SCHAGHTICOKE TRIBAL NATION *v.* STATE OF CONNECTICUT ET AL.
(AC 43811)

Alvord, Elgo and Palmer, Js.

Syllabus

The plaintiff, which consists of members of the Schaghticoke tribe, an indigenous tribe recognized by the state, brought an action against the defendants, the state of Connecticut and the Commissioner of Energy and Environmental Protection, claiming an unconstitutional taking of certain of its real property and a breach of fiduciary duty. In 1752, the General Assembly enacted a resolution permitting members of the tribe to use certain land for improvement and for the cutting of wood and timber for their own use "during the pleasure of [the] Assembly." Thereafter, in 1801, the General Assembly granted a request of the state appointed overseer of the tribe for permission to sell a portion of the land in order to settle a debt incurred by the tribe, authorized a committee of sale to build several dwellings on the land and empowered the overseer to manage the proceeds and any mortgage securities obtained. The plaintiff's action, brought in 2016, alleged, inter alia, that the 1801 land sale amounted to an unconstitutional taking without just compensation under the Connecticut and United States constitutions. The plaintiff requested various measures in its prayer for relief, including monetary relief, with the aim of making tribal funds whole. The trial court granted the defendants' motion to dismiss the plaintiff's complaint, and the plaintiff appealed to this court. *Held*:

1. The trial court properly dismissed the plaintiff's takings claims with respect to the sale of the land at issue as they were barred by sovereign immunity, that court having correctly determined that the revocable right of occupancy granted to the tribe through the 1752 resolution was not tantamount to a cognizable property right under state law that could form the basis of a takings claim, as the language in that resolution did not describe the plaintiff's rights to the land as exclusive, it did not reflect a statutory waiver of the state's sovereign immunity, and the ability to use the land was granted at the pleasure of the General Assembly.

2. The trial court properly dismissed the plaintiff's breach of fiduciary duty claims, as they were barred by sovereign immunity because, although the plaintiff's prayer for relief with respect to these claims requested that the defendants take certain actions, this relief was expressly grounded in the plaintiff's requests for funds from the defendants in order to make up for the injury it alleges it suffered at the hands of the defendants, and the plaintiff failed to cite to any statute in support of its claims that

entitled it to a monetary award and did not cite to any legislative materials that contained a waiver of the state's sovereign immunity regarding claims the plaintiff might have against it.

(*One judge concurring*)

Argued February 9—officially released September 27, 2022

Procedural History

Action to recover damages for, inter alia, the alleged unconstitutional taking of the plaintiff's property, and for other relief, brought to the Superior Court in the judicial district of Hartford, and transferred to the Complex Litigation Docket; thereafter, the court, *Moukawsher*, *J.*, granted the defendants' motions to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

John R. Weikart, with whom was *James P. Sexton*, for the appellant (plaintiff).

Daniel Salton, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Clare Kindall*, solicitor general, *Matthew I. Levine*, deputy associate attorney general, and *David H. Wrinn* and *Michael W. Lynch*, assistant attorneys general, for the appellees (defendants).

Opinion

ELGO, J. This appeal arises out of a protracted dispute between the plaintiff, the Schaghticoke Tribal Nation, and the defendants, the state of Connecticut and Robert Klee, the Commissioner of Energy and Environmental Protection. The plaintiff claims that it is owed compensation pursuant to the state's sale of land and associated mortgages in which it claims to have a property interest, and thus filed a complaint alleging an unconstitutional taking of its property without compensation and a breach of fiduciary duty by the defendants. The trial court rendered judgment dismissing the complaint, from which the plaintiff has appealed. On

appeal, the plaintiff challenges the judgment of the trial court dismissing its complaint in its entirety. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The plaintiff consists of members of the Schaghticoke tribe (tribe), an indigenous tribe recognized by the state in General Statutes § 47-59a (b). The state's relationship with the tribe dates back several centuries. In 1736, in response to the tribe's settlement of an area along the Housatonic River, the General Assembly enacted a resolution (1736 resolve) permitting the tribe to "[continue] where they are [now settled during] the [pleasure] of this [governmental body] . . . ." The General Assembly further addressed the tribe's rights with respect to that area in 1752, when it enacted another resolution (1752 resolve) permitting the tribe's use of additional land for "improvement and for the cutting of wood and timber for their own use . . . during the pleasure of this Assembly."

In 1801, the state appointed overseer of the tribe wrote to the General Assembly requesting permission to sell a portion of the tribe's land in order to settle a debt incurred by the tribe. The state granted that request and passed an instrument that established a committee of sale with respect to that land, authorized the committee to build several dwellings on the land, and empowered the overseer to manage the proceeds and any mortgage securities obtained.

More than two centuries later, on October 13, 2016, the plaintiff brought the present action by way of a six count complaint. In the first and second counts, the plaintiff alleged that the state's conduct with respect to the 1801 land sale and creation of the associated mortgages amounted to an unconstitutional taking of property without just compensation in violation of the

United States and Connecticut constitutions, respectively. In the third count, the plaintiff claimed that the allegedly unconstitutional taking of its property violated its due process rights under article first, § 8, of the Connecticut constitution. The fourth through sixth counts alleged that the defendants had violated a fiduciary duty to the plaintiff and requested a number of measures, including monetary relief as set forth in the fourth count, with the aim of "[making] tribal funds . . . whole."

On February 14, 2017, the defendants filed a motion to dismiss. In their accompanying memorandum of law, they argued that (1) the plaintiff lacked standing as a result of an alleged ongoing leadership dispute within the tribe and (2) the plaintiff's claims were barred by the doctrine of sovereign immunity.[1] The plaintiff filed an opposition to the motion to dismiss accompanied by a memorandum of law, arguing that it appropriately represented the interest of the tribe for standing purposes and that the defense of sovereign immunity was inapplicable to its takings, due process, and breach of fiduciary duty claims.

Following transfer of the action to the Complex Litigation Docket on July 24, 2017, the court ordered the

[1] In support of those claims, the defendants relied on General Statutes § 47-66i (b), which provides: "A leadership dispute shall be resolved in accordance with tribal usage and practice. Upon request of a party to a dispute, the dispute may be settled by a council. Each party to the dispute shall appoint a member to the council and the parties shall jointly appoint one or two additional members provided the number of members of the council shall be an odd number. If the parties cannot agree on any joint appointment, the Governor shall appoint any such member who shall be a person knowledgeable in Indian affairs. The decision of the council shall be final on substantive issues. An appeal may be taken to the Superior Court to determine if provisions of the written description filed with the Secretary of the State pursuant to this section have been followed. If the court finds that the dispute was not resolved in accordance with the provisions of the written description, it shall remand the matter with instructions to reinstitute proceedings, in accordance with such provisions."

parties to prepare a joint case management report in advance of a status conference, which they submitted to the court on August 9, 2017. In their report, the parties expressed their desire to resolve the issue of the plaintiff's standing and the applicability of General Statutes § 47-66i before considering any alternative grounds for dismissal.

The court heard argument on the standing issue on September 17, 2017. On September 19, 2017, the court denied the defendants' motion to dismiss on the ground that the plaintiff lacked standing to bring the action. The court reasoned that, regardless of whether the plaintiff consisted of the entirety of the tribe or a mere faction, the plaintiff sufficiently represented the interest of individual members of the tribe for the purposes of bringing the present action.[2]

The parties and the court next addressed the issue of whether the plaintiff's property interest in the land at issue was sufficient to survive dismissal. After several rounds of supplemental briefs and memoranda on this issue, the parties appeared for argument before the court on December 18, 2017.

On December 27, 2017, the court granted in part the defendants' motion to dismiss. Turning first to the text of the 1736 and 1752 resolves, the court determined that neither resolve contained language that would have been understood to signify a formal conveyance of a property interest at the time of their ratification. In response to the plaintiff's contention that even a mere ability to occupy the land created a property right that entitled the plaintiff to compensation following the state's sale of the land, the court undertook a similar analysis. The court observed that the resolves permitted the tribe's presence on the land "during the pleasure"

[2] On October 3, 2017, the defendants filed a motion to reargue the standing issue, which the court denied.

of the General Assembly, meaning that "the General Assembly . . . had the right to take away" the tribe's ability to use the land. The court further cited several cases holding that a revocable license to access land does not confer a property interest on its holder.[3]

On May 23, 2019, the plaintiff filed a motion for clarification with respect to the status of its due process and fiduciary claims against the defendants.[4] Days later, the court, sua sponte, opened the judgment "to prevent any appeal period from running during the consideration of [the plaintiff's] motion and any outstanding matters undecided."

The parties and the court then agreed on a briefing schedule for the plaintiff's remaining claims. Following the submission of briefs by the parties and oral argument before the court, the court granted the defendants' motion to dismiss as to the fiduciary claims and, accordingly, dismissed the remainder of the plaintiff's complaint. The court held that, regardless of whether sovereign immunity was fatal to the plaintiff's claims, the plaintiff had not adequately demonstrated the existence of a statutory or common-law fiduciary relationship between it and the defendants such that its claims could proceed. This appeal followed.

I

The plaintiff first claims that the court improperly dismissed its takings claim with respect to the sale of

[3] The parties and the court also addressed the issue of whether the plaintiff's takings claim encompassed any mortgages which the state had obtained in relation to its sale of the land at issue. After ordering jurisdictional discovery and hearing argument from the parties, the court dismissed the plaintiff's takings claims with respect to the mortgages. On appeal, the plaintiff does not challenge the propriety of the court's determination that it lacked a property interest in such mortgages.

[4] That motion was predicated on the fact that the court concluded its third memorandum of decision with the sentence "[j]udgment will enter for the defendants," despite the fact that the court had not yet ruled on the plaintiff's remaining claims.

the land at issue. The plaintiff argues that the 1752 resolve created an ownership interest in the land at issue that entitles it to compensation as a result of the prior sale of the land. We disagree.

Our review of this claim is governed by the following legal principles. "The standard of review for a court's decision on a motion to dismiss is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 200–201, 994 A.2d 106 (2010).

"[T]he doctrine of sovereign immunity is not available to the state as a defense to claims for just compensation arising under article first, § 11, of the Connecticut constitution. . . . When possession has been taken from the owner, he is constitutionally entitled to any damages which he may have suffered . . . ." (Internal quotation marks omitted.) *184 Windsor Avenue, LLC* v. *State*, 274 Conn. 302, 319, 875 A.2d 498 (2005). "The complaint, to survive the defense of sovereign immunity, must allege sufficient facts to support a finding of a taking of [property] in a constitutional sense." (Internal quotation marks omitted.) *Gold* v. *Rowland*, supra, 296 Conn. 201.

"It is axiomatic that government action cannot constitute a taking when the aggrieved party does not have

a property right in the affected property. Whether one's interest or entitlement rises to the level of a protected property right depends on the extent to which one has been made secure by [s]tate or [f]ederal law in its enjoyment." (Internal quotation marks omitted.) *184 Windsor Avenue, LLC* v. *State*, supra, 274 Conn. 319.

A

The plaintiff first argues that the right of occupancy conveyed to it through the 1752 resolve is tantamount to a property right under state law.[5] In support of this contention, the plaintiff relies solely on a United States Supreme Court case, *Shoshone Tribe of Indians of Wind River Reservation in Wyoming* v. *United States*, 299 U.S. 476, 496–97, 57 S. Ct. 244, 81 L. Ed. 360 (1937) (*Shoshone*), which held that the right of occupancy granted to the Shoshone tribe by the federal government constituted a compensable property interest for the purpose of assessing a taking claim under the fifth amendment to the United States constitution. We deem this reliance mistaken. On its face, *Shoshone* concerned a dispute between a federally recognized tribe and the federal government over a treaty concerning the tribe's rights with respect to the land at issue. Id., 485–86. The plaintiff offers no Connecticut authority in support of the proposition that federal precedent concerning federal tribal matters is binding on disputes between states and tribes recognized by those states.

Even if we were to consider *Shoshone* as persuasive authority, several key distinctions exist between its facts and the circumstances of the present case. In *Shoshone*, the treaty between the Shoshone and the federal government stated explicitly that the land in question "would be 'set apart for the absolute and undisturbed use and occupation of the Shoshone Indians,' "

[5] Although the plaintiff relied on both the 1736 resolve and the 1752 resolve at trial, on appeal it predicates its takings claim solely on the 1752 resolve.

and that "no persons, except for a few specially enumerated, and governmental agents engaged in the discharge of duties enjoined by law, should 'ever be permitted to pass over, settle upon, or reside' in the territory so reserved." Id., 485–86. This language is far broader than that contained in the 1752 resolve, which merely permitted the tribe to use the land for "improvement and for the cutting of wood and timber." Notably, the 1752 resolve does not contain any language that defines the tribe's right to be present and chop wood on the land as exclusive. Furthermore, it expressly conditions the tribe's ability to use the land as existing "during the pleasure of [the General] Assembly," a limitation not present in the treaty in *Shoshone*.

Most critically, in *Shoshone*, Congress had statutorily waived the federal government's sovereign immunity as it pertained to "any and all legal and equitable claims . . . arising under or growing out of" the particular treaty at issue between the Shoshone tribe and the federal government. *Shoshone Tribe of Indians of Wind River Reservation in Wyoming* v. *United States*, supra, 299 U.S. 484 n.1. The record before us does not reflect any such waiver on the part of the state concerning future litigation of claims arising from the 1752 resolve. For those reasons, we conclude that the plaintiff's use of *Shoshone* is an attempted shortcut around the proper sovereign immunity analysis and inapposite to our resolution of the present matter.

Indeed, the United States Supreme Court has held that, in a federal context, "Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the [g]overnment without compensation." *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 288–89, 75 S. Ct. 313, 99 L. Ed. 314 (1955) (*Tee-Hit-Ton*). In *Tee-Hit-Ton*, a clan of Tlingit Indians brought a takings claim arising out of the federal government's sale of land that the plaintiffs previously

had used for cutting timber. Id., 273. In response to the plaintiffs' assertion that their interest in the land was sufficient for the government's sale of the land to constitute a taking,[6] the federal government argued that "the [plaintiffs'] property interest, if any, is merely that of the right to the use of the land at the [g]overnment's will; that Congress has never recognized any legal interest of [the plaintiffs] in the land and therefore without such recognition no compensation is due the [plaintiffs] for any taking by the United States." Id., 277.

The United States Supreme Court first observed that the plaintiffs could not pinpoint any statutory language granting them ownership in the land at issue, which necessarily meant that the plaintiffs had "no rights against taking or extinction by the United States protected by the [f]ifth [a]mendment or any other principle of law." Id., 278, 285. The court then reviewed evidence introduced at trial before the United States Court of Claims and further acknowledged the similarities between the plaintiffs' relationship to and interactions with the land and that of the "nomadic tribes of the [lower forty-eight states]," whom the court previously had held were not entitled to compensation for government takings in the absence of formal title to the land. Id., 285–90. Accordingly, the court adhered to its established precedent concerning similar claims brought by tribes from the continental United States and held that the plaintiffs were not entitled to compensation. See id.

Although we are mindful that neither *Shoshone* nor *Tee-Hit-Ton* bears directly on disputes between tribes and individual states, we find the reasoning in *Tee-Hit-Ton* more analogous to the present matter. As was the

[6] The resolution providing for the sale of the land contained the following provision: "Nothing in this resolution shall be construed as recognizing or denying the validity of any claims of . . . rights to lands or timber within the exterior boundaries of the [land at issue]." (Internal quotation marks omitted.) *Tee-Hit-Ton Indians* v. *United States*, supra, 348 U.S. 276.

case in *Tee-Hit-Ton*, the plaintiff in the present case is unable to furnish any evidence demonstrating that it possessed an unconditional permanent right to remain on the land such that a legally cognizable property interest could arise. See id., 278–79 ("There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, *not merely permissive occupation*." (Emphasis added.)). In our view, the principle articulated in *Tee-Hit-Ton* differentiating an ownership right from permissive occupation is consonant with our prior holdings on this issue. See, e.g., *Murphy, Inc.* v. *Remodeling, Etc., Inc.*, 62 Conn. App. 517, 522, 772 A.2d 154 ("[a] license in real property is a mere privilege to act on the land of another, which does not produce an interest in the property" (internal quotation marks omitted)), cert. denied, 256 Conn. 916, 773 A.3d 945 (2001). We therefore conclude that the court correctly determined that the plaintiff did not possess a sufficient ownership interest in the land to overcome the bar of sovereign immunity.

