of the pollution beneath his basement was caused by the defendants. The court appears to have explicitly concluded that "the plaintiff has failed to prove the allegations that the defendant caused the pollution beneath his house." The court, however, muddied the waters by stating that a "secondary source exists beneath the basement property owned by the plaintiff. . . ."

The court, however, never defined the term "secondary source." As the plaintiff indicates in his appellate brief, the "only definition of 'secondary source' was provided by [Burgess], which he defined as 'an *additional* source other than what was identified on the [defendants'] parsonage property."[4] (Emphasis added.) The court does not attempt to place its use of the term into any particular legal context by citing to or discussing any case law or legal doctrine involving secondary source contamination. The court also does not make any references to the parties' contractual agreement, which included a provision exempting the defendants from any obligation to remediate the impact of contamination coming from "secondary sources."

Importantly, the court expressly indicated that it was not reaching any special defenses raised by the defendants because the court determined that the plaintiff had failed "to prove the allegations that the defendant has caused the pollution beneath his house." The defendants had pleaded two special defenses in response to the operative complaint. The first special defense asserted that all causes of action alleged were barred

[4] The fact that a witness defined the phrase in that manner does not necessarily mean that the court accepted it as the operative definition or intended to ascribe it that meaning when it used the term in its brief, oral decision. It is not simply the words themselves but the manner in which the court uses them, utterly disconnected from any true analysis or context, which renders the term ambiguous here.

by the relevant statutes of limitation. The second special defense pertained to the breach of contract counts and alleged that the defendants already had paid for all remediation work that was within the scope of the parties' remediation agreement. As previously stated, the parties had agreed that the defendants would not be responsible for any remediation that was attributable to a secondary source of contamination. Accordingly, the second special defense, if reached by the court, presumably would have required the court to consider reducing any damages awarded to the plaintiff if the court found that some of the contamination present beneath the plaintiff's basement was caused by both pollution from the defendants' property and from other sources. Because the court found that "the plaintiff has failed to prove the allegation that the defendant caused the pollution beneath his house," there was no need for the court to attempt to apportion the responsibility between the defendants and other potential sources of the contamination.

Read in context then, the court's reference to a secondary or other source of the contamination arguably may have been intended to reflect that there was a factual reason for finding unpersuasive the evidence presented by the plaintiff relating to whether the defendants' property was the source of the contamination. Stated another way, the court's finding of the existence of an alternative or "secondary source" of the pollution simply may have informed its broader conclusion that the plaintiff had failed to persuade the court, as he must to prevail, that the defendants caused the pollution underneath the plaintiff's basement. Ultimately, I am left to conclude that, although the court uses the term "secondary source" in discussing the origins of the contamination found on the plaintiff's property, its use of that terminology is ambiguous, at best, given the lack of any relevant legal analysis or other context.

Importantly, in his motion for articulation directed at the trial court after the appeal was filed, the plaintiff never asked the court to explain its use of the term secondary source or its legal significance, to identify the nature of the secondary source or to explain whether its use of the term meant that the plaintiff had proven that the defendants' property was the primary or principal source of the contamination. Given the obvious ambiguities in the court's brief, oral ruling, it was incumbent on the plaintiff to seek clarification of the court's decision and, if the plaintiff believed that the court's articulation was insufficient, to seek review and relief from this court.[5] See Practice Book § 66-5.

Our rules of practice provide that a party will not ordinarily forfeit review of a claim solely on the basis of a failure to request an articulation and that this court

[5] The majority suggests that no articulation was necessary because there was nothing "unclear or ambiguous in the court's brief explanation of its analysis." It would conclude that the court's use of the term secondary source can be readily discerned simply from the court having followed its secondary source reference with the statement that "*therefore* . . . the plaintiff has failed to prove the allegations that the defendant has caused the pollution beneath his house." I find this argument unpersuasive. In my view, the court may have been referring to an entirely alternative source of the contamination, fully excluding any contamination coming from the defendants' property. That interpretation finds support when read in conjunction with the court's subsequent articulation that "the existing contamination beneath the plaintiff's property was there long before [the] plaintiff purchased his property," referring to those oil discharges by previous owners or tenants of the plaintiff's property. Such a reading could be harmonized with the court's conclusion that the plaintiff had failed to meet his burden of persuasion with respect to proximate cause. Alternatively, the court's reference to another source could be read to mean a source in addition to or including the contamination from the defendants' property. That interpretation of the court's language, however, would result in a non sequitur because the mere existence of such an additional source would not "therefore" mean the plaintiff failed to show that the oil pollution from the defendants' property did not also cause some of the plaintiff's basement contamination and thus entitle the plaintiff to some recovery. I cannot resolve this conflict in favor of reversing the trial court without resorting to pure speculation or violating our duty not to presume error.

has the authority to order an articulation sua sponte if necessary. See Practice Book § 61-10 and commentary. We are unable to do so in the present case, however, because Judge Koletsky has retired, and the issue of his use of the term "secondary source" is not one that is susceptible to clarification by another judge simply from a review of the record. It would be contrary to our standards of review and, frankly, unfair to the defendants, who were the parties that prevailed after a lengthy and undoubtedly expensive trial, to view the ambiguity of the court's decision through a lens that presumes error and results in the need for a new trial.[6]

I simply am unable to fairly determine whether the court used the term "secondary source" as a reference to some other alternative source of the contamination under the plaintiff's property or, as the plaintiff would have us conclude, as an implicit finding that the defendants' property necessarily was also a source, if not the *primary* source, of the pollution, a finding, which in the plaintiff's view, would be inconsistent with the court's ultimate decision to render judgment in favor of the defendants.

Having determined that, due to the inherent and unexplained ambiguity in the court's imperfect decision, the record does not adequately support a conclusion that the court engaged in any clear legal error, I am left to

[6] The present case is readily distinguishable from our resolution of the appeal in *Zaniewski* v. *Zaniewski*, 190 Conn. App. 386, 210 A.39 620 (2019). In that case, we declined to apply a presumption of correctness to orders issued as part of a judgment of dissolution of marriage where the trial judge had failed to make factual findings underlying those orders. Unlike the present case, however, the trial judge in *Zaniewski* retired shortly after rendering the judgment on appeal, which prevented the appellant from obtaining an articulation of the court's decision. Id., 390–91. Here, the plaintiff had ample opportunity to seek and, in fact, obtained an articulation from the court. The plaintiff, however, failed to ask the court to articulate or otherwise remedy its failure to explain the factual and legal basis for its judgment, including its reference to a secondary source.

consider only whether the trial court's use of the term "secondary source" necessarily reflects a clearly erroneous factual finding. To the extent that the court used that term merely to reflect that another source, other than the defendants' property, existed for the contamination on the plaintiff's property, I cannot conclude on this record that such a finding is clearly erroneous.

"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. . . . On appeal, we will give the evidence the most favorable reasonable construction in support of the verdict to which it is entitled. . . . A factual finding may be rejected by this court only if it is clearly erroneous." (Internal quotation marks omitted.) *Coppedge* v. *Travis*, 187 Conn. App. 528, 532–33, 202 A.3d 1116 (2019). "A finding of fact is clearly erroneous when there is *no* evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Emphasis added; internal quotation marks omitted.) Id.

In considering whether a court has made a clearly erroneous factual finding, we look to the evidence that was admitted at trial. Although, in so doing, we cannot consider evidence that the trial court expressly rejected as the finder of fact, we nonetheless will presume for purposes of our review that any evidence not discussed by the court was considered by it and credited in making any factual findings under review. Here, there was considerable testimonial and documentary evidence admitted that would have supported the court's finding that the contamination on the plaintiff's property came from a source other than the defendants' property.

Among the evidence before the trial court of other potential sources of oil contamination was testimony

that a prior owner of the plaintiff's property regularly drained oil from his car onto the dirt driveway, allowing that oil to seep into the soil. In addition, a prior tenant living at the plaintiff's property testified at trial that on numerous occasions when the home's heating oil tank was being filled, oil would backflush out of the fill pipe "all over the ground." The plaintiff testified that the home inspection report that he received at the time he purchased his property stated that fuel oil had leaked from the home's fuel oil tank in the basement and that the fuel oil line was improperly laid. There was also evidence that the contractor who later installed a concrete floor in the basement to replace the existing dirt floor pumped water contaminated with oil from the basement into the plaintiff's backyard. Furthermore, there was evidence that, even after a new heating system was installed, oil leaked from that new system and had been observed pooling on the floor of the plaintiff's basement. Finally, Burgess, whose expert testimony was credited by the court, gave testimony suggesting that he believed that the oil intruding into the plaintiff's basement had an origin other than the contamination on the defendants' property.[7] When asked if he "ever

[7] Burgess gave the following testimony in response to direct examination by the defendants' counsel:

"Q. And what was it that . . . Brogie said to you in this phone conversation that led you to consider the possibility of an alternative contamination source for what was at 50 Trumbull Avenue?

"A. He indicated that he had received . . . —information from . . . Crouzet that a contractor was working in the basement and observed a purple oil flowing into the basement that looked fresh.

"Q. Did . . . Brogie share with you any other information about that purple oil—what part of the building or anything like that?

"A. I don't believe so at that time.

"Q. And what was significant to you about what . . . Brogie had said?

"A. Upon, you know, further research on that topic, it indicated that it would date the oil—the dyeing of oil took place around sometime after 1993, '94, when they started dyeing residential fuel oil. So that, that was a piece of information that sparked my interest at that time.

"Q. And why was the mention of purple oil suggestive to you of a secondary source or an alternative source of the contamination?

received data or information that suggested to [him] the existence of an alternative source of contamination at 50 Trumbull Avenue," he responded, "Yes."[8]

If I give the evidence presented the most favorable reasonable construction in support of the court's verdict as I must, I cannot conclude that the court's reference to a secondary source of contamination was a clearly erroneous factual finding. There was ample evidence in the record to support such a finding, regardless of its intended legal significance, and I am not convinced on this record that a mistake has been committed.

In summary, although the majority's construction of the court's decision, including the court's use of the term "secondary source," is plausible, I do not believe that it is the only explanation, or even the most likely, for the court's decision. Because we are compelled to resolve any inherent ambiguity in favor of upholding the court's judgment for the defendants, I would affirm the judgment of the trial court and, accordingly, respectfully dissent.

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"A. Well, as the project developed, I—and we actually conducted the remediation on number 48 and 50 on the exterior part, I didn't observe any oil or any—also—nor oil that had that dye in it during the excavation.

"Q. And so if the area that you were working in between 48 and 50 didn't have any oil with that dye in it, what was the significance to you of a report of oil with that dye in it that was seen at 50?

"A. Well, it indicated the potential for a secondary source that could have occurred on the Crouzet property based on that observation and others—other facts."

[8] The plaintiff and the majority make much of the fact that Burgess' testimony regarding the possibility of other sources of the contamination under the plaintiff's property was not stated to a reasonable degree of certainty. The defendants, however, did not have the burden of proof with respect to causation. That burden fell on the plaintiff, and the court clearly concluded that he failed to meet his burden.

# RAY BOYD *v.* COMMISSIONER OF CORRECTION (AC 42302)

Alvord, Prescott and Bright, Js.*

*Syllabus*

The petitioner, who had been convicted of the crime of murder when he was seventeen years old, sought a writ of habeas corpus, claiming that the respondent Commissioner of Correction failed to advance his parole eligibility date by applying statutory (§ 18-7a (c)) good time credit he had earned. The petitioner had been sentenced to a term of fifty years imprisonment without the possibility of parole. In 2015, the legislature amended the parole eligibility statute (§ 54-125a) to retroactively provide parole eligibility to juvenile offenders sentenced to more than ten years imprisonment. In 2016, the Board of Pardons and Paroles (board) informed the petitioner of his parole eligibility date, a calculation that did not reflect a reduction for the number of days of statutory good time credit he had earned. The habeas court granted the motion to dismiss filed by the respondent for failing to state a claim on which habeas corpus relief could be granted. On the granting of his petition for certification to appeal, the petitioner appealed to this court. *Held*:

1. Contrary to the respondent's claim, the habeas court properly determined that it had subject matter jurisdiction over the petition because the petitioner had a cognizable liberty interest in parole eligibility under § 54-125a (f): the legislature intended to vest the petitioner with a cognizable liberty interest in parole eligibility, as the language of § 54-125a (f) (1) (A) requires that the board shall consider the person for parole, and the text of § 54-125a (f) (3) reinforces the requirement that the board shall consider a person for parole by requiring that the board shall hold a hearing to determine a person's suitability for parole release when that person becomes eligible for parole; moreover, the language of § 54-125a (f) (2) provides that parole eligibility for juvenile offenders is unique, and such language evidences that the legislature intended for the petitioner to have a liberty interest in parole eligibility; furthermore, the language of § 54-125a (f) (5) serves to accentuate the mandatory nature of initial parole eligibility for individuals like the petitioner, as compared to subsequent parole eligibility, which is not guaranteed.
2. The petitioner could not prevail on his claim that the statutory good time credit he had earned reduced the sentence used to calculate his parole eligibility date, as the language of § 18-7a (c) and § 54-125a (f) is clear and unambiguous that it does not support such a claim: § 18-7a (c) contains no language providing that good time credit earned under that

* The listing of judges reflects their seniority status on this court as of the date the appeal was submitted on briefs.

subsection operates to reduce a person's parole eligibility date, and there is no language to suggest that the legislature intended that a person's sentence, after it has been reduced by the application of good time credit, should serve as the sentence that is used to calculate their parole eligibility date under § 54-125a (f); moreover, there are no references to § 18-7a (c) in § 54-125a, and such omission implies that the legislature did not intend for the term "sentence," as used in § 54-125a (f) (1) (A), to be a person's sentence as reduced by the statutory good time credit they may have earned under § 18-7a (c), and the phrases "definite sentence" and "total effective sentence" in § 54-125a (f) (1) refer to the maximum term of imprisonment imposed by the sentencing court; furthermore, in § 54-125a (a) and (d) and in a parole eligibility statute (§ 54-125) for prisoners serving indeterminate sentences, the legislature expressly stated whether credit applied to shorten a person's sentence before that sentence was used to calculate their parole eligibility date, and, because the legislature did not include any such language in § 54-125a (f), it did not intend for statutory good time credit earned by a person under § 18-7a (c) to reduce the sentence that would serve as the basis for calculating his parole eligibility date.

3. The petitioner could not prevail on his claim that the statutory good time credit he had earned under § 18-7a (c) was not applied properly in violation of his right to due process; the petitioner was not entitled to have the statutory good time credit he had earned under § 18-7a (c) applied to reduce the sentence from which his parole eligibility date will be calculated, and, because he did not have a liberty interest in his earned statutory good time credit advancing his parole eligibility date, he was not being deprived of a liberty interest and, thus, was not being deprived of due process.

Submitted on briefs April 17—officially released August 18, 2020

*Procedural History*

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland where the court, *Kwak, J.*, granted the respondent's motion to dismiss; judgment dismissing the petition, from which, the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

*Michael W. Brown*, assigned counsel, filed a brief for the appellant (petitioner).

*Steven R. Strom*, assistant attorney general, and *William Tong*, attorney general, filed a brief for the appellee (respondent).

*Opinion*

ALVORD, J. The petitioner, Ray Boyd, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus, which challenged the failure of the respondent, the Commissioner of Correction, to advance the petitioner's parole eligibility date by applying statutory good time credit he has earned. On appeal, the petitioner claims that the court improperly dismissed his petition. We disagree and affirm the judgment of the court.

The following procedural and statutory history is relevant to this appeal. On September 30, 1992, a jury found the petitioner guilty of a murder that he committed on September 23, 1989, when he was seventeen years old, in violation of General Statutes (Rev. to 1989) § 53a-54a. See *State* v. *Boyd*, 36 Conn. App. 516, 518–19, 651 A.2d 1313 (*Boyd I*), cert. denied, 232 Conn. 912, 654 A.2d 356, cert. denied, 516 U.S. 828, 116 S. Ct. 98, 133 L. Ed. 2d 53 (1995); see also *State* v. *Boyd*, 323 Conn. 816, 818, 151 A.3d 355 (2016) (*Boyd II*). On November 20, 1992, the court sentenced the petitioner to a term of fifty years imprisonment without the possibility of parole. *Boyd II*, supra, 818; see also General Statutes § 54-125a (b) (1).[1] On appeal, this court affirmed the trial court's judgment of conviction. *Boyd I*, supra, 525.

In 2015, the legislature amended § 54-125a by, inter alia, adding subsection (f); see Public Acts 2015, No. 15-84, § 1; which retroactively provided parole eligibility to juvenile offenders sentenced to more than ten years imprisonment. As a result of the 2015 amendment, the petitioner will become parole eligible after serving 60 percent of his fifty year sentence. See General Statutes

[1] General Statutes § 54-125a (b) (1) provides in relevant part: "No person convicted of any of the following offenses, which was committed on or after July 1, 1981, shall be eligible for parole under subsection (a) of this section: . . . (E) murder, as provided in section 53a-54a . . . ."

§ 54-125a (f) (1) (A).[2] In a letter dated March 29, 2016, the Board of Pardons and Paroles (board) informed the petitioner that his parole eligibility date is September 13, 2022. In arriving at the petitioner's parole eligibility date, the board subtracted sixty-seven days of presentence confinement credit earned by the petitioner from the number of days in his fifty year sentence, and then multiplied that difference by 60 percent in accordance with § 54-125a (f) (1) (A). The board's calculation did not reduce the petitioner's fifty year sentence by the number of days of statutory good time credit he had earned pursuant to General Statutes § 18-7a (c)[3] up to that point in time before the sentence was multiplied by 60 percent.

On January 16, 2018, the self-represented petitioner filed a petition for a writ of habeas corpus challenging

[2] General Statutes § 54-125a (f) provides in relevant part: "(1) Notwithstanding the provisions of subsections (a) to (e), inclusive, of this section, a person convicted of one or more crimes committed while such person was under eighteen years of age, who is incarcerated on or after October 1, 2015, and who received a definite sentence or total effective sentence of more than ten years for such crime or crimes prior to, on or after October 1, 2015, may be allowed to go at large on parole in the discretion of the panel of the Board of Pardons and Paroles for the institution in which such person is confined, provided (A) if such person is serving a sentence of fifty years or less, such person shall be eligible for parole after serving sixty per cent of the sentence or twelve years, whichever is greater . . . ."

[3] General Statutes § 18-7a (c) provides: "Any person sentenced to a term of imprisonment for an offense committed on or after July 1, 1983, may, while held in default of bond or while serving such sentence, by good conduct and obedience to the rules which have been established for the service of his sentence, earn a reduction of his sentence as such sentence is served in the amount of ten days for each month served and pro rata for a part of a month served of a sentence up to five years, and twelve days for each month served and pro rata for a part of a month served for the sixth and each subsequent year of a sentence which is more than five years. Misconduct or refusal to obey the rules which have been established for the service of his sentence shall subject the prisoner to the loss of all or any portion of such reduction by the commissioner or his designee. In the event a prisoner has not yet earned sufficient good time to satisfy the good time loss, such lost good time shall be deducted from any good time earned in the future by such prisoner."

the board's calculation of his parole eligibility date.[4] Specifically, the petitioner made two claims. First, he alleged that the board misinterpreted § 18-7a (c) when the board failed to apply the statutory good time credit he had earned to his sentence from which his parole eligibility date is calculated under § 54-125a (f) (1) (A). Second, the petitioner claimed that his right to due process was violated by the board's misapplication of the statutory good time credit he had earned.

