WELLSWOOD COLUMBIA, LLC, ET AL. *v.* TOWN OF HEBRON (SC 19693)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Espinosa and Robinson, Js.*

Syllabus

The plaintiffs, who owned property in a town adjoining the defendant town, commenced the present action seeking to recover damages for, inter alia, a temporary taking, temporary nuisance, and tortious interference with business expectancies after the defendant's Board of Selectmen closed the road that provided the only access to the plaintiffs' property. The plaintiffs previously commenced an action seeking a temporary and permanent injunction, and the trial court rendered judgment in favor

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

of the defendant. The plaintiffs appealed from that judgment to this court, which concluded that the defendant had exceeded its authority in closing the road and remanded the case to the trial court with direction to render judgment in favor of the plaintiffs. In the present action, the defendant moved for summary judgment on the basis of res judicata. The trial court granted the motion, concluding that the damages claims arose out of the same operative facts as the claim for injunctive relief in the first action. The plaintiffs appealed, claiming that the trial court incorrectly determined that their damages claims in the present action were barred by the principles of res judicata. *Held*:

1. The plaintiffs' argument that their takings claim did not accrue and thus could not have been brought until after the injunction had been issued in the first action was unavailing; a temporary takings claim accrues when the regulatory action that is alleged to have effected the taking becomes final, and the accrual of the plaintiffs' takings claim was not postponed for res judicata purposes by virtue of the fact that the extent of their damages was uncertain because the permanent or temporary nature of the taking was unknown, as it was clear at the time the road was closed that the plaintiffs had sustained some damages.
2. The road closure did not constitute a temporary nuisance or continuing wrong such that the plaintiff's damages claim fell within the exception to res judicata for continuing or recurrent wrongs: the plaintiffs did not allege that the defendant committed additional, wrongful acts during or subsequent to the injunction action but, rather, claimed that they were entitled to recover damages on the basis of the defendant's single, wrongful act of closing the road; moreover, even if the road closure was properly characterized as a nuisance, because it was the sort of harm that the plaintiffs were required to presume would continue indefinitely, it would have been a permanent nuisance for which the cause of action would have accrued upon the closure of the road.
3. The trial court properly granted the defendant's motion for summary judgment with respect to the plaintiffs' claim for tortious interference with business expectancies, there having been no genuine issue of material fact as to whether the plaintiffs sustained losses prior to the commencement of the first action; the plaintiffs having lost access to their property and having presented expert testimony in the first action regarding the diminution in value of that property, it was apparent that the plaintiffs had suffered immediate and cognizable losses resulting from the closure of the road, and, therefore, the trial court properly concluded that the claim for tortious interference with business expectancies could have been brought in the prior action.
4. The policies underlying res judicata strongly supported the doctrine's application in the present case, as allowing this case to proceed would run counter to the minimization of repetitive litigation, the promotion of judicial economy, and repose to the parties: although further proceedings as to the damages claims would have been required following this

court's reversal of the trial court's judgment in the first action, those proceedings would have concluded several years ago and would have conserved the considerable resources expended by the parties and the court in that time; moreover, the plaintiffs would have been aggrieved for purposes of an appeal even if they had requested both injunctive relief and damages in the first action and the trial court denied their request for an injunction but awarded damages.

Argued January 25—officially released November 7, 2017

Procedural History

Action to recover damages for the defendant's allegedly improper temporary closure of a public road, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the case was removed to the United States District Court for the District of Connecticut, which retained jurisdiction over certain of the plaintiffs' claims and remanded certain of the plaintiffs' claims to the Superior Court in the judicial district of Hartford; thereafter, the court, *Elgo*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed. *Affirmed.*

Kerry M. Wisser, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellants (plaintiffs).

Thomas R. Gerarde, with whom, on the brief, was *Emily E. Holland*, for the appellee (defendant).

Opinion

PALMER, J. In *Wellswood Columbia, LLC* v. *Hebron*, 295 Conn. 802, 804–805, 825, 992 A.2d 1120 (2010) (*Wellswood I*), this court reversed the judgment of the trial court, which denied the application of the plaintiffs, Wellswood Columbia, LLC (Wellswood), and its managing partner, Ronald Jacques, for a permanent injunction barring the defendant, the town of Hebron (town),[1] from

[1] The town's Board of Selectmen and Jared Clark, the town manager, were also defendants in *Wellswood I*. In the present action, however, the town is the sole defendant.

closing a road that provided the sole existing access to a property that Wellswood owned in the adjoining town of Columbia. Shortly after the trial court issued the injunction upon remand from this court, the plaintiffs commenced the present action against the town seeking damages for, inter alia, a temporary taking, temporary nuisance and tortious interference with the plaintiffs' business expectancies. The trial court, *Elgo, J.*, granted the town's motion for summary judgment on the ground that the plaintiffs' claims were barred by the doctrine of res judicata because they arose out of the same operative facts as the plaintiffs' claim for injunctive relief and, therefore, should have been brought in *Wellswood I*. On appeal,[2] the plaintiffs claim that the trial court incorrectly determined that their claims in the present action are barred by the principles of res judicata. We disagree and, accordingly, affirm the judgment of the trial court.[3]

I

FACTS AND PROCEDURAL HISTORY

This court's opinion in *Wellswood I* sets forth the following relevant facts and procedural history. "In early 2004, the plaintiffs were considering the purchase of the property, which consisted of approximately 188 acres of land in the town of Columbia, for purposes of constructing a six phase residential retirement community. The only . . . existing access to the property

[2] The plaintiffs appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[3] Because the trial court concluded that the plaintiffs' claims were barred by res judicata, it did not reach the town's claims that they were also barred by the applicable statutes of limitations or, in the case of the tortious interference claim, by governmental immunity. Because we also conclude that the plaintiffs' claims are barred by res judicata, we also do not reach the town's alternative grounds for affirmance.

[was] Wellswood Road in Hebron,[4] which runs from Route 66 to the town line between Hebron and Columbia. At that point, Wellswood Road becomes Zola Road, which continues into the property and terminates in a dead end. . . .

"Because the only access to the property was by way of Wellswood Road, the plaintiffs requested a meeting with Hebron town officials to discuss the proposed development. During a meeting on April 21, 2004, Hebron town officials expressed several concerns about the proposed development, including concerns about storm water runoff from Wellswood Road, the adequacy of the water supply and the feasibility of septic services. The parties also discussed whether access to the property would be through private or public roads. . . . Hebron town officials indicated that, because the sole access to the development, at least initially, would be Wellswood Road, the development did not comply with that town's subdivision regulations.

"After several additional meetings with the Hebron town officials to discuss the development, Wellswood purchased the property in August, 2004, and decided to go forward with its development plans despite knowing of [those] concerns. In October, 2004, the plaintiffs began the subdivision approval process in Columbia. On December 9, 2004, Paul Mazzaccaro, then the town manager for Hebron, sent a letter to the Columbia [P]lanning and [Z]oning [C]ommission in which he raised several concerns regarding the proposed development. Mazzaccaro stated that, as depicted in the plans that the plaintiffs had submitted, the proposed development 'never could have access to other . . . development [in Columbia] or be connected to the present Columbia street system.' He requested that future plans

[4] For purposes of clarity, in this portion of the opinion, we refer to the town by name.

provide for such connection. Thereafter, the plaintiffs met separately with officials of both towns and it was determined that Mazzaccaro's letter had been based on outdated plans. Later subdivision plans showed several proposed new streets running from Zola Road to the property line. None of these streets, however, connected with existing roads in Columbia.

"Over the next several months, the plaintiffs continued the subdivision approval process in Columbia. On September 13, 2005, the Columbia [P]lanning and [Z]oning [C]ommission conducted a public hearing on the proposed subdivision. Several town officials from Hebron attended the hearing and voiced concerns over the remote location of the subdivision, the difficulty of responding to emergencies at that location, the effect of additional traffic on the safety of Wellswood Road and the increased cost to Hebron of maintaining the road and providing emergency services.

"On October 6, 2005, the Hebron [P]lanning and [Z]oning [C]ommission held a special meeting and recommended closing and barricading Wellswood Road at the town line. The Hebron [B]oard of [S]electmen adopted the recommendation that night. Thereafter, the plaintiffs brought [an] action seeking a temporary and permanent injunction to prevent [Hebron] from closing Wellswood Road. After the plaintiffs filed the action, [Hebron] . . . posted a 'road closed' sign at the end of Wellswood Road. [Hebron] then filed a motion to dismiss the action for lack of subject matter jurisdiction, claiming, inter alia, that the plaintiffs' lacked standing, which the trial court, *Peck*, *J*., denied.

"In April, 2006, the town of Columbia approved the plaintiffs' subdivision application. The parties subsequently entered into a stipulation for a temporary injunction pursuant to which the town of Hebron was enjoined from obstructing the plaintiffs' use of Wells-

wood Road for access to their property pending resolution of the action. Thereafter, the action was tried to the court, *Hon. Lawrence C. Klaczak*, judge trial referee . . . ." (Footnotes altered.) *Wellswood Columbia, LLC* v. *Hebron*, supra, 295 Conn. 805–808.