B

The plaintiff alternatively argues that the court misconstrued the language of the 1752 resolve in concluding that it conveyed only a revocable license—rather than a right of ownership or its equivalent—to the tribe. Our review of that issue of statutory interpretation is plenary. See *Seramonte Associates, LLC* v. *Hamden*, 202 Conn. App. 467, 476, 246 A.3d 513 ("[i]ssues of statutory construction raise questions of law, over which we exercise plenary review" (internal quotation marks omitted)), cert. granted, 336 Conn. 923, 246 A.3d 492 (2021).

"The process of statutory interpretation involves the determination of the meaning of the statutory language

as applied to the facts of the case, including the question of whether the language does so apply. . . . 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, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) Id., 476–77.

In our view, the court properly concluded that the plain text of the 1752 resolve granted the tribe no more than a right to occupy the land which the state could revoke at any given time. As stated previously, the 1752 resolve provides: "Resolved by this Assembly, that the said Indians, the memorialists, shall have the liberty, and they have hereby liberty granted to them, for their improvement and for the cutting of wood and timber for their own use only, the whole of the twenty-fifth lot, as the lots are now laid out, and also the equal half of the twenty-fourth lot on the southward part thereof [adjoining] to such twenty-fifth lot, and this to be improved by said Indians as aforesaid during the pleasure of this Assembly." Our examination of the text of a legislative enactment is guided by the principle that, "[i]n the absence of a definition of terms in the statute itself, [w]e may presume . . . that the legislature intended [a word] to have its ordinary meaning in the English language, as gleaned from the context of its use. . . . Under such circumstances, it is appropriate

to look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *Jacques* v. *Commissioner of Energy & Environmental Protection*, 203 Conn. App. 419, 443, 249 A.3d 40, cert. denied, 336 Conn. 938, 249 A.3d 352 (2021).

According to the 1762 edition of Jacob's Law Dictionary, a liberty is defined as "a [privilege] held by [grant] or [prescription], by which [men] enjoy [some benefit] . . . in a more general [signification], it is [said] to be a [power] to do as one thinks fit . . . ." G. Jacob, A New Law Dictionary (8th Ed. 1762). Similarly, a license is defined as "a [power] or [authority] given to a [man] to do some lawful act . . . ." Id. In both instances, through their definitions' references to "power" and "privilege," it is clear that holding a liberty or a license relates to the ability to carry out certain actions. Conspicuously absent from either definition is a link between the term "liberty" or "license" and any concrete property rights or interests. In light of these definitions, we agree with the court's determination that the 1752 resolve merely permitted the tribe to engage in certain behaviors—being physically present on the land, chopping wood, and making "improvements" to the property.

We also find instructive Connecticut courts' interpretation of similar language throughout the years. In *Chalker* v. *Dickinson*, 1 Conn. 509, 514 (1816), our Supreme Court was tasked with evaluating a resolve permitting one Ambrose Kirkland "liberty and license . . . to use and occupy" certain land designated for fishing. (Emphasis omitted.) At the time the General Assembly enacted the resolve, a 1783 act was in effect barring the general public from fishing on the land at issue; the resolve in question essentially exempted Kirkland from the 1783 act. Id., 517. (*Gould*, *J.*, concurring). Following the General Assembly's 1808 repeal of the 1783 act, the status of Kirkland's rights with respect to

the fishing area was left unclear. Id., 517–18. (*Gould*, *J.*, concurring).

Writing for our Supreme Court, Chief Justice Zephaniah Swift first reasoned that, had the General Assembly sought to award a "new" right to Kirkland, such as "exclusive" rights to use the area, "very different language would have been proper." Id., 514. Elaborating further in his concurring opinion, Justice Gould noted that the resolve "[did] not import to grant . . . what was not before [Kirkland's] own . . . or to establish a right already vested in him." Id., 517. Justice Gould also contrasted the resolve's use of language such as " 'liberty' " and " 'license' " with "right, title, interest, franchise, or any term of similar import," suggesting that the former were "terms almost appropriate to denote a matter of mere [favor] or indulgence" as opposed to formal conferrals of rights. (Emphasis omitted.) Id.; see also *East Haven* v. *Hemingway*, 7 Conn. 186, 198 (1828) (use of "give, grant and ratify" in legislative instrument signifies bestowal of new rights rather than affirmation of preexisting rights (internal quotation marks omitted)).

After applying these principles to the 1752 resolve, we are convinced that the trial court's analysis of the text was proper. The 1752 resolve does not refer to any "right," "title," "interest," or "franchise" in the land that was to be granted to the tribe. In contrast, the resolve speaks of the tribe's status as to the land only in terms of a "liberty." We also note that, as exemplified by the resolve in *Chalker*, the General Assembly regarded (as did courts of appeal tasked with interpreting its resolves) the grant of a "liberty" and a "license" interchangeably; as noted in part I A of this opinion, this court explicitly has held that a license with respect to land "does not produce an interest in the property." *Murphy, Inc.* v. *Remodeling, Etc., Inc.*, supra, 62 Conn. App. 522.

Furthermore, it follows by implication that, by giving the tribe the ability to use the land "at the pleasure of [the General] Assembly," that ability would have been revocable at any time. See, e.g., Black's Law Dictionary (11th Ed. 2019) pp. 124–25 (defining "pleasure appointment" in public employment context as "assignment . . . that can be taken away at any time, with no requirement for cause, notice, or a hearing"). In our view, the use of such language greatly weakens any claim the plaintiff could have to a protected property right in the land. See *A. Gallo & Co.* v. *Commissioner of Environmental Protection*, 309 Conn. 810, 825, 73 A.3d 693 (2013) ("[w]hether one's interest or entitlement rises to the level of a protected property right depends upon the extent to which one has been made secure by [s]tate or [f]ederal law in its enjoyment" (internal quotation marks omitted)), cert. denied sub nom. *A. Gallo & Co.* v. *Esty*, 572 U.S. 1028, 134 S. Ct. 1540, 188 L. Ed. 2d 581 (2014). Such a reading also is supported by the commonly held meaning of the term "license" at the time of the 1752 resolve. As the trial court emphasized in its memorandum of decision, the definition of "license" also provided that, "if [a] license was not given for a specified time it may be 'countermanded' at any time."

In light of the foregoing, we conclude that the court properly determined that the 1752 resolve did not grant the tribe a cognizable property right that could form the basis of a takings claim. As a result, the court properly concluded that the plaintiff's takings claims are barred by sovereign immunity.

II

The plaintiff also claims that the court improperly dismissed its breach of fiduciary duty claims in counts four, five, and six for lack of standing. The plaintiff argues that several legislative acts setting forth the

responsibilities of the state appointed overseer established a fiduciary relationship between the defendants and the tribe, which the defendants allegedly breached. In response, the defendants contend that the plaintiff has not properly pleaded an exception to, or waiver of, the state's sovereign immunity from suit. We agree with the defendants.

"Sovereign immunity relates to a court's subject matter jurisdiction over a case, and therefore presents a question of law over which we exercise de novo review. . . . The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law. . . . Not only have we recognized the state's immunity as an entity, but [w]e have also recognized that because the state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state. . . .

"[T]he sovereign immunity enjoyed by the state is not absolute. There are [three] exceptions . . . . The first exception . . . occurs when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity; the second exception occurs when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights; and the third exception occurs when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority." (Citation omitted; internal quotation marks omitted.) *Jacques* v. *Commissioner of Energy & Environmental Protection*, supra, 203 Conn. App. 429.

"[A] plaintiff who seeks to bring an action for monetary damages against the state must first obtain authorization from the claims commissioner." *Miller* v. *Egan*,

265 Conn. 301, 317, 828 A.2d 549 (2003). "[T]he exception to sovereign immunity for actions in excess of statutory authority or pursuant to an unconstitutional statute, applies only to actions seeking declaratory relief or injunctive relief, not to those seeking monetary damages." Id., 321. "The principles governing statutory waivers of sovereign immunity are well established. [A] litigant that seeks to overcome the presumption of sovereign immunity [pursuant to a statutory waiver] must show that . . . the legislature, either expressly or by force of a necessary implication, statutorily waived the state's sovereign immunity . . . . In making this determination, [a court shall be guided by] the well established principle that statutes in derogation of sovereign immunity should be strictly construed. . . . [When] there is any doubt about their meaning or intent they are given the effect which makes the least rather than the most change in sovereign immunity. . . . Furthermore, because such statutes are in derogation of the common law, [a]ny statutory waiver of immunity must be narrowly construed . . . and its scope must be confined strictly to the extent the statute provides." (Internal quotation marks omitted.) *Allen* v. *Commissioner of Revenue Services*, 324 Conn. 292, 299–300, 152 A.3d 488 (2016), cert. denied, U.S. , 137 S. Ct. 2217, 198 L. Ed. 2d 659 (2017). Our resolution of this claim is also guided by the fact that, because "sovereign immunity implicates the subject matter jurisdiction of the court"; id., 299; it may be raised at any time. See *Starboard Resources, Inc.* v. *Henry*, 196 Conn. App. 80, 88, 228 A.3d 1042 ("[a] claim that a court lacks subject matter jurisdiction may be raised at any time during the proceedings . . . including on appeal" (internal quotation marks omitted)), cert. denied, 335 Conn. 919, 213 A.3d 1170 (2020).

On our review of the pleadings, the relief sought in counts five and six of the complaint is unmistakably

monetary in substance. The plaintiff's requests for accountings indicate that the plaintiff seeks to prove that the defendants failed to properly financially compensate the tribe, and, consequently, failed to uphold their fiduciary responsibilities to the tribe. This reading is further supported by the plaintiff's request that the defendants "settle [tribal] funds," which makes clear that the plaintiff expects to be compensated following the aforementioned accountings. We additionally read these requests for accountings in tandem with the plaintiff's explicit requests for $610 million in damages, which are incorporated by reference into the counts alleging a breach of fiduciary duty. This underscores the extent to which monetary compensation for the defendants' alleged failure to uphold a fiduciary duty to the plaintiff is the plaintiff's ultimate goal, were it to have prevailed on its claims.

In our view, the present case is easily distinguishable from our recent decision in *Aldin Associates Ltd. Partnership* v. *State*, 209 Conn. App. 741, 765–66, 269 A.3d 790 (2022) (*Aldin*), in which we held that a claim for monetary damages is distinct from an action for specific remedies set forth in a statute which may include monetary compensation. In *Aldin*, the monetary relief sought by the plaintiff—reimbursement from the Department of Energy and Environmental Protection for remediation of petroleum storage tanks—was explicitly provided for by statute. Id., 745–46, 765; see General Statutes § 22a-449r. Here, the statutes cited by the plaintiff in support of its claims do not entitle it to a monetary award. We therefore conclude that our reasoning in *Aldin* does not apply to the matter before us.

In its complaint, the plaintiff alleges that the defendants have wronged it; throughout the complaint, the plaintiff requests money from the state in order to make up for the injury it alleges it has suffered at the hands of the defendants. We emphasize that, even though the

plaintiff's prayer for relief with respect to counts five and six requests that the defendants take certain actions, this relief is expressly grounded in the plaintiff's desire "to make tribal funds . . . whole." As this court previously has held, for purposes of sovereign immunity, our conception of the relief sought by a plaintiff is to be driven by substance and not form. See *Bloom* v. *Dept. of Labor*, 93 Conn. App. 37, 41, 888 A.2d 115 ("The mere framing of the complaint as one for declaratory judgment does not, in and of itself, make it so. . . . Although the plaintiff's action was denominated as a petition for declaratory and injunctive relief, the prayer for relief . . . [indicated] that the plaintiff ultimately is seeking money damages. . . . Therefore, because the plaintiff's claim ultimately is an action for money damages, the doctrine of sovereign immunity bars his action." (Citations omitted.)), cert. denied, 277 Conn. 912, 894 A.2d 992 (2006); see also *Daimler-Chrysler Corp.* v. *Law*, 284 Conn. 701, 723, 937 A.2d 675 (2007) (holding that request for order that defendant refund sales taxes to plaintiff "must be characterized as a claim for damages").

In light of our conclusion that the second and third exceptions to sovereign immunity for injunctive and declaratory relief do not apply, the plaintiff's only conceivable path around sovereign immunity would be a legislative waiver. Yet none of the legislative materials cited by the plaintiff contains any reference, much less one "expressly or by force of a necessary implication," to a waiver of the state's sovereign immunity regarding claims that the plaintiff might have against the defendants. Id., 720. For these reasons, we conclude that the plaintiff's fiduciary claims are barred by sovereign immunity. The trial court, therefore, properly dismissed the plaintiff's breach of fiduciary duty claims.

The judgment is affirmed.

In this opinion ALVORD, J., concurred.

PALMER, J., concurring. I agree with, and join, the majority opinion. I write separately only to note my agreement, in addition, with the determination of the trial court that the plaintiff, Schaghticoke Tribal Nation, does not have standing with respect to its claims of a breach of fiduciary duty by the defendants, the state of Connecticut and the Commissioner of Energy and Environmental Protection.

As the majority has explained, the trial court properly rejected the plaintiff's claims seeking just compensation for the state's alleged unconstitutional taking of land that the plaintiff contends belongs to it, concluding that sovereign immunity bars those claims because the plaintiff has no cognizable property right in that land. See *Tamm* v. *Burns*, 222 Conn. 280, 284, 610 A.2d 590 (1992) ("[t]o survive a motion to dismiss on the ground of sovereign immunity, a complaint must allege sufficient facts to support a finding of a taking of land in a constitutional sense" (internal quotation marks omitted)). With respect to the plaintiff's fiduciary claims, the trial court thereafter dismissed those claims upon concluding that the plaintiff lacks standing to bring them for essentially the same reason that the plaintiff cannot prevail on its underlying takings claims, that is, because the plaintiff has no ownership interest in the property that it claims the state took from it. On appeal, the majority has not addressed the trial court's conclusion regarding standing, electing, instead, to affirm the court's dismissal of the fiduciary claims on the ground of sovereign immunity. I agree with the majority's conclusion in that regard because, as this court discussed in *Bloom* v. *Dept. of Labor*, 93 Conn. App. 37, 888 A.2d 115, cert. denied, 277 Conn. 912, 894 A.2d 992 (2006), equitable claims against the state that have been brought for the sole purpose of facilitating a money judgment against the state are barred by sovereign immunity to the same extent that the money judgment itself is barred by that doctrine. Id., 41.

Nevertheless, I also agree with the trial court's holding that the plaintiff has an insufficient interest in the land at issue for standing purposes. To establish standing, a party must make at least a threshold or colorable showing of aggrievement. See, e.g., *May* v. *Coffey*, 291 Conn. 106, 112, 967 A.2d 495 (2009). For present purposes, "aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the [controversy], as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the [alleged conduct] has specially and injuriously affected that specific or legal interest." (Internal quotation marks omitted.) *Lazar* v. *Ganim*, 334 Conn. 73, 85, 220 A.3d 18 (2019). Having correctly concluded that the plaintiff lacked a property interest sufficient to support a takings claim because the state, not the plaintiff, owns the land, the trial court also correctly concluded that the plaintiff has not made a colorable showing that it is entitled to the equitable relief it seeks in connection with that takings claim. For that reason, as well, I agree with the majority that the trial court properly dismissed all of the plaintiff's claims, including its fiduciary claims.

CLERK OF THE COMMON COUNCIL *v.* FREEDOM OF INFORMATION COMMISSION ET AL.
(AC 44284)

SEBASTIAN GIULIANO ET AL. *v.* FREEDOM OF INFORMATION COMMISSION ET AL.
(AC 44295)

Moll, Alexander and Suarez, Js.