On January 24, 2018, the habeas court, *Westbrook*, *J.*, ordered that the petition be "docket[ed]," and it scheduled a hearing in which the petitioner and the respondent were ordered to appear to address questions posed by the court.[5] On March 5, 2018, the respondent filed a motion to dismiss the petition pursuant to Practice Book § 23-29 and a memorandum of law in support thereof. According to the respondent, the petition was subject to dismissal due to a lack of subject matter jurisdiction, a "lack of standing, lack of any injury, failure to state a cognizable interest under any legal theory, and under the political question doctrine." On May 4, 2018, Attorney Miller, as counsel for the petitioner, filed an opposition to the respondent's motion to dismiss. On June 6, 2018, the court, *Kwak*, *J.*, held a hearing to address the questions raised in Judge Westbrook's January 24, 2018 order and the respondent's motion to dismiss. Thereafter, on October 3, 2018, Judge Kwak issued a memorandum of decision granting the respondent's motion to dismiss under Practice Book § 23-29 (2) for failing to state a claim upon which habeas corpus relief can be granted. With respect to the petitioner's first claim, Judge Kwak concluded

[4] Attorney Temmy Ann Miller assisted with the preparation of the petition, but did not represent the petitioner at the time he filed the petition. The court later appointed Attorney Miller as counsel for the petitioner and she represented him at the court's June 6, 2018 hearing.

[5] The court's questions and the parties' responses thereto are not relevant to this appeal.

that there was no authority to support his statutory interpretation and, thus, "[t]he relief [the petitioner sought], which [was] an order from the habeas court compelling [the board] to apply [statutory good time] credits to advance the parole eligibility date established by . . . § 54-125a (f) (1) (a), cannot be granted." With respect to the petitioner's second claim, Judge Kwak concluded that that claim "is not a cognizable due process claim and fails to state a claim for which a habeas court can grant relief." On October 22, 2018, Judge Kwak granted the petitioner's petition for certification to appeal from the October 3, 2018 judgment of dismissal. This appeal followed.

I

As a preliminary matter, the respondent argues that the petitioner's claims lack the "essential predicate" of a "cognizable liberty interest." The respondent's argument that the petitioner's claims lack a "cognizable liberty interest" amounts to a challenge to the habeas court's jurisdiction. "[I]n order to invoke successfully the jurisdiction of the habeas court, a petitioner must allege an interest sufficient to give rise to habeas relief." (Internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 368, 163 A.3d 597 (2017). "When a petitioner seeks habeas relief on the basis of a purported liberty interest in parole eligibility, he is invoking a liberty interest protected by the [d]ue [p]rocess [c]lause of the [f]ourteenth amendment which may not be terminated absent appropriate due process safeguards. . . . In order . . . to qualify as a constitutionally protected liberty, [however] the interest must be one that is *assured* either by statute, judicial decree, or regulation. . . . Evaluating whether a right has vested is important for claims under the . . . [d]ue [p]rocess [c]lause of the [f]ourteenth amendment, which solely protect[s] pre-existing entitlements." (Citations

omitted; emphasis in original; internal quotation marks omitted.) Id., 370. Because the respondent argues that the habeas court lacked jurisdiction over the petition, we address this argument at the outset. See *Baker* v. *Commissioner of Correction*, 281 Conn. 241, 249, 914 A.2d 1034 (2007) ("[i]t is axiomatic that once the issue of subject matter jurisdiction is raised, it must be immediately acted upon by the court" (internal quotation marks omitted)).Our review of the habeas court's subject matter jurisdiction, a question of law, is plenary. See id., 248.

Whether the petitioner has a cognizable liberty interest in parole eligibility status under § 54-125a (f) is a question of statutory interpretation. "The interpretation and application of a statute . . . involves a question of law over which our review is plenary. . . . 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 . . . [we] consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationships, 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." (Internal quotation marks omitted.) *Fernandez* v. *Commissioner of Correction*, 193 Conn. App. 746, 759, 220 A.3d 216, cert. denied, 333 Conn. 946, 219 A.3d 376 (2019); see also General Statutes § 1-2z. In interpreting § 54-125a, we do not write on a blank slate. In two prior cases, our Supreme Court has interpreted the text of § 54-125a to determine whether it

provides a petitioner with a liberty interest in parole eligibility. See *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 357; *Baker* v. *Commissioner of Correction*, supra, 281 Conn. 241. Because our interpretation of § 54-125a (f) is informed by our Supreme Court's analysis in *Baker* and *Perez*, we preface our discussion with a synopsis of each case.

In *Baker*, the petitioner had alleged that he improperly had been classified as a violent offender under General Statutes (Rev. to 2001) § 54-125a (b) (2) and (c), as amended by Public Acts, Spec. Sess., June, 2001, No. 01-9, § 74, thus rendering him ineligible for parole until he served 85 percent of his sentence, and that he should have been classified as a nonviolent offender under subsection (a) of that statute, which would have made him eligible for parole after he had served 50 percent of his sentence. *Baker* v. *Commissioner of Correction*, supra, 281 Conn. 245–46. Our Supreme Court held that the petitioner did not have a cognizable liberty interest in his parole eligibility status sufficient to invoke the subject matter jurisdiction of the habeas court. Id., 243, 251–52. In reaching that conclusion, the court was guided by United States Supreme Court precedent. See *Greenholtz* v. *Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 11–12, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979) (*Greenholtz*) (holding that mandatory language in state's parole statute created cognizable liberty interest); *Board of Pardons* v. *Allen*, 482 U.S. 369, 378 n.10, 107 S. Ct. 2415, 96 L. Ed. 2d 303 (1987) (same). In contrast to the statutes at issue in *Greenholtz* and *Allen*, the court in *Baker* observed that (1) the "only mandatory language in [the amended 2001 revision of § 54-125a] is that in subsection (b) *preventing* the board from considering violent offenders for parole before they have served 85 percent of their

sentences";[6] (emphasis in original) *Baker* v. *Commissioner of Correction*, supra, 255; (2) "the broad, discretionary nature of the board's authority in classifying offenders [as violent] is underscored in subsection (c) [of § 54-125a]"; id., 255–56; and (3) "the decision to grant parole [under § 54-125a] is entirely within the discretion of the board." Id., 257. In light of the permissive language of § 54-125a, the court concluded that the petitioner did not possess a cognizable liberty interest in parole eligibility. See id., 257.

In *Perez*, the petitioner had committed an offense involving the use of deadly force in November, 2010. *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 362. Subsection (b) (2) of § 54-125a in effect at that time provided that a person "shall be ineligible for parole" until he or she "served not less than eighty-five per cent of the definite sentence imposed." General Statutes (Rev. to 2009) § 54-125a (b) (2). Subsection (e) in effect at that time stated that once a person had served 85 percent of his or her definite or aggregate sentence, the board "shall hold a hearing to determine the suitability for parole release . . . ." General Statutes (Rev. to 2009) § 54-125a (e). In *Perez*, in July, 2011, while the petitioner's criminal case was pending before the trial court; see *Perez* v. *Commissioner of Correction*, supra, 363; General Statutes § 18-98e became

[6] Subsequent to the petitioner in *Baker* having filed his petition for a writ of habeas corpus on September 13, 2002; *Baker* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-02-0003742; the legislature amended § 54-125a to add new subsections (d) and (e). Public Acts 2004, No. 04-234, § 3. The legislature's enactment of new subsection (d) represented the first time it "explicitly required that the board conduct parole suitability hearings . . . for inmates not deemed violent offenders under § 54-125a (b) who may be eligible for parole under § 54-125a (a) after serving 50 percent of their sentences . . . ." *Baker* v. *Commissioner of Correction*, supra, 281 Conn. 256 n.12. Subsection (d), however, required the board to hold a hearing after an inmate served 75 percent of his sentence, not after he served 50 percent of his sentence. Id. Subsection (e) required the board to hold a parole hearing for inmates deemed to be violent offenders under subsection (b) who completed 85 percent of their sentences. Id.

effective, vesting the Commissioner of Correction with discretion to award, and revoke, risk reduction credit toward the sentence of an inmate. Subsection (b) (2) also was amended to provide that a person "shall be ineligible for parole" until he or she has "served not less than eighty-five per cent of the definite sentence imposed *less any risk reduction credit earned under the provisions of section 18-98e*." (Emphasis added.) See Public Acts 2011, No. 11-51, § 25, codified at General Statutes (Supp. 2012) § 54-125a (b) (2). Subsection (e) similarly was amended to reflect that earned risk reduction credit advanced a person's parole eligibility date. See Public Acts 2011, No. 11-51, § 25, codified at General Statutes (Supp. 2012) § 54-125a (e).

In May, 2013, the petitioner in *Perez* received a total effective sentence of fifteen years imprisonment. *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 364. The legislature again amended § 54-125a, effective July 1, 2013, to eliminate language from subsections (b) (2) and (e) that applied risk reduction credit to advance a person's parole eligibility date. See Public Acts 2013, No. 13-3, § 59, codified at General Statutes (Supp. 2014) § 54-125a (b) (2) and (e). Language requiring that the board "shall" hold a parole hearing after a person served 85 percent of his definite or aggregate sentences was also amended to state that the board "may" hold such a hearing, but "[i]f a hearing is not held, the board shall document the specific reasons for not holding a hearing and provide such reasons to such person. . . ." See Public Acts 2013, No. 13-247, § 376, codified at General Statutes (Supp. 2014) § 54-125a (e).

The petitioner in *Perez* then filed a writ of habeas corpus challenging the commissioner's application of the 2013 amendments to the calculation of his parole eligibility date and his right to a parole hearing as a violation of, inter alia, his right to due process under

the federal and state constitutions. *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 365–66. Despite mandatory language under the July, 2011 amendments that the board "shall" hold a parole hearing after a person served "eighty-five per cent of the definite sentence imposed less any risk reduction credit earned"; General Statutes (Supp. 2012) § 54-125a (b) (2); language which was not present in *Baker*; see footnote 6 of this opinion; our Supreme Court in *Perez* determined that the petitioner had no cognizable liberty interest in parole eligibility. The court stated that "neither the substantive (parole eligibility calculation) nor the procedural (hearing) changes under the 2013 amendments altered the fundamental fact that the determination whether to grant an inmate parole is entirely at the discretion of the board. It follows that if an inmate has no vested liberty interest in the *granting* of parole, then the *timing* of when the board could, in its discretion, grant parole does not rise to the level of a vested liberty interest either." (Emphasis in original.) *Perez* v. *Commissioner of Correction*, supra, 371. According to the court, the lack of a vested liberty interest was "further compounded" by the fact that risk reduction credit is awarded, and may be revoked, at any time for good cause in the discretion of the Commissioner of Correction. Id., 372. As it had in *Baker*, the court in *Perez* concluded that the petitioner's claims lacked a cognizable liberty interest in parole eligibility and, thus, were insufficient to invoke the habeas court's jurisdiction. See id., 374.

Informed by our review of *Baker* and *Perez*, in order to determine whether the petitioner has a cognizable liberty interest in parole eligibility, we turn now to our interpretation of § 54-125a (f). As set forth in the following paragraphs, we observe meaningful textual differences between the subsections of § 54-125a that were

at issue in *Baker* and *Perez* and subsection (f) of § 54-125a. As such, we conclude that the legislature intended to vest the petitioner with a cognizable liberty interest in parole eligibility.

First, and significantly, § 54-125a (f) (1) (A) states in relevant part that "if such person is serving a sentence of fifty years or less, such person *shall be eligible for parole* after serving sixty per cent of the sentence or twelve years, whichever is greater . . . ." (Emphasis added.) By contrast, subsection (b) (2), which applied to the petitioner in *Baker*, stated that he "*shall be ineligible* for parole" until he served 85 percent of his sentence. (Emphasis added.) General Statutes (Rev. to 2001) § 54-125a (b) (2), as amended by Public Acts, Spec. Sess., June, 2001, No. 01-9, § 74; *Baker* v. *Commissioner of Correction*, supra, 255. Subsection (b) (2) likewise applied to the petitioner in *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 362. The language employed in § 54-125a (f) (1) (A) stands in marked contrast to that of § 54-125a (b) (2). The language of § 54-125a (f) (1) (A) does not contain mandatory language *preventing* the board from considering a person for parole until they have served a percentage of their sentence; see *Baker* v. *Commissioner of Correction*, supra, 255; but, rather, requires that the board *shall consider* the person for parole. The United States Supreme Court has recognized that such mandatory language gives "rise to [a] constitutionally protected liberty [interest] . . . ." Id., 257; see also *Greenholtz*, supra, 442 U.S. 11–12; *Board of Pardons* v. *Allen*, supra, 482 U.S. 378 n.10.

Second, the text of § 54-125a (f) (3) reinforces the requirement of subsection (f) (1), that the board shall consider a person for parole, by requiring that "[w]henever a person becomes eligible for parole pursuant to this subsection, the board *shall* hold a hearing to determine such person's suitability for parole release. . . ."

(Emphasis added.) In *Baker*, the court noted that "[t]here is no statutory requirement that the [board] actually consider the eligibility of any inmate for parole, the statute does not vest an inmate with the right to demand parole, and there is no statutory provision [that] even permits an inmate to apply for parole." (Internal quotation marks omitted.) *Baker* v. *Commissioner of Correction*, supra, 281 Conn. 257; see also *Perez* v. *Commissioner of Correction*, 326 Conn. 373–74. By contrast, under § 54-125a (f) (3), there is a mandatory requirement that the board "actually consider the eligibility of [the petitioner] for parole . . . ." See *Baker* v. *Commissioner of Correction*, supra, 257. Moreover, the petitioner need not demand or apply for parole because, under subsection (f) (3), the board is required to hold a hearing "[w]henever a person becomes eligible for parole release," and the petitioner in the present case will become eligible for parole release after serving 60 percent of his fifty year sentence under § 54-125a (f) (1) (A).

The legislature's emphasis on individuals like the petitioner receiving parole consideration is further underscored by a comparison of the language of § 54-125a (f) (3) with the current language of § 54-125a (d) and (e), both of which provide that the board "*may* hold a hearing to determine the suitability for parole release of any person . . . ." (Emphasis added.) Moreover, although § 54-125a (d) and (e) excuse the board from holding a parole hearing so long as the board "document[s] the specific reasons for not holding a hearing and provide[s] such reasons to such person," § 54-125a (f) (4) contains no such language. This discrepancy reveals the significance the legislature attached to parole consideration for individuals like the petitioner, such that the legislature requires that those persons receive their parole consideration by way of a guaranteed hearing. The importance of such parole consideration for individuals like the petitioner to the legislature

is further reflected in the fact that, at their parole hearings, the court must assign counsel to any indigent individuals pursuant to § 54-125a (f) (3), an entitlement that is not extended to individuals who may be considered for parole under any other subsection of § 54-125a.

Third, subsection (f) (2) of § 54-125a provides that "[t]he board shall apply the parole eligibility rules of this subsection only with respect to the sentence for a crime or crimes committed while a person was under eighteen years of age. Any portion of a sentence that is based on a crime or crimes committed while a person was eighteen years of age or older shall be subject to the applicable parole eligibility, suitability and release rules set forth in subsections (a) to (e), inclusive, of this section." The text of subsection (f) (2) explicitly distinguishes parole eligibility under subsection (f) (1) from other subsections of § 54-125a that govern parole eligibility, including subsection (b) (2), which was the subject of interpretation in *Baker* and *Perez*. This language, thus, provides that parole eligibility for juvenile offenders is unique. Particularly when read in conjunction with subsection (f) (1), which states that a "person shall be eligible for parole," the language of subsection (f) (2) leads us to conclude that the legislature intended for the petitioner to have a liberty interest in parole eligibility. Cf. *Baker* v. *Commissioner of Correction*, supra, 281 Conn. 255 ("the only mandatory language in these provisions is that in subsection (b) *preventing* the board from considering violent offenders for parole before they have served 85 percent of their sentences" (emphasis in original)).

Fourth, and finally, subsection (f) (5) states that when the board denies a person parole following a hearing, the board "may reassess such person's suitability for a new parole hearing at a later date to be determined at the discretion of the board, but not earlier than two years after the date of its decision." General Statutes

§ 54-125a (f) (5). This language serves to accentuate the mandatory nature of initial parole eligibility for individuals like the petitioner, as compared to subsequent parole eligibility, which is not guaranteed.

The respondent notes that § 54-125a (f) (4) vests the board with discretion over whether to grant a person parole. In *Baker* and *Perez*, the board's discretion over whether to grant a person parole, in part, justified the court's conclusion that the petitioners in those cases had no cognizable liberty interest in parole eligibility. See *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 371; *Baker* v. *Commissioner of Correction*, supra, 281 Conn. 257. There is, however, a distinction between parole eligibility and parole suitability. Under § 54-125a (f), a person's suitability to be released on parole is a decision that is left to the discretion of the board, but not their parole eligibility. Compare General Statutes § 54-125a (f) (3) ("the board *shall* hold a hearing to determine such person's *suitability* for parole release" (emphasis added)), with General Statutes § 54-125a (f) (4) ("the board *may* allow such person to go at large on parole" (emphasis added)). For all of the foregoing reasons, we conclude that the text of § 54-125a (f) meaningfully differs from the subsections of § 54-125a discussed in *Baker* and *Perez*, and clearly and unambiguously provides the petitioner with a vested right in parole eligibility.[7]

[7] We further note that our Supreme Court has held that parole eligibility for juvenile offenders under § 54-125a (f) negates a claim of an illegal sentence of life imprisonment, or its equivalent, without parole under *Miller* v. *Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), *State* v. *Riley*, 315 Conn. 637, 110 A.3d 1205 (2015), cert. denied, U.S. , 136 S. Ct. 1361, 194 L. Ed. 2d 376 (2016), and *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, U.S. , 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016). See *State* v. *McCleese*, 333 Conn. 378, 387, 215 A.3d 1154 (2019) ("parole eligibility under [§ 54-125a (f)] is an adequate remedy for a *Miller* violation under our state constitution just as it is under the federal constitution"); see also *Casiano* v. *Commissioner of Correction*, supra, 79 (holding that "the procedures set forth in *Miller* must be followed when considering whether to sentence a juvenile

Accordingly, we conclude that the habeas court properly determined that it had subject matter jurisdiction over the petition because the petitioner has a cognizable liberty interest in parole eligibility under § 54-125a (f). Having concluded that the habeas court had subject matter jurisdiction over the petition, we next consider the claims made on appeal by the petitioner.

II

On appeal, the petitioner claims that the court improperly dismissed his petition because the court had incorrectly concluded that (1) "there [is] no statutory basis for [his] claims," and (2) he had "not adequately alleged a due process violation based upon the respondent's failure to appropriately apply [his] earned [statutory good time credit] to [his] parole eligibility date." "[W]hether a habeas court properly dismissed a petition pursuant to Practice Book § 23-29 (2), on the ground that it fails to state a claim upon which habeas corpus relief can be granted, presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 368. We will discuss each of the petitioner's claims seriatim.[8]

offender to fifty years imprisonment without parole"). Indeed, our Supreme Court in *McCleese* stated, "[t]o comport with federal constitutional requirements, the legislature passed No. 15-84 of the 2015 Public Acts [codified at General Statutes § 54-125a (f)]." *State* v. *McCleese*, supra, 383.

[8] The petitioner argues that the court improperly granted the respondent's motion to dismiss on a basis not raised by the respondent's motion and, as a result, he was deprived of his right to notice and an opportunity to be heard. In his motion to dismiss, the respondent asserted that "[t]here is *no* statutory basis for [the petitioner's] claim, as he has not lost or forfeited any statutory good time . . . ." (Emphasis in original.) In his memorandum in support of his motion to dismiss, the respondent argued that "[t]here is no authority either in statute or in case law to support the petitioner's arguments, that he is entitled to [statutory good time credit] to reduce parole eligibility." If, as the respondent asserted before the habeas court, the petitioner's claims lack a statutory basis, the court could not grant him the relief he requested in his petition. Furthermore, at the June 6, 2018 hearing before the court, the respondent argued that the petition could be dismissed under Practice Book § 23-29 (2), and the petitioner responded to

A

The petitioner first claims that the court improperly dismissed his petition following its incorrect conclusion that his statutory construction claim failed to state a claim upon which habeas corpus relief can be granted. The petitioner argues that, "[i]f [statutory good time credit earned under § 18-7a (c)] does serve to actually reduce [his] sentence, then the plain language of . . . § 54-125a (f) indicates that the 'sentence' that [he] is serving for the purposes of those calculations is the [statutory good time credit] reduced new sentence. . . . Stated in another way, the petitioner's position is that [statutory good time credit] serves to change [his] sentence before ever looking to the parole statute."[9] We disagree.