On July 21, 2008, the trial court issued a memorandum of decision in which it concluded, inter alia, that the plaintiffs were not entitled to a permanent injunction because they had failed to demonstrate that they were without an adequate remedy at law or that they would suffer irreparable harm in the absence of an injunction.[5] *Wellswood Columbia, LLC* v. *Hebron*, Superior Court, judicial district of Tolland, Docket No. TTD-CV-05-4003914-S (July 21, 2008) (46 Conn. L. Rptr. 69, 76), rev'd, 295 Conn. 802, 992 A.2d 1120 (2010). In reaching its determination, the trial court noted that "the plaintiffs have argued that they have suffered irreparable harm because [the town's] actions have injured them in such a way that money damages cannot compensate them. However, the plaintiffs have contradicted this position through the evidence they provided at trial, namely, the expert testimony of their appraiser. While this fact may preclude them from seeking injunctive relief, it does not prevent them from seeking money damages. Yet, in order to recover such money damages . . . the plaintiffs must show a total and permanent loss of the right of access to public roads, and presently the plaintiffs have failed to prove such a loss based on the evidence presented at trial." (Emphasis omitted; internal quotation marks omitted.) Id., 74.[6]

[5] As this court repeatedly has stated, "[a] party seeking injunctive relief must demonstrate that: (1) it has no adequate remedy at law; (2) it will suffer irreparable harm absent an injunction; (3) it will likely prevail on the merits; and (4) the balance of equities tips in its favor." *Aqleh* v. *Cadlerock Joint Venture II, L.P.*, 299 Conn. 84, 97, 10 A.3d 498 (2010).

[6] In concluding that the plaintiffs had failed to prove a total and permanent loss of the right of access to public roads, the trial court stated: "In the present case, it remains to be seen whether proposals with alternative means of access would be acceptable to Columbia authorities, but the fact remains

"Furthermore, the plaintiffs have not demonstrated that they are without an adequate remedy at law. [On the basis of] their allegations, the plaintiffs could have sought damages based on a taking[s] theory of recovery, yet they chose not to seek such a remedy in their prayer for relief or otherwise during the course of this litigation. While both parties provided expert appraisal testimony at trial, each [appraiser] provided significantly different opinions regarding the diminution of value resulting from the closure of Wellswood Road, such evidence was presented with respect to the issue of irreparable harm, not money damages. This court disagrees with the plaintiffs' assertion that the availability of money damages is not relevant to determining whether an adequate remedy at law exists. . . . Based on the expert appraisal testimony of the parties, the legal remedy of money damages would be available to the plaintiffs . . . as each appraiser testified to specific estimates of economic loss that would result from the closure of Wellswood Road. Because both parties provided expert testimony that offered specific amounts of compensable injury, the court finds that the plaintiffs have not sufficiently demonstrated that they are without an adequate remedy at law, and as such, an injunction should not issue in the present action." Id.

Finally, the trial court observed that "the plaintiffs argue in their [post trial] brief that, should the court find [that] injunctive relief is not the proper remedy

that access through Columbia would be possible in the future and the plaintiffs themselves embrace that model of planning. Because the plaintiffs have failed to establish that [the town's] actions would actually landlock their proposed development, they have not satisfied their burden of proving that they would suffer irreparable harm if an injunction is not granted. The fact that the plaintiffs will have to access their property through more [time consuming] and expensive means than they would if [the town] was forced to keep Wellswood Road open to their development does not mean that irreparable harm will result." *Wellswood Columbia, LLC* v. *Hebron*, supra, 46 Conn. L. Rptr. 74.

. . . they are entitled to money damages and a temporary injunction until such damages are paid . . . .'' Id., 76 n.2. The court explained, however, that ''the plaintiffs have not provided sufficient evidence on this issue. In fact, this alternative theory of recovery was never brought up in any of the plaintiffs' pleadings, nor in their prayer for relief. Because they have failed to properly bring this issue before the court, the issue of money damages will not be addressed; the only issue presently before the court is whether the plaintiffs are entitled to injunctive relief.'' Id.

On appeal to this court in *Wellswood I*, the plaintiffs challenged the trial court's denial of their request for a permanent injunction but not the court's denial of their request for damages. Specifically, the plaintiffs argued that the trial court ''improperly denied their request for a permanent injunction barring the [town] from closing Wellswood Road because: (1) barring the road was an unreasonable and arbitrary exercise of police power; (2) equitable relief is an appropriate remedy for the destruction of access even without a showing of irreparable harm; (3) even if a showing of irreparable harm is required, the plaintiffs were irreparably harmed by the road closure because there is no other access to the property; (4) the road closure was inconsistent with the public policy underlying General Statutes § 13a-55; and [5] contrary to the trial court's finding, the plaintiffs cannot use the property for purposes other than the subdivision if the road is closed.'' (Footnote omitted.) *Wellswood Columbia, LLC* v. *Hebron*, supra, 295 Conn. 808–809. We agreed with the plaintiffs' first contention, concluding that the town had exceeded its authority in closing Wellswood Road; id., 809; and, therefore, that ''the resolution of the [town's] [B]oard of [S]electmen to close and barricade Wellswood Road was void ab initio . . . .'' Id., 824. Accordingly, we remanded the case to the trial court with

direction to "render judgment in favor of the plaintiffs . . . voiding the . . . action of the [town's] [B]oard of [S]electmen adopting the recommendation of the [town's] [P]lanning and [Z]oning [C]ommission to close and barricade Wellswood Road." Id., 824–25.

In reaching our determination, we rejected the town's contention that the plaintiffs were not aggrieved by its decision to close the road, and, therefore, the plaintiffs lacked standing to bring the injunction action. Id., 809, 813. We concluded that the plaintiffs were classically aggrieved by the town's decision because they had established a specific personal and legal interest that had been injuriously affected by the town's actions. In particular, we explained that, "[i]n the course of exercising the powers expressly granted to it, such as the power to discontinue a road and to lay out a new road, a municipality may deprive a landowner of an access easement"; (footnotes omitted) id., 815; but, "in such cases, the elimination of the access easement constitutes a constitutional taking entitling the landowner to compensation." Id., 815 n.16.

Shortly after the trial court issued the injunction, as directed by this court on remand, the plaintiffs brought the present action seeking damages for, inter alia, a temporary taking. In their complaint, the plaintiffs alleged that, as a result of the temporary closure of Wellswood Road, "[they] were prevented from developing the property and deprived of the economic value and income to be derived from the property and from [the] development. When the . . . [t]own . . . posted and maintained the 'road closed' sign, it knew or should have known that any potential buyer with respect to [the residential retirement community] would become aware of the 'road closed' sign, and that [the] sign would have the effect of driving away potential buyers with respect to [the residential retirement community]." Thereafter, the town removed the case to the United

States District Court for the District of Connecticut, and that court, Bryant, J., subsequently dismissed two of the plaintiffs' federal claims, retained jurisdiction over a bad faith takings claim, and remanded the plaintiffs' temporary takings, temporary nuisance and tortious interference with business expectancies claims to the Superior Court.

Following remand to the Superior Court, the town moved for summary judgment, arguing, inter alia, that the plaintiffs' claims were barred by the doctrine of res judicata and the applicable statutes of limitations. The trial court, *Elgo, J.*, granted the town's motion, concluding that all of the plaintiffs' claims arose out of the same operative facts as the plaintiffs' claim for injunctive relief, and, therefore, the plaintiffs' claims should have been brought in *Wellswood I*. After oral argument in this court, the District Court reached a similar conclusion with respect to the plaintiffs' bad faith takings claim and granted summary judgment in favor of the town with respect to that claim. See *Wellswood Columbia, LLC* v. *Hebron*, United States District Court, Docket No. 3:10-CV-1467 (VLB) (D. Conn. March 28, 2017).

On appeal, the plaintiffs argue that their takings and tortious interference with business expectancies claims are not barred by res judicata because they did not accrue until the town reopened the road following this court's decision in *Wellswood I*. In support of this claim, the plaintiffs maintain that, until the reopening of the road, the full extent of their damages could not be established with reasonable certainty. The plaintiffs further argue that the road closure constituted a private temporary or "continuing" nuisance,[7] and, as such, their

[7] "[I]n order to recover damages in a common-law private nuisance cause of action, a plaintiff must show that the defendant's conduct was the proximate cause of an unreasonable interference with the plaintiff's use and enjoyment of his or her property. The interference may be either intentional . . . or the result of the defendant's negligence." (Citation omitted.) *Pestey*

damages claim falls within the exception to res judicata for "continuing or recurrent wrong[s]." 1 Restatement (Second), Judgments § 26 (1) (e), p. 234 (1982).[8] In the alternative, the plaintiffs argue that the policies underlying the doctrine of res judicata, in particular, the policy of judicial economy, are not furthered by the doctrine's application in the present case. The plaintiffs' claim, among other reasons, that damages could not have been assessed in *Wellswood I* until this court ruled, in 2010, on the propriety of the town's conduct and, therefore, even if the plaintiffs had brought all of their claims in the earlier action, "[t]he remand order from this court would have been . . . for a hearing in damages for the temporary taking." Thus, according to the plaintiffs, because further proceedings would have been required, even if they had brought all of their claims in *Wellswood I*, allowing the present case to proceed would work no real violence on the doctrine of res judicata.