Syllabus

In each of two cases, the defendant Freedom of Information Commission appealed from the judgment of the trial court sustaining an appeal from the commission's decision ordering the disclosure of unredacted records

after rejecting the claims of the city of Middletown that the requested information was protected. A city employee alleged that the city's mayor had harassed her and a union representing city employees alleged that the mayor had improperly solicited campaign contributions from its members. In response to these complaints, the city's legislative body, the common council, hired a law firm to conduct an investigation. In the first case, the defendant D, a former member of the common council, sent a request to the plaintiff, the clerk of the common council, for, inter alia, invoices submitted to the city by the law firm in connection with its investigation. In response, the clerk sent D the requested records after redacting the names of city employees and the dates on which meetings occurred between those employees and the law firm's attorneys. Thereafter, D filed a complaint with the commission challenging the redactions with respect only to the name of the clerk and the dates of the meetings. Following a hearing, the commission ordered that the requested records be produced without the contested redactions. The clerk appealed to the trial court, which sustained her objection, determining that the redacted information was exempt from disclosure pursuant to the applicable statute (§ 1-210 (b) (2) and (10)), and the commission appealed to this court.

In the second case, the defendant mayor filed a complaint with the commission after the clerk produced redacted records in response to his request for, inter alia, communications between the law firm and the city. The commission ordered the disclosure of certain records but permitted the redaction of the names of then current city employees and their job titles. Thereafter, the plaintiffs, two members of the common council and the clerk, appealed to the trial court. The trial court sustained the appeal of the common council members, determining that the records at issue were exempt from disclosure pursuant to § 1-210 (b) (10) because they were protected by the attorney-client privilege, and it dismissed the clerk's appeal. The commission appealed to this court, and, thereafter, the two appeals were consolidated. On the commission's appeals to this court, *held*:

1. With respect to the commission's appeal in the first case, AC 44284, the trial court did not err in concluding that the records at issue were similar in nature to personnel files and constituted similar files under § 1-210 (b) (2), as the records, invoices with redactions of the names of city employees and the dates on which meetings occurred between the employees and attorneys at the law firm, were created as a result of the law firm's investigation of the complaints brought against the mayor and could have been used in determining whether the mayor should have been dismissed or subjected to other personnel actions; moreover, the information contained in the invoices was exempt from disclosure pursuant to § 1-210 (b) (2) if such disclosure would constitute an invasion of personal privacy, and, accordingly, the case was remanded to the

commission for further factual findings relating to whether the disclosure of the redacted information would constitute an invasion of privacy, as the commission previously did not reach the issue because it erroneously had determined that the records were not personnel or similar files; furthermore, the trial court erred in concluding that the name of the clerk and the dates of the interviews of city employees by the law firm's attorneys were exempt from disclosure as privileged attorney-client communications under § 1-210 (b) (10), as the four part test set forth in *Shew* v. *Freedom of Information Commission* (245 Conn. 149) for determining whether communications were protected by the attorney-client privilege was not met, the mere fact that a meeting had taken place between the clerk and the attorneys did not constitute a privileged communication, disclosure of the name of the clerk would not reveal the substance of the communication or the specific nature of the services provided, and the dates of interviews did not relate to legal advice or reveal the specific nature of the services provided.

2. With respect to the commission's appeal in the second case, AC 44295, the case was remanded to the commission for further factual findings because the commission had failed to make determinations concerning two of the *Shew* test factors, namely, whether, pursuant to § 1-210 (b) (10), communications were made between city employees and the law firm's attorneys and, if so, whether any such communications were made in confidence.

Argued November 9, 2021—officially released September 27, 2022

Procedural History

Appeal, in the first case, from the decision of the named defendant ordering the disclosure of certain unredacted billing records, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani*, *J.*; judgment sustaining the plaintiff's appeal, from which the named defendant appealed to this court; appeal, in the second case, from the decision of the named defendant ordering the disclosure of certain unredacted email records, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani*, *J.*; judgment dismissing the appeal of the plaintiff Linda Reed and sustaining the appeal of the named plaintiff et al., from which the named defendant appealed to this court; thereafter, this court granted the named defendant's motion to consolidate the appeals. *Reversed in part*; *further proceedings*

in Docket No. AC 44284; *reversed*; *further proceedings in Docket No. AC 44295*.

Danielle L. McGee, commission counsel, with whom, on the brief, was *Colleen M. Murphy*, general counsel, for the appellant (named defendant in both appeals).

Michael C. Harrington, for the appellees (plaintiff in Docket No. AC 44284 and named plaintiff et al. in Docket No. AC 44295).

Opinion

ALEXANDER, J. These consolidated appeals arise out of an investigation by the city of Middletown (city) into alleged improprieties by the former mayor and the city's subsequent refusal to provide unredacted records related to that investigation on the ground that the records were not subject to disclosure under the Freedom of Information Act (act), General Statutes § 1-200 et seq. The defendant Freedom of Information Commission (commission)[1] appeals from the judgments of the Superior Court in Docket No. AC 44284, sustaining the appeal of the plaintiff, the Clerk of the Common Council for the city (clerk of the common council), and in Docket No. AC 44295, sustaining the appeal of the plaintiffs Sebastian Giuliano and Mary Bartolotta[2] from the commission's decisions ordering disclosure of unredacted billing and email records, respectively, after rejecting the city's claims that the information at issue was either protected personnel or similar files or subject to the attorney-client privilege. In AC 44284, the commission claims that the court erred in (1) concluding that the attorney billing records were personnel or similar files pursuant to General Statutes § 1-210 (b)

[1] In each case, the individuals who requested the unredacted records from the city, namely, Gerald Daley in Docket No. AC 44284 and Daniel Drew in Docket No. AC 44295, also were named as defendants.

[2] Linda Reed was also a plaintiff in AC 44284. The trial court dismissed her appeal and she has not appealed from that judgment.

(2); (2) making a factual finding that the disclosure of the redacted information would constitute an invasion of personal privacy and was thus prohibited under § 1-210 (b) (2); and (3) concluding that certain information in attorney billing records was exempt from disclosure as privileged attorney-client communications pursuant to § 1-210 (b) (10). In AC 44295, the commission claims that the court erred in concluding that certain email communications also were privileged attorney-client communications protected under § 1-210 (b) (10). We agree with the commission except with respect to the issue of whether the invoices constitute personnel or similar files. Therefore, in AC 44284, we affirm in part and reverse in part the judgment of the court. In AC 44295, we reverse the judgment of the court.

I

AC 44284

We first address the appeal brought under Docket No. AC 44284. The following facts and procedural history are relevant to our resolution of this appeal. In December, 2017, a city employee complained that the mayor, Daniel Drew, unlawfully had harassed her. Additionally, a union representing city employees sent a letter to the city alleging that the mayor improperly had been soliciting campaign contributions from city employees. In response, the common council, which is the city's legislative body, hired an outside law firm, LeClairRyan, to conduct an investigation into the complaints. Attorney Margaret Mason of LeClairRyan served as lead counsel on the investigation. The common council also created a special investigative subcommittee, which was comprised of three of the common council's twelve members: Bartolotta, Giuliano, and Thomas Serra.

On September 7, 2018, Gerald Daley, a former member of the common council, sent a records request to the clerk of the common council, who was the records

custodian for the common council, in which he stated in relevant part: "I am requesting an opportunity to inspect or obtain copies of public records comprising the complete billing statements and invoices, including all non-privileged supporting documentation, submitted by LeClairRyan . . . between January 25, 2018 and August 13, 2018." Pursuant to General Statutes § 1-214 (b) (1),[3] the city gave notice to all employees whose names appeared in the responsive documents and a number of employees objected in writing to the disclosure of their identities. In response, the clerk of the common council sent Daley the requested records with redactions of the names of city employees and the clerk of the common council, as well as redactions of the dates on which meetings occurred between the employees and attorneys at LeClairRyan.

Thereafter, Daley filed a complaint with the commission and a contested case hearing was held on January 3, 2019. At the hearing, Daley indicated that he was challenging only the redactions of the clerk of the common council's name and the dates of the meetings between city employees and LeClairRyan attorneys. He did not challenge the redactions of the names of other city employees. The common council asserted that the redacted portions of the records were exempt from public disclosure pursuant to § 1-210 (b) (2)[4] or (10).[5]

[3] General Statutes § 1-214 (b) (1) provides in relevant part: "Whenever a public agency receives a request to inspect or copy records contained in any of its employees' personnel or medical files and similar files, and the agency reasonably believes that the disclosure of such records would legally constitute an invasion of privacy, the agency shall immediately notify in writing (A) each employee concerned . . . and (B) the collective bargaining representative, if any, of each employee concerned."

[4] General Statutes § 1-210 (b) provides in relevant part: "Nothing in the Freedom of Information Act shall be construed to require disclosure of . . . (2) Personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy . . . ."

[5] General Statutes § 1-210 (b) provides in relevant part: "Nothing in the Freedom of Information Act shall be construed to require disclosure of . . . (10) . . . communications privileged by the attorney-client relationship . . . ."

At the conclusion of the hearing, the hearing officer ordered the common council to submit to the commission all of the records at issue for an in camera review.

On September 17, 2019, the commission issued its final decision in which it ordered that the requested records be produced without redactions of the clerk of the common council's name and the dates and locations of interviews. The commission determined that the requested records are public records within the meaning of General Statutes §§ 1-200 (5), 1-210 (a) and 1-212 (a). It concluded that the attorney billing records did not constitute " 'personnel' or 'similar' files within the meaning of § 1-210 (b) (2)." It further concluded that none of the redactions were " 'oral or written communications' within the meaning of [General Statutes § 52-146r (2)].[6] . . . [T]he redacted information does not reveal the motive of the common council in seeking representation, litigation strategy or the specific nature of the services provided. . . . Accordingly, it is concluded that the date and place of the legal meetings and the name of the clerk of the common council (to the extent such name is contained in the in camera records) are not exempt from disclosure pursuant to § 1-210 (b) (10)." (Footnote added.)

Thereafter, the clerk of the common council appealed to the Superior Court. On September 3, 2020, after a hearing, the court issued a memorandum of decision sustaining the appeal and rendering judgment for the clerk of the common council. In its decision, the court

[6] General Statutes § 52-146r (2) provides: " 'Confidential communications' means all oral and written communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties or within the scope of his or her employment and a government attorney relating to legal advice sought by the public agency or a public official or employee of such public agency from that attorney, and all records prepared by the government attorney in furtherance of the rendition of such legal advice . . . ."

concluded that the redacted information was exempt from disclosure pursuant to both § 1-210 (b) (2) and (10).

First, the court determined that the redaction of the clerk of the common council's name was exempt from disclosure pursuant to § 1-210 (b) (2) because the records were personnel or similar files and redaction was necessary to prevent the invasion of the personal privacy of the clerk of the common council. It explained that the "invoices were produced solely in connection with a personnel investigation. . . . The results of the investigation and any actions taken therefrom are clearly personnel actions. The investigation, its results, and any consequent actions were meant to impact the mayor, the city employees who complained, and city employees generally. The documents contain information that is pertinent to personnel decisions."

The court reasoned that the clerk of the common council "participated in the investigation to facilitate the investigation on behalf of the common council, and also potentially as a witness, whistleblower and/or complainant. Our Supreme Court has recognized the concern associated with disclosing the identifying information of individuals who report harassment or who participate in an investigation concerning allegations of harassment in the workplace. . . . [R]evealing the identity of such complainants or participants in a harassment investigation in this context could facilitate retaliation and could inhibit people from participating in such investigations. In this case, that concern is heightened because Daley has consented to the redaction of the names of all current city employees except solely for that of the clerk of the common council. This focus on a particular city employee gives an even higher degree of concern." (Citations omitted.) The court found that the information sought from the records did not relate to legitimate matters of public concern and

that disclosure would be highly offensive to a reasonable person because it would facilitate retaliation and would inhibit future participation in such investigations.[7]

The court further concluded that the redacted information in the invoices relating to the names of city employees interviewed by attorneys from LeClairRyan, as well as the time spent on each interview and the date and place of each interview, were protected by the attorney-client privilege. It explained that, although "attorney invoices may not necessarily be entirely privileged, the information contained in the invoices must be analyzed in the same way any communication between the attorney and the client is analyzed for privilege. . . . [T]he applicability of the attorney-client privilege to the information in question is apparent from the documents themselves, the context of the harassment allegations, and the attorney's assignment to conduct a workplace harassment investigation." This appeal followed.

We begin by setting forth our standard of review and the legal principles that guide our analysis. "The scope of our review of the merits of the plaintiffs' argument is governed by a provision of the [act], General Statutes § 1-206 (d), and complementary rules of the Uniform Administrative Procedure Act . . . General Statutes § 4-166 et seq. [W]e must decide, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily or illegally, or abused its discretion. . . . Even as to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative agency

[7] See *Perkins* v. *Freedom of Information Commission*, 228 Conn. 158, 175, 635 A.2d 783 (1993).

must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . Although the interpretation of statutes is ultimately a question of law . . . it is the well established practice of this court to accord great deference to the construction given [a] statute by the agency charged with its enforcement. . . . Where, as in this case, the application of the statute to the documents at issue is fact bound, the abuse of discretion standard governs the appeal. . . .

"By way of background, we discuss briefly the policy of the act. [T]he overarching legislative policy of [the act] is one that favors the open conduct of government and free public access to government records.[8] . . . [I]t is well established that the general rule under the [act] is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the [act]. . . . [Thus] [t]he burden of proving the applicability of an exception [to disclosure under the act] rests upon the party claiming it." (Citations omitted; footnote added; internal quotation marks omitted.) *Lindquist* v. *Freedom of Information Commission*, 203 Conn. App. 512, 525–26, 248 A.3d 711 (2021).

A

We first address the commission's claim that the court erred in concluding that the invoices at issue are personnel or similar files. We disagree.

[8] General Statutes § 1-210 (a) provides in relevant part: "Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212. . . ."

Section 1-210 (b) provides in relevant part: "Nothing in the Freedom of Information Act shall be construed to require disclosure of . . . (2) [p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy . . . ." "When [a] claim for exemption involves [§ 1-210 (b) (2)],[9] the plaintiffs must meet a twofold burden of proof . . . . First, they must establish that the files in question are within the categories of files protected by the exemption, that is, personnel, medical or similar files. Second, they must show that disclosure of the records would constitute an invasion of personal privacy. . . . Determination as to whether either prong has been satisfied is, in the first instance, a question of fact for the [commission], to be determined pursuant to the appropriate legal standards." (Citation omitted; footnote added; internal quotation marks omitted.) *Connecticut Alcohol & Drug Abuse Commission* v. *Freedom of Information Commission*, 233 Conn. 28, 38, 657 A.2d 630 (1995).

The terms "personnel" and "similar" files are not defined in the act; however, our courts have interpreted the meaning and scope of such terms. " 'We interpret the term "similar files" to encompass only files similar in nature to personnel or medical files.' " Id., 40. Our Supreme Court has stated that a determination of whether a file is similar to a personnel file "requires a functional review of the documents at issue. . . . [A] 'personnel' file has as one of its principal purposes the furnishing of information for making personnel decisions regarding the individual involved. If a document or file contains material, therefore, that under ordinary circumstances would be pertinent to traditional personnel decisions, it is 'similar' to a personnel file. Thus, a file containing information that would, under ordinary

[9] Section 1-210 previously was codified at General Statutes § 1-19.

circumstances, be used in deciding whether an individual should, for example, be promoted, demoted, given a raise, transferred, reassigned, dismissed or subject to other such traditional personnel actions, should be considered 'similar' to a personnel file for the purposes of [§ 1-210 (b) (2)]." Id., 41.