The petitioner's claim requires us to interpret §§ 18-7a (c) and 54-125a (f). The principles governing our interpretation of statutes are as previously set forth in part I of this opinion. See also *Fernandez* v. *Commissioner of Correction*, supra, 193 Conn. App. 759. Section 18-7a (c) provides in relevant part that "[a]ny person

that argument. Accordingly, we are unpersuaded by the petitioner's argument.

[9] In its memorandum of decision, the court stated that "[t]he petitioner's assertion that [the board] must apply [statutory good time] credits to his parole eligibility date . . . would mean that if he earned ten years of . . . credits, then he would be parole eligible not thirty years [i.e., 60 percent] into his fifty year sentence, but instead at twenty years into his fifty year sentence." The petitioner argues that the court misinterpreted his claim, stating that, under his claim, he "would request that the habeas court order that [the board] calculate his parole eligibility date of 60 [percent] of [forty] years ([fifty] years minus the [ten] years of [statutory good time credit] for a [forty] year '[statutory good time credit] modified' sentence). This would require a parole hearing after [twenty-four] years of incarceration." The respondent argues that the claim the petitioner makes on appeal differs from the one he advanced before the habeas court. [We need not reach the respondent's argument that the petitioner's claim on appeal differs from the one he made before the habeas court because we conclude in this part of the opinion that, regardless of which calculation is used, his claim on appeal is unavailing.

sentenced to a term of imprisonment for an offense committed on or after July 1, 1983, may, while held in default of bond or while serving such sentence, by good conduct and obedience to the rules which have been established for the service of his sentence, earn a reduction of his sentence as such sentence is served . . . .'' Section 18-7a (c) further provides the maximum rate at which a person may earn good time credit, that such credit may be revoked by the respondent for ''[m]isconduct or refusal to obey the rules,'' and that good time may even be ''deducted from any good time earned in the future'' if a person ''has not yet earned sufficient good time to satisfy the good time loss . . . .'' The language of § 18-7a (c) is clear and unambiguous that the phrases ''his sentence'' and ''such sentence'' are references to the sentence of ''a term of imprisonment for an offense committed on or after July 1, 1983,'' that was imposed by the sentencing court. Accordingly, any good time credit earned by a person will apply to reduce the expiration date of the term of imprisonment imposed at sentencing. See *Seno* v. *Commissioner of Correction*, 219 Conn. 269, 281, 593 A.2d 111 (1991) (''[i]t is clear . . . that [the phrases 'of his sentence' and 'of a sentence'] as used in § 18-7a [(a) through (c)] refer to the sentence as imposed by the court, reduced by the applicable good time''). Section 18-7a (c) contains no language providing that good time credit earned under the subsection operates to reduce a person's parole eligibility date. Moreover, we find no language in § 18-7a (c) to suggest that the legislature intended that a person's sentence, after it has been reduced by the application of good time credit, should serve as the sentence that is used to calculate his parole eligibility date under § 54-125a (f). The petitioner fails to direct us to any such language.

The text of § 54-125a (f) also does not provide support for the petitioner's argument. The relevant portion of

§ 54-125a (f) provides: "(1) Notwithstanding the provisions of subsections (a) to (e), inclusive, of this section, a person convicted of one or more crimes committed while such person was under eighteen years of age, who is incarcerated on or after October 1, 2015, and who received a definite sentence or total effective sentence of more than ten years for such crime or crimes prior to, on or after October 1, 2015, may be allowed to go at large on parole in the discretion of the panel of the Board of Pardons and Paroles for the institution in which such person is confined, provided (A) if such person is serving a sentence of fifty years or less, such person shall be eligible for parole after serving sixty per cent of the sentence or twelve years, whichever is greater . . . ." There are no references to § 18-7a (c) in § 54-125a (f), or elsewhere in § 54-125a for that matter. This omission implies that the legislature did not intend for the term "sentence," as that term is used in § 54-125a (f) (1) (A), to be a person's sentence as reduced by the statutory good time credit he may have earned under § 18-7a (c).

Indeed, the legislature clearly expressed what it intended the term "sentence" to mean in § 54-125a (f) (1) (A). Within subsection (f) (1), in which the legislature set forth the necessary qualifications for parole eligibility, we find the first reference to the term "sentence." Subsection (f) (1) applies to persons who were convicted of one or more crimes committed while they were under eighteen years of age, have been incarcerated on or after October 1, 2015, and "received a *definite sentence or total effective sentence of more than ten years* for such crime or crimes . . . ." (Emphasis added.) The phrases "definite sentence" and "total effective sentence" refer to the maximum term of imprisonment imposed by the sentencing court. See General Statutes § 53a-35a ("[f]or any felony committed on or after July 1, 1981, the sentence of imprisonment

shall be a definite sentence and . . . the term shall be fixed by the court as follows"); *Holliday* v. *Commissioner of Correction*, 184 Conn. App. 228, 232 n.3, 194 A.3d 867 (2018) ("[d]efinite sentence is the flat maximum to which a defendant is sentenced" (internal quotation marks omitted)), cert. granted on other grounds, 335 Conn. 901, 225 A.3d 960 (2020). All subsequent references to the term "sentence" in § 54-125a (f) (1) must be read consistently with the use of the phrases "definite sentence" and "total effective sentence," and, thus, are references to the maximum term of imprisonment imposed by the sentencing court. Therefore, within the language of subsection (f) (1) (A) of § 54-125a, which is applicable to a person "serving a sentence of fifty years or less," the term "sentence" should be understood as the definite sentence or total effective sentence that was imposed by the sentencing court, not yet reduced by any good time credit earned by a person under § 18-7a (c).

The petitioner argues that, "[c]ontrary to the respondent's view (and the conclusion of the habeas court), if the legislature had intended to exclude [statutory good time credit] from the juvenile parole procedures, it would have expressly said so." The petitioner has it exactly backward. Because "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence"; (internal quotation marks omitted) *Baker* v. *Commissioner of Correction*, supra, 281 Conn. 253; had the legislature intended *to apply* statutory good time credit to reduce a person's parole eligibility date under § 54-125a (f), it would have stated that intention explicitly. See *Stratford* v. *Jacobelli*, 317 Conn. 863, 875 n.12, 120 A.3d 500 (2015) ("legislature knows how to convey its intent expressly" (internal quotation marks omitted)).

The flaw in the petitioner's argument becomes apparent when the language of § 54-125a (f) (1) (A) is contrasted with the language of subsections (a) and (d)

of § 54-125a and with General Statutes § 54-125. Both subsections (a) and (d) of § 54-125a expressly state that before a person may be released on, or considered for release on, parole, that person must serve a specified percentage of their sentence "*less any risk reduction credit earned under the provisions of section 18-98e*." (Emphasis added.); see also *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 365 (noting that legislature amended § 54-125a (b) (2) and (e) to eliminate application of risk reduction credit advancing person's parole eligibility date by deleting phrase "less any risk reduction credit earned under the provisions of section 18-98e"). The text of § 54-125 states in relevant part: "Any person confined for an indeterminate sentence, after having been in confinement under such sentence for not less than the minimum term, or, if sentenced for life, after having been in confinement under such sentence for not less than the minimum term imposed by the court, *less such time as may have been earned under the provisions of section 18-7*, may be allowed to go at large on parole . . . ." (Emphasis added.)

In §§ 54-125a (a) and (d) and 54-125, the legislature expressly stated whether credit applied to shorten a person's sentence before that sentence was used to calculate his parole eligibility date. Because the legislature did not include any such language in § 54-125a (f), we conclude that the legislature did not intend for statutory good time credit earned by a person under § 18-7a (c) to reduce his sentence that will serve as the basis for calculating his parole eligibility date. See *Aspetuck Country Club, Inc.* v. *Weston*, 292 Conn. 817, 829, 975 A.2d 1241 (2009) ("statutes should be construed, where possible, so as to create a rational, coherent and consistent body of law" (internal quotation marks omitted)).

The petitioner argues that the court overlooked "that pursuant to [General Statutes] §§ 18-7 and 18-7a (c),

[statutory good time credit] always reduces parole eligibility dates as it diminishes the sentence'' and that ''[n]othing in § 54-125a (f) (1) requires the respondent to deviate from statutorily-mandated historical practice of calculating parole eligibility dates based on [statutory good time credit].'' In making this argument, the petitioner relies on the following language in the first footnote of *Seno* v. *Commissioner of Correction*, supra, 219 Conn. 269 n.1: ''[G]ood time is a commutation of a sentence, affecting an inmate's *parole* and discharge *dates*, thereby serving an important rehabilitative function by allowing an inmate the opportunity to earn an earlier release for himself. See *McGinnis* v. *Royster*, 410 U.S. 263, 271, 93 S. Ct. 1055, 35 L. Ed. 2d 282 [1973]. *Holmquist* v. *Manson*, 168 Conn. 389, 394, 362 A.2d 971 (1975).'' (Emphasis added; internal quotation marks omitted.) The court provided this definition of ''good time'' as it was setting out the ''sole issue in [the] appeal,'' which was ''whether a person sentenced to a term of imprisonment exceeding five years must be incarcerated for five calendar years in order to earn statutory good time at the rate of twelve days per month pursuant to . . . § 18-7a (c).'' (Footnote omitted.) *Seno* v. *Commissioner of Correction*, supra, 269.

The court's definition of ''good time'' in *Seno* was taken from *Holmquist* v. *Manson*, supra, 168 Conn. 394, which cited *McGinnis* v. *Royster*, supra, 410 U.S. 271. The issue before the court in *Seno* concerned how much statutory good time the petitioner had earned; it did not concern his parole eligibility date. See *Seno* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. 89-551 (September 10, 1991) (''[i]n accordance with the opinion of [our] Supreme Court, *Seno* v. *Commissioner of Correction*, [supra, 219 Conn. 269] the writ herein is granted, judgment is entered for the petitioner, and the respondent is ordered to grant the petitioner an additional thirty days statutory

good time against his *total effective sentence*" (emphasis added)).

Furthermore, the language used in *Holmquist* and *McGinnis*, and cited to by the court in *Seno*, reflected statutes at issue in those cases that expressly authorized the application of good time credit to parole eligibility dates. In *Holmquist*, the issue before the court was "whether the plaintiff, who was sentenced to life imprisonment, [was] entitled to credit for presentence confinement, commonly referred to as 'jail time,' under the provisions of General Statutes §§ 18-97 and 18-98. In determining this issue, [the court] also consider[ed] §§ 54-125 and 18-7." *Holmquist* v. *Manson*, supra, 168 Conn. 390–91. The defendant, the Commissioner of Correction, in that case claimed that, under §§ 54-125 and 18-7, "an inmate serving a life sentence [was] required to serve a minimum of twenty years after the day of sentencing before he becomes eligible for parole consideration, i.e., twenty-five years under the minimum sentence, less five years maximum earned or 'good time' as provided in § 18-7," and that the plaintiff was not entitled to presentence confinement credit. Id., 392. The court disagreed with the defendant and, in so doing, distinguished "jail time" from "good time," stating that the latter "is a commutation of a sentence, affecting an inmate's parole and discharge dates . . . . See *McGinnis* v. *Royster*, [supra, 410 U.S. 271]." *Holmquist* v. *Manson*, supra, 394. The court's definition of "good time," however, was influenced by the text of what it referred to as the " 'good-time' statute," § 54-125. Id., 393. Section 54-125 expressly provided that the good time credit earned by a person under § 18-7 would be applied to reduce the "minimum term" of his indeterminate sentence, i.e., their parole eligibility date.[10] Id.,

[10] Effective at the time the plaintiff in *Holmquist* committed the crime for which he was convicted, § 54-125 stated: "Any person confined . . . for an indeterminate sentence, after having been in confinement under such sentence for not less than the minimum term, or, if sentenced for life, after having been in confinement under such sentence for not less than twenty-

391–92. In contrast, § 54-125a (f) (1) (A) does not provide that a person's sentence, from which his parole eligibility date will be calculated, may be reduced by the good time credit he have earned under § 18-7a (c).

In *McGinnis*, the United States Supreme Court ruled on an equal protection claim challenging the constitutionality of a New York statute that denied state prisoners good time credit for their presentence incarceration in county jails. *McGinnis* v. *Royster*, supra, 410 U.S. 264–65. Crucially, one of the statutes at issue in the case "authorize[d] [good time] credit *toward the minimum parole date* for good conduct and efficient and willing performance of duties assigned . . . ." (Emphasis added; internal quotation marks omitted.) Id., 271. To reiterate, § 54-125a (f) (1) (A) does not permit good time credit to be applied to reduce a person's sentence that will be used to calculate his parole eligibility date. Accordingly, the definition of statutory good time in *Seno*, although stated by the court when construing § 18-7a (c), has no relevance to the calculation of parole eligibility dates under § 54-125a (f) (1) (A). Thus, we reject the petitioner's argument.

On the basis of the foregoing, we conclude that the language of §§ 18-7a (c) and 54-125a (f) is clear and unambiguous and that it does not support the claim of the petitioner that the statutory good time credit he has earned reduces the sentence used to calculate his parole eligibility date.

B

The petitioner's second claim on appeal is that the court improperly dismissed his claim that the statutory good time credit he has earned under § 18-7a (c) is not

five years, *less such time, not exceeding a total of five years, as may have been earned under the provisions of section 18-7*, may be allowed to go at large on parole . . . ." (Emphasis added; internal quotation marks omitted.) *Holmquist* v. *Manson*, supra, 168 Conn. 391 n.3.

being applied properly to the sentence from which his parole eligibility date will be calculated, in violation of his right to due process under *Sandin* v. *Conner*, 515 U.S. 472, 483–84, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995), and *Wilkinson* v. *Austin*, 545 U.S. 209, 222–23, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005). We disagree.

"The fourteenth amendment to the United States constitution provides that the [s]tate [shall not] deprive any person of life, liberty, or property, without due process of law . . . ." (Internal quotation marks omitted.) *State* v. *Angel C.*, 245 Conn. 93, 104, 715 A.2d 652 (1998). "In order to prevail on his due process claim, the [petitioner] must prove that: (1) he has been deprived of a property [or liberty] interest cognizable under the due process clause; and (2) the deprivation of the property [or liberty] interest has occurred without due process of law. . . . States may under certain circumstances create liberty interests [that] are protected by the [d]ue [p]rocess [c]lause. . . . But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the [d]ue [p]rocess [c]lause of its own force . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." (Citations omitted; internal quotation marks omitted.) *Vandever* v. *Commissioner of Correction*, 315 Conn. 231, 241–42, 106 A.3d 266 (2014).

The petitioner argues that he possesses "a liberty interest in the correct application of the [statutory good time credit] he earned and retains" and that the "respondent's refusal to apply the [statutory good time credit] he [has] earned and still retains to calculate his parole [eligibility date] strips him of part of the value of his [statutory good time credit] . . . ." As discussed previously in part II A of this opinion, the petitioner is not entitled to have the statutory good time credit he has

earned under § 18-7a (c) applied to reduce the sentence from which his parole eligibility date will be calculated pursuant to § 54-125a (f) (1) (A). Because the petitioner does not have a liberty interest in his earned statutory good time credit advancing his parole eligibility date, he is not being deprived of a liberty interest and, thus, is not being deprived of due process. See *Vandever* v. *Commissioner of Correction*, supra, 315 Conn. 241. Accordingly, the court properly dismissed the petition for failing to state a due process claim upon which habeas corpus relief can be granted.[11]

The judgment is affirmed.

In this opinion the other judges concurred.

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## 25 GRANT STREET, LLC *v.* CITY OF BRIDGEPORT ET AL.
## (AC 42155)

Prescott, Bright and Bear, Js.*

*Syllabus*

The plaintiff sought to recover damages from the defendant city of Bridgeport, for, inter alia, negligence, in connection with a fire that destroyed its warehouse and caused substantial environmental damage to the surrounding area. The plaintiff alleged that the defendant was negligent in failing to inspect the warehouse as required by statute (§ 29-305) and

[11] As discussed in part I of this opinion, the petitioner has a cognizable liberty interest in *parole eligibility* sufficient to invoke the jurisdiction of the habeas court. The petitioner's due process claim pertains to the failure to apply good time credit to his *parole eligibility date*, which he contends is as a result of the respondent's incorrect interpretation of §§ 18-7a (c) and 54-125a (f). Because we disagree with the petitioner's interpretation of §§ 18-7a (c) and 54-125a (f), we conclude that he does not have a liberty interest under those statutes in having his parole eligibility date calculated on the basis of a sentence reduced by the statutory good time credit he has earned. Because he has no such liberty interest, he cannot state a due process claim upon which habeas corpus relief can be granted.

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

that, as a result, its fire department used water rather than foam to extinguish the fire, which caused the fire to spread, when an inspection would have revealed the presence of chemicals. After a series of amended and revised complaints, the plaintiff filed a proposed complaint in June, 2018, on the same day the defendant's motion for summary judgment was scheduled to be argued. In its proposed complaint, the plaintiff newly alleged that the defendant's failure to inspect resulted in undiscovered code violations, and that these code violations were the cause of the damages. The defendant argued that the court should not consider the proposed complaint when deciding its motion for summary judgment because it was untimely and the new theory of liability was outside the statute of limitations and did not relate back to the previous complaints. The court did not decide these issues but, instead, addressed the merits of the defendant's motion and granted the defendant's motion for summary judgment on the ground that it was entitled to statutory (§ 52-557n) governmental immunity and rendered judgment thereon, from which the plaintiff appealed to this court. *Held*:

1. This court affirmed the judgment of the trial court on the alternative ground that the plaintiff's proposed June, 2018 complaint was not properly before the trial court; the June, 2018 complaint was not the operative complaint for purposes of the defendant's motion for summary judgment because the complaint was to be in response to a request to revise but, instead, the plaintiff made substantive changes that set forth a new theory of liability and were outside the scope of the requested revisions, the plaintiff did not seek leave to amend its complaint to add this new theory of liability, and the trial court neither explicitly granted the plaintiff such leave nor indicated that it weighed the relevant considerations for determining whether to grant a plaintiff leave to amend a complaint; moreover, the plaintiff does not challenge the court's judgment to the extent it was based on its previous theory of liability but only on the basis of the new theory set forth in the June, 2018 complaint which was not properly before the court.
2. This court affirmed the judgment of the trial court on the alternative ground that, even if the June, 2018 complaint were the operative complaint, the new allegations contained therein did not relate back and, therefore, were barred by the statute of limitations; all prior iterations of the plaintiff's complaint alleged that the acts and omissions of the defendant resulted in it improperly using water rather than foam to extinguish the fire, thereby causing damage, whereas the allegations in the June, 2018 complaint alleged that the defendant's failure to inspect the warehouse led to undiscovered code violations and that those code violations caused the damages and constituted reckless disregard for health and safety, an entirely new set of facts never previously alleged that did not relate back to the prior, timely filed complaints.

Argued March 11—officially released August 18, 2020

*Procedural History*

Action to recover damages for, inter alia, negligence, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the plaintiff filed amended and revised complaints; thereafter, the action was withdrawn as to the defendant Brian Rooney et al.; subsequently, the court, *Radcliffe, J.*, granted the named defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

*Devin W. Janosov*, with whom was *Donald A. Papcsy*, for the appellant (plaintiff).

*James J. Healy*, with whom were *Barbara Curatolo* and, on the brief, *Bruce L. Levin* and *Lawrence A. Ouellette, Jr.*, associate city attorneys, for the appellee (named defendant).