We conclude that the plaintiffs' claims are foreclosed by principles of res judicata that are well established in Connecticut law, and that the out-of-state cases on which the plaintiffs rely provide no compelling reason to deviate from those principles so as to exempt their

v. *Cushman*, 259 Conn. 345, 361, 788 A.2d 496 (2002). As we explain more fully hereinafter, whether the private nuisance is deemed temporary or permanent determines the point at which the claim accrues. See part III B of this opinion; see also *Rickel* v. *Komaromi*, 144 Conn. App. 775, 788, 73 A.3d 851 (2013).

[8] Section 26 (1) (e) of the Restatement (Second) of Judgments provides: "When any of the following circumstances exists, the general rule of [res judicata] does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant: . . . For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to [recover] once for the total harm, both past and prospective, or to [commence an action] from time to time for the damages incurred to the date of [the action], and chooses the latter course . . . ." 1 Restatement (Second), supra, § 26 (1) (e), p. 234.

claims from the preclusive effect of res judicata. To the contrary, as we explain more fully hereinafter, the present case falls squarely within the parameters of that doctrine and its jurisprudential underpinnings.

II

GOVERNING LEGAL PRINCIPLES

It has long been an "established principle in our law of civil procedure that two [actions] shall not be brought for the determination of matters in controversy between the same parties, whether relating to legal or equitable rights, or to both, when such determination can be had as effectually and properly in one [action]. . . . To this end the law provides that all courts having jurisdiction at law and in equity, may administer legal and equitable rights, and apply legal and equitable remedies in favor of either party, in one and the same [action], so that legal and equitable rights of the parties may be enforced and protected in one action." (Internal quotation marks omitted.) *Beach* v. *Beach Hotel Corp.*, 117 Conn. 445, 452–53, 168 A. 785 (1933).

"The doctrine of res judicata holds that an existing final judgment rendered [on] the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. . . . If the same cause of action is again sued on, the judgment is a bar with respect to any claims relating to the cause of action [that] were actually made or [that] might have been made. . . .

"The applicability of the [doctrine] of . . . res judicata presents a question of law that we review de novo. . . . Because [the doctrine is a] judicially created [rule] of reason that [is] enforced on public policy grounds;

Stratford v. *International Assn. of Firefighters, AFL-CIO, Local 998*, 248 Conn. 108, 127, 728 A.2d 1063 (1999); we have observed that whether to apply [the] doctrine in any particular case should be made based [on] a consideration of the doctrine's underlying policies, namely, the interests of the defendant and of the courts in bringing litigation to a close . . . and the competing interest of the plaintiff in the vindication of a just claim. . . . These [underlying] purposes are generally identified as being (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments [that] undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation. . . . The judicial [doctrine] of res judicata . . . [is] based on the public policy that a party should not be able to relitigate a matter [that] it already has had an opportunity to litigate. . . . Stability in judgments grants to parties and others the certainty in the management of their affairs [that] results when a controversy is finally laid to rest. . . .

"We also have recognized, however, that the application of [the] doctrine has dramatic consequences for the party against whom it is applied, and that we should be careful that the effect of the doctrine does not work an injustice. . . . Thus, [t]he [doctrine] . . . should be flexible and must give way when [its] mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies." (Citations omitted; internal quotation marks omitted.) *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 600–602, 922 A.2d 1073 (2007).

"Because the operative effect of the principle of [res judicata] is to preclude relitigation of the original claim, it is crucial to define the dimensions of that original claim. The Restatement (Second) [of Judgments] pro-

vides, in § 24, that the claim [that is] extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. What factual grouping constitutes a transaction, and what groupings constitute a series, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. In amplification of this definition of original claim, § 25 of the Restatement (Second) [of Judgments provides] that [t]he rule of § 24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action (1) [t]o present evidence or grounds or theories of the case not presented in the first action, or (2) [t]o seek remedies or forms of relief not demanded in the first action.

"The transactional test of the Restatement [(Second) of Judgments] provides a standard by which to measure the preclusive effect of a prior judgment, which we have held to include any claims relating to the cause of action [that] were actually made or might have been made. . . . In determining the nature of a cause of action for these purposes, we have long looked to the group of facts [that] is claimed to have brought about an unlawful injury to the plaintiff . . . and have noted that [e]ven though a single group of facts may give rise to rights for several different kinds of relief, it is still a single cause of action. . . .

"The Restatement (Second) of Judgments further explains, with respect to how far the witnesses or proof in the second action would tend to overlap the witnesses or proof relevant to the first, [i]f there is a substantial overlap, the second action should ordinarily be

held precluded. But the opposite does not hold true; even when there is not a substantial overlap, the second action may be precluded if it stems from the same transaction or series. 1 Restatement (Second), [supra] § 24, comment (b) . . . ."[9] (Internal quotation marks omitted.) *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 348–49, 15 A.3d 601 (2011).

III

THE PLAINTIFFS' CLAIMS

With these principles in mind, we turn to the merits of the plaintiffs' claims. Specifically, they contend that their damages claims—for a temporary taking, temporary nuisance and tortious interference with the plaintiffs' business expectancies—do not fall within the purview of the doctrine of res judicata. The plaintiffs' further contend that, even if principles of res judicata are generally applicable to their claims, we should exempt them from the preclusive effect of that doctrine because its underlying policies would not be served in the present case. We reject these contentions.

A

Temporary Taking

The plaintiffs first argue that res judicata does not apply to their temporary takings claim because it did

[9] Because the plaintiffs challenge the trial court's decision to grant the town's motion for summary judgment, our review of that decision is also guided by the general principles governing such motions. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing . . . that the party is . . . entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Powell* v. *Infinity Ins. Co.*, supra, 282 Conn. 599–600.

not accrue, and, therefore, could not have been brought, until this court issued its opinion in *Wellswood I*. They claim that, until then, neither the extent of their damages nor the nature of the taking—whether temporary or permanent—was known. At oral argument before this court, however, counsel for the plaintiffs conceded that this contention is contrary to this court's decision in *Cumberland Farms, Inc.* v. *Groton*, 247 Conn. 196, 210–13, 719 A.2d 465 (1998), which held that a temporary takings claim accrues and is capable of resolution on the merits when the regulatory action that is alleged to have effectuated a taking becomes final. In *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 952 A.2d 1 (2008), this court explained the holding in *Cumberland Farms, Inc.*, as follows: "In *Cumberland Farms, Inc.* v. *Groton*, supra, 198–99, a plaintiff landowner brought an inverse condemnation action against a municipality, arguing that the municipality's denial of a variance had destroyed the value of the plaintiff's real property and, therefore, that the plaintiff was entitled to just compensation for the regulatory taking of that property. The Appellate Court concluded that the inverse condemnation action had been brought prematurely because the plaintiff's administrative appeal from the denial of its variance request remained pending, and, consequently, the extent of its damages was unknown. . . . We disagreed and reversed the decision of the Appellate Court. . . . Specifically, we disagreed that the fact that the plaintiff potentially could prevail in the administrative appeal, thereby eliminating its right to damages, rendered the plaintiff's takings claim speculative. . . . We reasoned that, even if the plaintiff's administrative appeal ultimately was successful, the plaintiff still would be entitled to some compensation for the temporary taking it had suffered during the pendency of that appeal.[10] . . . In other words, even though it was

[10] See, e.g., *Miller* v. *Westport*, 268 Conn. 207, 214, 842 A.2d 558 (2004) ("when municipal land use regulations result in taking, owner [is] entitled to temporary takings damages for period that use of land was denied until

unclear at the outset of the inverse condemnation action whether the plaintiff's damages claim was for a temporary or complete taking, the claim nevertheless was ripe and capable of resolution on the merits." (Citations omitted; footnote added.) *Chapman Lumber, Inc.* v. *Tager*, supra, 88; see also *Miller* v. *Westport*, 268 Conn. 207, 216, 842 A.2d 558 (2004) (explaining that, under *Cumberland Farms, Inc.*, "the denial of a variance by a zoning board of appeals is considered a final decision by an initial decision maker, which is all that is required to establish finality in order to bring a takings claim, and that once the zoning board of appeals makes its decision, the regulatory activity is final for purposes of an inverse condemnation claim").