In *Connecticut Alcohol & Drug Abuse Commission*, the records at issue pertained to an investigation regarding complaints of sexual harassment filed by police officers against a fellow officer. Id., 30–31. Our Supreme Court concluded that the investigation file was a " 'similar' " file and explained that, although "reports of incidents occurring in the workplace are not 'personnel files' per se, they may be similar to personnel files in that they may contain information that would ordinarily be considered in making personnel decisions regarding the individuals involved. Such reports would be functionally similar to information contained in the individual's personnel files. [Section 1-210 (b) (2)] requires a case-by-case analysis to determine whether a particular file is a 'similar file.' " Id., 42.

In *Almeida* v. *Freedom of Information Commission*, 39 Conn. App. 154, 155, 158, 664 A.2d 322 (1995), this court held that an investigative file regarding an altercation between the plaintiff, who was a guidance counselor, and a student was a personnel or similar file. The records at issue "were kept in a locked location separate from any personnel file, [but] contained the following: descriptions of the incident which took place in an open classroom; a list of exhibits, including a classroom description, pertinent public acts, school policy and faculty handbooks; the names of individuals providing statements; names, ages and grades of student witnesses interviewed; the name of the teacher's union representative, a description of the fact-finding efforts and a statement of the case status; statements of . . . the complainant's son, and two other teachers; and an

overhead chart of the classroom and desk arrangement." (Internal quotation marks omitted.) Id., 159–60. The court explained that "[t]he documents in the file contain information relevant to ascertaining whether the plaintiff assaulted a student and were reviewed to determine whether the plaintiff was to be exonerated or whether he was to be subject to disciplinary action, or perhaps even discharged, as a result of the incident. The cumulative effect of these documents, therefore, had a direct bearing on the employment status of the plaintiff. In this way, the file is 'similar' to a personnel file." Id., 160.

In *Superintendent of Police* v. *Freedom of Information Commission*, 222 Conn. 621, 628, 609 A.2d 998 (1992), our Supreme Court held that "a permit to carry a pistol or revolver is not 'similar' to a medical or personnel file" and, therefore, the information therein was not exempt from disclosure pursuant to § 1-210 (b) (2). In that case, a request was sent to the plaintiffs, the superintendent of police of the city of Bridgeport and the Bridgeport Police Department, asking for "a list of all those residents of Bridgeport who possessed municipal permits to carry pistols or revolvers." Id., 623. Specifically, the requester "desired to know the individual's name, birthdate, address, telephone number, occupation, sex, date of issuance of the permit and what weapons were registered to the individual." Id., 624. Our Supreme Court, in concluding that the pistol permits were not " 'similar' " files, reasoned that, "[i]n common parlance, a permit to carry a pistol or revolver is not 'similar' to a medical or personnel file. Unlike a personnel or medical file, a permit to carry a pistol or revolver does not contain detailed information with a potential for disclosure of the intimate details of one's personal life or capabilities. To conclude that a permit to carry a pistol or revolver is 'similar' to a medical or personnel file and therefore exempt from disclosure would be a

broad interpretation of § [1-210 (b) (2)] that would stretch the ordinary meaning of 'similar' to the breaking point. Such an interpretation would be inconsistent with the general principle that exceptions to disclosure must be narrowly construed." (Footnotes omitted.) Id., 628.

The question before this court is whether the commission properly determined that the attorney invoices are not personnel or similar files. We conclude, as did the court, that the commission incorrectly determined that the attorney billing records are not personnel or similar files within the meaning of § 1-210 (b) (2). The records at issue are invoices with redactions of the names of city employees and the dates of the meetings that occurred between the employees and the attorneys at LeClair-Ryan. The invoices were created as a result of an investigation conducted by LeClairRyan after allegations of harassment and improper solicitation of campaign contributions were brought against the mayor. The invoices contained the names of city employees with whom LeClairRyan had spoken in the course of its investigation, as well as the dates on which the interviews took place. The information obtained in the course of the investigation, therefore, could be used to inform any necessary remedial action and in deciding whether the mayor should be "dismissed or subject to other such traditional personnel actions . . . ." *Connecticut Alcohol & Drug Abuse Commission* v. *Freedom of Information Commission*, supra, 233 Conn. 41. The invoices, therefore, are " 'similar in nature' " to personnel files and constitute " 'similar' " files as that term is used in § 1-210 (b) (2). Id., 40, 42; see also *Rocque* v. *Freedom of Information Commission*, 255 Conn. 651, 661–62, 774 A.2d 957 (2001) ("written complaint of sexual harassment made by an employee . . . the complainant's detailed statement to investigating officer, and notes from interviews of many coworkers taken during

the course of the department's investigation of that complaint" constituted personnel or similar files). Consequently, the information contained in the invoices, including the name of the clerk of the common council, is exempt from disclosure pursuant to § 1-210 (b) (2) if disclosure of such information would constitute an invasion of personal privacy. See *Connecticut Alcohol & Drug Abuse Commission* v. *Freedom of Information Commission*, supra, 38.

B

The commission next argues that the court erred in making factual findings because the commission did not make any determination as to whether disclosure of the redacted information would constitute an invasion of personal privacy under § 1-210 (b) (2). Specifically, the commission contends that, "[b]ecause the [commission] found that the billing records did not constitute personnel or similar files . . . the [commission] did not reach a finding as to whether disclosure would constitute an invasion of personal privacy. Because the Superior Court concluded that the [commission's] finding was clearly erroneous, the court should have remanded the matter to the [commission] to consider whether the disclosure would result in an invasion of personal privacy." In light of our conclusion that the court correctly determined that the records are personnel or similar files, we agree with the commission that the case should be remanded to the commission for factual findings in regard to whether disclosure of the redacted information would constitute an invasion of personal privacy. Because the commission determined that the records did not constitute personnel or similar files within the meaning of § 1-210 (b) (2), it did not reach the issue of whether disclosure of the invoices would constitute an invasion of personal privacy. "Such a determination is for the [commission] in the first

instance." *Connecticut Alcohol & Drug Abuse Commission* v. *Freedom of Information Commission*, supra, 233 Conn. 43; see also *Shew* v. *Freedom of Information Commission*, 245 Conn. 149, 160–61, 714 A.2d 664 (1998). We are obligated, therefore, to direct the remand of the matter to the commission for a determination as to whether disclosure of the name of the clerk of the common council and the dates contained in the invoices would constitute an invasion of privacy pursuant to § 1-210 (b) (2).

C

Finally, the commission argues that the court erred in concluding that the name of the clerk of the common council and the dates of interviews by counsel with city employees are exempt from disclosure as privileged attorney-client communications.[10] We agree.

Section 1-210 (b) provides in relevant part: "Nothing in the Freedom of Information Act shall be construed to require disclosure of . . . (10) . . . communications privileged by the attorney-client relationship . . . ." "[T]he essential elements of the attorney-client privilege under both statutory and common law are identical." *Lash* v. *Freedom of Information Commission*, 300 Conn. 511, 516, 14 A.3d 998 (2011). We apply a four part test to determine whether communications are privileged: "(1) the attorney must be acting in a professional capacity for the agency, (2) the communications must be made to the attorney by current employees or officials of the agency, (3) the communications must relate to the legal advice sought by the agency from the attorney, and (4) the communications must be made in confidence." (Footnote omitted; internal quotation marks omitted.) *Shew* v. *Freedom of Information Commission*, supra, 245 Conn. 159. "[T]he party

[10] We note that, although the commission also contends that the court erred in concluding that time and location information was exempt from disclosure, the information redacted from the invoices consisted only of names and dates.

claiming an exemption from the disclosure requirements of the act bears the burden of establishing the applicability of the exemption." *Lash* v. *Freedom of Information Commission*, supra, 517. The privilege must be established "for each document separately considered" and must be "narrowly applied and strictly construed." *Harrington* v. *Freedom of Information Commission*, 323 Conn. 1, 12, 144 A.3d 405 (2016).

"[T]here is a general agreement that attorney billing statements and time records are protected by the attorney-client privilege *only* to the extent that they reveal litigation strategy and/or the nature of services performed . . . . Thus, statements and records that simply reveal the amount of time spent, the amount billed, and the type of fee arrangement between the attorney and the client are fully subject to discovery." (Emphasis in original; internal quotation marks omitted.) *Pryor* v. *Pryor*, Superior Court, judicial district of Fairfield, Docket No. FA-08-4026674-S (January 22, 2010) (49 Conn. L. Rptr. 274, 275); see also *Bernstein* v. *Mafcote, Inc.*, 43 F. Supp. 3d 109, 115 (D. Conn. 2014) (billing records not subject to attorney-client privilege because "they do not reveal the specific nature of the services provided, but rather only reveal the general nature of work performed"). Information contained in invoices, however, that reveals "the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided . . . fall within the privilege." (Emphasis omitted; internal quotation marks omitted.) *Bruno* v. *Bruno*, Superior Court, judicial district of Danbury, Docket No. FA-05-40049006-S (July 10, 2009). Furthermore, a client's identity and information related to where and when a client has conversations with his or her attorney do not fall within the attorney-client privilege. See *Ullmann* v. *State*, 230 Conn. 698, 712, 647 A.2d 324 (1994) ("the mere fact that a meeting took place between [an attorney] and his client did not

constitute a communication and such information is not privileged for that reason''); *New Haven* v. *Freedom of Information Commission*, 4 Conn. App. 216, 220, 493 A.2d 283 (1985) (affirming commission's order compelling disclosure of number of billing hours and general subject matter designations on billing invoices and stating that ''[q]uestions as to where and when a client had conversations with his attorney have been found not to be within the attorney-client privilege'').

On the basis of our thorough review of the record, we cannot conclude, as the trial court did, that the commission acted unreasonably, arbitrarily, illegally, or in abuse of its discretion in concluding that the name of the clerk of the common council, to the extent it appears in the invoices, and the dates of interviews, were not exempt from disclosure. The four part test for identifying communications protected by the attorney-client privilege has not been met.

The clerk of the common council is a city employee and a representative of the client, the common council. Similar to the facts of *Ullmann* v. *State*, supra, 230 Conn. 712, the mere fact that a meeting took place between the LeClairRyan attorneys and the clerk of the common council, a representative of the client, does not constitute a privileged communication. Furthermore, the disclosure of the name of the clerk of the common council would not reveal '' 'the substance of any communication' ''; id.; that the clerk of the common council had with the LeClairRyan attorneys and, therefore, would not reveal the specific nature of the services provided.

Similarly, the dates of interviews are not privileged attorney-client communications because they do not relate to legal advice nor do they reveal the specific nature of the services provided. The clerk of the common council failed to present evidence that the disclosure of only the date that an interview took place would

reveal the identity of individuals who participated in the investigation. The dates of the interviews, therefore, do not reveal the specific nature of services provided and are not exempt from disclosure pursuant to the attorney-client privilege.

Accordingly, in AC 44284 we affirm the judgment of the court with respect to its determination that the attorney invoices are personnel or similar files. With respect to the court's determination that disclosure of the redacted information would constitute an invasion of personal privacy pursuant to § 1-210 (b) (2), we reverse the judgment of the court with direction to remand the case to the commission for further proceedings to determine whether disclosure of the name of the clerk of the common council and the dates of the interviews would constitute an invasion of personal privacy pursuant to § 1-210 (b) (2). We reverse the judgment of the court with respect to its determination that the name of the clerk of the common council, to the extent it appears in the invoices, and the dates of interviews are exempt from disclosure pursuant to § 1-210 (b) (10).

II

AC 44295

We now turn to the appeal brought under Docket No. AC 44295. The following facts and procedural history are relevant to our resolution of this appeal. On August 7, 2018, Daniel Drew sent a records request to the clerk of the common council requesting, inter alia, "copies of any and all [emails], text messages, calendars, written communications in any form, [unredacted] legal bills, and cellular telephone logs pertaining to this investigation between members of the subcommittee, any employee/associate/partner of [LeClairRyan], and any staff of the city . . . ." In response to his request, Drew received "a large package of records," some of which had been redacted.

Thereafter, Drew filed a complaint with the commission, and a contested case hearing was held on January 3, 2019. At the hearing, Drew indicated that he was not challenging the redactions in the records he had already received but, instead, argued that there were additional responsive records, such as emails, that had not been disclosed. Drew further contended that the common council lacked the authority to hire an attorney for the purpose of receiving legal advice, and, therefore, none of the requested records should be exempt pursuant to the attorney-client privilege. The common council contended that the records were exempt from disclosure pursuant to § 1-210 (b) (2) or (10). At the conclusion of the hearing, the hearing officer ordered the common council to submit to the commission all of the records at issue for an in camera review.

On September 17, 2019, the commission issued its final decision in which it ordered the common council to disclose certain records identified in paragraph 48 of its final decision but permitted the redaction of the names of any current city employees, as well as their job titles. The commission determined that the requested records are public records within the meaning of §§ 1-200 (5), 1-210 (a), and 1-212 (a). It also determined that the common council and LeClairRyan entered into an attorney-client relationship. With regard to a number of the records at issue, however, the commission determined that no legal advice was being sought by the client or being provided by the attorney, and, therefore, those records were not exempt from disclosure pursuant to the attorney-client privilege.

Thereafter, Giuliano, Bartolotta,[11] and Linda Reed,[12] appealed to the Superior Court. On September 10, 2020,

[11] Giuliano and Bartolotta appealed in their capacity as members of the common council.

[12] In its decision, the court determined that Reed, who was not a member of the common council, did not have standing to pursue an appeal and dismissed her claim. Reed has not appealed from the court's dismissal of her claim.

after a hearing, the court issued a memorandum of decision sustaining the appeal and rendering judgment for Giuliano and Bartolotta. In its decision, the court concluded that the records at issue, identified in paragraph 48 of the commission's final decision, were protected by the attorney-client privilege and, therefore, were exempt from disclosure pursuant to § 1-210 (b) (10).

The court identified the four part test used to determine whether information is covered by the attorney-client privilege and determined that three of the four prongs were clearly met. See *Shew* v. *Freedom of Information Commission*, supra, 245 Conn. 159. "[T]here is no doubt that the LeClairRyan attorney was acting in her professional capacity as an attorney. The attorney was hired to conduct a workplace harassment investigation and report her findings and recommendations to the common council. The documents in question are clearly communications between the attorney and either the clerk of the common council, who acted as an agent for the common council, or other employees of the city who were participating in the investigation being conducted by the attorney. The communications were made in confidence and were confidential absent some disclosure here. Thus, the only remaining element to be considered is whether the communications were related to legal advice." The court characterized the documents at issue as communications from (1) the clerk of the common council providing information to the attorney in furtherance of the attorney's investigation, (2) employees of the city seeking to speak with the attorney in connection with the attorney's investigation, each of whom was officially interviewed by the attorney in the conduct of her investigation, (3) the attorney to the clerk of the common council conveying information about the investigation, (4) the attorney to the common council members concerning the investigation, and (5) the attorney to specific city employees concerning inter-

viewing the employees as part of the attorney's investigation.

The court explained that, "[a]lthough some of these documents contain logistical information concerning the investigation, the information in the documents in question: (i) supports the results of the investigation, (ii) reveals the attorney's thinking and strategy concerning the investigation by revealing her choices of information needed, employees to interview, and the time spent with each employee, (iii) potentially suggests to the alleged harasser the results of the investigation by revealing whether the correct employees were interviewed, (iv) gives indications of what information certain employees have relevant to the investigation and the employees' attitudes, and (v) reveals the thoroughness of the investigation and the nature of the services provided. Clearly, the foregoing documents relate to the legal advice to be provided, and the communications made therein were made in furtherance thereof." This appeal followed.

On appeal, the commission contends that the court erred in concluding that certain email communications were exempt from disclosure as attorney-client privileged communications pursuant to § 1-210 (b) (10). It also contends that, because the commission did not make factual findings with respect to each of the factors of the test set forth in *Shew* v. *Freedom of Information Commission*, supra, 245 Conn. 159, it was improper for the court to make such findings and it should have remanded the case to the commission for consideration of those factors.

We begin with our standard of review and the legal principles relevant to our resolution of this claim. As we stated in part I of this opinion, "[t]he scope of our review of the merits of the [plaintiff's] argument is governed by a provision of the [act] . . . § 1-206 (d), and complementary rules of the Uniform Administrative

Procedure Act . . . § 4-166 et seq. [W]e must decide, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily or illegally, or abused its discretion." (Internal quotation marks omitted.) *Lindquist* v. *Freedom of Information Commission*, supra, 203 Conn. App. 525.