*Opinion*

PRESCOTT, J. This appeal arises from an action brought by the plaintiff, 25 Grant Street, LLC, against the defendant city of Bridgeport (city),[1] following the destruction of the plaintiff's warehouse by a fire that caused substantial environmental damage to the surrounding area. The plaintiff ultimately alleged that the city was liable for the damage because it had failed to

[1] The plaintiff also named the following individuals as defendants: Brian Rooney, individually and in his capacity as the former fire chief; William Cosgrove, individually and in his capacity as the former fire marshal; Scott T. Appleby, individually and in his capacity as the Director of Emergency Management and Homeland Security; and Terron Jones, individually and in his capacity as Deputy Director of Emergency Management and Homeland Security. On November 21, 2017, however, the plaintiff withdrew the underlying action as against these defendants.

In addition, the city filed an apportionment complaint, alleging that the plaintiff's lessees, Rowayton Trading Company and JWC Roofing and Siding Company, also known as Jim Waters Corp., would be liable for a proportionate share of the plaintiff's damages if the city were found liable to the plaintiff. The apportionment defendants have not participated in this appeal.

inspect the warehouse prior to the fire, which constituted a reckless disregard for health and safety. The plaintiff appeals from the trial court's summary judgment rendered in favor of the city on the ground that it is entitled to governmental immunity pursuant to General Statutes § 52-557n (b) (8).[2] We affirm the judgment of the trial court on the alternative grounds that are discussed herein.

The record before the court, viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following facts and procedural history. The plaintiff owned property located at 25 Grant Street in Bridgeport, which "consisted of 5.92 acres improved with a 44,802 square foot one story industrial/commercial warehouse that sat toward the back of the property near Seaview Avenue." The plaintiff leased this warehouse to the Rowayton Trading Company (Rowayton) and JWC Roofing and Siding Company. Inside the warehouse were fragrance and essential oil products contained in several hundred fifty-five gallon barrels.

On the evening of September 11, 2014, "someone contacted 911 to report that a small fire had broken out . . . at the [plaintiff's] warehouse." To extinguish the fire, the fire department used only water and did not use foam. The fire eventually "consum[ed] the entire

[2] General Statutes § 52-557n (b) (8) provides in relevant part: "Notwithstanding the provisions of subsection (a) of this section, a political subdivision of the state or any employee, officer or agent acting within the scope of his employment or official duties shall not be liable for damages to person or property resulting from . . . failure to make an inspection or making an inadequate or negligent inspection of any property, other than property owned or leased by or leased to such political subdivision, to determine whether the property complies with or violates any law or contains a hazard to health or safety, *unless the political subdivision had notice of such a violation of law or such a hazard* or *unless such failure to inspect or such inadequate or negligent inspection constitutes a reckless disregard for health or safety under all the relevant circumstances* . . . ." (Emphasis added.)

warehouse; and caused the release of [at least] 1500 . . . fifty-five gallon barrels of various chemicals into the soil, air, and water surrounding the property." In total, the fire resulted in the plaintiff "sustain[ing] a total loss of [its] warehouse; loss of use of the [25 Grant Street] property; loss of rents; stigma to [the plaintiff's] business; the cost of an [Environmental Protection Agency (EPA)] cleanup; the costs of [the plaintiff's] own attempted cleanup; legal fees [and] costs; and the loss of future profits on the appreciation of its value and/or continued rental of the property."

The plaintiff commenced this action against the city on June 13, 2016. The plaintiff filed its original complaint on June 28, 2016 (original complaint), and then filed or attempted to file five amended or revised complaints thereafter. In the first count[3] of the original complaint, which was titled "negligence," the plaintiff made the following relevant allegations:

"37. Instead of applying foam to the small fire existing at the site when they first arrived, first responding members of the Bridgeport Fire Department and those manning its command structure, applied massive amounts of solid water streams [despite the city being warned against using water] . . . caus[ing] the fire to expand rapidly [and] consum[e] the entire warehouse; and [also resulted in] the release of 1500 or more fifty-five gallon barrels of various chemicals into the soil, air and water surrounding the property. . . .

"43. Defendant [William] Cosgrove, as Bridgeport fire marshal, failed to conduct an inspection of the [plaintiff's warehouse], which was required pursuant to Connecticut General Statutes § 29-305 (a) and (d) (knowledge hazardous to life and safety from fire) and such

[3] The original complaint contained four other counts. Count two of the complaint sounded in nuisance and counts three, four, and five stated that the city was obligated to indemnify the individual defendants; see footnote 1 of this opinion; for their liability pursuant to General Statutes §§ 7-101a, 7-308, and 7-465.

failure satisfies the exception for liability set forth at . . . § 52-557n (b) (8) in that the knowledge that certain chemicals present could be hazardous to life and safety from fire constitutes reckless disregard for health and safety under all relevant circumstances.

"44. Defendant [Brian] Rooney, as Bridgeport fire chief, failed to conduct an inspection of the [plaintiff's warehouse], for the purposes of 'preplanning the control of a fire [involving] any combustible material . . . that is or may become dangerous as a fire menace,' pursuant to General Statutes § 7-313e (e); and such failure satisfies the exception for liability set forth at . . . § 52-557n (b) (8) in that the knowledge that certain chemicals present could be hazardous to life and safety from [a] fire constitutes reckless disregard for health and safety under all relevant circumstances. . . .

"47. [The] defendant [was] also negligent in one or more of the following ways: (1) failure to have [the information about the warehouse's contents] immediately available so first response by fire personnel would be appropriate to [the] chemicals present; (2) inexcusable delay in ascertaining [the] proper address [of the warehouse] to obtain [the information about the warehouse's contents]; (3) inexcusable delay in obtaining [the] information [about the warehouse's contents]; (4) failure to access chemicals likely present and [the information about the warehouse's contents] from website of [Rowayton]; (5) failure to implement and utilize Computer Aided Management of Emergency Operations (CAMEO) developed by the US Department of Commerce, National Oceanic and Atmospheric Association and U.S. Environmental Protection Agency and designed to help first responders and emergency planners respond to and plan for chemical accidents, including fires involving chemicals; (6) failure to implement and utilize CAMEO Response Information Data Sheets (RIDS), a database of over 4000 chemicals and product trade names linked

to chemical-specific information on fire, explosive and health hazards, firefighting techniques, cleanup procedures and protective clothing, developed by the National Oceanic and Atmospheric Association and U.S. Environmental Protection Agency and designed to help first responders and emergency planners respond to and plan for chemical accidents, including fires involving chemicals; (7) failure to implement an Integrated Command Structure (ICS) early enough; resultant disorganization caused issues with information management that could have potentially put lives at risk; (8) failure to extinguish fire from chemicals in accordance with [prescribed] methods [contained in the information about the warehouse's contents]; (9) failure to use [prescribed] foam created seepage into Yellow Mill River and Long Island Sound (foam would have prevented or mitigated amount of chemical seepage); (10) failure to abide by [the] proscription for those media unsuitable to extinguish a fire for certain chemicals [stated in the information about the warehouse's contents]; (11) failure properly to ensure that members of the fire department, including first responders, have sufficient training in hazardous material response; (12) failure to [develop a plan] [for extinguishing a potential fire] with the [plaintiff's] tenant [who] stored and used chemicals [in the warehouse and, thus] would have identified specific concerns for the [warehouse] and opportunities to prepare effectively for those concerns, or to reduce existing risks. . . .

"50. As a direct and proximate cause of the negligence as set forth herein,

[the] plaintiff [has] incurred [various] injuries . . . ." (Internal quotation marks omitted.)

On July 29, 2016, the city, in response to the original complaint, filed a request to revise in which it requested, inter alia, that the plaintiff provide certain information

in its complaint so that the city could plead a governmental immunity defense.[4] The plaintiff did not object to the request to revise and, on September 6, 2016, filed a revised complaint (September, 2016 complaint). It did so, however, only after the city had moved for a judgment of nonsuit because the plaintiff had failed either to object to or to comply with the request to revise in a timely manner. See Practice Book § 10-37 (a).[5] In the September, 2016 complaint, the plaintiff

[4] In its request to revise the original complaint, the city requested the following: "[T]hat, [with respect to paragraph 11 of the complaint], the plaintiff . . . stat[e] specifically the authority which the plaintiff is quoting. This revision is necessary in order to determine whether the plaintiff has cited a city charter provision, ordinance, regulation, rule, policy, or any other directive. . . .

"[With respect to paragraph 18 of the complaint], that the plaintiff stat[e] the citation of the authority which mandates a protocol for firefighting, as required by Practice Book § 10-3. . . .

"[With respect to paragraph 41 of the complaint] that the plaintiff delete this paragraph in accordance with Practice Book § 10-1 fact pleading), [Practice Book §] 10-20 (contents of complaint), as this paragraph pleads only evidence. . . .

"[With respect to paragraph 47 of the complaint] that the plaintiff revise each specification of negligence by stating whether it violated a city charter provision, ordinance, regulation, rule, policy, or any other directive. . . . This revision is necessary in order to determine whether the duty allegedly breached was ministerial or discretionary and to determine whether the [city] should plead the defense of governmental immunity. . . . [This revision] is also necessary for the [city] to move to strike the complaint on the basis of governmental immunity. . . ." (Citations omitted; internal quotation marks omitted.)

[5] Practice Book § 10-37 (a) provides: "Any such request [to revise], after service upon each party as provided by Sections 10-12 through 10-17 and with proof of service endorsed thereon, shall be filed with the clerk of the court in which the action is pending, and such request shall be deemed to have been automatically granted by the judicial authority on the date of filing and shall be complied with by the party to whom it is directed within *thirty days* of the date of filing the same, unless within *thirty days* of such filing the party to whom it is directed shall file objection thereto." (Emphasis added.)

The city moved for nonsuit pursuant to Practice Book §§ 10-18, 17-19, and 17-31. Practice Book § 10-18 provides that "[p]arties failing to plead according to the rules and orders of the judicial authority may be nonsuited or defaulted, as the case may be. (See General Statutes § 52-119 and anno-

attempted to make most of the revisions that the city had requested. The substance of the plaintiff's allegations in this complaint were the same as those made in the original complaint.[6]

On September 6, 2016, the city again moved for a judgment of nonsuit against the plaintiff. In support of this motion, the city argued that the plaintiff had failed to revise adequately paragraphs 41 and 47 of its original complaint, as requested in its uncontested request to revise.[7] The plaintiff objected to this motion. On November 7, 2016, the court denied without prejudice the city's motion for nonsuit but ordered the plaintiff to comply fully with the city's uncontested request to revise within four weeks.

On December 21, 2016, more than four weeks after the court entered its November 7, 2016 order, the plaintiff filed a new revised complaint (December, 2016 complaint). The only substantive change in this complaint,

tations.)"

Practice Book § 17-19 provides that "[i]f a party fails to comply with an order of a judicial authority or a citation to appear or fails without proper excuse to appear in person or by counsel for trial, the party may be nonsuited or defaulted by the judicial authority."

Practice Book § 17-31 provides in relevant part that "[w]here either party is in default by reason of failure to comply with Sections 10-8, 10-35, 13-6 through 13-8, 13-9 through 13-11, the adverse party may file a written motion for a nonsuit or default or, where applicable, an order pursuant to Section 13-14. . . ."

[6] In paragraph 47 of the September, 2016 complaint, unlike paragraph 47 of the original complaint, the plaintiff alleged that the city's negligence represented a reckless disregard for safety. Specifically, in the September, 2016 complaint, the plaintiff alleged that, "[p]ursuant to [§] 52-557n, the [city was] negligent for failure to inspect and prepare [for] a fire at the subject property even though the hazard information was provided to them. This negligence represents a reckless disregard for safety . . . ."

[7] Paragraph 41 of the plaintiff's original complaint states: "Defendant City of Bridgeport's then head of economic development, David Kooris, estimated that the fire [in the plaintiff's warehouse] left about fifty people out of work: 'It's probably the first commercial fire in a long time that displaced companies and workers,' referring to other blazes in vacant buildings."

as compared with the allegations made in the original and September, 2016 complaints, was made to paragraph 47. In this paragraph of the December, 2016 complaint, the plaintiff reduced the number of ways in which the city was allegedly negligent from twelve to six. The plaintiff still alleged in this paragraph, however, that the city was negligent for (1) failing to inspect the warehouse, (2) failing to plan how it would extinguish a potential fire, and (3) using water to extinguish the fire, despite the fact that information was available to the city about the chemicals stored in the warehouse and that, in the event of a fire, foam should be used to extinguish it instead of water.[8]

On December 27, 2016, the city again requested that the plaintiff revise its complaint.[9] In response to the

[8] The September, 2016 complaint alleged that the city was negligent in one or more of the same twelve ways that it had alleged in paragraph 47 of the original complaint. For comparison, in paragraph 47 of the December, 2016 complaint, the plaintiff alleged that the "[d]efendant . . . [was] negligent in one or more of the following ways: (1) failure to have [the information about the warehouse's contents] immediately available in violation of department written policy, directive and standard custom; (2) failure to implement and utilize Computer Aided Management of Emergency Operations (CAMEO) developed by the U.S. Department of Commerce in violation of department written policy, directive and standard custom; (3) failure to extinguish fire from chemicals in accordance with [the prescribed] methods [stated in the information about the warehouse's contents, which was] in violation of department written policy, directives, and standard custom; (4) failure to use [prescribed] foam in violation of department written policy, directives and standard custom; (5) failure to abide by [the] proscription for those media unsuitable to extinguish a fire for certain chemicals [stated in the information about the warehouse's contents, which was] in violation of written department policies, directives and standard custom; and/or (6) failure to inspect the facility and [develop a plan] [for extinguishing a potential fire] with [Rowayton, who] stored and used chemicals [and] would have identified specific concerns for the facility . . . to prepare effectively for those concerns, or to reduce existing risks, in violation of state statute, written department policies, directives and standard custom."

[9] In its request to revise the December, 2016 complaint, the city requested the following: "[T]hat the plaintiff state the statute allegedly violated in paragraph 47 (6) [because] Practice Book § 10-3 (a) requires that '[w]henever any claim made in a complaint . . . is grounded on a statute, the statute shall be specifically identified by its number' [and] so that the [city] may

city's request to revise, the plaintiff filed a revised complaint on January 27, 2017 (January, 2017 complaint). In this version of the complaint, the plaintiff added to paragraph 47 of the January, 2017 complaint's allegations that certain acts or omissions of the city—including the city's failure to inspect the warehouse as required by . . . § 29-305 (a) and (d); its failure to use foam to extinguish the fire, even though there were chemicals inside of the warehouse; and its failure to develop a plan for extinguishing a fire—satisfied the exception to governmental immunity found in § 52-557n (b) (8) because "the knowledge that certain chemicals present could be hazardous to life and safety from [a] fire constitutes reckless disregard for health and safety under all relevant circumstances."

After the plaintiff filed its January, 2017 complaint, the city filed its answer and special defenses. The city then moved for summary judgment on August 29, 2017 (first motion for summary judgment). In that motion, the city asserted, inter alia, that it was entitled to summary judgment because "the plaintiff's claim of negligence in the first count of its [January, 2017 complaint] . . . [was] barred by the defense of governmental immunity, to which none of the exceptions apply." (Footnote omitted.)

In response, the plaintiff, on September 5, 2017, sought leave to amend its January, 2017 complaint. It accompanied its request for leave with its proposed

test the legal sufficiency of [the] allegation [made in paragraph 47 (6) of the complaint] pursuant to a motion to strike based on governmental immunity. . . .

"[With respect] to each subparagraph of paragraph 47, [that the plaintiff set] forth the department written policy [and] directive allegedly violated and . . . describ[e] the standard custom allegedly violated . . . so that the [city] may test the legal sufficiency of [these] allegation[s] pursuant to a motion to strike based on governmental immunity." (Internal quotation marks omitted.)

amended complaint (September, 2017 complaint).[10] On September 14, 2017, the city objected to the plaintiff's request for leave to amend its complaint. At a hearing on November 13, 2017, the court overruled the city's objection, thereby granting the plaintiff leave to amend its complaint.[11]

In the September, 2017 complaint, the plaintiff alleged in relevant part: "17. Because there had been no recent inspection of the property, no accurate record keeping and no coordination of known information about the contents of the warehouse . . . the Bridgeport Fire Department was delayed for more than an hour in responding to the fire because they could not figure out how to access the property. . . .

"19. Then and there, given the lack of information, instead of applying foam to the small fire existing at the site when they arrived, they applied massive amounts of solid water streams . . . that caused the fire to expand rapidly, consuming the entire warehouse; and caused the release of 1500 or more 55 gallon barrels of various chemicals into the soil, air and water surrounding the property.

"20. As a proximate result of the firefighter's application of water rather than foam, the plaintiff was caused to sustain [various] loss[es] . . . .

"23. In the present case, the [city] had notice of the violation of law and/or the hazard existing at 25 Grant Street prior to the fire . . . .

"24. Furthermore, and in the alternative, the [city] is liable because [its] failure . . . to inspect the warehouse prior to the fire constituted, not mere negligence,

[10] In addition to responding to the city's first motion for summary judgment by filing its September, 2017 complaint, the plaintiff also objected to the city's motion for summary judgment on November 9, 2017.

[11] Neither party disputes that, at this hearing, the court determined that the proposed September, 2017 complaint had become the operative complaint.

but rather a reckless disregard for health or safety under the circumstances . . . .

"25. As such, the [city] bears financial responsibility for the plaintiff's losses proximately caused by the fire suppression effort as set forth above."[12] (Internal quotation marks omitted.)

At the same November 13, 2017 hearing, the plaintiff also clarified that it was no longer alleging negligence, as it had done in prior iterations of its complaint, and that it was alleging only recklessness against the city.[13] Accordingly, the plaintiff's lead counsel agreed that he would "immediately" file a new one count complaint sounding in recklessness, but he failed to do so until the plaintiff attempted to file the proposed June 16, 2018 complaint (proposed June, 2018 complaint).

On November 15, 2017, the city requested that the plaintiff revise its September, 2017 complaint. The plaintiff neither objected to nor complied with this request, prompting the city, on February 2, 2018, again to move for a judgment of nonsuit pursuant to Practice Book § 10-18. Prior to the court's adjudication of the motion for judgment of nonsuit, the city, on March 28, 2018, moved for summary judgment a second time (second

[12] In light of the plaintiff having filed the September, 2017 amended complaint, the court determined that no action was necessary on the city's first motion for summary judgment.

[13] The proposed September, 2017 complaint contained two other counts. Count two alleged that individual defendants Scott T. Appleby and Terron Jones were liable for their reckless failure to communicate information about the chemicals inside the warehouse to the firefighters working to extinguish the September 11, 2014 fire. The plaintiff, however, at the November 13, 2017 hearing, stated that it was withdrawing its action against these two defendants and filed a withdrawal of action on November 21, 2017 stating as much. See footnote 1 of this opinion. Moreover, this count did not appear again in the proposed June, 2018 complaint.

Count three of this complaint alleged that the city was obligated to indemnify Appleby and Jones for their liability pursuant to General Statutes §§ 7-465 and 7-301 et seq. This count, too, did not appear in the proposed June, 2018 complaint.

motion for summary judgment). In sum, the city argued that the court should enter summary judgment in its favor on the basis of governmental immunity because there was no genuine issue of material fact as to whether the city exhibited recklessness in connection with the fire that occurred at the plaintiff's warehouse.

On April 16, 2018, the court denied the city's motion for judgment of nonsuit and ordered that the plaintiff file a revised complaint within three weeks. In doing so, the court never granted the plaintiff leave to file an amended complaint but simply ordered it to file a revised complaint that complied with the city's November 15, 2017 request to revise. The plaintiff failed to comply with the court's order. This prompted the city on May 8, 2018, to move again for a judgment of nonsuit pursuant to Practice Book § 17-19.