Thus, under controlling case law, the mere fact that the extent of the plaintiffs' damages was not immediately known at the time of the taking—because the plaintiffs did not know whether the taking would be temporary or permanent—does not operate to postpone the accrual of the plaintiffs' takings claim for res judicata purposes. This is so because, "[a]lthough the exact amount of the [plaintiffs'] damages might have remained uncertain when [they] commenced [the first] action, it nevertheless was abundantly clear that the plaintiff[s] had sustained some damages . . . . Pursuant to Connecticut's ripeness jurisprudence, as long as it is clear that [the plaintiffs have] suffered an injury sufficient to give rise to the cause of action alleged, a lack of certainty as to the precise scope of damages will not prevent the claim from being justiciable." (Emphasis omitted; footnote added.) *Chapman Lumber, Inc.* v. *Tager*, supra, 288 Conn. 87–88. As far as we are aware, this is the law throughout the country. See,

taking ends"); see also *Whitehead Oil Co.* v. *Lincoln*, 245 Neb. 680, 697, 515 N.W.2d 401 (1994) (upholding trial court's decision that temporary taking had occurred but remanding for recalculation of damages to compensate for additional damages that accrued during pendency of appeal).

e.g., *Navajo Nation* v. *United States*, 631 F.3d 1268, 1278 (Fed. Cir. 2011) ("[t]his court has previously rejected the notion that the cessation of [a] regulation is a necessary condition to liability of the United States for a temporary regulatory takings claim" [internal quotation marks omitted]); *Bass Enterprises Production Co.* v. *United States*, 133 F.3d 893, 896 (Fed. Cir. 1998) ("[t]he fact that regulation has not ceased may complicate a determination of just compensation but does not justify a bright-line rule against liability"); *Kuhnle Bros., Inc.* v. *Geauga*, 103 F.3d 516, 521 (6th Cir. 1997) ("In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed." [Internal quotation marks omitted.]); *Scott* v. *Sioux City*, 432 N.W.2d 144, 147–48 (Iowa 1988) (inverse condemnation resulting from zoning ordinance restricting development is not continuing injury but is single injury compensable at time of ordinance's passage); *Chesterfield Village, Inc.* v. *Chesterfield*, 64 S.W.3d 315, 320–21 (Mo. 2002) (second action by plaintiff for temporary taking and damages after prevailing in first action for injunctive relief was barred by res judicata, as "[t]he fact that [the plaintiff] did not know at [time of the first action] precisely what its damages would be is of little importance"); *Raab* v. *Avalon*, 392 N.J. Super. 499, 513, 921 A.2d 470 (App. Div.) (concluding that taking was complete when defendant town took possession of shoreline property after storm and built dunes by passing various ordinances, and that there was no basis in fact for applying continual wrong doctrine "to rescue plaintiffs from the legal consequences of their deliberate inactions"), cert. denied, 192 N.J. 475, 932 A.2d 26 (2007).

Consistent with the foregoing principles, the Appellate Court, in *Buck* v. *Berlin*, 163 Conn. App. 282, 293,

135 A.3d 1237, cert. denied, 321 Conn. 922, 138 A.3d 283 (2016), concluded that a takings claim predicated on the defendant town's placement of a gate across a road that provided the sole access to the land of the plaintiff property owners was barred by res judicata because the property owners, in an earlier injunction action, had sought to enjoin the town from blocking the road. In *C & H Management, LLC* v. *Shelton*, 140 Conn. App. 608, 615–16, 59 A.3d 851 (2013), the Appellate Court similarly concluded that a temporary takings claim was barred by res judicata when the plaintiff management company previously had brought a successful mandamus action to compel the defendant city to issue a building permit on a particular parcel of land. The Appellate Court concluded that, because the damages action arose out of the same operative facts as the mandamus action—the city's refusal to issue the building permit—the management company should have brought its takings claim in the prior action. Id., 617 ("[w]e are aware of no case law in this state that allows a subsequent action for damages to be maintained, despite the doctrine of res judicata, simply because the first action sought only a writ of mandamus"); see also *Creek* v. *Westhaven*, 80 F.3d 186, 190 (7th Cir.) ("You cannot split a claim into a request for damages and a request for injunction and litigate each in a separate [action]. . . . [1 Restatement (Second), supra, § 24 (1) and comment (a), p. 197]. To divide a claim in that way is precisely the vice against which the doctrine of res judicata . . . is directed." [Citations omitted.]), cert. denied, 519 U.S. 868, 117 S. Ct. 180, 136 L. Ed. 2d 120 (1996).

In arguing to the contrary, the plaintiffs rely on two federal circuit court cases, *Corn* v. *Lauderdale Lakes*, 904 F.2d 585, 587–88 (11th Cir. 1990), and *Creppel* v. *United States*, 41 F.3d 627, 632 (Fed. Cir. 1994), both of which concluded that a temporary takings claim did

not accrue until there was a final *judicial* determination of the validity of the regulatory action alleged to have effectuated the taking. Neither of these cases constitutes persuasive precedent.

In *Corn* v. *Lauderdale Lakes*, supra, 904 F.2d 585, the United States Court of Appeals for the Eleventh Circuit determined that, for purposes of res judicata, a temporary takings claim "is not mature until the propriety or impropriety of the zoning regulation has been finally determined [by the courts]." Id., 587. Subsequently, however, in *New Port Largo, Inc.* v. *Monroe County*, 985 F.2d 1488, 1497, 1499 (11th Cir.), cert. denied, 510 U.S. 964, 114 S. Ct. 439, 126 L. Ed. 2d 373 (1993), Chief Judge Gerald Tjoflat and Judge James Edmondson acknowledged that *Corn* was flawed to the extent that it purported to hold that a temporary takings claim does not accrue until the propriety of the regulatory action has been adjudicated.[11] In a concurring opinion, Chief Judge Tjoflat explained that the court in *Corn* had misinterpreted language in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) (*Williamson*), that a temporary takings claim accrues when the decision maker "charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue . . . ." (Internal quotation marks omitted.) *New Port Largo, Inc.* v. *Monroe County*, supra, 1495 (Tjoflat, C. J., concurring). As Chief Judge Tjoflat explained,

[11] The court in *New Port Largo, Inc.*, did not overrule *Corn*, however, as the concurring opinions explained, inter alia, that only an en banc panel of that court can overrule a prior panel's holdings and that, in any event, it was unnecessary to review *Corn* en banc because the result would be the same regardless of what standard the court applied. *New Port Largo, Inc.* v. *Monroe County*, supra, 985 F.2d 1495 n.1 (Tjoflat, C. J., concurring); see also id., 1501 n.8 (Edmondson, J., concurring) (explaining that rehearing en banc was not warranted because such rehearings "are costly, time-consuming affairs for litigants and for the court as an institution").

"[t]he [court in] *Corn* . . . erred by improperly expanding *Williamson*'s final decision requirement so that accrual is postponed until 'state review entities'—rather [than] the initial [decision makers]—'have made a final determination on the status of the subject property.' . . . Hence, under *Williamson*, a federal takings claim ripens as soon as the initial [decision maker] renders a final decision. . . . Indeed, *Williamson* specifically rejected the notion that plaintiffs must exhaust state review procedures before their takings claims ripen." (Citations omitted; footnotes omitted.) Id., 1497 (Tjoflat, C. J., concurring).

In a separate concurring opinion, Judge Edmondson, the author of the opinion in *Corn*, similarly acknowledged that Chief Judge Tjoflat's criticisms of *Corn* were valid but maintained that the decision was nevertheless correct on its facts and in light of the issue presented therein, which did not require a determination of when a claim accrues but, rather, when the applicable statute of limitations began to run. Id., 1499 (Edmondson, J., concurring) ("Most important, *Corn* . . . did not decide [because it was unnecessary to decide] when [the plaintiff's] taking claim first became ripe or mature for federal adjudication. Anything the language of the *Corn* . . . [decision] may imply about maturity or ripeness [the *Williamson* kind of issue] for [that] claim is [dictum]." [Footnote omitted.]); see also id., 1501–1502 (Edmondson, J., concurring) ("As a jurisprudential matter, the doctrine of ripeness rests on different considerations than do statutes of limitation[s]. . . . And it is not strange that a matter may become ripe and yet the statute does not start to run.").

The plaintiffs also rely on *Creppel* v. *United States*, supra, 41 F.3d 627, in which the United States Court of Appeals for the Federal Circuit stated that "property owners cannot [commence an action] for a temporary taking until the regulatory process that began it has

ended. This is because they would not know the extent of their damages until the [g]overnment completes the 'temporary' taking. Only then may property owners seek compensation." Id., 632. It is impossible to square this language—which some courts have dismissed as dictum[12]—with later cases from the Federal Circuit, which uniformly hold that a regulatory takings claim is ripe for adjudication upon a final decision of the regulatory authority.[13] See, e.g., *Navajo Nation* v. *United States*, supra, 631 F.3d 1278 ("[The] court has previously rejected the notion 'that the cessation of [a] regulation is a necessary condition to liability' . . . for a temporary regulatory takings claim. [*Bass Enterprises Production Co.* v. *United States*, supra, 133 F.3d 896 (Fed. Cir. 1998)]; see also *First English Evangelical Lutheran Church* v. *Los Angeles*, 482 U.S. 304, 320, 107 S. Ct. 2378, 96 L. Ed. 2d 250 [1987] ['It would require a considerable extension of [earlier Supreme Court] decisions to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid.' . . .]. In *Bass* [*Enterprises Production Co.*], for example, [the court] explicitly rejected the argument that a plaintiff was required to wait until a regulation was no longer in effect before bringing a temporary regulatory takings claim."); *Caldwell* v. *United States*, 391 F.3d 1226, 1234 (Fed. Cir. 2004) ("[i]t is not unusual

[12] See, e.g., *Algonquin Heights Associates L.P.* v. *United States*, 100 Fed. Cl. 792, 797 (2011) ("[T]he Federal Circuit's discussion [in *Creppel*] of when the temporary takings claim accrued was not essential to its disposition of that claim. It therefore carries no binding effect.").