As we set forth in part I C of this opinion, we apply a four part test to determine whether communications are privileged: "(1) the attorney must be acting in a professional capacity for the agency, (2) the communications must be made to the attorney by current employees or officials of the agency, (3) the communications must relate to the legal advice sought by the agency from the attorney, and (4) the communications must be made in confidence." (Footnote omitted; internal quotation marks omitted.) *Shew* v. *Freedom of Information Commission*, supra, 245 Conn. 159.

In considering the first prong of the test, the court properly determined that, consistent with the commission's finding, an attorney-client relationship had been established between LeClairRyan and the common council and that the common council's purpose in hiring LeClairRyan was to "investigate the complaints and to provide legal advice." The LeClairRyan attorneys, therefore, were acting in a professional capacity when communicating with city employees.

With respect to the third prong, whether the communications relate to the legal advice sought by the common council, we agree with the court's conclusion that the information contained in the documents at issue were made in furtherance of the investigation and, therefore, related to the legal advice to be provided. "Not every communication between attorney and client falls within the privilege. A communication from attorney to client solely regarding a matter of fact would not ordinarily be privileged, unless it were shown to be inextricably linked to the giving of legal advice."

Ullmann v. *State*, supra, 230 Conn. 713. "[I]t is not required that the [legal] advice [sought] must pertain to contemplated or pending litigation. . . . Moreover, the communication need not expressly seek legal advice. . . . The privilege merely requires that the client be consulting an attorney for professional advice, and [a]ny type of legal advice will qualify . . . ." (Citations omitted; internal quotation marks omitted.) *Blumenthal* v. *Kimber Mfg., Inc.*, 265 Conn. 1, 13, 826 A.2d 1088 (2003). Furthermore, "the privilege extends to the giving of information to the lawyer to enable counsel to give sound and informed [legal] advice." (Internal quotation marks omitted.) Id., 14. The communications at issue did not expressly ask any legal questions; however, the information conveyed in the communications related to the investigation by LeClairRyan into the conduct of and allegations against the mayor and was needed to supply a basis for legal advice concerning any future steps taken by the common council. See id., 13; *Shew* v. *Freedom of Information Commission*, supra, 245 Conn. 160.

We agree, however, with the commission's contention that it did not make a determination concerning two of the *Shew* factors, namely, whether the communications were made between employees of the city and the LeClairRyan attorneys and whether the communications were made in confidence. Consequently, we remand the case for further factual findings by the commission with respect to those questions. See *Shew* v. *Freedom of Information Commission*, supra, 245 Conn. 160–61 ("The commission . . . made no findings concerning . . . two requirements, namely, whether the persons interviewed were employees or officials of the town at the time of the interviews, and whether the communications were made in confidence. Consequently, a remand for further factual findings by the commission with regard to these questions is necessary.").

Accordingly, the judgment of the court is reversed with direction to remand the case to the commission for a determination as to whether, pursuant to § 1-210 (b) (10), the communications at issue were made in confidence between employees of the city and the LeClairRyan attorneys.

In Docket No. AC 44284, the judgment is reversed with respect to the determination that the name of the clerk of the common council and the dates of interviews are exempt from disclosure pursuant to § 1-210 (b) (10) and with respect to the determination that disclosure of the redacted information would constitute an invasion of personal privacy pursuant to § 1-210 (b) (2) and the case is remanded with direction to remand the case to the commission for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In Docket No. AC 44295, the judgment is reversed and the case is remanded with direction to remand the case to the commission for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

JOHN S. ADAMS, COADMINISTRATOR (ESTATE OF RYAN MICHAEL ADAMS), ET AL. *v.* AIRCRAFT SPRUCE AND SPECIALTY COMPANY ET AL.
(AC 44524)

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

Syllabus

The plaintiffs, the administrators of the estate of the decedent, sought to recover damages from several defendants, including D, as a result of an airplane crash that killed the decedent, who was a passenger, and the pilot, C, D's eighteen year old daughter who had obtained her pilot's license about one month before the crash. C, who had no training or

experience flying a Cessna 150H, was provided ground and dual flight instruction in the airplane approximately three weeks before the crash by E Co., a provider of flight instruction and airplane rentals, and its owner, B, after which B permitted her to fly the airplane without an instructor. C called E Co. to reserve a Cessna 150H airplane to fly on the day of the crash. The plaintiffs claimed, inter alia, that D had orally agreed with B prior to the crash that C would contact B about scheduling further training, which would include the rental of the airplane, and that D agreed to provide E Co. with a $1000 retainer, which D later paid, to cover the cost of its services and rental fees. Until the day of the crash, D was unaware that C had intended to fly that day, that she had rented the airplane or that she had flown it that day with the plaintiffs' decedent as a passenger. D filed a motion for summary judgment in which he claimed that he lacked the physical or legal control over the airplane that was required to establish liability under the doctrine of negligent entrustment. The trial court granted the motion, concluding, inter alia, that D lacked the requisite control of the airplane to be considered an entrustor or a supplier of it under a theory of negligent entrustment. On the plaintiffs' appeal to this court, *held* that the trial court properly granted D's motion for summary judgment, as there was no genuine issue of material fact that D's facilitation—monetary or otherwise—of C's access to the airplane was insufficient as a matter of law to demonstrate the element of control necessary to find D liable under the plaintiffs' negligent entrustment cause of action: the plaintiffs could not prevail on their claim that it was necessary to resolve the parties' dispute over whether D had arranged and paid for C's rental of the airplane before the court could determine whether D controlled the airplane or C's use of it, as that purported factual dispute did not raise any genuine issue of material fact that was relevant to the case insofar as access to and use of the airplane always remained exclusively within the power and control of its owners, B and E Co., and, even if D had acquired a right to use the airplane through an agreement with B and E Co., such interest never amounted to actual control of the airplane or control that was exclusive or superior to that of B and E Co., as D could never have had physical or constructive possession of the airplane without prior permission from B or E Co.; moreover, the undisputed evidence showed that B was responsible for deciding whether to rent the airplane and the terms and conditions of its rental, D had no right or ability to prevent other parties from leasing the airplane or to veto B's decision to allow C access to it on the day of the crash, and D was unaware on the day of the crash that C had flown the airplane or that the plaintiffs' decedent was a passenger; furthermore, contrary to the plaintiffs' unsupported contention, B and E Co. could not be considered, under the applicable provision (§ 390) of the Restatement (Second) of Torts, as third parties through whom D supplied C with the airplane, as the phrase "third person" in § 390 was construed to mean one who acts

as a conduit for an entrustor, rather than one who exercises authority and control.

Argued February 9—officially released September 27, 2022

Procedural History

Action to recover damages for, inter alia, the allegedly wrongful death of the plaintiff administrators' decedent as a result of an allegedly defective product, and for other relief, brought to the Superior Court in the judicial district of Danbury and transferred to the judicial district of Stamford-Norwalk, Complex Litigation Docket, where the court, *Lee*, *J.*, granted the motion to dismiss filed by the named defendant; thereafter, the court, *Ozalis*, *J.*, granted the motion for summary judgment filed by the defendant James W. Depuy and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

David S. Golub, for the appellants (plaintiffs).

Laura Pascale Zaino, with whom, on the brief, were *Richard C. Tynan* and *Logan A. Carducci*, for the appellee (defendant James W. Depuy).

Opinion

PRESCOTT, J. This appeal arises out of a tragic accident involving two first year students at Colgate University (Colgate) who died when the airplane in which they were flying, piloted by one of them, crashed in Morrisville, New York. The principal issue in this appeal is whether the father of the pilot can be held individually liable in an action brought by the estate of the deceased passenger on a claim of negligent entrustment because the father facilitated the airplane's rental from an entity operating out of a small airport near Colgate. More particularly, we are called on to consider whether there are genuine issues of material fact as to whether the father's actions could constitute sufficient control over the airplane, a potentially dangerous instrumentality, so that he could be deemed a supplier or entrustor of

that instrumentality under our law regarding the tort of negligent entrustment.

The plaintiffs, John S. Adams and Mary Lou Hanney, brought the underlying action as coadministrators of the estate of their son, Ryan Michael Adams, who was eighteen years old when he died on September 20, 2015, in the airplane crash that also claimed the life of the eighteen year old, newly licensed pilot of the airplane, Cathryn Depuy. The plaintiffs now appeal from the summary judgment rendered against them on the two counts of their complaint brought against the defendant James W. Depuy, the father of the deceased pilot,[1] which sounded in negligence and negligent entrustment.

The plaintiffs claim on appeal that the trial court improperly rendered summary judgment with respect to the negligent entrustment count.[2] In particular, they claim that genuine issues of material fact remain in dispute regarding the defendant's rental of the Cessna 150H airplane that his daughter was piloting when it

[1] In addition to bringing this action against James Depuy in his individual capacity, the plaintiffs also brought suit against him and his wife, Cathleen Wright, in their capacities as coadministrators of the estate of Cathryn Depuy. Also named as additional defendants were Aircraft Spruce & Specialty Company; Kelly Aerospace Power Systems, Inc., and its successor in liability, Kelly Aerospace Energy Systems, LLC; Bargabos Earthworks, Inc., doing business as Eagle View Flight; and Eagle View Flight's owner and manager, Richard O. Bargabos. Because James Depuy is the sole defendant participating in the present appeal, we refer to him throughout this opinion as the defendant and to the other parties by name.

Furthermore, because counts five and six were the only counts of the operative complaint brought against James Depuy individually, the summary judgment rendered on those counts is immediately appealable. See Practice Book § 61-3 ("[a] judgment disposing of only a part of a complaint, counterclaim or cross complaint is a final judgment if that judgment disposes of all causes of action in that complaint, counterclaim or cross complaint brought by or against a particular party or parties"); see also *Kelly* v. *New Haven*, 275 Conn. 580, 594–96, 881 A.2d 978 (2005).

[2] The plaintiffs do not raise any challenge in the present appeal regarding the court's rendering of summary judgment in favor of the defendant on the negligence count.

crashed, which, the plaintiffs contend, if proven, would demonstrate that he had the requisite control over the airplane to establish that he negligently entrusted the airplane to his daughter.[3] We conclude that no genuine issue of material fact exists and that the defendant is entitled to summary judgment as a matter of law on the negligent entrustment count because the undisputed facts demonstrate that, assuming he rented the airplane for his daughter's use, he nevertheless lacked the necessary control over the airplane to meet an essential element of a cause of action sounding in negligent entrustment. Accordingly, we affirm the judgment of the court.

The record before the court, which we view in the light most favorable to the plaintiffs as the nonmoving parties, reveals the following relevant facts and procedural history. On August 2, 2013, the defendant's daughter began taking ground instruction at the Danbury Airport in Connecticut. On August 17, 2015, shortly before leaving for college and approximately one month prior to the crash at issue, she obtained her private pilot's license from the Federal Aviation Administration (FAA). Up to this point, all of her training and experience flying had been in a Piper Warrior airplane. She had no training or experience flying a Cessna 150H prior to leaving for college.

On August 23, 2015, the defendant's wife, Cathleen Wright, drove their daughter to Colgate, located in Hamilton, New York, intending to leave the vehicle with their daughter for her use while at college. The defen-

[3] The plaintiffs also argue on appeal that a genuine issue of material fact exists regarding another element of negligent entrustment, namely, whether the defendant knew or should have known that his daughter's inexperience and lack of training as a pilot posed an unreasonable risk of harm to a third party. Because we conclude as a matter of law that the defendant lacked the requisite control over the airplane to impose a duty of care under a negligent entrustment theory of liability, and because that conclusion is dispositive of the present appeal, we do not reach this additional argument.

dant, who also is a licensed pilot and owns his own plane, flew his plane to the Hamilton Municipal Airport to join his wife and help move their daughter into her dormitory room.

After he arrived at the airport in Hamilton, the defendant needed to wait for his wife to pick him up to bring him to the Colgate campus. During that time, the defendant had an opportunity to meet and speak with Richard O. Bargabos, who owned and operated Bargabos Earthworks, Inc., which was doing business as Eagle View Flight (Eagle View) and was based at the Hamilton Municipal Airport. Eagle View offered both flight instruction and airplane rentals. The two discussed the fact that the defendant's daughter was a licensed pilot. They agreed that she would contact Bargabos about scheduling further training at the Eagle View flight school, which would include the rental of Eagle View's Cessna 150H airplane, and that Eagle View would be provided with a $1000 retainer to cover the cost of Eagle View's services, including any rental fees.[4]

[4] The defendant disputes that he reached any formal agreement with Bargabos or that he had any possessory interest, as lessee or otherwise, in the Cessna 150H that crashed. The defendant describes his encounter with Bargabos as a "chance meeting . . . ." The plaintiffs, however, in their opposition to the motion for summary judgment, reference a November 9, 2017 sworn affidavit by Bargabos that was included as an exhibit to the motion for summary judgment, in which he avers that, during this August 23, 2015 meeting with the defendant, they "reached an agreement whereby [Eagle View] would provide instruction and familiarization training to the [defendant's daughter] and the rental of a Cessna 150H airplane from [Eagle View] to be piloted by [the defendant's daughter] for flight in New York. The agreement was verbal and not reduced to writing."

Bargabos and Eagle View, in sworn responses to interrogatories that are also part of the summary judgment record, provided the following additional information regarding the disputed August 23, 2015 agreement between Bargabos and the defendant: "It was agreed that [the defendant's daughter] would bring with her on her first appointment with [Bargabos and Eagle View] a retainer of $1000 for payment of the services and rental to be rendered. On August 29, 2015, August 30, 2015, and [September] 2, 2015, [the defendant's daughter] appeared at Eagle View's office where she engaged in preflight inspection of the Cessna 150H airplane, ground training, and

This was the only conversation that the defendant had with Bargabos until after the plane crash on September 20, 2015. After the defendant helped his daughter move into her dormitory room, she drove him and Wright back to the Hamilton Municipal Airport, and the defendant flew himself and his wife back to the airport in Danbury.

The defendant's daughter attended Eagle View's flight school on August 29 and 30, 2015, at which time Bargabos provided her with both ground instruction and dual flight instruction in a Cessna 150H airplane owned by Eagle View. On August 30, 2015, Bargabos permitted her to fly the Cessna 150H airplane by herself without an instructor.

On August 31, 2015, the defendant spoke with his daughter on the phone and learned that she had begun receiving flight instruction from Bargabos and Eagle View. He asked her how she had paid for those services, and she indicated that she had not yet paid any money to Eagle View. Thereafter, the defendant sent a $1000 check to Eagle View payable to "Eagle View Flight." He included a handwritten note with the check, indicating that the money was for "flight training [and] plane rental for Cathryn Depuy." Neither the check nor the note made reference to any specific dates, to a specific aircraft, or to how the $1000 payment was to be allocated between past and future instruction and rentals. The defendant never signed any rental agreement or other paperwork with Eagle View or Bargabos.[5]

familiarization flight, and also flew solo on August 30. [The defendant's daughter] did not bring with her the $1000 retainer check on these dates. On September 3, 2015, [Eagle View] received a check from [the defendant] in the amount of $[1000] as the retainer for payment for flight instruction and plane rental."

[5] Bargabos testified during a videotaped deposition that he did not use a written rental agreement form in leasing Eagle View's aircrafts to pilots. Specifically, he stated that "I don't have them fill out any paperwork necessarily, but . . . I do require them to present their pilot certification, medical certificate, and a review of their log book. Once they've been checked out

The defendant was not aware until after the crash occurred that Bargabos had cleared his daughter to fly without a flight instructor out of the Hamilton Municipal Airport. The defendant was also not aware that his daughter had intended to fly anywhere on September 20, 2015, that she had rented an airplane on that date, or that she flew with the plaintiffs' decedent as a passenger.