On June 18, 2018, the plaintiff filed its proposed June, 2018 complaint, in which the plaintiff alleged for the first time that fire code violations in the warehouse, which the city should have discovered during an inspection required by § 29-305, were the proximate cause of the substantial damage to its warehouse.[14] Specifically, in its one count proposed June, 2018 complaint, the plaintiff alleged in relevant part:

"6. At all times mentioned herein an inspection of the property by the [city's] fire marshal, or by the [city's] fire chief, or his designee, would have revealed that [the chemicals contained in the warehouse], if ignited, could not be suppressed with water, and that in fact water would cause any fire, however small, to become a conflagration engulfing the entire warehouse. . . .

[14] In response to this new theory of liability, the court observed that "the plaintiff feels that [it] doesn't have any claim other than [the new allegations set forth in the proposed June, 2018 complaint] because otherwise that additional language wouldn't have been inserted . . . into the revised complaint."

"8. *In addition, upon inspection, they would have found several code violations requiring immediate remediation.* . . .

"14. *Because there had been no inspection* of the property for over fifteen years, *and therefore no remediation of code violations that would have been found upon inspection, a minor fire turned into a conflagration that destroyed the entire property.*

"15. Then and there, *because of the repeated lack of inspection, the fire* . . . *expand*[*ed*] *rapidly*, consuming the entire warehouse; *and caused the release of several hundred fifty-five gallon barrels of various chemicals* into the soil, air and water surrounding the property.

"16. As a proximate result of the fire department's *reckless failure to comply with state law and inspect the property for code violations* for more than fifteen years, the plaintiff was caused to sustain [various] loss[es] . . . .

"18. The [city] . . . is liable to the plaintiff due to its reckless and repeated disregard of its statutory duty to inspect the subject warehouse *which inspection would have shown serious code violations requiring immediate remediation thereby causing the compete loss of the building and the other damages* specified above.

"19. The reckless actions of the [city's] agents included: (a) the fire marshal failing more [than] fifteen times over fifteen years to honor his statutory duty; (b) the fire chief ignoring for more than fifteen years his duties per city ordinance to inspect and provide reports and accurately keep records; (c) *failing to identify and remediate serious code violations that would have been found upon inspection* including amounts of chemical that were stored on the property, improper storage of

said chemicals, and the lack of any sprinkler system [or] [fire] suppression system." (Emphasis added.)

Notably, the plaintiff did not seek leave to amend its September, 2017 complaint pursuant to Practice Book § 10-60. Instead, the plaintiff attempted to file its proposed June, 2018 complaint *the same day as* the court's June 18, 2018 hearing on the city's second motion for summary judgment.[15] The plaintiff also filed an objection to the city's motion for summary judgment *the same day as* the court's June 18, 2018 hearing on this motion.

The city, on June 18, 2018, objected to the proposed June, 2018 complaint on the basis of the plaintiff's failure to comply with Practice Book § 10-60 and filed two

[15] Practice Book § 10-60 provides: "(a) Except as provided in Section 10-66, a party may amend his or her pleadings or other parts of the record or proceedings at any time subsequent to that stated in the preceding section in the following manner:

"(1) By order of judicial authority; or

"(2) By written consent of the adverse party; or

"(3) By filing a request for leave to file an amendment together with: (A) the amended pleading or other parts of the record or proceedings, and (B) an additional document showing the portion or portions of the original pleading or other parts of the record or proceedings with the added language underlined and the deleted language stricken through or bracketed. The party shall file the request and accompanying documents after service upon each party as provided by Sections 10-12 through 10-17, and with proof of service endorsed thereon. If no party files an objection to the request within fifteen days from the date it is filed, the amendment shall be deemed to have been filed by consent of the adverse party. If an opposing party shall have objection to any part of such request or the amendment appended thereto, such objection in writing specifying the particular paragraph or paragraphs to which there is objection and the reasons therefor, shall, after service upon each party as provided by Sections 10-12 through 10-17 and with proof of service endorsed thereon, be filed with the clerk within the time specified above and placed upon the next short calendar list.

"(b) The judicial authority may restrain such amendments so far as may be necessary to compel the parties to join issue in a reasonable time for trial. If the amendment occasions delay in the trial or inconvenience to the other party, the judicial authority may award costs in its discretion in favor of the other party. For the purposes of this rule, a substituted pleading shall be considered an amendment. (See General Statutes § 52-130 and annotations.)"

supplemental memoranda in support of its second motion for summary judgment. In both its objection and supplemental memoranda, the city argued in relevant part that, "[a]s a matter of law . . . the [June, 2018] complaint sets forth a cause of action never previously pleaded, [and it] does not relate back to the filing of the operative complaint, and, therefore, is violative of the applicable statute of limitations[16] for this September 11, 2014 fire claim such that it is time barred." (Footnote added.) The city also objected to the proposed June, 2018 complaint becoming the operative complaint on the grounds that it was filed after deadlines imposed by the court and that it would have to expend additional resources conducting discovery on and defending against the new theory of liability set forth therein after already having expended significant resources conducting discovery on and defending against the theory of liability that the plaintiff had set forth for approximately two years in prior versions of the complaint.[17]

[16] General Statutes § 52-584 provides in relevant part that "[n]o action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct . . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of, except that a counterclaim may be interposed in any such action any time before the pleadings in such action are finally closed."

[17] Specifically, in addition to asserting that the new theory of liability was barred by the statute of limitations, the city also objected to the proposed June, 2018 complaint for the following reasons: "1. The plaintiff . . . violated the final court-ordered deadline of [May 7, 2018] within which to file a revised pleading . . . .

"2. The revision [to the operative complaint] is being filed well beyond the [April 1, 2018] pleading closure deadline fixed in the court's scheduling order . . . and seeks to keep the pleadings open in violation of that order.

"3. Allowing a revised complaint that sets out an entirely new cause of action at this stage for this 2016 lawsuit stemming out of a [September 11, 2014] fire is highly prejudicial to the [city] and will . . . significantly delay the trial of this case because" the city would have to conduct new discovery, an additional investigation, and file a third motion for summary judgment in order "to address the newly pleaded allegations and claims in the [June, 2018] complaint."

Moreover, the city, in a June 22, 2018 memorandum, argued that the court should not consider the plaintiff's proposed June, 2018 complaint in adjudicating its second motion for summary judgment. In this memorandum, the city argued that, "when acting upon the defendant's [second] motion for summary judgment . . . the court should only consider the [September, 2017] operative amended complaint, and exclude from its consideration the plaintiff's untimely . . . [proposed June, 2018] complaint . . . ." The city also noted that "if [the plaintiff] desired to introduce the new factual and legal claims that it is now attempting to assert in its [proposed June, 2018] complaint, [then it could have timely] file[d], in [accordance with] Practice Book § 10-60 . . . a request for leave to amend, along with an appended amended complaint, [which] would have allowed [the court to determine] whether [the proposed June, 2018] complaint would [become the] operative amended complaint . . . well before the scheduling order's . . . deadlines for the [city's] motion for summary judgment." Moreover, the city asserted that "the plaintiff's [September, 2017 amended complaint [would] continue to be the operative complaint until the [city's] . . . objection to the plaintiff's [proposed June, 2018] complaint has been decided . . . ." The court scheduled hearings on the city's second motion for summary judgment for June 18 and 25, 2018. The plaintiff's lead counsel failed to attend both hearings and, instead, a different attorney appeared in his place at both hearings.[18]

[18] Because the plaintiff's lead counsel was unable to attend the June 18, 2018 hearing, an attorney, who previously had filed an appearance in the case, attended in his place. This attorney, however, was unprepared for the hearing, noting that he had learned of the proposed June, 2018 complaint the morning of the hearing and that he "had just a few minutes to review . . . the [city's] motion for summary judgment." ] In light of his unpreparedness, the attorney "ask[ed] . . . the court [to] allow a short continuance [so that the plaintiff's lead counsel could] address [the] issues" pertaining to the proposed June, 2018 complaint and the city's motion for summary judgment. The court agreed to continue the June 18, 2018 hearing until June 25, 2018.

On June 25, 2018, the court granted the city's second motion for summary judgment on the basis of governmental immunity. In addressing the merits of the case, the court noted that "this is a case in which the [plaintiff] allege[s] . . . that there was a reckless failure to inspect, and that reckless failure to inspect did not uncover certain [fire code] violations and that the failure to uncover those violations led to a conflagration and led to the fire department responding using water instead of foam, [despite] the contents of the . . . warehouse . . . ." Moreover, the court characterized the plaintiff's claim as alleging "that there was a reckless failure to inspect based upon a policy that no inspection what[so]ever would be done. . . . And that had there been an inspection, certain violations would have been discovered. And but for that, it . . . would not have led to the property damage to the extent that it did."

In rendering summary judgment in favor of the city, the court noted that the plaintiff's case was not brought within the narrow exception to governmental immunity for a municipality's reckless failure to conduct an inspection for fire code violations that was established in *Williams* v. *Housing Authority*, 327 Conn. 338, 364, 368, 174 A.3d 137 (2017).[19] In *Williams*, our Supreme

The plaintiff then moved to continue the June 25, 2018 hearing three days prior to the hearing. The city objected to this motion, and the court never granted a continuance. The plaintiff's lead counsel failed to attend the June 25, 2018 hearing, and the same attorney appeared in his place. This attorney stated that the plaintiff's lead counsel was unable to attend the hearing because "he [was] on a preplanned family vacation . . . ."

[19] The *Williams* case arose "out of a tragic fire in which four residents of a Bridgeport public housing complex . . . lost their lives. The plaintiff . . . as administratrix of the estate of each decedent [sued] the Bridgeport Fire Department and five Bridgeport city officials . . . ." *Williams* v. *Housing Authority*, supra, 327 Conn. 341. "In her revised complaint, the plaintiff alleged, among other things, that the municipal defendants failed to ensure that [the] unit [in which the fire started] complied with state building and fire safety codes, failed to remedy numerous defects in [this] unit . . . and failed to conduct an annual fire safety inspection of [this] unit . . . as required by § 29-305. The plaintiff specifically alleged that the municipal defendants knew or should have known about and remedied a number of

Court determined that, despite general principles concerning governmental immunity, a municipality may be liable for damages to person or property if the municipality has a "general policy of not conducting inspections of a certain type"; id., 368; and that "it is clear that the failure to inspect may result in a catastrophic harm, albeit not a likely one." Id., 364. Such conduct, according to the court, would "in the context of § 52-557n (b) (8), [constitute] a . . . reckless disregard for health or safety." Id., 364.

In light of this narrow exception to governmental immunity, the trial court rendered summary judgment in favor of the city because the plaintiff had failed to establish that there was a genuine issue of material fact that "there [had] been [any fire] code violations that [were] . . . a substantial factor in causing either the fire or the method of response by the Bridgeport Fire Company . . . ." Furthermore, the court concluded that "there's no genuine issue of fact [as to whether the city's failure to inspect the warehouse constituted recklessness] because no violation of the code is shown . . . ."

Although the plaintiff's lead counsel failed to attend both hearings on the city's second motion for summary judgment, the court, nevertheless, stated that it would "entertain a motion to reargue if it is filed within the appropriate time . . . and gives a basis for denying the motion for summary judgment." In response, the plaintiff, on July 16, 2018, moved to reargue the city's motion. The city opposed the plaintiff's motion to reargue. After hearing arguments from both parties, the

asserted defects in [this] unit . . . including the absence of fire escapes or other adequate means of egress, photoelectric smoke detectors, fire alarm systems, fire suppression systems, fire sprinklers, fire extinguishers, and fire safety or prevention plans. [Moreover, the plaintiff] alleged that such conduct on the part of the municipal defendants was both negligent and reckless." Id., 345.

court granted reargument but denied relief, reiterating that "as a matter of law . . . there [is no] genuine issue of material fact . . . because a mere failure to inspect without more, [is] not . . . sufficient to show [reckless] conduct." Furthermore, the court noted that "there's been no showing [by the plaintiff] that [the city's] failure to inspect [its warehouse] was wilful, intentional, deliberate or was pursuant to a policy whereby there were no inspection[s] of a particular class of facilities . . . ." This appeal followed.

On appeal, the plaintiff claims that the trial court improperly rendered summary judgment for the city on the basis of governmental immunity. Specifically, the plaintiff claims that there was a genuine issue of material fact as to whether the city's failure to inspect the plaintiff's warehouse, and therefore its failure to uncover fire code violations therein, constituted a "reckless disregard for health or safety under all the relevant circumstances . . . ." See General Statutes § 52-557n (b) (8). The plaintiff, on appeal, however, does not contest the court's rendering of summary judgment in favor of the city based on the theory of liability that it alleged in prior versions of its complaint, i.e., that the city improperly decided to use water rather than foam to extinguish the fire in its warehouse, resulting in significant damage to the warehouse and surrounding property.

In its appellate brief, the city argues, in sum, that the court properly rendered summary judgment in its favor on the basis of governmental immunity because there was no genuine issue of material fact as to whether its conduct in connection with the warehouse fire was reckless. The city also argues that the plaintiff cannot prevail on its claim on appeal for two alternative reasons.

First, the city asserts that the proposed June, 2018 complaint was not the operative complaint and thus

was not properly before the court. In its preliminary statement of issues on appeal, the city states that the court improperly considered the proposed June, 2018 complaint, even though "that complaint was barred by the statute of limitations, filed the morning of argument on [the city's] motion for summary judgment and filed in violation of the scheduling order."[20] Moreover, in its appellate brief, the city asserts that the September, 2017 complaint was the operative complaint.[21]

Second, the city argues that the trial court properly rendered summary judgment in its favor because the new theory of liability set forth in the proposed June, 2018 complaint alleging that the city recklessly failed to inspect the plaintiff's warehouse and uncover fire code violations was barred by the statute of limitations. Having considered the arguments of both parties, we conclude that the trial court properly rendered summary judgment in favor of the city. We do so, however, on the alternative grounds that (1) the plaintiff's proposed June, 2018 complaint, and the new allegations contained therein, was not the operative complaint and

[20] The city's preliminary statement of issues on appeal contained in relevant part: "1. Did the trial court abuse its discretion in overruling the [city's] objection to the plaintiff's request for leave to amend to file the amended complaint of September 5, 2017, where that complaint was filed beyond the statute of limitations and was otherwise untimely?

"2. Did the trial court abuse its discretion in considering the plaintiff's revised complaint filed June 18, 2018 . . . where that complaint was barred by the statute of limitations, filed the morning of argument on [the city's] motion for summary judgment and filed in violation of the scheduling order?"

[21] In its appellate brief, the plaintiff acknowledges that "[t]he operative complaint at present is a matter [that] the [city] has called into question," but it also asserts that the trial court determined that the proposed June, 2018 complaint was the operative complaint when the court adjudicated the city's second motion for summary judgment. Moreover, in its reply brief, the plaintiff stated that "[i]t is folly for the [city] to claim . . . that [the June, 2018] complaint was not operative" and noted that "the [city] [undertook] some impressive maneuvers to make the [June, 2018] complaint inoperable in the instant appeal."

thus was not properly before the trial court and, (2) even if the proposed June, 2018 complaint was the operative complaint, the new allegations contained therein were barred by the statute of limitations.

I

Before we consider whether the new theory of liability set forth in the plaintiff's proposed June, 2018 complaint relates back to the original complaint for purposes of compliance with the statute of limitations, we first must address whether this version of the complaint became the operative complaint. For the following reasons, we conclude that the proposed June, 2018 complaint was not the operative complaint and, therefore, that complaint, including the new theory of liability set forth therein, was not properly before the trial court in adjudicating the motion for summary judgment.

We begin by setting forth legal principles relevant to amending a complaint. This court has stated that "[General Statutes §] 52-128 and Practice Book § 10-59 allow the curing of any defect [or] mistake in a complaint as of right within thirty days of the return date. If an amendment is as of right, the amendment takes effect ab initio. . . . Practice Book § 10-60 allows a plaintiff to amend his or her complaint more than thirty days after the return day [only] by [order of the] judicial authority, written consent of the adverse party, or filing a request for leave to amend with the amendment attached." (Citations omitted; internal quotation marks omitted.) *Gonzales* v. *Langdon*, 161 Conn. App. 497, 517–18, 128 A.3d 562 (2015).

The plaintiff argues that the proposed June, 2018 complaint was the operative complaint because it was filed in response to the court's April 16, 2018 order compelling it to file a "revised complaint." In essence, the plaintiff contends that, by ordering it to file a "revised

complaint," the court permitted it to make any and all substantive changes to its September, 2017 complaint that it wanted to make, including making new allegations or alleging new theories of recovery that had not previously been set forth. Thus, the plaintiff implicitly argues that all of the *substantive changes* that it made to the September, 2017 complaint were made in response to the court's April 16, 2018 order and that, therefore, its proposed June, 2018 complaint automatically became the operative complaint. We disagree with the plaintiff's argument.

In arriving at this conclusion, we consider the relevant procedural history that preceded the court's April 16, 2018 order. The city filed a request to revise directed at the plaintiff's September, 2017 complaint, and the plaintiff did not object to this request. Practice Book § 10-37 (a) provides in relevant part that a request to revise "shall be deemed to have been automatically granted by the judicial authority on the date of filing and shall be complied with by the party to whom it is directed within thirty days of the date of filing the same, unless within thirty days of such filing the party to whom it is directed shall file objection thereto." Thus, by neither objecting to nor complying with the city's request to revise within thirty days of it having been filed, the plaintiff failed to comply with a request to revise that automatically had been granted by the court. See Practice Book § 10-37 (a).

Because the plaintiff failed to comply with this request to revise, the city moved for nonsuit. On April 16, 2018, the court denied the city's motion for nonsuit, but it ordered the plaintiff to file a "*revised complaint*" within three weeks. (Emphasis added.)

In light of this procedural history, we reject the plaintiff's assertion that the court's April 16, 2018 order was an invitation to make any and all substantive changes

to its September, 2017 complaint that it desired. Rather, we construe the court's order as compelling the plaintiff to file a "revised complaint" that complied with the city's duly granted request to revise.

The plaintiff, however, attempted to make substantive changes to its September, 2017 complaint that were outside the scope of the revisions that the court had ordered. Indeed, the plaintiff, in its proposed June, 2018 complaint, set forth an entirely new theory of liability. Accordingly, we reject the plaintiff's argument that the proposed June, 2018 complaint automatically became the operative complaint upon being filed because the proposed complaint contained substantive changes that the city did not request in its request to revise.

In the alternative, the plaintiff argues that its proposed June, 2018 complaint was the operative complaint at the time that the court adjudicated the city's second motion for summary judgment because the court had determined it as such. In support of this argument, the plaintiff points to a colloquy between the court and the city's counsel at the June 25, 2018 hearing. During this exchange, the city's counsel stated that the city objected to the proposed June, 2018 complaint because the plaintiff had attempted to file it after the "pleading closure deadline fixed in the court's scheduling order" and the deadline for the plaintiff to file a revised complaint that the court had imposed in its April 16, 2018 order. In response, the court stated that it would "allow [the complaint] based on the deadlines . . . because . . . the court ha[d] a flavor of [what was] being requested . . . [and] . . . want[ed] to get to the merits of [the case]." By making this statement at the hearing, the plaintiff asserts that the court had, in effect, permitted it to amend its September, 2017 complaint pursuant to Practice Book § 10-60 and had concluded that the proposed June, 2018 complaint was

the operative complaint. We disagree with this argument for three reasons.

First, there is no indication in the record that the plaintiff sought leave to amend its September, 2017 complaint and that any request for leave to amend, along with the proposed June, 2018 complaint, was properly served on the city, as required by Practice Book § 10-60 (a) (3). Section 10-60 (a) (3) requires that a request for leave to amend be made and that it contain a proof of service indicating that the request and the proposed amended complaint were properly served on the opposing party.[22] *Gonzales* v. *Langdon*, supra, 161 Conn. App. 517–18.