[13] We note that the opinion in *Creppel* cites a single case, namely, *First English Evangelical Lutheran Church* v. *Los Angeles*, 482 U.S. 304, 321–22, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987), for the proposition that a temporary regulatory taking does not accrue until the taking ceases. Nothing that the United States Supreme Court stated in that case, however, can reasonably be construed as supporting that proposition. In *First English Evangelical Lutheran Church*, the court "merely [held] that [when] the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." Id., 321.

that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues"), cert. denied, 546 U.S. 826, 126 S. Ct. 366, 163 L. Ed. 2d 72 (2005); see also *Kemp* v. *United States*, 65 Fed. Cl. 818, 824 (2005) (rejecting plaintiff's claim that statute of limitations for taking was tolled because, "until the property was sold, she had no way of knowing when the period as to which she was entitled to compensation would end"); *Kemp* v. *United States*, supra, 823 ("Plaintiff [property owner] argues that the temporary taking must end before an owner can seek compensation, but that theory has been held invalid: even if the claim were properly viewed as a regulatory taking, the regulation that results in a taking does not have to cease for a finding of a temporary taking"). Accordingly, insofar as the plaintiffs contend that their temporary takings claim could not have been brought with their claim for injunctive relief because it had not yet accrued, Connecticut law belies that contention, and we find unpersuasive the out-of-state authority on which the plaintiffs rely.

B

Temporary Nuisance

We also do not agree with the plaintiffs that the road closure constituted a temporary private nuisance—or any other type of continuing or recurrent wrong—such that their damages claim falls within the exception to res judicata for continuing or recurrent wrongs, as set forth in § 26 (1) (e) of the Restatement (Second) of Judgments. Pursuant to that exception, in cases of "continuing or recurrent wrong[s]," a plaintiff may commence an action "from time to time for the damages incurred to the date of [that action]" without running afoul of res judicata's prohibition against seeking additional damages after the original action. 1 Restatement (Second), supra, § 26 (1) (e), p. 234. The continuing or

recurrent wrongs exception accords with the principle that "[m]aterial operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first." 1 Restatement (Second), supra, § 24, comment (f), p. 203; see also *Marone* v. *Waterbury*, 244 Conn. 1, 15 n.14, 707 A.2d 725 (1998).

The plaintiffs cite two cases for the proposition that the road closure constituted a continuing wrong such that every day that the road remained closed constituted a new injury. They first cite *Gordon* v. *Warren*, 579 F.2d 386 (6th Cir. 1978), in which the United States Court of Appeals for the Sixth Circuit applied the continuing violations doctrine[14] in concluding that a temporary takings claim was not time barred because the alleged wrong—a city ordinance that prevented a developer from completing construction of an apartment complex—was a "continuing course of action [that] made it impossible for the plaintiffs to enjoy the full use of their property . . . ." Id., 387, 391. As the United States Court of Appeals for the Third Circuit later explained, however, the Sixth Circuit has not followed *Gordon*; see *Cowell* v. *Palmer*, 263 F.3d 286, 293 (3d Cir. 2001); see also *Kuhnle Bros., Inc.* v. *Geauga*, supra, 103 F.3d 521 n.4; and other federal circuit courts of appeals have also declined to adhere to *Gordon*'s holding. See, e.g., *Ocean Acres Ltd. Partnership* v. *Board of Health*, 707 F.2d 103, 106 (4th Cir. 1983).

[14] "The continuing violations doctrine is an equitable exception to a strict application of a statute of limitations where the conduct complained of consists of a pattern that has only become cognizable as illegal over time. . . . [W]hen a defendant's conduct is part of a continuing practice, an action is timely [as] long as the last act evidencing the continuing practice falls within the limitations period; in such an instance, the court will grant relief for the earlier related acts that would otherwise be time barred." (Citations omitted; internal quotation marks omitted.) *Foster* v. *Morris*, 208 Fed. Appx. 174, 177–78 (3d Cir. 2006).

Courts have not adopted the approach utilized in *Gordon* because that methodology conflates the continuation of unlawful acts with the continued ill effects of a single unlawful act, for example, the passage of an ordinance halting construction of an apartment complex. See, e.g., *Trzebuckowski* v. *Cleveland*, 319 F.3d 853, 858 (6th Cir. 2003) (explaining distinction between continuing violation and continuing effect of prior violation that was alleged to have effected taking); *Cowell* v. *Palmer*, supra, 263 F.3d 293 ("[t]he focus of the continuing violations doctrine is on affirmative acts of the [defendant municipality]," which do not include the "mere existence of [municipal] liens" or the refusal to remove them); *Kuhnle Bros., Inc.* v. *Geauga*, supra, 103 F.3d 521 ("In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed." [Internal quotation marks omitted.]); *Ocean Acres Ltd. Partnership* v. *Board of Health*, supra, 707 F.2d 106 (adoption of septic tank ban was not continuing violation); *Gallegos* v. *Battle Creek*, Docket No. 1:10-CV-448, 2012 WL 1033693, *15 (W.D. Mich. March 1, 2012) (noting criticism of *Gordon* and emphasizing "the subtle difference between a continuing violation and a continuing effect of a prior violation" [internal quotation marks omitted]); *Bettendorf* v. *St. Croix*, 679 F. Supp. 2d 974, 978 (W.D. Wis. 2010) ("the adoption of an ordinance has immediate economic consequences for a land owner; the time for challenging it was within the state period of limitations"), aff'd, 631 F.3d 421 (7th Cir. 2011); see also *Wellswood Columbia, LLC* v. *Hebron*, supra, United States District Court, Docket No. 3:10-CV-1467 (VLB) (plaintiffs "suffered the continued ill effects of the single act of closing Wellswood Road" rather than continuing unlawful acts necessary to dem-

onstrate a continuing violation); *Scott* v. *Sioux City*, supra, 432 N.W.2d 148 ("[T]he cause of action arises out of the enactment of a land use regulation, not a continuing nuisance or trespass. Although damages for flooding and physical invasion can occur intermittently over the passage of time, in this case, the passage of the permanent ordinance had immediate adverse economic consequences for [the] plaintiffs. The regulation's impact on the development potential and market value of the property was immediate, and constituted a single injury.").

The plaintiffs also rely on *Creek* v. *Westhaven*, supra, 80 F.3d 186, in which the United States Court of Appeals for the Seventh Circuit held that an earlier injunction action in state court did not bar a second action in federal court for damages when the defendant Village of Westhaven, Illinois (Westhaven), allegedly "wishing to keep [Westhaven] white," had denied the plaintiff developer's application for a permit to build low income housing. Id., 188, 191. In the first action, the court granted the developer's request for an injunction ordering Westhaven to issue the permit. Id., 189. Westhaven, however, refused to comply with that order and continued to engage in what the court described as an alleged racially motivated campaign to defeat the housing development, which included "acting in cahoots" with a local homeowners association "to invalidate [federal] approval of rent support for [the] development." Id. In disagreeing with the District Court that the second action was barred by principles of res judicata, the Seventh Circuit held that the continuing wrongs exception to res judicata was applicable. The court reasoned, inter alia, that res judicata did not foreclose the developer's claims in the second action because they were predicated in part on wrongful acts committed after the final resolution of the injunction action. Id., 191. The court further reasoned that the second action was

not barred because, at the time of the injunction action, the developer could not know when, if ever, Westhaven would relent and issue the permit, such that the developer also had no way of estimating his full damages. Id., 190.

The present case is readily distinguishable from *Creek* on many levels, most notably, for our purposes, because the plaintiffs do not allege that the town committed any additional unlawful acts during or subsequent to the injunction action. Rather, all of the plaintiffs' claims are predicated on a single wrongful act—the closing of Wellswood Road—that occurred prior to the injunction action.