Bargabos and Eagle View had rented the same Cessna 150H airplane to two other pilots in the week prior to renting it to the defendant's daughter on September 20, 2015. Bargabos and Eagle View permitted her to rent the plane on the day of the crash without any communication with the defendant and allowed her to fly it without a flight instructor. Ryan Adams joined her as a passenger. Shortly before 12:51 p.m., on September 20, 2015, the Cessna 150H airplane apparently lost power to the engine.[6] The airplane soon thereafter crashed to the ground, and both teenagers were killed.

. . . then they would just schedule the airplane either with myself or one of the employees." When asked what he meant by "checked out," Bargabos responded: "Well, if they're not a pilot that I've trained or flown with before, then I would require them to fly with me to be evaluated for proficiency, and familiarization with the systems, and the flying characteristics of the particular airplane that they're going to rent to be certain that they're proficient and qualified." Bargabos then was asked who from Eagle View was responsible in 2015 for making the decision that it was acceptable to rent a plane to a given customer, to which he responded, "it was me."

[6] In its memorandum of decision, the trial court stated that, "[o]n or about May 29, 2012, the defendant Aircraft Spruce & Specialty Company had sold an overhauled replacement carburetor to Bargabos and, in turn, Bargabos caused such carburetor to be installed in the Cessna 150H airplane that [the defendant's daughter] was piloting at the time of her death." One of the plaintiffs' theories is that the crash was caused by a defect in the carburetor. The final report issued by the National Transportation Safety Board, although not expressly foreclosing that theory, states the following regarding its findings as to the probable cause of the crash: "The pilot's failure to maintain airspeed and her exceedance of the airplane's critical angle-of-attack, which led to an aerodynamic stall, following a total loss of engine power for reasons that could not be determined because postaccident examination of the airframe and engine did not reveal any anomalies that would have precluded normal operation."

In September, 2017, the plaintiffs commenced the underlying lawsuit. The operative revised complaint was filed on March 23, 2018, and contained six counts. Counts one and two alleged product liability against Aircraft Spruce & Specialty Company (Aircraft Spruce) and Kelly Aerospace Power Systems, Inc., and its successor in liability, Kelly Aerospace Energy Systems, LLC, related to the airplane's allegedly faulty carburetor.[7] Count three sounded in negligence and was brought against the defendant and Wright in their representative capacities as the coadministrators of their daughter's estate. Count four alleged negligent entrustment of the airplane by Bargabos and Eagle View. Counts five and six were brought against the defendant in his individual capacity and, as previously stated, sounded in negligence and negligent entrustment. The defendant filed an answer and special defenses to the revised complaint.

On January 30, 2020, the defendant filed a motion for summary judgment as to both counts against him individually and a memorandum of law in support of the motion. Attached to the memorandum of law were exhibits consisting of excerpts from the depositions of Hanney and Bargabos; sworn affidavits by the defendant and Bargabos; a copy of the handwritten note that accompanied the defendant's payment to Eagle View; and a copy of the final accident report issued by the National Transportation Safety Board regarding the September 20, 2015 crash.

With respect to the negligence count, the defendant argued that he was entitled to summary judgment as a

[7] Prior to granting the motion for summary judgment in favor of the defendant, the trial court granted a motion to dismiss the count brought against Aircraft Spruce for lack of personal jurisdiction. The plaintiffs filed an appeal from that ruling, which our Supreme Court transferred to its own docket pursuant to Practice Book § 65-2 The Supreme Court heard oral argument on that appeal on March 25, 2022.

matter of law because he had no legal right or duty to control his adult daughter on the date of the accident or any duty to protect the plaintiffs' decedent. He also argued that an action for negligence could not be maintained unless some legally cognizable duty of care exists. With respect to the negligent entrustment count, the defendant argued that he could not be liable as a matter of law on a theory of negligent entrustment because he had no physical or legal control over the Cessna 150H involved in the crash, which was owned by Eagle View and which Bargabos had cleared his daughter to use.

The plaintiffs filed a memorandum of law in opposition to the motion for summary judgment, to which they attached a number of exhibits, including excerpts from interrogatory responses by Bargabos and Eagle View, and excerpts from transcripts of depositions of Bargabos, the defendant, Wright, and the plaintiffs. The plaintiffs argued that there were genuine issues of material fact in dispute that should preclude the rendering of summary judgment. Two of those issues arguably pertained to elements of the negligent entrustment count that is at issue on appeal, namely, whether the defendant had supplied or "entrusted" the airplane to his daughter, and whether he had done so with knowledge that her inexperience or incompetence as a pilot presented an unreasonable risk of physical harm to her or a third party.

First, with respect to the entrustment element, the plaintiffs argued that a factual dispute remained as to the manner in which the defendant had arranged and/or paid for the rental of the Cessna 150H used in the crash. Specifically, the plaintiffs note Bargabos' statements regarding (1) the meeting between the defendant and Bargabos at the Hamilton Municipal Airport in August, 2015, at which the defendant had requested that Bargabos provide the defendant's daughter with

flight instruction and airplane rental for her use, which Bargabos agreed to do, and (2) the check and note later sent to Eagle Flight by the defendant that specifically references airplane rental. See footnote 4 of this opinion.

Second, with respect to the defendant's knowledge of the risk involved, the plaintiffs argued that a dispute exists about whether the defendant knew or should have known that it would be dangerous, and therefore inappropriate, for him to rent an airplane for use by his newly licensed and inexperienced eighteen year old daughter. In particular, the plaintiffs point out that, according to Hanney's deposition testimony, which was a part of the summary judgment record, two weeks prior to the crash, the plaintiffs, the defendant, and Wright had a conversation after church services during which Wright expressed reservations about the defendant's daughter flying in general and, in particular, with her flying with passengers. Allegedly, Wright had told the plaintiffs that she had spoken with the mother of another person who her daughter had offered to take flying, and had stated: "And I want you to know that I wouldn't let my other daughter fly with [Cathryn] for fear of losing them both." The defendant denies being present for this conversation or hearing that statement.

The court heard oral argument on the motion for summary judgment and subsequently issued a memorandum of decision rendering judgment in favor of the defendant on both counts against him. With respect to the negligent entrustment count, the court concluded as a matter of law that the defendant lacked the requisite control over Eagle View's Cessna 150H airplane to be considered an entrustor or supplier of the aircraft.

The court explained in relevant part: "It is clear from the undisputed evidence submitted in support of this motion for summary judgment, that there is no genuine

issue of material fact that [the defendant] did not have a superior right or exclusive control of the Cessna 150H airplane involved in the crash on September 20, 2015. The evidence shows that Bargabos and Eagle View owned the aircraft, controlled the scheduling for the rental of the plane, controlled which pilots were deemed sufficiently proficient to rent their planes, and never communicated with [the defendant] about reserving the Cessna 150H airplane for [his daughter] on September 20, 2015, or any other date, or the circumstances under which she could use the plane. [The defendant's] payment for [his daughter's] flight instruction and plane rental was not specific to dates or routes. The plaintiffs have not presented any evidence that [the defendant] knew [his daughter] was flying the Cessna 150H airplane on September 20, 2015, who she would be flying with, or where she would be flying to. The undisputed evidence shows that it was [the defendant's daughter], in sole coordination with Eagle View, who made the arrangements for the airplane rental on September 20, 2015." Because the court determined that the defendant had met his burden of demonstrating that there was no genuine issue of material fact and he lacked the requisite control over the aircraft piloted by his daughter on the day of the crash to be liable under a theory of negligent entrustment, it granted the motion for summary judgment in favor of the defendant on that count. This appeal followed.

The plaintiffs claim on appeal that the trial court improperly granted the defendant's motion for summary judgment with respect to the negligent entrustment count. They argue that the court impermissibly resolved genuine issues of material fact and ignored controlling legal principles in arriving at its conclusion that, as a matter of law and undisputed fact, the defendant lacked the requisite control over Eagle View's Cessna 150H to qualify as an entrustor of the

airplane. The defendant argues to the contrary that the court properly rendered summary judgment in his favor with respect to the negligent entrustment count because the undisputed facts confirm that he did not have the necessary control, power, or authority to entrust Eagle View's airplane to his daughter, and, even if he did, he did not know or have reason to know that his daughter was unfit to fly the airplane. On the basis of our review of the summary judgment record, we agree with the defendant that his facilitation—monetary or otherwise—of his daughter's access to the airplane at issue was insufficient as a matter of law to demonstrate control of the airplane necessary to find him liable under a theory of negligent entrustment. Before turning to our analysis of the plaintiffs' claim, we first set forth relevant legal principles, including our standard of review and a discussion of the common-law tort of negligent entrustment as it exists in this state and in other states.[8]

I

Our standard of review with respect to a court's ruling on a motion for summary judgment is well settled. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

[8] Although the plane crash at issue occurred in New York, the parties did not raise a choice of law issue before the trial court, instead agreeing that no outcome determinative conflict exists between the laws of New York and Connecticut with respect to the issues raised in the motion for summary judgment. "When the applicable law of a foreign state *is not shown to be otherwise*, we presume it to be the same as our own." (Emphasis added.) *Walzer* v. *Walzer*, 173 Conn. 62, 76, 376 A.2d 414 (1977). Furthermore, any choice of law claim not raised in the trial court in a timely manner is deemed to be waived in a subsequent appeal. See *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 90, 881 A.2d 139 (2005). Because no choice of law issue was raised before the trial court, we apply Connecticut law.

. . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Barbee* v. *Sysco Connecticut, LLC*, 156 Conn. App. 813, 817–18, 114 A.3d 944 (2015). "A material fact . . . [is] a fact which will make a difference in the result of the case." (Internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 116, 49 A.3d 951 (2012).

We now turn to the applicable substantive law. It is a well accepted general tort principle that a person ordinarily will not be deemed liable for the actions of another that result in an injury to a third party. See, e.g., *Fraser* v. *United States*, 236 Conn. 625, 632, 674 A.2d 811 (1996) ("absent a special relationship of custody or control, there is no duty to protect a third person from the conduct of another" (internal quotation marks omitted)). As stated in § 315 of the Restatement (Second) of Torts: "There is no duty so to control the conduct of a third person as to prevent him from causing

physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection."[9] 2 Restatement (Second), Torts § 315, p. 122 (1965); see also *Murdock* v. *Croughwell*, 268 Conn. 559, 567, 848 A.2d 363 (2004) (applying § 315 and noting that, by its express terms, it "is an exception to the general rule that there is no duty to control the conduct of a third person").

The tort of negligent entrustment is another exception to this general tort principle. "The rationale underlying the imposition of negligent entrustment liability on suppliers of chattels is that one has a duty not to supply a chattel to another who is likely to misuse it in a manner causing unreasonable risk of physical harm to the entrustee or others. The purpose of the negligent entrustment doctrine is to articulate a set of standards that, if met, establish the duty and breach elements of a negligence claim without the necessity for the detailed analysis that often is required to determine the existence of a duty." (Footnotes omitted.) 57A Am. Jur. 2d 387, Negligence § 293 (2022); see also *Casebolt* v. *Cowan*, 829 P.2d 352, 359 (Colo. 1992) ("the very purpose of the doctrine of negligent entrustment is to establish criteria by which to resolve the difficult issues of duty and breach when negligent entrustment elements are established").

[9] Although parents are deemed to have a special relationship with their *minor* children from which a duty of care to them and others may arise; see 2 Restatement (Second), Torts § 316, p. 123 (1965); with limited exceptions not relevant here, no such duty exists between parents and their emancipated adult children. See, e.g., annot., 25 A.L.R. 5th 1, 13, § 2 [b] (1994) ("[c]ourts . . . rarely find justification for imposing liability on parents for the conduct of their adult, emancipated children and hold that [if] there is no legal right to control the children, there can be no liability imposed on the parent").

In *Soto* v. *Bushmaster Firearms International, LLC*, 331 Conn. 53, 78–81, 202 A.3d 262, cert denied sub nom. *Remington Arms Co., LLC* v. *Soto*, U. S. , 140 S. Ct. 513, 205 L. Ed. 2d 317 (2019), our Supreme Court explained the historical background of the common-law tort of negligent entrustment and how it has developed thus far in Connecticut.[10] The court traced the origin of the tort back to a nineteenth century English case, *Dixon* v. *Bell*, 105 Eng. Rep. 1023 (K.B. 1816). See *Soto* v. *Bushmaster Firearms International, LLC*, supra, 78. "In *Dixon*, the defendant sent a preadolescent girl to retrieve a loaded gun, resulting in the accidental shooting of the plaintiff's son. . . . In upholding a verdict for the plaintiff that the defendant was liable for entrusting the girl with the care and custody of the weapon, the court recognized that he well [knew] that the said [girl] was too young, and an unfit and improper person to be sent for the gun . . . ." (Citation omitted; internal quotation marks omitted.) Id. The court further stated: "American courts began applying the doctrine of negligent entrustment in the 1920s, following the advent of the mass produced automobile . . . and Connecticut first recognized the common-law cause of action in *Turner* v. *American District Telegraph & Messenger Co.*, 94 Conn. 707, 110 A. 540 (1920).[11] In

[10] In *Soto*, administrators of the estates of nine of the decedents in the 2012 Sandy Hook school shooting filed an action against the manufacturers, distributors, and sellers of the assault rifle used by the shooter. *Soto* v. *Bushmaster Firearms International, LLC*, supra, 331 Conn. 65. The administrators sought damages and injunctive relief, alleging, among other causes of action, negligent entrustment of the firearm. Id., 66–68. The trial court granted the defendants' motion to strike the complaint in its entirety, and the administrators appealed. Id., 67–69. Our Supreme Court agreed with the trial court that the administrators "ha[d] not pleaded a legally sufficient cause of action in negligent entrustment under our state's common law . . . ." Id., 76.

[11] As indicated by the court in *Soto*, courts in Connecticut, prior to the decision in *Turner*, already had determined that a person who entrusted a dangerous item to another could be held liable for resulting third-party injuries. See *Soto* v. *Bushmaster Firearms International, LLC*, supra, 331 Conn. 79–80. Those courts, however, had applied a traditional common-law

that case, the defendant security company entrusted a loaded pistol to an employee who later instigated a fight with and ultimately shot the plaintiff, a customer's night watchman. . . . [Our Supreme Court] held that there was insufficient evidence to support a verdict for the plaintiff on his negligent entrustment claim because there was not even a scintilla of evidence that the defendant had or [should] have had knowledge or even suspicion that [its employee] possessed any of the traits . . . attributed to him by the plaintiff, including that he was a reckless person, liable to fall into a passion, and unfit to be [e]ntrusted with a deadly weapon . . . ." (Citations omitted; footnote added; internal quotation marks omitted.) Id., 78–79. The court then stated: "Without this vitally important fact . . . the plaintiff's claim falls to the ground . . . ." (Internal quotation marks omitted.) *Soto* v. *Bushmaster Firearms International, LLC*, supra, 79.

The court in *Soto* next discussed *Greeley* v. *Cunningham*, 116 Conn. 515, 165 A. 678 (1933), in which our Supreme Court articulated the standards that govern a negligent entrustment action in the context of automobiles, which, as the court in *Soto* noted, has since "become the primary context in which [negligent entrustment] claims have arisen."[12] *Soto* v. *Bushmaster*

negligence analysis, rather than analyzing the matter "under the rubric of negligent entrustment . . . ." Id., 79. The court in *Soto* cited *Wood* v. *O'Neil*, 90 Conn. 497, 500, 97 A. 753 (1916), which held that "no cause of action *in negligence* could be maintained against the parents of a fifteen year old boy who accidentally shot a companion with a shotgun because the parents, in permitting the boy to use the gun, had no specific knowledge that he was possessed of a marked careless disposition." (Emphasis added; internal quotation marks omitted.). *Soto* v. *Bushmaster Firearms International, LLC*, supra, 79. As one treatise explains: "Once the duty of care is imposed, the negligent-entrustment case is an ordinary negligence case to which all the principles of negligence law apply." See 2 D. Dobbs, The Law of Torts (2d Ed. 2001) § 330, p. 893.