By way of comparison, in attempting to amend its January, 2017 complaint, the plaintiff sought leave to

[22] Practice Book § 10-60 (a) provides in relevant part: "Except as provided in Section 10-66, a party may amend his or her pleadings or other parts of the record or proceedings at any time subsequent to that stated in the preceding section in the following manner: . . . (3) By filing a request for leave to file an amendment together with: (A) the amended pleading or other parts of the record or proceedings, and (B) an additional document showing the portion or portions of the original pleading or other parts of the record or proceedings with the added language underlined and the deleted language stricken through or bracketed. The party shall file the request and accompanying documents after service upon each party as provided by Sections 10-12 through 10-17, and with proof of service endorsed thereon. . . ."

Practice Book § 10-12 (a) provides in relevant part: "It is the responsibility of counsel or a self-represented party filing the same to serve on each other party who has appeared one copy of every pleading subsequent to the original complaint . . . and every paper relating to . . . request . . . . When a party is represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the judicial authority."

Practice Book § 10-14 provides in relevant part: "Proof of service pursuant to Section 10-12 (a) and (b) may be made by written acknowledgment of service by the party served, by a certificate of counsel for the party filing the pleading or paper or by the self-represented party, or by affidavit of the person making the service, but these methods of proof shall not be exclusive. Proof of service shall include the address at which such service was made. . . ."

amend. The September 5, 2017 request for leave to amend contained a certificate of service, in which the plaintiff's lead counsel certified that the city's counsel was served both its request for leave to amend and its proposed September, 2017 complaint.[23] Moreover, at the November 13, 2017 hearing, the court overruled the city's objection to the proposed September, 2017 complaint and thereby determined that this complaint was the operative complaint.

When the plaintiff attempted to amend its September, 2017 complaint, however, it failed to seek leave to amend it. Moreover, there is no indication in the record that the city properly was served with the plaintiff's request for leave to amend and its proposed June, 2018 complaint.[24]

Second, the court never explicitly ruled on whether the plaintiff would be granted leave to amend its complaint. This court has stated that in the absence of a trial court *explicitly* granting a request for leave to amend a complaint, an appellate tribunal should infer that the trial court denied such a request for leave to amend. See *Gonzales* v. *Langdon*, supra, 161 Conn. App. 509.

Moreover, our unwillingness to infer that the court granted the plaintiff leave to amend its complaint is buttressed by the fact that there is no indication in the record as to whether the court weighed the relevant considerations for determining whether a plaintiff should be granted leave to amend his or her complaint. Although determining whether to permit leave to amend

[23] The plaintiff's September 5, 2017 request to amend contained the following certificate of service: "Undersigned certifies that a copy of this request and the amended complaint were sent to City Attorney Bruce Levin who is counsel of record for the defendants on . . . September [3], 2017."

[24] At the June 18, 2018 hearing, the city's counsel stated that it received the proposed June, 2018 complaint but that counsel received it no more than two days before the hearing.

a complaint is within the discretion of a trial court, a court, in exercising its discretion, normally weighs certain considerations to determine whether allowing an amendment is appropriate. See id., 509–10, 518. As this court has stated, "[t]he allowance of an amendment to a complaint more than thirty days after the return day . . . rests in the discretion of the court. . . . Much depends upon the particular circumstances of each case. The factors to be considered include unreasonable delay, fairness to the opposing parties, and negligence of the party offering the amendment." (Internal quotation marks omitted.) Id., 509–10. Moreover, "[c]ourts traditionally deny leave to amend only if the amendment would prejudice the defendant by causing undue delay *or the amendment does not relate back to the matters pleaded in the original complaint*." (Emphasis added.) Id., 518. "In exercising its discretion with reference to a [request] for leave to amend, a court should ordinarily be guided by its determination of the question whether the greater injustice will be done to the mover by denying him his day in court on the subject matter of the proposed amendment or to his adversary by granting the motion, with the resultant delay." (Internal quotation marks omitted.) *Miller* v. *Fishman*, 102 Conn. App. 286, 294, 925 A.2d 441 (2007), cert. denied, 285 Conn. 905, 942 A.2d 414 (2008).

Turning to the present case, the city filed an objection to the June, 2018 complaint and set forth three primary reasons in support of its objection. First, the city asserted that the proposed June, 2018 complaint was untimely based on certain deadlines for filing a revised complaint that the court had imposed.

Second, the city asserted that the proposed June, 2018 complaint was prejudicial to the city and would delay significantly the trial of this case because it set forth a new theory of liability. Specifically, the city stated that, after two years of setting forth a consistent

theory of liability, the plaintiff completely changed its theory in its proposed June, 2018 complaint, which it filed *the same day as* the June 18, 2018 hearing on the city's second motion for summary judgment. This new theory of liability would require the city to conduct additional discovery and investigation to defend against it.

Third, the city objected to the proposed June, 2018 complaint on the ground that the new theory of liability set forth therein was barred by the statute of limitations. We address this issue in part II of this opinion.

The court, at the June 25, 2018 hearing and in the absence of the plaintiff's lead counsel, appears to have declined to address most of the grounds asserted in the city's objection to the proposed June, 2018 complaint. Instead, the court simply stated that, despite the deadlines for filing a revised complaint that the court had imposed, it "[preferred] to get to the merits of [the case]." The court, however, did not address the other grounds raised in the city's objection, even though all of the grounds set forth in its objection are considerations that a trial court usually assesses when determining whether to grant a plaintiff leave to amend its complaint. See *Gonzales* v. *Langdon*, supra, 161 Conn. App. 509–10, 518; *Miller* v. *Fishman*, supra, 102 Conn. App. 293–94.

Because the plaintiff did not properly seek leave to amend its complaint pursuant to Practice Book § 10-60 (a) (3), and the court neither explicitly granted the plaintiff leave to amend nor indicated that it had weighed the relevant considerations for determining whether to grant a plaintiff leave to amend, we conclude that the court did not permit the plaintiff to amend its September, 2017 complaint.[25] Therefore, we also conclude that the proposed June, 2018 complaint did not

[25] We do not mean to suggest that a trial court is obligated to *state explicitly* that it has weighed the considerations that this court described in *Gonzales* v. *Langdon*, supra, 161 Conn. App. 509–10, 518, in order to determine whether to grant a plaintiff leave to amend his or her complaint. In the present case,

become the operative complaint. See *Gonzales* v. *Langdon*, supra, 161 Conn. App. 509.

Because we have determined that the proposed June, 2018 complaint was not the operative complaint, we further conclude that this complaint, including the new theory of liability set forth therein, was not properly before the trial court. Moreover, as previously stated in this opinion, on appeal, the plaintiff claims *only* that the court improperly rendered summary judgment in favor of the city based on the new theory of liability that it set forth in its proposed June, 2018 complaint. It *does not* claim that the court's rendering of summary judgment in favor of the city based on the theory of liability set forth prior to the proposed June, 2018 complaint was improper, to the extent that the court rendered summary judgment in favor of the city based on this theory. Therefore, because the proposed June, 2018 complaint was not the operative complaint and both it and the new theory of liability set forth therein were not properly before the trial court, we conclude that the trial court properly rendered summary judgment in favor of the city.

Even if we were to conclude that the proposed June, 2018 complaint was the operative complaint, the city argues that the new allegations in that complaint, including the new theory of liability set forth therein, are barred by the statute of limitations. In support of this argument, the city asserts that these new allegations were raised outside of the two year limitation period for actions alleging negligent or reckless conduct; see footnote 16 of this opinion; and do not relate back to

however, because the plaintiff failed to properly seek leave to amend its complaint and the court was silent with respect to these considerations and did not explicitly state that it would grant the plaintiff leave to amend, we decline to infer that the court granted the plaintiff leave to amend its complaint.

the original complaint. We turn then to this alternative basis for affirming the trial court's rendering summary judgment in favor of the city.

II

Assuming for the sake of argument that the proposed June, 2018 complaint was, indeed, the operative complaint, the plaintiff contends that the new allegations set forth in this complaint were not barred by the statute of limitations. In support of this argument, the plaintiff asserts that, even though these allegations were brought outside of the two year limitation period for actions alleging negligent or reckless conduct; see footnote 16 of this opinion; they related back to the original complaint. We disagree with the plaintiff.

We begin by setting forth our standard of review and relevant legal principles pertaining to whether amendments made to a complaint relate back to the original complaint for purposes of compliance with the statute of limitations. Our Supreme Court has stated that "[t]he de novo standard of review is always the applicable standard of review for" making such a determination. (Internal quotation marks omitted.) *Briere* v. *Greater Hartford Orthopedic Group, P.C.*, 325 Conn. 198, 206, 157 A.3d 70 (2017). Indeed, "[i]f the statute of limitations has expired and an amended pleading does not relate back to the earlier pleading, then the trial court has no discretion to allow an amendment." Id., 206 n.8. Determining whether an amendment relates back "is grounded in interpretation of the pleadings and is not the type of determination that a trial court is in a better position to make than an appellate court. Therefore, whether a pleading relates back is subject to plenary review." Id.

"The relation back doctrine [is] well established . . . . [An amendment relates back for purposes of the statute of limitations when it] amplif[ies] or expand[s]

what has already been alleged in support of a cause of action, provided the identity of the cause of action remains substantially the same, but [when] an entirely new and different factual situation is presented, a new and different cause of action [that does not relate back has been] stated. . . .

"Our relation back doctrine provides that an amendment relates back when the original complaint has given the party fair notice that a claim is being asserted stemming from a particular transaction or occurrence, thereby serving the objectives of our statute of limitations, namely, to protect parties from having to defend against stale claims . . . ." (Citations omitted; internal quotation marks omitted.) Id., 207; see *Sempey* v. *Stamford Hospital*, 180 Conn. App. 605, 612, 184 A.3d 761 (2018). "[I]n order to provide fair notice to the opposing party, the proposed new or changed allegation . . . must fall within the scope of the original cause of action, which is the transaction or occurrence underpinning the plaintiff's legal claim against the defendant. Determination of what the original cause of action is requires a case-by-case inquiry by the trial court. In making such a determination, the trial court must not view the allegations so narrowly that any amendment changing or enhancing the original allegations would be deemed to constitute a different cause of action. But the trial court also must not generalize so far from the specific allegations that the cause of action ceases to pertain to a specific transaction or occurrence between the parties that was identified in the original complaint." (Emphasis omitted; footnote omitted.) *Briere* v. *Greater Hartford Orthopedic Group, P.C.*, supra, 325 Conn. 210.

Importantly, "[i]f the alternat[ive] theory of liability [in the amended complaint] may be supported by the original factual allegations, then the mere fact that the amendment adds a new theory of liability is not a bar to the application of the relation back doctrine. . . .

If, however, the new theory of liability is not supported by the original factual allegations of the earlier, timely complaint, and would require the presentation of new and different evidence, the amendment does not relate back." (Citation omitted.) *Sherman* v. *Ronco*, 294 Conn. 548, 563, 985 A.2d 1042 (2010).

Moreover, in determining whether an amendment relates back, we also "must . . . determine whether the new allegations support and amplify the original cause of action or state a new cause of action entirely. Relevant factors for this inquiry include, but are not limited to, whether the original and the new allegations involve the same actor or actors, allege events that occurred during the same period of time, occurred at the same location, resulted in the same injury, allege substantially similar types of behavior, and require the same types of evidence and experts." *Briere* v. *Greater Hartford Orthopedic Group, P.C.*, supra, 325 Conn. 211. If the amendment does not support or amplify the original cause of action and instead states a new cause of action entirely, then the amendment does not relate back. See id., 207–208. "[I]n the cases in which [our courts] have determined that an amendment does not relate back to an earlier pleading, the amendment presented different issues or depended on different factual circumstances rather than merely amplifying or expanding upon previous allegations." (Internal quotation marks omitted.) Id.; see *Sempey* v. *Stamford Hospital*, supra, 180 Conn. App. 612.

We are also mindful of our well settled rules for construing pleadings to determine whether an amendment relates back to the original complaint for purposes of compliance with the statute of limitations. "When comparing [the original and proposed amended] pleadings [to determine whether allegations in an amended complaint relate back for purposes of the statute of limitations], we are mindful that, [i]n Connecticut, we

have long eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory 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.) *Briere* v. *Greater Hartford Orthopedic Group, P.C.*, supra, 325 Conn. 209.

Moreover, in determining whether an amendment relates back, "[w]e note that the original [complaint] itself must provide the opposing party with notice of a cause of action that encompasses the proposed amended allegations. . . . A plaintiff may not rely solely on disclosures made during discovery to overcome his failure to plead a cause of action prior to the expiration of the statute of limitations that he later decides is a better claim." Id., 210 n.9.

Turning to the present case, the plaintiff acknowledges "that the pleadings in the [present] case are *far from* perfect." (Emphasis in original.) The plaintiff nevertheless sets forth two arguments in support of its claim that the new allegations in the proposed June, 2018 complaint relate back for purposes of the statute of limitations. First, the plaintiff contends that these new allegations relate back because the plaintiff "consistently alleged, although under a heading which was not entitled 'recklessness,' statutory recklessness by the [city] . . . ." (Emphasis omitted.) Moreover, the plaintiff argues that, in all versions of the complaint,

the city's "recklessness" derived from its failure to inspect the plaintiff's warehouse, in violation of § 29-305. In the alternative, the plaintiff asserts that, even if versions of the complaint filed prior to the proposed June, 2018 complaint did not put the city on notice of its theory of liability concerning undiscovered code violations, its response to one of the city's interrogatories provided this notice. We are not persuaded by these arguments for the reasons that follow.

A

The plaintiff first argues that its allegations regarding code violations relate back because, in every iteration of the complaint, the plaintiff generally alleged that the city had failed to inspect its warehouse and that such conduct was reckless. In support of this argument, the plaintiff points to paragraphs 43 and 44 of its original complaint, in which it alleged that the fire marshal had failed to inspect its warehouse and that "such failure satisfies the exception for liability set forth at . . . § 52-557n (b) (8) in that the *knowledge that certain chemicals present* could be hazardous to life and safety from fire constitutes a *reckless disregard for health and safety under all relevant circumstances*," and that the fire chief had "*failed to conduct an inspection* of the [plaintiff's warehouse],*for the purposes of 'preplanning the control of fire . . . where any combustible material . . . that is or may become dangerous as a fire menace*' pursuant to General Statutes § 7-313e (e); *and such failure satisfies the exception for liability set forth at . . . § 52-557n (b) (8) in that the knowledge that certain chemicals present could be hazardous to life and safety from fire constitutes a reckless disregard for health and safety under all relevant circumstances*." (Emphasis added.)

In light of these allegations in the original complaint, the plaintiff asserts that it "consistently alleged [in various iterations of the complaint] statutory recklessness

by the defendant under . . . § 52-557n (b) (8),'' and, therefore, the city had sufficient notice for the theory of liability in the proposed June, 2018 complaint concerning undiscovered code violations to relate back. (Emphasis omitted.) Moreover, the plaintiff contends that ''the . . . complaint[s] [subsequent to the original complaint merely] amplify this particular portion of the allegations contained within the original [complaint], so as to fit more squarely with the facts obtained during discovery in the matter.'' We are not persuaded by the plaintiff's argument.

In asserting that these new allegations in the proposed June, 2018 complaint relate back, the plaintiff misconstrues our state's well established relation back doctrine. Indeed, merely alleging that a defendant violated a statute or that a defendant was negligent or reckless in all iterations of a complaint by themselves is insufficient for allegations to relate back to the original complaint for purposes of compliance with the statute of limitations. See *Sharp* v. *Mitchell*, 209 Conn. 59, 73, 546 A.2d 846 (1988) (concluding that ''[t]he fact that the same defendant is accused of negligence in each complaint and the same injury resulted . . . does not make any and all bases of liability relate back to an original claim of negligence'').

In determining whether an amendment to a complaint relates back, we must analyze whether the amendment sets forth a new theory of liability that relies on ''different . . . circumstances and . . . different facts'' that would require a ''defendant . . . to gather different facts, evidence and witnesses to defend the amended claim'' or whether the amendment merely ''amplifie[s] and expand[s] upon the previous allegations by setting forth alternat[ive] theories of liability.'' *Gurliacci* v. *Mayer*, 218 Conn. 531, 549, 590 A.2d 914 (1991). Indeed, ''[i]f . . . the new theory of liability is not supported by the original factual allegations of the earlier, timely

complaint, and would require the presentation of new and different evidence, the amendment does not relate back." *Sherman* v. *Ronco*, supra, 294 Conn. 563.

Before making these determinations regarding new allegations in the proposed June, 2018 complaint, we must first assess the differences between the new theory of liability set forth in that complaint and the theory set forth in prior versions of the complaint. All of the versions of the complaint preceding the proposed June, 2018 complaint set forth a consistent theory of liability. In these versions, the plaintiff alleged that the city failed to access information in its possession about the chemicals in the warehouse or, in the alternative, failed to inspect the warehouse and document the presence of chemicals in the warehouse. The plaintiff also alleged that the city failed to develop a plan for extinguishing a potential fire in its warehouse that accounted for the presence of chemicals inside the warehouse. Based on these allegations, the plaintiff's theory of liability in these complaints was that, as a result of the city's failure to utilize information about the chemicals in the warehouse that it possessed or should have possessed, the city improperly decided to use water rather than foam to extinguish the fire that occurred. Thus, in sum, the theory of liability alleged by the plaintiff in these complaints was that the *manner* in which the city extinguished the fire was the proximate cause of the damages to its warehouse and property.

The new theory of liability that the plaintiff set forth in its proposed June, 2018 complaint, however, is distinct from the theory that it set forth in the prior iterations of its complaint. Indeed, the attorney, Thomas G. Cotter, who appeared at the June, 2018 hearing in the place of the plaintiff's lead counsel, appears to have acknowledged this in the following exchange with the court:

"The Court: Well, what's the cause of action—the new cause of action in the [June, 2018] complaint? It

seems to me that [the plaintiff is] alleging here that there was a reckless failure to inspect at all pursuant to a policy and that—that an inspection would have—unlike the initial complaint, [the plaintiff is] alleging that an [inspection] would have disclosed violations of the code, and that those violations of the code were a substantial factor in causing the destruction of the property because, but for the failure to inspect, they wouldn't have existed.

* * *

"The Court: I've tried—I tried to look at the original—the amended complaint of September [3], 2017, and I didn't see any allegation in there—and, correct me if I'm wrong, Mr. Cotter, I didn't see any allegation in that complaint that there was a violation of the fire code or the building code for that matter. Now—although the fire company's not responsible for the building code. I didn't see any. Am I missing something?

"[The Plaintiff's Attorney]: No, you're not, Your Honor."

In its proposed June, 2018 complaint, the plaintiff alleges that the city recklessly failed to inspect the plaintiff's warehouse in violation of § 29-305. For the first time during the course of this litigation, the plaintiff also alleged that, as a result of this failure to inspect the warehouse, the city failed to uncover certain fire code violations and that these undiscovered code violations proximately caused the fire in the plaintiff's warehouse to be more intense, resulting in greater damage to the plaintiff's warehouse and surrounding property. Thus, unlike the theory of liability alleged prior to the proposed June, 2018 complaint, this new theory of liability *does not* assert that the *manner* in which the city extinguished the fire proximately caused significant damage to the plaintiff's warehouse and surrounding property. Rather, it asserts that code violations existed

at the warehouse that the city should have discovered during an inspection. The plaintiff alleges that *these code violations caused* the fire to intensify, resulting in significant damage to the warehouse and surrounding property.