Apart from *Gordon*, the plaintiffs have not identified a single case in which a regulation that merely restricted the manner in which land could be developed was deemed to constitute a continuing or recurrent wrong, much less a nuisance. We previously have explained that " '[a] private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land.' 4 Restatement (Second), Torts § 821D (1979); see also *Herbert* v. *Smyth*, 155 Conn. 78, 81, 230 A.2d 235 (1967). . . . 'The essence of a private nuisance is an interference with the use and enjoyment of land.' W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 87, p. 619." (Citation omitted.) *Pestey* v. *Cushman*, 259 Conn. 345, 352, 788 A.2d 496 (2002). Notwithstanding the use of such sweeping terms, our cases involving nuisances almost uniformly have involved physical encroachments or disturbances that were alleged to have interfered with the use and enjoyment of land, such as runoff, odors, and noise. See, e.g., id., 347–48 (odors emanating from dairy farm); *Walsh* v. *Stonington Water Pollution Control Authority*, 250 Conn. 443, 445, 736 A.2d 811 (1999) (odors emanating from sewage treatment plant); *Filisko* v. *Bridgeport Hydraulic Co.*, 176 Conn. 33, 35, 404 A.2d 889 (1978) (runoff from town refuse dump);

Maykut v. *Plasko*, 170 Conn. 310, 311–12, 365 A.2d 1114 (1976) (use of mechanical noise making device known as a " 'corn cannon' "); *Adams* v. *Vaill*, 158 Conn. 478, 480, 262 A.2d 169 (1969) (noise from " 'unmufflered engines' "); *Herbert* v. *Smyth*, 155 Conn. 78, 82–83, 230 A.2d 235 (1967) (operation of commercial dog kennel, accompanied by incessant barking and howling, as well as "obnoxious odors"); *Gregorio* v. *Naugatuck*, 89 Conn. App. 147, 150, 871 A.2d 1087 (2005) (influx of raw sewage into home).

But, even if the road closure in the present case was properly characterized as a nuisance, the plaintiffs' private nuisance claim would still be barred by res judicata. As the Appellate Court explained in *Rickel* v. *Komaromi*, 144 Conn. App. 775, 73 A.3d 851 (2013), the date on which a nuisance claim accrues depends on whether the nuisance is considered temporary (i.e., continuing) or permanent: "a permanent nuisance claim accrues when injury first occurs or is discovered while a temporary nuisance claim accrues anew upon each injury." (Internal quotation marks omitted.) Id., 787. The Appellate Court further explained that, "[i]f a nuisance is not abatable, it is considered permanent, and a plaintiff is allowed only one cause of action to recover damages for past and future harm. The statute of limitations begins to run against such a claim upon the creation of the nuisance once some portion of the harm becomes observable. . . . A nuisance is deemed not abatable, even if possible to abate, if it is one whose character is such that, from its nature and under the circumstances of its existence, it presumably will continue indefinitely. . . . However, a nuisance is not considered permanent if it is one which can and should be abated. . . . In this situation, every continuance of the nuisance is a fresh nuisance for which a fresh action will lie, and the statute of limitation[s] will begin to run

at the time of each continuance of the harm." (Citation omitted; internal quotation marks omitted.) Id., 788.

In reliance on *Rickel*, the plaintiffs in the present case argue that the road closure was a temporary nuisance because the town could have abated it at any time by reopening the road. This argument, however, simply ignores the Appellate Court's analysis in *Rickel* and the readily distinguishable facts of that case. First, as the Appellate Court explained, not all nuisances that are technically abatable are considered temporary: "if [the nuisance] is one whose character is such that, from its nature and under the circumstances of its existence, it presumably will continue indefinitely," it will not be deemed abatable. (Internal quotation marks omitted.) Id. The closure of the road in the present case, like the passage of an ordinance, is precisely the sort of harm that the plaintiffs were required to presume would "continue indefinitely." (Internal quotation marks omitted.) Id. Unlike the flow of sewage onto one's property or, as in *Rickel*, the repeated incursion of invasive bamboo shoots from a neighboring property, ordinances and resolutions are not harms that necessarily should be abated. To the contrary, we generally presume the propriety of such actions until a requisite showing of impropriety. See *Greater New Haven Property Owners Assn.* v. *New Haven*, 288 Conn. 181, 188, 951 A.2d 551 (2008) ("Every intendment is to be made in favor of the validity of [an] ordinance and it is the duty of the court to sustain the ordinance unless its invalidity is established beyond a reasonable doubt. . . . [T]he court presumes validity and sustains the legislation unless it clearly violates constitutional principles. . . . If there is a reasonable ground for upholding it, courts assume that the legislative body intended to place it [on] that ground and was not motivated by some improper purpose." [Internal quotation marks omitted.]). Accordingly, even if the road closure were properly construed as a nui-

sance, it would be a permanent one, and the cause of action would have accrued upon the closure of the road.

C

Tortious Interference with Business Expectancies

The plaintiffs further claim that the trial court improperly granted the town's motion for summary judgment on the ground of res judicata as to the plaintiffs' tortious interference with business expectancies claim because there is a genuine issue of material fact as to when that claim accrued. Specifically, the plaintiffs argue that, because an essential element of a claim for tortious interference is that the plaintiffs suffer an "actual loss"; (internal quotation marks omitted) *American Diamond Exchange, Inc.* v. *Alpert*, 302 Conn. 494, 510, 28 A.3d 976 (2011);[15] it was incumbent on the town, for purposes of its motion for summary judgment, to present evidence demonstrating that the plaintiffs sustained losses prior to the commencement of the injunction action. Because the town failed to do so, the plaintiffs argue, the trial court improperly granted its motion for summary judgment with respect to the tortious interference claim. We are not persuaded by the plaintiffs' claim.

This court previously has explained that, with respect to the "ascertainable loss" requirement of a claim under the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., "[t]he term loss necessarily encompasses a broader meaning than the term damage, and has been held synonymous with deprivation, detriment and injury. . . . To establish an ascertainable loss, a plaintiff is not required to prove actual damages

[15] "[T]he elements of a claim for tortious interference with business expectancies are: (1) a business relationship between the plaintiff and another party; (2) the defendant's intentional interference with the business relationship while knowing of the relationship; and (3) as a result of the interference, the plaintiff suffers actual loss." (Internal quotation marks omitted.) *American Diamond Exchange, Inc.* v. *Alpert*, supra, 302 Conn. 510.

of a specific dollar amount. . . . [A] loss is ascertainable if it is measurable even though the precise amount of the loss is not known." (Citations omitted; internal quotation marks omitted.) *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, 287 Conn. 208, 218, 947 A.2d 320 (2008); see also *Hinchliffe* v. *American Motors Corp.*, 184 Conn. 607, 613, 440 A.2d 810 (1981) (" 'Loss' has been held synonymous with deprivation, detriment and injury. . . . It is a generic and relative term. *United States* v. *City National Bank*, 31 F. Supp. 530, 533 [D. Minn. 1939]. 'Damage,' on the other hand, is only a species of loss. Id., 532. The term 'loss' necessarily encompasses a broader meaning than the term 'damage.' " [Citation omitted.]). "Thus, an award of compensatory damages is not necessary to establish a cause of action for tortious interference as long as there is a finding of actual loss . . . ." *Hi-Ho Tower, Inc.* v. *Com-Tronics, Inc.*, 255 Conn. 20, 34, 761 A.2d 1268 (2000); see also *DiNapoli* v. *Cooke*, 43 Conn. App. 419, 428, 682 A.2d 603 (failure to prove money damages did not preclude judgment in favor of plaintiffs on tortious interference claim when trial court found that plaintiffs had proven other losses), cert. denied, 239 Conn. 951, 686 A.2d 124 (1996), cert. denied, 520 U.S. 1213, 117 S. Ct. 1699, 137 L. Ed. 2d 825 (1997).

Applying this definition of loss to the facts of the present case, it is readily apparent that the plaintiffs suffered immediate and cognizable losses as a result of the closure of Wellswood Road, foremost among them the loss of access to their property. In support of their claim for a permanent injunction in *Wellswood I*, the plaintiffs presented expert testimony regarding the diminution in the value of the land that resulted from the town's decision to close the road. The trial court in the present case properly relied on these facts in concluding that the plaintiffs' tortious interference claim could have been brought in *Wellswood I* and,

accordingly, properly granted the town's motion for summary judgment with respect to that claim.

D

Whether the Plaintiffs' Claims Should Be Exempt from the Preclusive Effect of Res Judicata

The plaintiffs finally argue that the policies underlying the doctrine of res judicata, namely, judicial economy, minimization of repetitive litigation, prevention of inconsistent judgments and repose to parties, will not be served by the doctrine's application in the present case. In support of this contention, they maintain, first, that, even if they had brought all of their claims in *Wellswood I*, any damages awarded by the trial court would have been vacated by this court's reversal of the trial court's judgment, resulting in further proceedings upon remand for a determination of damages for a temporary taking. Thus, according to the plaintiffs, because a new hearing on damages would have been required in *Wellswood I* in any event, allowing this case to proceed would not undermine the policy of judicial economy. The plaintiffs' argument fails to take into account the duration of the proceedings that have occurred in the present case.