[12] "In *Greeley*, the plaintiff alleged that the defendant had been negligent in entrusting his car to an unlicensed driver, who subsequently caused an accident while attempting to pass the plaintiff's vehicle. . . . [Although] liability cannot be imposed [on] an owner merely because he [e]ntrusts [his

Firearms International, LLC, supra, 331 Conn. 79. Relying on language from *Greeley*, the court in *Soto* stated that the elements of a cause of action sounding in negligent entrustment of an automobile are "(1) the owner of an automobile entrusts it to another person (2) whom the owner knows or should reasonably know is so incompetent to operate it that injury to others should reasonably be anticipated, and (3) such incompetence results in injury."[13] Id., 80.

automobile] to another to drive [on] the highways, the court explained, [i]t is . . . coming to be generally held that the owner may be liable for injury resulting from the operation of an automobile he loans to another [if] he knows or ought reasonably to know that the one to whom he [e]ntrusts it is so incompetent to operate it, by reason of inexperience or other cause, that the owner ought reasonably to anticipate the likelihood that in its operation injury will be done to others." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Soto* v. *Bushmaster Firearms International, LLC*, supra, 331 Conn. 79–80.

[13] We note that the defendant in *Greeley* undisputedly was a joint owner of the automobile that caused the plaintiff's injuries. As courts in other jurisdictions have recognized, however, the legal ownership of an entrusted instrumentality should not be mistakenly viewed as an element of a cause of action for negligent entrustment. See, e.g., *DeWester* v. *Watkins*, 275 Neb. 173, 177–80, 745 N.W.2d 330 (2008) (overruling prior case law in Nebraska that, in setting forth elements of cause of action for negligent entrustment of automobile, used language that implied that only owner of automobile could be found liable under theory of negligent entrustment).

As set forth in § 308 of the Restatement (Second) of Torts, which we will discuss subsequently in this opinion, it is the defendant's *control* over the instrumentality, not legal ownership thereof, that is key to a determination of liability for negligent entrustment. We find the following statement by the Supreme Court of Nebraska in *DeWester* persuasive regarding this point: "[T]he overwhelming majority of courts to have analyzed the issue have concluded that a nonowner *who has control of a vehicle* can be held liable for negligently entrusting the vehicle. Certificates of title and other incidents of legal ownership are often documents of convenience, rather than reflections of the *actual possession and control of a vehicle*. And the basis for liability under the doctrine of negligent entrustment *is the power to permit and prohibit the use of the entrusted chattel*, which need not arise from legal ownership. Holding otherwise produces the paradox that even the grossest negligence can be insulated from liability, so long as the person deciding who can drive a car is not the person who legally owns it." (Emphasis added; footnotes omitted.) Id., 178–79.

Because we agree with the logic of the foregoing statement, it is prudent for this court to caution against construing the court's language in *Soto* regarding "the elements of a cause of action sounding in negligent

The court emphasized in *Soto* that "a cause of action for negligent entrustment—whether involving a vehicle, a weapon, or some other dangerous item—will [not] lie in the absence of evidence that the direct entrustee is likely to use the item unsafely. Most jurisdictions that have recognized a cause of action in negligent entrustment likewise require that the actor have actual or constructive knowledge that the specific person to whom a dangerous instrumentality is directly entrusted is unfit to use it properly. . . . In accordance with the majority view, this also is the rule set forth in the Restatement (Second) of Torts. Section 308 of the Restatement (Second) of Torts[14] provides that [i]t is negligence to permit a third person to use a thing . . . [*that*] *is under the control of the actor*, if the actor knows or should know that such person intends or is likely to use the thing . . . in such a manner as to create an unreasonable risk of harm to others. . . . Section 390,[15] which further defines the tort of negligent

entrustment of an automobile"; *Soto* v. *Bushmaster Firearms International, LLC*, supra, 331 Conn. 80; as limiting the scope of liability for negligent entrustment of an automobile to only the owner of an automobile.

[14] Section 308 of the Restatement (Second) of Torts provides: "It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others." 2 Restatement (Second), supra, § 308, p. 100. Comment (a) to § 308 further provides: "The words 'under the control of the actor' are used to indicate that the third person is entitled to possess or use the thing or engage in the activity only by the consent of the actor, and that the actor has reason to believe that by withholding consent he can prevent the third person from using the thing or engaging in the activity." Id., comment (a), p. 100.

[15] Section 390 of the Restatement (Second) of Torts provides: "One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them." 2 Restatement (Second), supra, § 390, p. 314.

entrustment, provides that [o]ne who supplies . . . a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others . . . is subject to liability for physical harm resulting to them. . . . We take it as well established, then, that, in order to prove negligent entrustment, a plaintiff must demonstrate that (1) the defendant has entrusted a potentially dangerous instrumentality to a third person (2) whom the entrustor knows or should know intends or is likely to use the instrumentality in a manner that involves unreasonable risk of physical harm, and (3) such use does in fact cause harm to the entrustee or others." (Citations omitted; emphasis altered; footnotes added; internal quotation marks omitted.) Id., 80–81.

The principal issue decided by the court in *Soto* was whether the plaintiffs in that case had met the second of these three enumerated requirements that it identified as necessary to sustain a cause of action for negligent entrustment.[16] Accordingly, the decision does not discuss in any meaningful way the first requirement, which is the focus of our inquiry in the present appeal. Nonetheless, it is clear from the court's discussion in *Soto* preceding its recitation of the three requirements that it employed and approved of the analytical approach found in the Restatement (Second) of Torts, as expressed in §§ 308 and 390, which is consistent

[16] Ultimately, the court in *Soto* decided that "[t]he rule that a cause of action for negligent entrustment will lie only when the entrustor knows or has reason to know that the direct entrustee is likely to use a dangerous instrumentality in an unsafe manner would bar the plaintiffs' negligent entrustment claims." *Soto* v. *Bushmaster Firearms International, LLC*, supra, 331 Conn. 81. The direct entrustee in *Soto* was not the school shooter but the shooter's mother, and no allegation had been made "that there was any reason to expect that [the shooter's] mother was likely to use the rifle in an unsafe manner." Id.

with the approach taken by courts in other jurisdictions when considering the tort of negligent entrustment. See, e.g., *Casebolt* v. *Cowan*, supra, 829 P.2d 358–59, and cases cited therein; id., 358 ("[i]n electing to utilize [§§] 308 and 390 of the Restatement to guide us in our analysis, we follow a path already taken by a number of other states that have employed, approved, or adopted those Restatement rules as part of their negligence jurisprudence" (footnote omitted)); see also *Neary* v. *McDonald*, 956 P.2d 1205, 1208 (Alaska 1998) (in adopting [§§] 308 and 390, court recognized that "[m]ost states have patterned their versions of the negligent entrustment doctrine after [§§ 308 and 390] of the Restatement (Second) of Torts"). Furthermore, comment (b) to § 390 explains that the rule stated in § 390, which pertains to the supplying of a chattel to a person who is incompetent to use it safely, "is a special application of the rule stated in § 308," which applies more broadly to all types of property and activities. 2 Restatement (Second), supra, § 390, comment (b), p. 315. Accordingly, §§ 308 and 390 must be read in conjunction with one another. See *Broadwater* v. *Dorsey*, 344 Md. 548, 558, 688 A.2d 436 (1997) ("[s]ections 390 and 308 [of the Restatement (Second) of Torts] are in pari materia, and must be read together").[17]

Accordingly, consistent with §§ 308 and 390 of the Restatement (Second) of Torts and the commentary thereto, we interpret the first *Soto* requirement—that a plaintiff must demonstrate that the defendant "entrusted a potentially dangerous instrumentality"; *Soto* v. *Bushmaster Firearms International, LLC*, supra, 331 Conn. 81—to require a plaintiff to show that the potentially dangerous instrumentality supplied or

[17] Statutes deemed "in pari materia" pertain to the same general subject matter and are "closely enough related to justify interpreting one in light of the other." 2B N. Singer & S. Singer, Sutherland Statutory Construction (7th Ed. 2008) § 51:3, pp. 240–41.

entrusted by the defendant was "under the control of" the defendant at the time possession was transferred.[18] 2 Restatement (Second), supra, § 308, p. 100. Such a construction is consistent with other jurisdictions that have adopted the Restatement's approach to the tort of negligent entrustment, as well as other authoritative secondary sources.

As courts in other jurisdictions persuasively have reasoned, actions by a defendant that only facilitate another's ability to have access to a potentially dangerous instrumentality from a third party will be insufficient, without more, to establish *control* over the instrumentality for purposes of sustaining an action for negligent entrustment. Some examples are useful to illustrate this point.[19]

[18] Logically, a defendant cannot "entrust" an instrumentality, and potentially be subject to liability for doing so negligently, if he or she lacked the ability to exercise a right to control that instrumentality that exceeds that of the entrustee or a third party.

[19] There are relatively few cases applying principles of negligent entrustment in the context of airplanes, especially ones in which the court had been called on to analyze what constitutes control over an airplane sufficient to deem someone an entrustor or supplier of the airplane. Rather, in most cases that we have found involving an alleged negligent entrustment of an airplane, the contested issue is most often whether the defendant had knowledge of a pilot's incompetence, inexperience, or recklessness, not whether the defendant supplied or entrusted to the pilot the airplane that later crashed.

Airplanes are vehicles used for transportation that, although potentially dangerous, are not inherently so. In that regard, an airplane is similar to an automobile. See, e.g., *Garland* v. *Sybaris Club International*, *Inc.*, 21 N.E.3d 24, 46 (Ill. App. 2014) ("[l]ike an automobile, an airplane is not inherently dangerous, but may become so if operated by a pilot who is incompetent, inexperienced, or reckless"), cert. denied, 23 N.E.3d 1200 (2015), and cert. denied, 23 N.E.3d 1200 (2015), and cert. denied, 23 N.E.3d 1200 (2015); see also *Cosey ex rel. Hilliard*, Docket No. 2019-785, 2020 WL 6687515, *15–16 (La. App. November 12, 2020) (agreeing with case law from other states that airplanes are not inherently dangerous instrumentalities), writ denied, 312 So. 3d 1097 (La. 2021). In resolving the present appeal, therefore, it is appropriate for us to consider and rely on case law discussing negligent entrustment of both airplanes and automobiles. See *Garland* v. *Sybaris Club International*, *Inc.*, supra, 46; *Cosey ex rel. Hilliard*, supra, *15–16; see also *Hubbard* v. *Pacific Flight Services*, *Inc.*, Docket No. C046617, 2005

In *Zetter* v. *Griffith Aviation, Inc.*, Docket No. 6:03-218-DCR, 2006 WL 1117678 (E.D. Ky. April 25, 2006), the federal District Court granted a motion for summary judgment on a negligent entrustment count that arose out of an airplane crash. Id., *13–14. The relevant undisputed facts were as follows: Todd Zetter was the vice president of a company with operations in Griffith, Indiana. Id., *1. Zetter, his wife, and four children lived in Somerset, Kentucky. To entice Zetter to agree to work in Griffith while his family remained in Somerset, the company included a clause in his employment contract that allowed Zetter to fly home to Somerset on weekends or his family to fly to Griffith. Id. To arrange these flights, Zetter would speak with an administrative assistant at the company, who would then arrange the details of the flights. Id. The administrative assistant would first obtain approval for the flight from the company's president and then would contact Griffith Aviation, a fixed base operator at Griffith Airport in Griffith. Id. Griffith Aviation would provide a pilot, who ordinarily would fly Zetter or his family in an airplane owned by the company's president or one of his businesses. Id. On one of these routine trips, Zetter's wife and children were returning home after visiting Zetter in Griffith in a Cessna 421 owned by a different party. Id., *1–2, 15. That plane crashed as it was making its final approach to the Somerset airport. Id., *1. One of Zetter's children was ejected from the aircraft and died. Id. The pilot and another passenger in the front seat were also killed. Id. Zetter's wife and his other three children were injured but survived the crash. Id. The Zetters filed a lawsuit against multiple parties, alleging both tort and contract causes of action. Id. One count was brought against Zetter's employer and sounded in negligent entrustment on the theory that the company had

WL 2739818, *4 (Cal App. October 25, 2005) (applying precedent concerning negligent entrustment of automobile to entrustment of private plane).

allowed the pilot to operate the Cessna without proper FAA licensing and without verifying the pilot's currency with FAA regulations. Id., *13.

The company moved for summary judgment, arguing, inter alia, that the plaintiffs could not establish the elements of negligent entrustment because the company did not own the aircraft that had crashed. Id. The District Court recognized that Kentucky had adopted § 390 of the Restatement (Second) of Torts, pursuant to which the plaintiffs needed to establish, inter alia, that the company was the "supplier of" the airplane that crashed. Id., *13–14. The court concluded that summary judgment on the negligent entrustment count was warranted because "the plaintiffs ha[d] not identified sufficient evidence by which a reasonable jury could find that [the company] 'supplied' the plane." Id., *14. Although the court recognized that "nowhere is it explicitly stated, in either § 390 or any of the cases interpreting it, that the party supplying the chattel must have ownership, possession or control of the same, all of the comments and illustrations to the Restatement assume as much. . . . No authority has been cited in which a party was held liable under negligent entrustment where *it had no control at any time of the object (i.e., chattel) which was misused.* [The company] cannot be liable for negligently entrusting [the pilot] with a plane which was owned by [a third party] and kept at Griffith Airport. The plaintiffs have identified no evidence to suggest that [the company] *exercised any physical possession or control* of the [airplane that] was involved in the crash." (Citations omitted; emphasis added; footnotes omitted.) Id., *14–15. In other words, even though the company or its servants *had arranged for and financed* the ill-fated flight, those actions alone were insufficient to establish control of the airplane for purposes of sustaining a

cause of action sounding in negligent entrustment. See id., *13–15.

In *Mejia* v. *Erwin*, 45 Wn. App. 700, 726 P.2d 1032 (1986), an automobile passenger was injured in a crash that also killed the driver. Id., 701. The passenger sued, inter alia, the deceased driver's father on a theory of negligent entrustment. Id. The undisputed facts established that the driver, who was twenty-nine years old, had contacted his father and asked to borrow the father's credit card in order to rent an automobile from a car rental company while the driver's own vehicle was being repaired. Id. The father agreed and went with the son to the car rental company to arrange for the rental. Id. The car was rented in the father's name, although the rental agent knew that the son was to be the only driver and the rental agreement indicated that the driver would be the son. Id. The trial court rendered summary judgment in favor of the father on the negligent entrustment count, and the passenger appealed. Id., 701–702.

The Washington Court of Appeals upheld the trial court's summary judgment, holding in part that the driver's father had not "entrusted" the rental vehicle to his son. Id., 703. The court first recognized that "reason would suggest that a person renting or leasing a car *could* negligently entrust it to another" because "[a] person may be in control of a vehicle, for purposes of negligent entrustment, even though the person does not own a vehicle." (Emphasis added.) Id. The court summarily concluded nevertheless that, "even viewing the evidence here most favorably to [the plaintiff], there are no facts showing that [the father] *entrusted* a vehicle to [his son]. The facts reveal, rather, that [the father] was simply lending his credit to [his son] to assist him in renting a replacement automobile. The fact that the automobile was rented in [the father's] name does not

alter the true nature of this transaction—a mere accommodation."[20] (Emphasis in original.) Id. In other words, it was the rental car company, not the father, that had entrusted the vehicle to the son because the company had physical control over the vehicle and the authority to decide whether to rent it for the use of the son.

The Supreme Court of Colorado engaged in similar analysis in its en banc opinion in *Peterson* v. *Halsted*, 829 P.2d 373 (Colo. 1992). In that case, the plaintiffs, Barry Halsted, the operator of a vehicle that was struck by another vehicle operated by a twenty-five year old drunken driver, and Teresa Billings, the mother of a child in Halsted's vehicle who was killed in the crash, brought consolidated actions against the parents of the drunken driver, alleging, inter alia, negligent entrustment. Id., 375. The trial court rendered summary judgment in favor of the drunken driver's parents, and the plaintiffs appealed. Id. The Colorado Court of Appeals reversed the summary judgment rendered on the negligent entrustment counts, but the Colorado Supreme Court reversed the decision of the Court of Appeals, holding that the parents were not the "suppliers" of the automobile and the tort doctrine of negligent entrustment was not applicable under the facts presented. Id., 377. The facts showed that one of the parents had cosigned loan documents that allowed the drunken driver to purchase the vehicle that was later involved in the crash. Id., 376.