Having concluded that the new theory of liability in the proposed June, 2018 complaint is distinct from the theory contained in all prior versions of the complaint, we must now determine whether it relates back for purposes of compliance with the statute of limitations. To make this determination, we must determine whether this theory is dependent on different factual allegations than those made in prior iterations of the complaint. See *Sherman* v. *Ronco*, supra, 294 Conn. 563. We also must determine whether this new theory would require the city to gather facts and evidence to defend against it that are different than what would have been necessary to defend against the prior theory. See *Gurliacci* v. *Mayer*, supra, 218 Conn. 549.

First, we conclude that the new theory alleged in the proposed June, 2018 complaint is dependent on factual allegations that were not set forth in prior iterations of the complaint. Indeed, the new theory is dependent on the warehouse containing code violations that an inspection would have uncovered and that these violations caused either the ignition or intensification of the fire. In iterations of its complaint prior to the proposed June, 2018 complaint, however, the plaintiff *never* alleged that such code violations existed at its warehouse, let alone alleged that these undiscovered violations either caused the fire to start or intensified it. Thus, the new theory depends on factual allegations that were not made prior to the proposed June, 2018 complaint.

Second, the facts and evidence necessary for the city to defend against the prior theory of liability differ from

what would be necessary to defend against the new theory. The plaintiff's prior theory of liability, which alleged that that the damage to its warehouse was proximately caused by the city's erroneous decision to use water rather than foam to extinguish the fire, would require that both parties produce evidence concerning firefighting strategies. To defend against this theory, the city likely would have presented evidence showing, inter alia, that its actions *after* the fire started—its decision to use water rather than foam on the fire—were not the proximate cause of the harm that the plaintiff suffered.

To defend against the new theory of liability, however, the city would be required to produce evidence that was significantly different from that needed to defend against the prior theory. Indeed, to defend against the new theory, the city's evidence would need to focus on the *cause* of the fire. The city would need to present evidence disputing the existence of fire code violations and that these code violations proximately caused the fire to start or to burn more intensely.

Accordingly, we conclude that the new theory set forth in the proposed June, 2018 complaint relies on facts *never* alleged in prior iterations of the complaint and would require different facts and evidence for the city to defend against it than the prior theory. For the reasons stated, we conclude that the plaintiff's first argument is unpersuasive and that its new theory of liability does not relate back for purposes of the statute of limitations.

B

The plaintiff's second argument—that the city was on notice of its theory of liability concerning undiscovered code violations based on an answer that the plaintiff provided to one of its interrogatories—fails for two

primary reasons. In support of this argument, the plaintiff points to an interrogatory of the city and its response to the interrogatory:

"Q. What is the legal basis for the plaintiff's claim that the [city] . . . had a ministerial duty to inspect the [plaintiff's warehouse?]

"A. There is a statutory duty to annually inspect buildings such as [the plaintiff's warehouse] imposed by the fire code on the fire marshal. Had the fire marshal conducted an inspection the [city] would have known the nature of the chemicals stored and [the] quantity. Moreover, [it] would have known how to access the building. Further, [the city] would have advised [the plaintiff] as to any modifications necessary to ensure that foam as opposed to water could be used in the event of a fire. By failing in [its] duties, the plaintiff suffered unnecessary and enormous loss. The [city's employees] clearly should have known that this was an occupied warehouse, and that their failure to [develop] a . . . plan [for extinguishing a potential fire] exposed an identifiable victim to harm—that victim being [the plaintiff], the residences adjacent to the warehouse, [the plaintiff's] lessees and the environment. In addition, discovery is ongoing as to the procedures and customs of the [city], which [the plaintiff] expect[s] [will uncover] additional buttressing ministerial duties, as public safety and [developing plans for addressing] fires and other emergencies was the foundation for the duties assigned to [the city]." In its brief, the plaintiff asserts that its response to the city's interrogatory "[put] the [city] on notice of the precise type of claim which the plaintiff intended to bring regarding violating the inspection policies and . . . § 52-557n (b) (8)."

First, in making this argument, the plaintiff completely disregards the proper analysis for determining whether amendments made to a complaint relate back

to the original complaint for purposes of compliance with the statute of limitations. Indeed, our Supreme Court has stated "that the *original* [*complaint*] *itself* must provide the opposing party with notice of a cause of action that encompasses the proposed amended allegations [and that a] plaintiff *may not rely solely on disclosures made during discovery to overcome his failure to plead a cause of action prior to the expiration of the statute of limitations that he later decides is a better claim*." (Emphasis added.) *Briere* v. *Greater Hartford Orthopedic Group, P.C.*, supra, 325 Conn. 210 n.9.

In the present case, the plaintiff failed to provide the city with notice of its theory of liability concerning fire code violations in the warehouse in all iterations of the complaint preceding the proposed June, 2018 complaint. Thus, even if the plaintiff described this theory in its response to an interrogatory, this response alone is insufficient for it to relate back for purposes of compliance with the statute of limitations.

Second, *nothing* contained in the interrogatory response to which the plaintiff points would put the city on notice that the plaintiff's theory of liability had shifted to undiscovered code violations resulting in a minor fire turning into a conflagration. Instead, in response to the city's interrogatory, which asked the plaintiff to set forth its legal basis for its claim against the city, the plaintiff merely described the theory of liability that it set forth prior to the proposed June, 2018 complaint. Indeed, in its response, the plaintiff mentions the city's failure to inspect its warehouse, which, it asserts, resulted in the city's failing to use "foam as opposed to water" in extinguishing the fire, and the city's failure to "[develop plans to address] fires and other emergencies."

In sum, having construed the iterations of the plaintiff's complaint broadly and realistically and having

compared the new theory of liability in the proposed June, 2018 complaint to the theory alleged in prior versions of the complaint, we conclude that the proposed June, 2018 complaint did not relate back for purposes of the statute of limitations.[26] Because this theory was barred by the statute of limitations, we conclude that the trial court properly rendered summary judgment in favor of the city.

The judgment is affirmed.

In this opinion the other judges concurred.

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## PRIME LOCATIONS OF CT, LLC, ET AL. *v.* ROCKY HILL DEVELOPMENT, LLC, ET AL.
## (AC 41417)

Lavine, Keller and Devlin, Js.

*Syllabus*

The plaintiff lot owners sought a judgment declaring that a certain amendment to a declaration of easements, covenants and restrictions, which created a business park common ownership interest community, was invalid, and for injunctive relief. The declaration provided that each lot owner in the business park would be a member of an owner's association and would receive a vote that was proportional to its percentage ownership in the business park. The plaintiffs owned four of the seven lots in the business park, and brought the action against several defendants, including M Co. and D. M Co. owned lot 2, R Co. owned lot 1, and O Co. owned lot 7. M Co. proposed to sell lot 2 to D, who intended to use the lot to build a crematorium. Believing that the plaintiffs would oppose D's plan to build a crematorium, M Co., O Co. and R Co., the holders of more than 50 percent of the votes of the association, executed an amendment to the declaration that withdrew lots 1, 2, and 7 from the

[26] As previously stated, the plaintiff, on appeal, claims *only* that the trial court improperly granted summary judgment for the city based on the new theory of liability set forth in the proposed June, 2018 complaint. The plaintiff *does not* claim on appeal that the trial court improperly rendered summary judgment based on the theory set forth in iterations of the complaint prior to the proposed June, 2018 complaint, to the extent that the court rendered summary judgment in favor of the city based on this theory.

association and recorded it on the town land records. D thereafter purchased lot 2 from M Co., and sought zoning approval for the crematorium, a process in which the plaintiffs participated and confirmed that the defendants had withdrawn from the association. The town zoning commission denied D's application to build the crematorium and D appealed; D and the zoning commission reached a settlement agreement and filed a motion for approval of their settlement. The plaintiffs filed a motion to intervene as of right in the zoning appeal, taking the position that the defendants were not members of the association. The trial court denied the motion to intervene. D commenced construction of the crematorium and the plaintiffs thereafter sought, inter alia, to enjoin him from connecting lot 2 to the association's drainage system and a judgment declaring that the amendment to the declaration was void and unenforceable. After a trial to the court, the court rendered judgment in favor of the defendants, from which the plaintiffs appealed to this court. *Held*:

1.The trial court properly concluded that the declaration did not prevent lot owners from withdrawing their lots from the association, and, accordingly, the recorded amendment withdrawing lots 1, 2 and 7 from the association was proper, D was not required to be a member of the association when he purchased lot 2 from M Co. and his lot was no longer subject to the declaration's restrictions; the plain language of the declaration stated that it may be modified or terminated, and a modification or termination resulting in a lot owner's withdrawal from the association was not prohibited by the language in the declaration, the plaintiffs' prior conduct in acknowledging O Co.'s withdrawal from the association and its argument to the zoning commission that D was not a member of the association supported the trial court's determination that lot owners were permitted to withdraw their lots and was contradictory to the plaintiffs' argument on appeal that D was not permitted to withdraw his lot and was a member of the association; moreover, the plaintiffs could not prevail on their claim that, because R Co. had been permitted to withdraw from the association prior to the execution of the amendment, the lots owners signing the amendment held less than 50 percent of the lots, as the association failed to record R Co.'s withdrawal from the association on the land records, and the record reflected that, at the time the amendment was executed, R Co. was still a member of the association; furthermore, the plaintiffs could not prevail on their claim that the amendment did not comply with a provision (§ 47-236 (a) (1)) of the Common Ownership Interest Act that requires that an amendment to a declaration to be approved by at least 67 percent of the votes in the association, as that provision is inapplicable to a situation in which the properties that are part of an association are not used for residential purposes.

2. The trial court did abuse its discretion in declining to grant the plaintiffs' request for an injunction preventing D from connecting lot 2 to the

association's drainage system, the drainage system having been created as part of the subdivision approval, prior to the creation of the declaration and the easements created therein, and, in D's settlement with the zoning commission in his zoning appeal, the commission incorporated a proposal that D would utilize the drainage system.

Argued February 13—officially released August 18, 2020

*Procedural History*

Action for a declaratory judgment that, inter alia, a certain amendment to a declaration of easements, covenants and restrictions executed by the named defendant et al. is invalid, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the action was withdrawn as against the named defendant et al.; thereafter, the matter was tried to the court, *Aurigemma, J.*; judgment for the defendant MPM Enterprises, LLC, et al., from which the plaintiffs appealed to this court. *Affirmed.*

*Kevin J. McEleney*, with whom, on the brief, were *Richard D. Carella*, *Christopher A. Klepps* and *Matthew K. Stiles*, for the appellants (plaintiffs).

*Matthew S. Carlone* for the appellees (defendant MPM Enterprises, LLC, et al.).

*Opinion*

KELLER, J. This case was brought by the plaintiffs, Prime Locations of CT, LLC, Hasson Holdings, LLC, SMS Realty, LLC, and C&G Holdings, LLC, to prevent one of the defendants, Luke DiMaria, from constructing a crematorium on a lot in the Coles Brook Commerce Park in Cromwell. The plaintiffs appeal from the judgment of the trial court, rendered after a court trial, in favor of the defendants MPM Enterprises, LLC, (MPM Enterprises) and DiMaria.[1] On appeal, the plaintiffs

[1] Rocky Hill Development, LLC, and Rescue One, LLC, were also named as defendants but the plaintiffs withdrew the action as against them prior to trial, and those two entities are not part of this appeal. We refer to MPM Enterprises and DiMaria as the defendants.

argue that the court (1) improperly concluded that the Declaration of Easements, Covenants and Restrictions (declaration), which created a common interest community, the Coles Brook Commerce Park Owners Association, LLC (association), to govern the use of the property in the business park, did not prevent the defendants from voting to withdraw from the association a lot formerly owned by MPM Enterprises and currently owned by DiMaria, (2) improperly concluded that the defendants were entitled to connect a lot to the association's drainage system, (3) improperly concluded that the plaintiffs' cause of action was barred by the doctrines of laches and equitable estoppel, and (4) erred in declining to grant the plaintiffs' request for a permanent injunction prohibiting DiMaria from constructing a crematorium on his lot without approval from the association. We disagree with the plaintiffs and affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to this appeal. The Coles Brook Commerce Park is a business park located on Commerce Drive in Cromwell. The business park is divided into seven lots.[2] At the time of trial, DiMaria owned lot 2, Rocky Hill Development, LLC (Rocky Hill Development) owned lot 1, and Rescue One, LLC (Rescue One) owned lot 7. MPM Enterprises previously had owned lot 2 until it sold it to DiMaria. The plaintiffs owned lots 3, 4, 5 and 6. The association is a common interest community created by the Coles Brook Commerce Park Associates, LLC (declarant). The declarant created the association by executing the declaration. The declaration provides the following concerning its purpose: "Whereas, in order to develop the [p]roperty as a functionally integrated business park, [d]eclarant

[2] Plaintiffs' exhibit 2, a subdivision map of the property, depicts the seven lots originally included in the association.

desires to establish and create certain easements, covenants, and restrictions affecting the [p]roperty and to create an '[a]ssociation' . . . to maintain, administer and enforce these covenants and restrictions . . . ."

The association is governed by the declaration and the bylaws of the association, dated September 27, 2004. Section 3.2 of the declaration provides that "[e]very owner shall be a member of the [a]ssociation." The declaration also provides: "Now therefore, [d]eclarant does hereby declare as follows: (i) no land, building, structure or portion thereof shall hereafter be used and no building, structure or portion thereof shall be constructed, reconstructed, located, extended, enlarged or substantially altered on the [p]roperty except in conformity with the standards and specifications contained in this [d]eclaration; (ii) the [p]roperty shall be conveyed, hypothecated, encumbered, leased, occupied, built upon, or otherwise used, improved or transferred in whole or in part subject to this [d]eclaration and all of the easements, covenants, conditions and restrictions as set forth herein; and (iii) this [d]eclaration and all of the easements, covenants, conditions and restrictions as set forth herein shall run with the [l]ots and the balance of the [p]roperty for all purposes and shall be binding upon and inure to the benefit of all [o]wners, and their tenants, subtenants, employees, concessionaires, licensees, customers and business invitees, and their successors in interest."

The declaration defines an "owner" in § 1.1 as "the respective owners in fee simple of the [l]ots . . . ." Under the terms of §§ 3.2 and 3.3 of the declaration, every owner is a member of the association and has a proportionately weighted vote in the association's affairs.

Section 9.10 of the declaration provides: "Modification or Termination. This [d]eclaration may only be modified in part or terminated in its entirety by the recording

in the [l]and [r]ecords of Cromwell, Connecticut, of an instrument modifying or terminating this [d]eclaration, signed by [o]wners and/or owners of portions of the [p]roperty that are not [l]ots having more than 50 [percent] of the votes of the [a]ssociation.[3] No modification may modify or terminate any easement created hereunder, including those referenced in Exhibit B attached hereto, that benefits or burdens any [o]wner's [l]ot without approval of that [o]wner. . . . Further, [d]eclarant (with respect to any [l]ots that [d]eclarant owns) and/or any other [o]wner or [o]wners (with respect to the [l]ot or [l]ots owned by them) shall have the right to add onto, resubdivide (which may result in more or less [l]ots existing), and/or reconfigure any [l]ot, at any time, in its and/or their sole discretion, subject to the provisions of this [d]eclaration and applicable land use regulations." (Footnote added.)

In its memorandum of decision, the court found the following facts: "On June 12, 2012, the [a]ssociation voted to remove [l]ot 1 from the [a]ssociation. It did not record an amendment or any other evidence of this vote on the Cromwell [l]and [r]ecords. Since June, 2012, the owner of [l]ot 1 did not participate in [a]ssociation meetings and did not pay dues.[4]

"Attorney Glenn Terk represented DiMaria with respect to his efforts to construct a crematorium on [l]ot 2 of the [p]roperty. Believing, apparently with good reason, that the members of the [a]ssociation would not approve of the building of a crematorium, Attorney Terk took steps to attempt to remove [l]ot 2 from the [a]ssociation. He drafted an [a]mendment to [the declaration] dated July 26, 2012 ([amendment]). The amendment was signed by Matthew Holcomb, a member of

[3] In this case, all votes came from owners of entire lots and none of the votes came from owners of portions of lots.

[4] On June 12, 2012, the owner of lot 1 was Rocky Hill Development.

MPM Enterprises, the proposed seller of [l]ot 2, Henry Vasel, a member of Rescue One, the owner of [l]ot 7, and Roger Tabshay, a member of Rocky Hill Development, the owner of [l]ot 1.[5] The [a]mendment contained the following language: 'WHEREAS, the original [d]eclaration to Coles Brook Commerce Park (the "[a]ssociation") is dated as of September 27, 2004 and recorded in Volume 1046 at Page 256 of the Cromwell [l]and [r]ecords; and WHEREAS, Rocky Hill Development, LLC is the owner of [lot] 1, Coles Brook Commerce Park and by virtue of such ownership is entitled to a 27.84 percentage interest in the [a]ssociation and entitled to a vote of 27.84 percent; and WHEREAS, MPM Enterprises, LLC is the owner of [lot] 2, Coles Brook Commerce Park and by virtue of such ownership is entitled to a 11.01 percentage interest in the [a]ssociation and entitled to a vote of 11.01 percent; and WHEREAS, Rescue One, LLC is the owner of [lot] 7, Coles Brook Commerce Park and by virtue of such ownership is entitled to a 15.30 percentage interest in the [a]ssociation and entitled to a vote of 15.30 percent; and WHEREAS, the above owners of [lots] 1, 2 and 7 are the holders of more than fifty (50) percent of the votes of the [a]ssociation; and WHEREAS, the parties desire to amend the [d]eclaration as hereinafter provided. NOW THEREFORE, in consideration of the mutual covenants and restrictions contained herein, the parties hereby agree as follows; 1. [Lots] 1, 2 and 7 are hereby withdrawn from the [a]ssociation. The owners of [lots] 1, 2 and 7 shall hereinafter no longer be considered "[o]wners" and shall no longer have any percentage ownership in common elements of Coles Brook Commerce Park, shall have no liability for common expenses for Coles Brook Commerce Park and shall

[5] At the time the amendment was signed, the plaintiffs owned lots 3, 4, 5 and 6. Those lots comprised 44.03 percent of the park property. MPM Enterprises owned lot 2, Rocky Hill Development owned lot 1 and Rescue One owned lot 7. Lots 1, 2 and 7 comprised 54.14 percent of the park property.

hereafter no longer be entitled to a vote in connection with the activities of Coles Brook Commerce Park.

"As required by § 9.10 of the [d]eclaration, Rocky Hill Development, LLC, MPM Enterprises, LLC, and Rescue One, LLC recorded the [a]mendment on the Cromwell land records [on July 26, 2012]. [DiMaria] purchased lot 2 from MPM Enterprises on September 27, 2012, for the purposes of building a crematorium.

"In June, 2013, almost a year after the [a]mendment was drafted, the [a]ssociation's treasurer wrote a letter to Rescue One, [the owner of lot 7] which accepted Rescue One's withdrawal from the [a]ssociation. Although the [a]ssociation never sent a similar letter to DiMaria, he never paid any fees or dues to the [a]ssociation and never participated in its meetings. Moreover, throughout the lengthy zoning approval process, the [a]ssociation took the position that DiMaria *was not a part of the* [*a*]*ssociation*.

"[DiMaria] began to seek zoning approval for his crematorium in the spring of 2012 when the defendants[6] submitted an application for site plan approval to Cromwell's Planning and Zoning Commission ([commission]) for approval to construct a crematorium. Lot 2 as well as [the rest of the Coles Brook Commerce Park] is situated in Cromwell's industrial zone, in which a crematorium is a permitted use. The plaintiffs participated in the application process and were represented by Attorney Richard Carella. In connection with the application for site approval, Attorney Carella sent a letter to Stuart Popper, Cromwell's [t]own [p]lanner, in which he confirmed that the defendants had withdrawn from the [a]ssociation.

"On October 16, 2012, the [c]ommission denied the application to build the crematorium. DiMaria and MPM

[6] The application was filed by MPM Enterprises and DiMaria, in anticipation of the sale of lot 2 to DiMaria.