To be sure, if the plaintiffs had sought damages in *Wellswood I*, further proceedings would have been required for a determination of just compensation for the period of time that the plaintiffs were deprived of the use of their land, namely, from the date of the road's closure until the date of its reopening following this court's decision in *Wellswood I*.[16] Those proceedings,

[16] Once a taking has been classified as either temporary or permanent, the trial court must determine just compensation for the period of the taking. See, e.g., *First English Evangelical Lutheran Church* v. *Los Angeles*, supra, 482 U.S. 322 (in temporary takings case, government must compensate landowner for effective period of ordinance prior to its invalidation by courts); *Miller* v. *Westport*, supra, 268 Conn. 214 ("when municipal land use regulations result in [a] taking, [the] owner [is] entitled to temporary takings damages for [the] period that [the] use of [the] land was denied until [the]

however, would have concluded seven years ago, thus conserving the considerable resources that the parties and the courts have expended on the present case to date—with no end in sight, if the case were to proceed—and providing repose to the town. Furthermore, as we previously indicated, the issue of damages was extensively litigated in *Wellswood I*, albeit in relation to the issue of irreparable harm. In light of this history, allowing the present case to go forward runs counter to several of the central tenets of res judicata, namely, the minimization of repetitive litigation, the promotion of judicial economy and repose to the parties. We therefore believe that the policies undergirding the doctrine of res judicata strongly support its application in the present case.

The plaintiffs argue nonetheless that it is "inequitable and illogical" for this court to conclude that they should have brought their takings claim in *Wellswood I* because, until this court issued its decision in that case, they had no way of knowing whether the taking would be temporary or permanent, and, therefore, they had no way of knowing the full extent of their damages. The plaintiffs contend, moreover, that applying the doctrine under the facts of this case "would in effect punish [them] for . . . challenging the town's conduct in *Wellswood I*, rather than initially seeking damages." More specifically, the plaintiffs argue that, "[o]nce it became clear in 2005 that the town intended to close Wellswood Road, [they] had two mutually exclusive

taking ends"); see also *Ladd* v. *United States*, 110 Fed. Cl. 10, 13 (2013) ("The beginning and ending dates of a temporary taking establish due compensation to the landowners. Compensation is the difference between the before and after-appraised values . . . applied to the length of time landowners were deprived of their reversionary interests."). As we noted previously, the period of an unlawful taking for which compensation must be paid includes the period of time that the landowner was deprived of his or her use of the property during the pendency of any appeal. See footnote 10 of this opinion.

remedies . . . concede [their] property rights and seek damages for a permanent taking or . . . challenge the town's actions and seek to have the road closure . . . reversed. [They] could not be granted both remedies . . . ."

We have already explained that any uncertainty as to the nature of the takings claim—whether it was for a temporary or permanent taking—did not prevent the plaintiffs from bringing the claim in *Wellswood I*. See part III A of this opinion; see, e.g., *Chapman Lumber, Inc.* v. *Tager*, supra, 288 Conn. 88. It is beyond argument, moreover, that a plaintiff may request two mutually exclusive forms of relief in a single action. See, e.g., *Dreier* v. *Upjohn* Co., 196 Conn. 242, 245, 492 A.2d 164 (1985) ("[u]nder our pleading practice, a plaintiff is permitted to advance alternative and even inconsistent theories of liability against one or more defendants in a single complaint"); see also Practice Book § 10-25 ("[t]he plaintiff may claim alternative relief, based upon an alternative construction of the cause of action"). In the present case, however, the plaintiffs need not have done so, as they should have sought injunctive relief and damages for a taking, explaining that the scope of those damages would depend on whether the injunction was granted by the court. See *Chapman Lumber, Inc.* v. *Tager*, supra, 88 ("even though it was unclear at the outset of the inverse condemnation action whether the plaintiff's damages claim was for a temporary or complete taking, the claim nevertheless was ripe and capable of resolution on the merits"); see also *Caldwell* v. *United States*, supra, 391 F.3d 1234 ("[i]t is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues"). If the plaintiffs had done so, the trial court might well have bifurcated the trial, addressing the question of damages—whether for a permanent or temporary taking—after resolving the claim for injunctive relief.

We also disagree with the plaintiffs that, if they had brought all of their claims in *Wellswood I* and the trial court had denied their request for a permanent injunction but awarded them damages for a permanent taking, "a substantial question exists as to whether the Connecticut courts would have entertained [their] appellate challenge to the denial of the injunction . . . ." The plaintiffs cite no authority for this proposition, and we are aware of none. Indeed, it is axiomatic that a party may appeal from a final adverse determination of the trial court and that the award of some relief does not mean that a party is not aggrieved by the trial court's decision. See, e.g., *In re Allison G.*, 276 Conn. 146, 158, 883 A.2d 1226 (2005) ("[a] prevailing party . . . can be aggrieved . . . if the relief awarded to that party falls short of the relief sought" [internal quotation marks omitted]). Although it is true that, "as a general proposition, when a litigant asks for one form of relief *or* another, the litigant is not aggrieved by an order providing at least one of the requested forms of relief"; (emphasis altered) *Seymour* v. *Seymour*, 262 Conn. 107, 112–13, 809 A.2d 1114 (2002); that does not mean that a plaintiff is not aggrieved by an order denying relief that was *not* requested in the alternative, such as a request for damages *and* an injunction. Thus, in the present case, the plaintiffs should have sought both injunctive relief and damages in *Wellswood I*, with the scope of those damages to be determined upon the resolution of the claim for injunctive relief.

In sum, we are not persuaded that the plaintiffs have identified a sufficiently compelling reason to exempt their claims from the preclusive effect of res judicata. We therefore reject their claim that the trial court improperly granted the town's motion for summary judgment.

The judgment is affirmed.

In this opinion the other justices concurred.

WAYNE BAGLEY ET AL. *v.* ADEL WIGGINS GROUP ET AL.
(SC 19835)

Palmer, Eveleigh, McDonald, Espinosa and Robinson, Js.*

Syllabus

The plaintiff, the executrix of the estate of the decedent, sought to recover damages, pursuant to Connecticut's Product Liability Act (§ 52-572m et seq.) for, inter alia, the wrongful death of the decedent under theories of negligence and strict liability. The plaintiff alleged that the decedent was exposed during his employment with S Co. to an asbestos containing product manufactured by the defendant and that exposure contributed to his contraction of mesothelioma, a cancer that is caused by the inhalation of asbestos fibers. She further alleged that the defendant's actions in selling its product constituted violations of the act in that its product was unreasonably dangerous and that the defendant knew or should have known that its product was inherently dangerous and yet failed to use reasonable care by not testing the product to ascertain its danger or removing the product from the marketplace. At trial, one of the decedent's former coworkers testified that the defendant's product was subject to sanding and that the sanding process created visible dust to which the decedent would have been exposed. The plaintiff's expert witnesses testified about the history of the asbestos industry, asbestos related diseases, and how certain exposure to asbestos can cause mesothelioma. One expert, A, opined that a proximate cause of the decedent's mesothelioma was his exposure to the defendant's product at S Co. After the plaintiff rested her case, the trial court denied the defendant's motion for a directed verdict, concluding that the plaintiff had presented sufficient evidence to support her theories of liability. Thereafter, the jury returned a verdict for the plaintiff on her negligence and strict liability claims, and the trial court denied the defendant's motion to set aside the verdict and for judgment notwithstanding the verdict. From the judgment rendered in favor of the plaintiff, the defendant appealed. *Held* that the plaintiff failed to prove through expert testimony that respirable asbestos fibers in a quantity sufficient to cause mesothelioma were released from the defendant's product when it was used in the

* This case originally was scheduled to be argued before a panel of this court consisting of Justices Palmer, Eveleigh, McDonald, Espinosa and Robinson. Although Justice Espinosa was not present when the case was argued before the court, she has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

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

manner that it was at S Co. during the decedent's tenure there and, accordingly, she failed to prove her case: the defendant did not concede that its product, when sanded, emitted respirable asbestos fibers that the decedent could have inhaled, that was not a matter within the common knowledge of lay jurors, none of the plaintiff's witnesses had done any testing or examination of the defendant's product or a similar product to establish that such fibers are emitted when such a product is sanded, A did not possess any specialized knowledge about how adhesive products containing asbestos, such as the defendant's product, behave when they are utilized as the defendant's product was under the conditions at S Co., and, in light of these gaps in the evidentiary record, the trial court improperly denied the defendant's motion for a directed verdict and its motion to set aside the verdict and for judgment notwithstanding the verdict; moreover, the requirement of an expert witness to prove whether the defendant's product emitted respirable asbestos fibers when sanded, subject matter that was technical in nature and beyond the field of the ordinary knowledge of a lay juror, was required under well established law that existed at the time of trial and predated this court's recent product liability jurisprudence, *Bifolck* v. *Philip Morris, Inc.* (324 Conn. 402), and *Izzarelli* v. *R.J. Reynolds Tobacco Co.* (321 Conn. 172), and, therefore, the plaintiff was not entitled to a new trial.