The court in *Peterson* first examined the rule stated in § 390 of the Restatement (Second) of Torts and the

[20] The court also affirmed the rendering of summary judgment on the alternative ground that, although there was evidence that the driver had had multiple speeding violations and prior motor vehicle accidents as a teenager, there was no evidence from which to conclude that the father was or should have been aware that his son's driving was "not satisfactory, much less reckless, heedless, or incompetent . . . because [the son] was emancipated and not living in his parents' home at the time he received the traffic citations and was involved in the accidents . . . ." (Internal quotation marks omitted.) *Mejia* v. *Erwin*, supra, 45 Wn. App. 704.

examples therein, and concluded that the "examples of suppliers all describe persons having possession or right to possession of a chattel at the time of entrustment and who directly supply the chattel to the user." Id., 378. It then reasoned: "The purpose of the negligent entrustment doctrine is to articulate a set of standards that if met, establish the duty and breach elements of a negligence claim without the necessity for the detailed analysis that often is required to determine the existence of a duty. . . . *We are persuaded that the circumstances in which money or credit may be lent to facilitate the purchase of a vehicle are so many and varied as not to be readily adaptable to the simplified resolution of the duty question that results from the application of negligent entrustment analysis*. . . . Policy considerations may vary depending on the relationship of the lender to the borrower, the financial circumstances of the borrower, and the time elapsed between the loan and any resulting injury, to name but a few relevant factors. Our general negligence law is well adapted to take into account and weigh such manifold and disparate considerations in arriving at a conclusion whether a particular lender owes a duty of care to a particular injured party. . . . Accordingly, we think it unwise and destructive of flexibility of analysis to classify suppliers of money or credit categorically as suppliers of chattels under section 390 even though the loan or credit may be essential to the borrower in obtaining possession of the chattel." (Citations omitted; emphasis added.) Id.

Finally, in *Johnson* v. *Mers*, 279 Ill. App. 3d 372, 664 N.E.2d 668 (1996), one of the plaintiffs, James Johnson, had filed a lawsuit against a number of defendants after he was seriously injured by a municipal police officer who shot him with her service revolver, while off duty, during an altercation at Johnson's home.[21] Id., 375. One

[21] According to *Johnson*, "both [the officer] and Johnson had attended a fundraiser at [a local restaurant] where [the officer] consumed several alco-

count of the multicount complaint was brought against the town in which the police officer was employed on a theory that the town had negligently entrusted the service revolver to the officer. Id. The undisputed facts demonstrated that, when the town hired the officer, she did not have a firearm owner's identification (FOI) card and that the chief of the town's police department had written a letter to a local gun shop on town stationery, verifying that she was a police officer to aid her acquisition of her service revolver. Id., 377. The town moved for summary judgment. Id., 375. The trial court rendered summary judgment on that count in favor of the town, and Johnson appealed. Id.

The Appellate Court of Illinois upheld the trial court's decision. Citing to and relying on § 308 of the Restatement (Second) of Torts and its commentary, the court stated: "[*E*]*ntrustment must be defined with reference to the right of control of the* [*defendant*] *over the subject property*, which, in the case at bar, is [the officer's] service revolver. . . . If [a defendant] does not have an *exclusive right or superior right* of control, no entrustment of the property can occur. . . . *The mere fact that* [*a defendant*] *facilitates the acquisition of the dangerous subject property, is, by itself, insufficient to support an action for negligent entrustment.* . . .

"In the case at bar, the chief of [police] wrote a letter to a gun shop which *facilitated* [the officer's] acquisition of her service revolver before she was in possession of a valid FOI card. However, [the officer]

holic beverages. [The officer] quarreled with Johnson, and Johnson left and returned to his mobile home. After a short time, [the officer] also left and returned to Johnson's mobile home. Their quarrel continued, and [the officer] drew her service revolver and fired several shots into the ceiling. Both [the officer] and Johnson then allegedly struggled with the revolver, whereupon [the officer] shot Johnson in the head, causing permanent injuries." *Johnson* v. *Mers*, supra, 279 Ill. App. 3d 375. Johnson filed a personal injury action, raising claims against the officer, the restaurant, and the town in which the officer was employed. Id.

subsequently received her FOI card and, thus, had a right, independent of her status as a police officer, to possess a firearm. The firearm was not owned by [the town], but had been purchased by [the officer]. Therefore, because [the officer's] service revolver was not in any way under the control of [the town], the trial court was correct in granting summary judgment in favor of [the town] as to [the negligent entrustment] count." (Citations omitted; emphasis added.) Id., 379; see also *Bailey* v. *Advance America, Cash Advance Centers, Inc.*, Docket No. 3:16-CV-256TSL-RHW, 2016 WL 9281316, *4 (S.D. Miss. June 8, 2016) (citing *Johnson* and other precedent for proposition that "no entrustment can occur unless the entrustor has an exclusive or superior right of control; *merely facilitating access to the property, by itself, is insufficient to support an action for negligent entrustment*" (emphasis altered)); *Bahm* v. *Dormanen*, 168 Mont. 408, 412, 543 P.2d 379 (1975) ("[T]he basis of negligent entrustment is founded on control [that] is greater [than] physical power to prevent. *A superior if not exclusive legal right to the object is a precondition to the imposition of the legal duty.*" (Emphasis added.)).

With this legal background and case law in mind, we now apply these principles to the present case to determine whether summary judgment was properly rendered.

II

The trial court rendered summary judgment in favor of the defendant because, in its view, the undisputed facts showed that the defendant lacked the requisite control over the Cessna 150H to have liability under a theory of negligent entrustment. The court determined that the dispute about the precise contours of the arrangement between the defendant and Bargabos, by which the defendant facilitated his daughter's access

to the Cessna 150H, including whether any actual agreement existed, did not raise a genuine issue of material fact because access to and use of the plane was and always remained exclusively within the power and control of Bargabos and Eagle View. On the basis of our plenary review of the summary judgment record, we agree with the trial court that the defendant is entitled to summary judgment on the negligent entrustment count because there is no genuine issue of material fact that he lacked the necessary control over the airplane to have "entrusted" it to his daughter.

The plaintiffs argue that a conclusion regarding whether the defendant controlled the aircraft or his daughter's use of it requires resolution of the parties' factual dispute over whether the defendant had "arranged for his daughter's use of the plane and paid for its rental." Viewed in the light most favorable to the plaintiffs, however, this purported factual dispute does not raise any issue of fact that is material to the outcome of this case. Even if we were to assume that the defendant entered into an agreement with Bargabos through which he acquired some right to use the airplane, such interest alone never amounted to actual control over the airplane because he never could have had physical or constructive possession of it without the prior permission of Bargabos or Eagle View.[22] Thus, any control the defendant did have over the airplane could not be reasonably construed as exclusive or superior to that of Bargabos and Eagle View. It is undisputed that, as the owners-lessors of the airplane, Bargabos and Eagle View always had possession and control of the airplane

[22] The plaintiffs argue in their appellate brief that the trial court improperly adopted the defendant's version of the facts surrounding their meeting at the Hamilton Municipal Airport. Even if we agreed with this contention, it is important to remember that we review de novo the summary judgment record to determine whether summary judgment properly was rendered. Accordingly, the trial court's recitation of the underlying facts has no bearing on our review.

prior to it being flown by the defendant's daughter, including on September 20, 2015, the day of the crash. Accordingly, they, not the defendant, had the right and ability, regardless of any prior dealing or agreement with the defendant, to determine whether the defendant's daughter would be permitted to fly on the day of the crash, in what airplane, and under what restrictions.

The plaintiffs argue that the trial court "seems to have concluded that 'control,' in the present context, requires 'superior' and 'exclusive' rights with respect to the entrusted chattel" and that "[t]hat conclusion is inconsistent with . . . recent Connecticut authority," citing the Superior Court decision in *Wilson* v. *Hopkins*, Docket No. CV-16-5042908-S, 2018 WL 3579160, *2 (Conn. Super. July 9, 2018). In particular, the plaintiffs rely on a statement by the trial court in *Wilson* that "[n]either the Restatement nor any controlling Connecticut authority agrees with imposing the additional requirement . . . that any allegation of control must allege exclusive control." Id. We are not persuaded by this argument for a number of reasons. First, *Wilson* is not binding precedent on this court. Second, the court's statement in *Wilson*, made in the context of considering a motion to strike a negligent entrustment count, must be considered in light of the language that follows the quoted passage. The court in *Wilson* continued: "Control under the Restatement must be seen as the power to exclude use of the chattel by another, but it doesn't automatically mean that the power can't be shared with others. If two parties have the right to veto the use of a chattel both parties may make judgment calls that—under some circumstances—might logically lead to liability." Id. Thus, the court in *Wilson* was addressing a situation in which there were multiple parties involved with *equal* control over use of an instrumentality and concluded that "there is no good reason to make the party immune from negligent entrustment

liability merely because the party had control but not exclusive control." Id. As we have stated, the record in the present case demonstrates that the defendant, unless his daughter agreed to abide by his wishes, had no right or ability to veto or countermand Bargabos' and Earth View's decision, even if he had known about it prior to the flight, to allow his daughter access to the airplane on the date of the crash, and, therefore, the discussion of the Restatement in *Wilson* is inapposite to the present case.[23] Third, logically, and as clearly reflected in the case law and secondary sources that we have set forth in part I of this opinion, liability for negligent entrustment is founded on the right and power of a defendant to permit or prohibit the use of the purportedly entrusted chattel. A person can exercise that degree of control only if that right to control is exclusive or, if not, then superior to any coexisting right of control held by the entrustee or by a third party. See *DeWester* v. *Watkins*, 275 Neb. 173, 178, 745 N.W.2d 330 (2008) ("if the actor does not have an exclusive or superior right of control, no entrustment of the property can occur" (internal quotation marks omitted)); see also *Bailey* v. *Advance America, Cash Advance Centers, Inc.*, supra, 2016 WL 9281316, *4 (same); *Johnson* v. *Mers*, supra, 279 Ill. App. 3d 379 (same); *Bahm* v. *Dormanen*, supra, 168 Mont. 412 (same); 65 C.J.S. 484, Negligence § 157 (2010) (superior right to control is "essential element of a negligent entrustment cause of action").

The undisputed evidence demonstrates that it was Bargabos who was responsible for deciding whether to allow a person to rent an airplane from Eagle View and what the terms and conditions of that rental would be. He required any potential pilot to present him with

[23] For this same reason, the court's decision in *Prior* v. *Lang*, Docket No. CV-07-5001248S, 2009 WL 1532526 (Conn. Super. May 7, 2009), on which the plaintiffs place substantial reliance, is similarly inapposite.

a pilot certification and a medical certificate, and he reviewed the pilot's log book. Only after they had been "checked out" by Bargabos would he allow the pilot to fly an Eagle View airplane. There is no evidence in the record that this procedure was not followed with respect to the defendant's daughter or, as the plaintiffs assert in their appellate brief, that the agreement between the defendant and Bargabos allowed her to have unrestricted access to Eagle View's Cessna. To the contrary, the undisputed evidence showed that, after the defendant and Bargabos met, the Cessna at issue was rented, without the defendant's knowledge and permission, by Eagle View to two other pilots in the week prior to the crash. Such evidence evinces a lack of exclusive or superior control over the Cessna by the defendant. The defendant did not have unrestricted authority, i.e., exclusive or superior control, to prevent other parties from leasing the airplane or to bump them if his daughter wanted to fly the plane. Further, Bargabos made clear in his deposition testimony that the only reason the defendant's daughter was able to rent the airplane on the date of the crash was because she had called ahead to reserve it, adding that, if another person had reserved the plane before her, she would not have been able to use the plane on the day of the crash. We agree with the defendant's assertion in his brief that "[i]t was Bargabos' determination of [the defendant's daughter's] competency [to fly], not [the defendant's] alleged rental of the plane, that made Eagle View's plane available to her, and this is dispositive." The defendant did nothing more than facilitate his daughter's access to the airplane, which, as other courts have held, is not enough to establish control for purposes of establishing a claim of negligent entrustment.

The outcome of this case arguably might be different if the evidence showed that the defendant rented the

airplane from Bargabos and Eagle View and, *after taking personal or constructive possession of it*, directly allowed his daughter to pilot the plane, knowing she was inexperienced or incompetent to fly. See *Mejia* v. *Erwin*, supra, 45 Wn. App. 703 ("a person renting or leasing a car could negligently entrust it to another"). This simply is not the case here. The defendant never had possession or control of the airplane himself and, in fact, was unaware on the day of the crash that his daughter was flying it or that the plaintiffs' decedent was a passenger.

The plaintiffs argue that § 390 of the Restatement (Second) of Torts expressly states that "[o]ne who supplies [a chattel] directly or *through a third person* . . . is subject to liability" for negligent entrustment. (Emphasis added.) 2 Restatement (Second), supra, § 390, p. 314. The plaintiffs suggest that we should view Bargabos and Eagle View as merely third parties through whom the defendant supplied his daughter with an airplane. The plaintiffs' argument, however, finds no support in the Restatement itself, as none of the illustrations provided in the commentary to § 390 concerns a lessor or owner being treated as a third person supplier for a lessee or user. Nothing in the commentary to the rule supports the plaintiffs' novel argument, nor have the plaintiffs provided us with any case law from this or any other jurisdiction that supports their interpretation. We construe the phrase "third person" as used in § 390 to mean someone who is simply acting as a conduit for the entrustor rather than someone such as Bargabos or an entity such as Eagle View that exercises independent authority and control over the chattel. For example, a person cannot avoid liability for negligent entrustment if, rather than handing a loaded gun directly to a young child, he or she instead asks a friend to bring the gun to the child. In this scenario, the person has supplied the gun "through a third

person." The facts of the present case do not fall within this type of example, and, accordingly, we reject the plaintiffs' reading of § 390.

The defendant in the present case had no more control over the ill-fated airplane than did the defendant in *Zetter* v. *Griffith Aviation, Inc.*, supra, 2006 WL 1117678. Like the defendant company in *Zetter*, which had taken actions to arrange and pay for the pilot's access to the airplane that crashed, the defendant in the present case took similar actions by arranging and paying for his daughter's general access to an airplane. Moreover, as the District Court in *Zetter* concluded in upholding the summary judgment in that case, the mere fact that the defendant in the present case paid for and arranged access to an airplane is insufficient as a matter of law to establish the control necessary to be an entrustor of that airplane. The plaintiffs have not submitted any evidence from which a trier of fact reasonably could find that the defendant ever exercised control over who had access to the Cessna involved in the crash. See *Zetter* v. *Griffith Aviation, Inc.*, supra, 2006 WL 1117678, *1, 15. When, on September 20, 2015, the defendant's daughter was granted access to the airplane, it was in the possession of its owner Eagle View and was located at the Hamilton Municipal Airport. The defendant, on the other hand, was at his home in Ridgefield and was not contacted by his daughter, Bargabos, or Eagle View before Bargabos and Eagle View permitted her to take the airplane. Put simply, the defendant did not have the power to permit or prohibit the use of the property, he did not exercise any such power on September 20, 2015, and, thus, there was no "basis for liability under the doctrine of negligent entrustment . . . ." 57A Am. Jur. 2d, supra, § 302, p. 397.

In sum, we conclude that there was no genuine issue of material fact that the defendant, on September 20, 2015, lacked the necessary control over the airplane

for a trier of fact to find that he had "entrusted" it to his daughter, and, therefore, he was entitled to summary judgment as a matter of law on the negligent entrustment count. We deny the plaintiffs' claims to the contrary.

The judgment is affirmed.

In this opinion the other judges concurred.