[Enterprises] appealed the denial. On July 25, 2013, the defendants and the [c]ommission reached a settlement agreement and on October 7, 2013, the [c]ommission filed a motion for approval of the settlement agreement. On October 11, 2013, the plaintiffs filed a motion to intervene as of right to be made party defendants in the zoning appeal. In the motion to intervene, the plaintiffs took the position that the defendants *were not members of the* [*a*]*ssociation*. The Superior Court for the judicial district of Hartford, *Wahla*, *J.*, denied the motion to intervene . . . .

"DiMaria commenced construction [of the crematorium] in August, 2014. DiMaria has never paid dues to the [a]ssociation, but has connected to the [a]ssociation's drainage easement." (Citation omitted; emphasis in original; footnotes added.)

On August 6, 2014, the plaintiffs initiated this action seeking (1) a declaratory judgment that the amendment was void and unenforceable, (2) a permanent injunction preventing the defendants from connecting lot 2 to the association's drainage system, and (3) a permanent injunction preventing the defendants from building any structure on lot 2 without approval from the association.[7] A trial was held on October 2 and December 19, 2014. The trial court, *Domnarski*, *J.*, issued a memorandum of decision rendering judgment in favor of the plaintiffs on the basis that the amendment was invalid because the declaration did not permit lot owners to withdraw a lot from the association. See *Prime Locations of CT*, *LLC* v. *Rocky Hill Development*, *LLC*, Superior Court, judicial district of Middlesex, Docket No. CV-14-6012319-S (December 19, 2014) (59 Conn. L. Rptr. 494). The defendants appealed to this court claiming

[7] Counts two and three are alleged against both defendants, DiMaria and MPM Enterprises, but, practically speaking, because MPM Enterprises sold lot 2 to DiMaria, the counts really affect only DiMaria as the current owner of the lot.

that the trial court decided the case on the basis of an argument that was not raised or briefed by the parties, specifically, that the court's conclusion that the declaration did not permit a lot owner to withdraw from the association or permit the removal of a lot from the business park was not pleaded, briefed, or argued before the trial court. On appeal, this court reversed the 2014 judgment rendered by the trial court and remanded this case for a new trial. See *Prime Locations of CT, LLC* v. *Rocky Hill Development, LLC*, 167 Conn. App. 786, 145 A.3d 317, cert. denied, 323 Conn. 935, 150 A.3d 686 (2016). On November 14, 2016, the plaintiffs filed a request for leave to file an amended complaint, to which the defendants objected.[8]

The first count of the plaintiffs' amended complaint dated November 14, 2016, alleged that the amendment is void ab initio for three reasons: first, the plaintiffs alleged that the amendment is precluded by the declaration; second, they alleged that the amendment is void per se because the parties that executed the amendment did not hold sufficient voting interest in the association; and finally, they alleged that the amendment failed to comply with the Connecticut Common Interest Ownership Act (COIA), General Statutes § 47-200 et seq. The second count of the complaint sought a permanent injunction prohibiting the defendants from utilizing a drainage system that the plaintiffs alleged can be used only by association members. The third count sought a permanent injunction preventing the defendants from constructing any structure on lot 2 without prior approval from the association.

A second court trial was held on August 16, 2017. The court, *Aurigemma, J.*, issued a memorandum of

[8] The court originally sustained the defendants' objection but, at a later date, held sua sponte that the plaintiffs' amendment to the complaint should be permitted.

decision on February 1, 2018, rendering judgment in favor of the defendants. After setting forth the facts previously noted in this opinion, the court found that "[t]he gravamen of this action is that the [a]mendment is invalid. However, from the time the [a]mendment was filed until the time DiMaria started construction, the plaintiffs opposed DiMaria's plans on the ground that the [*a*]*mendment was valid* and DiMaria was *not* a member of the [a]ssociation. The delay in attacking the [a]mendment was inexcusable and [DiMaria] was prejudiced by the delay."

The court then found that "the [d]eclaration did permit the [a]mendment. However, even if it did not, the plaintiffs are estopped by the doctrine of equitable estoppel and laches from claiming that the [a]mendment is invalid. Judgment enters on the first count in favor of the defendants. The third count seeks an injunction prohibiting the defendants from constructing any structure on the DiMaria lot without approval of the [a]ssociation. As the plaintiffs are estopped from claiming that the defendants are still in the [a]ssociation, judgment enters in favor of the defendants on the third count insofar as that count seeks an injunction prohibiting construction.

"The plaintiffs argue that the [d]eclaration created the drainage easement for the benefit of the [a]ssociation and its [o]wners. The defendants voluntarily withdrew from the [a]ssociation and, therefore, DiMaria's predecessor in interest, MPM Enterprises, voluntarily relinquished its right to use the drainage easement.

"The defendants argue that the drainage system was created as part of the subdivision approval and DiMaria's rights to use the drainage system arise from the [s]ubdivision [a]pproval, which occurred on August 3, 2004, prior to the filing of the [d]eclaration. The town of Cromwell has determined that DiMaria may tie into

the storm water drainage system and has charged DiMaria a fee to tie into the system, which he has paid.

"The [d]eclaration states that easements, covenants, and restrictions run with the [l]ots and are binding on [l]ot owners and their successors in interest. In the settlement of the site plan appeal, DiMaria proposed to the [commission] that pavement runoff would discharge into a 'bay saver' structure and then to a detention water infiltration system with overflow directed to the road drainage system. That proposal was incorporated into the settlement with the [c]ommission." See *DiMaria* v. *Cromwell Planning and Zoning Commission*, Superior Court, judicial district of Hartford, Docket No. CV-126036891-S (December 23, 2013).

"Based on the foregoing, the court finds that the defendants have a right to tie into the storm water drainage system regardless of whether they belong to the [a]ssociation. Judgment enters in favor of the defendants on the second count of the complaint. The third count of the complaint also seeks an injunction prohibiting the defendants from utilizing the drainage easement. Judgment enters in favor of the defendants on the third count insofar as it seeks to prohibit their use of the drainage easement."

This appeal followed.

I

First, the plaintiffs claim that the court improperly concluded that the declaration does not prevent lot owners from withdrawing a lot from the association. We disagree.

We begin by setting forth the applicable standard of review. "When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record.

. . . [W]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law." (Citations omitted; internal quotation marks omitted.) *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 229, 654 A.2d 342 (1995).

"In ascertaining the contractual rights and obligations of the parties, we seek to effectuate their intent, which is derived from the language employed in the contract, taking into consideration the circumstances of the parties and the transaction. . . . We accord the language employed in the contract a rational construction based on its common, natural and ordinary meaning and usage as applied to the subject matter of the contract. . . . Where the language is unambiguous, we must give the contract effect according to its terms. . . . A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . . In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so." (Citations omitted; internal quotation marks omitted.) *Cantonbury Heights Condominium Assn., Inc.* v. *Local Land Development, LLC*, 273 Conn. 724, 734–35, 873 A.2d 898 (2005).

"The meaning and effect of the [restrictive covenant] are to be determined, not by the actual intent of the

parties, but by the intent expressed in the deed, considering all its relevant provisions and reading it in the light of the surrounding circumstances . . . . The primary rule of interpretation of such [restrictive] covenants is to gather the intention of the parties from their words, by reading, not simply a single clause of the agreement but the entire context, and, where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met. . . . A restrictive covenant must be narrowly construed and ought not to be extended by implication. . . . Moreover, if the covenant's language is ambiguous, it should be construed against rather than in favor of the covenant." (Citations omitted; internal quotation marks omitted.) *Alligood* v. *LaSaracina*, 122 Conn. App. 479, 482, 999 A.2d 833 (2010).

Accordingly, to determine whether the amendment was valid and, therefore, lot owners were permitted to withdraw from the association, we must review the contested portion of the declaration in terms of the declaration as a whole as well as in the context of the surrounding circumstances. Section 9.10 of the declaration provides: "Modification or Termination. This [d]eclaration may only be modified in part or terminated in its entirety by the recording in the [l]and [r]ecords of Cromwell, Connecticut, of an instrument modifying or terminating this [d]eclaration, signed by [o]wners and/or owners of portions of the [p]roperty that are not [l]ots having more than 50 [percent] of the votes of the [a]ssociation.[9] No modification may modify or terminate any easement created hereunder, including those referenced in [e]xhibit B attached hereto, that benefits or burdens any [o]wner's [l]ot without the approval of

[9] As previously noted, for purposes of this appeal, all of the defendants voting in favor of the amendment were owners of full lots, not portions of lots. See footnote 3 of this opinion.

that [o]wner. Notwithstanding the foregoing, [d]eclarant shall have the right, in its sole discretion, to modify the street lines of, extend the length of, or shorten, the [p]ublic [r]oadways (whether such [p]ublic [r]oadways are conceptual as depicted on the [m]ap or actually construed and installed) and/or install new or additional [p]ublic [r]oadways, provided that the same shall not materially and adversely affect the access to, or street frontage of, any [l]ot not owned by the [d]eclarant. Further, [d]eclarant (with respect to any [l]ots that [d]eclarant owns) and/or any other [o]wner or [o]wners (with respect to the [l]ot or [l]ots owned by them) shall have the right to add onto, resubdivide (which may result in more or less [l]ots existing), and/or reconfigure any [l]ot, at any time, in its and/or their sole discretion, subject to the provisions of this [d]eclaration and applicable land use regulations." (Footnote added.)

We agree with the trial court's determination that the declaration did not prevent the 2012 amendment and, therefore, the defendant lot owners in July, 2012, were permitted to withdraw lots from the association. The plain language of the declaration states that it may be modified or terminated. Section 9.10 continues by stating that, in accordance with the declaration, the modification or termination must be recorded in the Cromwell land records and must be signed by a majority of the voting land owners. The declaration also prohibits and restricts certain types of modifications and terminations.[10] Nowhere in these requirements and restrictions, however, does the declaration state that a lot owner is not permitted to withdraw a lot from the association. A modification or termination resulting in a lot owner's withdrawal of a lot from the association, although impactful, is not prohibited by the language in § 9.10

[10] In accordance with the declaration, a modification or termination cannot modify or terminate an easement created under the declaration that benefits or burdens a lot owner without that lot owner's consent.

of the declaration. Further, because the declaration includes language limiting certain types of modifications or terminations (i.e., the termination of certain easements), we can infer that, if the declaration also intended to limit the ability of lot owners to withdraw a lot from the association, the declaration would have included express language limiting that action as well. "[I]t is well settled that we will not import terms into [an] agreement . . . that are not reflected in the contract." (Internal quotation marks omitted.) *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 16, 938 A.2d 576 (2008). "A court simply cannot disregard the words used by the parties or revise, add to, or create a new agreement. . . . A term not expressly included will not be read into a contract unless it arises by necessary implication from the provisions of the instrument." (Citation omitted; internal quotation marks omitted.) *Greenburg* v. *Greenburg*, 26 Conn. App. 591, 598, 602 A.2d 1056 (1992).

In addition to the express language of the declaration, the trial court's determination that lot owners were permitted to withdraw lots from the association is also supported by the plaintiffs' previous conduct. Specifically, prior to commencing the present action, in June, 2013, the association, which includes the plaintiffs, sent a letter to Rescue One acknowledging its withdrawal from the association. The plaintiffs' prior acceptance of a withdrawal of a lot from the association is counter to its present argument that lot owners were not permitted to withdraw lots from the association. To the contrary, such acceptance suggests that withdrawal was permissible. Moreover, with regard to DiMaria's December 23, 2013 settlement agreement with the commission, the plaintiffs took the position that DiMaria was not a member of the association. Here, the plaintiffs attempt to take a contradictory position by arguing that DiMaria

was not permitted to withdraw his lot from the association *and* is an existing member.

The plaintiffs also argue that the owners of the lots are required to be members of the association because § 3.2 of the declaration provides that "[e]very owner shall be a member of the [a]ssociation." The defendants argue that the plaintiffs' interpretation incorrectly links ownership of the lots with membership in the association and that § 3.2 would have to read "[e]very owner shall *always* be a member of the [a]ssociation" in order to import the meaning suggested by the plaintiffs. We agree with the defendants that the language of § 3.2 does not support the plaintiffs' position that lot owners are never able to withdraw their lots from the association. In addition, this portion of § 3.2 can be interpreted as simply conferring on owners the status as a member of the association rather than requiring that they must always remain a member.

The plaintiffs advance two other legal theories in support of their claim that the court improperly concluded that the declaration permits lot owners to withdraw lots from the association, neither of which we find availing. One of the plaintiffs' arguments is that the amendment to the declaration was invalid because the lot owners signing the amendment held less than 50 percent of the lots because Rocky Hill Development was no longer a member of the association. In response to this argument, the trial court determined that, "[a]lthough the [a]ssociation allowed Rocky Hill Development to withdraw from the [a]ssociation, it never recorded any amendment to that effect. That failure contravened the policies of [§] 9.10 of the [d]eclaration, which requires that in order to be valid, an amendment must be filed on the land records. The defendants correctly argue that at the time the [a]mendment was executed, all three signatories, MPM Enterprises, Rescue One, and Rocky Hill Development, were still part of the

[a]ssociation. Those three parties held more than 50 [percent] voting interest in the [a]ssociation at the time of the [a]mendment." We agree with the trial court's determination that there is no evidence in the record, namely, the document required to be filed in the land records, to support the plaintiffs' position that Rocky Hill Development was no longer part of the association at the time the amendment was signed. Therefore, the record reflects that, at the time the amendment was signed, Rocky Hill Development was entitled to 27.84 percent of the voting interest, and the three signing owner entities comprised more than 50 percent[11] of the total voting interest, and thus the parties effectuated a valid amendment.

Next, the plaintiffs advance the argument that the amendment did not comply with the CIOA. Specifically, the plaintiffs argue that, by failing to obtain sufficient votes required by General Statutes § 47-236,[12] the defendants failed to effectuate the amendment. With regard to the plaintiffs' argument, the trial court stated that there was a question as to whether the CIOA applied to the association because pursuant to § 47-236 (a) (3),[13] the CIOA's requirement of a 67 percent vote to amend a declaration does not apply in situations in which the properties that are part of an association are nonresidential. We agree with the trial court's determination

[11] As previously noted, Rocky Hill Development owned 27.84 percent, MPM Enterprises owned 11.01 percent, and Rescue One owned 15.3 percent, for a total of 54.15 percent.

[12] General Statutes § 47-236 (a) (1) provides that a declaration may be amended by "vote or agreement of unit owners of units to which at least sixty-seven per cent of the votes in the association are allocated, unless the declaration specifies either a larger percentage or a smaller percentage, but not less than a majority, for all amendments or for specific subjects of amendment . . . ."

[13] General Statutes § 47-236 (a) (3) provides that "[t]he declaration may specify a smaller number [of voting percentage] only if all of the units are restricted exclusively to nonresidential use."

that the lots are to be used within a functionally integrated business park and not for residential purposes. Therefore, we conclude that, in amending the declaration, the defendants did not need to comply with the CIOA voting requirement. On the basis of the foregoing, we conclude that the court properly concluded that the declaration did not prevent lot owners from withdrawing their lots from the association. Consequently, the recorded amendment was proper. DiMaria was not required to be a member of the association when he purchased lot 2 from MPM Enterprises and his property was no longer subject to the declaration's restrictions.

II

Next, the plaintiffs claim that, in denying their request for injunctive relief in the second count of their complaint, the court improperly concluded that the defendants were entitled to connect lot 2 to the association's drainage system even though the defendants expressly had waived any right to the association's common elements in purportedly withdrawing lot 2 from the association. We disagree.

We begin by setting forth the applicable standard of review. "A party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate remedy at law. . . . A prayer for injunctive relief is addressed to the sound discretion of the court and the court's ruling can be reviewed only for the purpose of determining whether the decision was based on an erroneous statement of law or an abuse of discretion. . . . Therefore, unless the trial court has abused its discretion, or failed to exercise its discretion . . . the trial court's decision must stand. . . . The extraordinary nature of injunctive relief requires that the harm complained of is occurring or will occur if the injunction is not granted. Although an absolute certainty is not

required, it must appear that there is a substantial probability that but for the issuance of the injunction, the party seeking it will suffer irreparable harm. . . . We note also that, in exercising its discretion, the court, in a proper case, may consider and balance the injury complained of with that which will result from interference by injunction." (Citations omitted; internal quotation marks omitted.) *Tighe* v. *Berlin*, 259 Conn. 83, 87–88, 788 A.2d 40 (2002).

The plaintiffs have not demonstrated that the court abused its discretion by ruling in favor of the defendants and determining that DiMaria was entitled to connect his lot to the association's drainage system, despite the fact that lot 2 had been withdrawn from the association. One of the introductory clauses of the declaration states that "this [d]eclaration and all of the easements, covenants, conditions and restrictions as set forth herein shall run with the [l]ots and the balance of the [p]roperty for all purposes and shall be binding upon and inure to the benefit of all [o]wners, and their tenants, subtenants, employees, concessionaries, licensees, customers and business invitees, and their successors in interest." Further, § 9.10 of the declaration provides in relevant part: "No modification may modify or terminate any easement created hereunder, including those referenced in [e]xhibit B attached hereto, that benefits or burdens any [o]wner's [l]ot without the approval of that [o]wner."

The plaintiffs argue that, if the amendment permitted the withdrawal of DiMaria's lot from the association, then DiMaria is not permitted to use the drainage easement created under exhibit B of the declaration. The defendants alternatively argue that, on the basis of their argument in part I of this opinion, § 9.10 of the declaration permits the removal of any lot from the association, as well as for the complete termination of the association. Following this logic, the defendants argue

that use of the drainage easement cannot be premised upon association membership because were the association to be terminated, the still usable lots would have nowhere to drain runoff water.

In determining that DiMaria was still permitted to use the drainage easement, despite the withdrawal of his lot from the association, the trial court stated the following: "The [d]eclaration states that easements, covenants, and restrictions run with the [l]ots and are binding on [l]ot owners and their successors in interest. In the settlement of the site plan appeal, DiMaria proposed to the [commission] that pavement runoff would discharge into a 'bay saver' structure and then to a detention water infiltration system with overflow directed to the road drainage system. That proposal was incorporated into the settlement with the [c]ommission. . . . Based on the foregoing, the court finds that the defendants have a right to tie into the stormwater drainage system regardless of whether they belong to the [a]ssociation."

We agree with the defendants that the lot owners' use of the drainage easement is not predicated on membership in the association. Preliminarily, according to the express language of the declaration, the easements created by the declaration run with the land and are binding on all lot owners. Further, although not argued by the defendants in their appellate brief, we agree with the trial court's determination that the drainage system was created as part of the subdivision approval on August 3, 2004, prior to the filing of the declaration. Therefore, DiMaria's right to use the drainage system arose before the creation of the declaration and the easement rights created therein. Moreover, DiMaria's December 23, 2013 settlement with the commission incorporated a proposal that DiMaria would utilize the drainage system in question. On the basis of the foregoing, we conclude that the court did not abuse its discretion in declining to grant the plaintiffs' request for an

injunction preventing DiMaria from using the drainage easement.

III

Finally, we conclude that we need not address the plaintiffs' third claim, that the court improperly concluded that the plaintiffs' cause of action was barred by the doctrines of laches and equitable estoppel, or their fourth claim, that the court erred in declining to grant the plaintiffs' request for a permanent injunction prohibiting DiMaria from constructing a crematorium on his lot without approval from the association.

On the basis of our conclusion in part I of this opinion that the amendment was valid and therefore the defendants, being the current and prior owners of lot 2, were permitted to withdraw that lot from the association, the plaintiffs are unable to prevail with respect to either of these claims. These claims are dependent on the plaintiffs' having prevailed on their first claim, that the court improperly concluded that the declaration does not prevent lot owners from withdrawing a lot from the association.

The judgment is affirmed.

In this opinion the other judges concurred.