Argued April 5—officially released November 7, 2017

Procedural History

Action to recover damages for personal injuries sustained as a result of an allegedly defective product designed, manufactured or sold by the defendants, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the action was withdrawn as to the named defendant et al.; thereafter, the court, *Bellis, J.*, granted the motion for summary judgment filed by Raytheon Company et al.; subsequently, Marianne Bagley, executrix of the estate of Wayne Bagley, was substituted as the named plaintiff; thereafter, the case was tried to the jury before *Radcliffe, J.*; subsequently, the court, *Radcliffe, J.*, denied the motion of the defendant Wyeth Holdings Corporation for a directed verdict; verdict for the plaintiffs; thereafter, the court, *Radcliffe, J.*, denied the motion of the defendant Wyeth Holdings Corporation to set aside the verdict and for judgment notwithstanding the

verdict, and rendered judgment in accordance with the verdict, from which the defendant Wyeth Holdings Corporation appealed. *Reversed; judgment directed.*

Katharine S. Perry, with whom were *James A. Hall* and, on the brief, *Mark O. Denehy* and *Michael T. McCormack*, for the appellant (defendant Wyeth Holdings Corporation).

Kenneth J. Bartschi, with whom were *Robert M. Shields, Jr.*, and, on the brief, *Christopher Meisenkothen*, for the appellee (plaintiffs).

Opinion

PALMER, J. The issue presented by this appeal is whether, in an action brought pursuant to Connecticut's Product Liability Act (act), General Statutes § 52-572m et seq., under strict liability and negligence theories, expert testimony was necessary to prove that a defective, asbestos containing product caused a worker who came in contact with that product to contract a fatal lung disease. The defendant[1] Wyeth Holdings Corporation appeals[2] from the judgment of the trial court rendered following a jury verdict in favor of the plaintiff Marianne Bagley.[3] The jury awarded the plaintiff damages for the wrongful death of her husband, Wayne

[1] This action was commenced in 2012 and originally named more than fifty defendants. By the time of trial, however, Wyeth Holdings Corporation was the sole remaining defendant and it is the only defendant who remains a party to this appeal. All references herein to the defendant are to Wyeth Holdings Corporation.

[2] The defendant appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[3] The action originally was brought by both Wayne Bagley, to recover for his personal injuries, and Marianne Bagley, to recover for loss of consortium. After Wayne Bagley died, Marianne Bagley, in her capacity as executrix of Wayne Bagley's estate, was substituted as plaintiff as to the claims alleged by him. See General Statutes § 52-555. For simplicity, we refer to Marianne Bagley as the plaintiff both in her individual capacity and in her capacity as Wayne Bagley's executrix.

Bagley (decedent), and for loss of consortium after concluding that the decedent's death was caused by the defendant's negligence and by its sale of an unreasonably dangerous product to the decedent's former employer, Sikorsky Aircraft Corporation (Sikorsky).[4] The defendant claims that the trial court improperly denied its motion for a directed verdict and its motion to set aside the verdict and for judgment notwithstanding the verdict because the plaintiff failed to prove both that the product at issue was unreasonably dangerous and that it was a legal cause of the decedent's fatal lung disease. We agree and, accordingly, reverse the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our disposition of this appeal. The decedent was employed at Sikorsky from 1979 until shortly before his death in 2012. For approximately ten months in 1979 and 1980, he worked as a manufacturing engineer in the composite blade manufacturing and development department (blade shop), where various helicopter blades were manufactured. The decedent's office was located on a mezzanine overlooking the area where the blade production took place. According to a coworker, however, the decedent often entered the production areas to assist in resolving the various issues that arose during the manufacturing process.

During the time that the decedent worked in the blade shop, the defendant manufactured and sold to Sikorsky an adhesive product known as FM-37.[5] FM-37 was used in the blade shop to bind together interior components of helicopter blades. It was made of modified epoxy material, supplied in sheet form with strippable release

[4] Sikorsky was permitted to intervene as a plaintiff in this matter but did not participate in the trial proceedings and is not a party to this appeal.

[5] More accurately, FM-37 was manufactured by American Cyanamid Corporation. The defendant is a successor corporation to that entity.

paper, and contained 8.6 percent asbestos. In regular usage, FM-37, after application, was heated until it foamed and expanded. When it expanded onto areas of the blades where it was not supposed to be, it was removed with chisels or by sanding. Product information sheets that the defendant supplied for FM-37 did not indicate that it contained asbestos and further stated that the product could be sanded after curing.

The decedent was diagnosed with mesothelioma on or about August 10, 2011. Mesothelioma is a cancer occurring in the outer cells of the pleura, a membrane surrounding the lung. It is a "signature" or "sentinel" disease for asbestos exposure, meaning that such exposure is the only known cause. Mesothelioma is caused by the inhalation of asbestos fibers and typically takes decades to develop. There is a dose-response relationship between asbestos exposure and mesothelioma; in other words, the more exposure a person has, the greater is the likelihood that he or she will contract the disease.

In the course of the litigation of this case, the decedent acknowledged that he had been exposed to asbestos secondarily due to his father's employment at a shipyard from 1958 through 1961, and directly during three separate home renovation projects in the 1960s and 1970s. Additionally, a workers' compensation benefits application entered into evidence reveals that the decedent filed a claim for benefits indicating that he had been exposed to asbestos during his employment with the Torrington Company, prior to his employment at Sikorsky.

In the operative complaint, the plaintiff alleged that the decedent was exposed to asbestos containing products while working at Sikorsky and that the exposure had contributed to his contraction of mesothelioma. She alleged further that the defendant's actions in sell-

ing such asbestos containing products constituted violations of the act in that (1) the products were unreasonably dangerous, that is, dangerous to an extent beyond that which the ordinary worker in the position of the decedent would have contemplated (strict liability claim),[6] and (2) the defendant knew or should have known that the products were inherently dangerous, yet failed to use reasonable care by, inter alia, not testing or conducting research on the products to ascertain their dangers, or removing the products from the marketplace (negligence claim).[7]

The plaintiff presented the testimony of several witnesses at trial. Barry Castleman testified as an expert in public health and the history of the asbestos industry and asbestos related disease. Castleman explained that the dangers of asbestos to industrial workers began to be known as early as the late nineteenth century and that companies, including the defendant, were cognizant of the dangers of inhaling asbestos dust as early as the 1940s. In response to a hypothetical posed by the plaintiff's counsel, Castleman opined that a company producing an adhesive product at approximately the time that the defendant produced FM-37 would have been aware that relatively low exposures to asbestos, which might occur from sanding, could cause mesothelioma, and that the company, having that knowledge,

[6] The plaintiff also raised a strict liability claim based on the defendant's alleged failure to warn adequately of the dangerousness of FM-37. See General Statutes § 52-572q. In response to interrogatories, however, the jury found that, although the defendant failed to provide adequate warnings or instructions concerning FM-37, the lack of such warnings did not cause the decedent to contract mesothelioma. The plaintiff has not challenged this finding on appeal.

[7] The plaintiff also claimed that the defendant was negligent in failing to ensure that FM-37 carried adequate warnings. In light of the jury's adverse findings on the plaintiff's strict liability failure to warn claim, it is apparent that the plaintiff necessarily did not prevail on her negligent failure to warn claim. See footnote 6 of this opinion. In any event, this claim is not an issue in this appeal.

could have done air sampling under foreseeable conditions of use to determine what level of exposure would be created. On cross-examination, Castleman acknowledged that he did not examine FM-37 and did not know what percentage of it was asbestos, what its other ingredients were or whether it contained any bonding agent. Castleman further acknowledged that he was unaware of any other case in which someone had developed mesothelioma as a result of exposure to a similar product.

Carl Ulsamer, a senior materials engineer at Sikorsky, testified as to the asbestos containing materials that were used in the blade shop at Sikorsky in 1979 and 1980. He identified FM-37, as well as two other adhesive products manufactured by another company. On cross-examination, Ulsamer named several other asbestos containing products that had been in use elsewhere at Sikorsky and agreed that, over the years, the company had used many asbestos containing components in manufacturing its helicopters.

Michael Petrucci, a coworker of the decedent who held a similar position in the blade shop in 1979 and 1980, testified that the two had adjacent desks in a mezzanine area overlooking the shop but would spend some of their time on the shop floor troubleshooting problems. Petrucci described the layout of the blade shop, which had various rooms, including one where various blades were cured and sanded during production. According to Petrucci, he and the decedent would have worked all over the blade shop on a daily basis, including in the sanding room, and workers in the sanding room also would move about the shop. Petrucci recalled the asbestos containing adhesives that Ulsamer had identified, and he confirmed that both FM-37 and an asbestos containing adhesive supplied by another manufacturer were subject to sanding. He testified that the sanding process created visible dust to which he

and the decedent would have been exposed. The sanding room was equipped with a ventilation system that collected some of the dust. During Petrucci's time at Sikorsky, no one informed him that there was asbestos in the dust from FM-37.

Arnold Brody, a pathologist, testified in detail as to the process by which asbestos causes mesothelioma. Brody's presentation, however, was premised on the assumption that a person has been exposed to respirable asbestos fibers; he did not review any materials specific to the decedent's case. In short, he explained that mesothelioma can result when a person inhales tiny asbestos fibers that then make their way past the various defense mechanisms of the body and lodge deeply in the lungs. Brody spoke of animal experiments that he had conducted using dust from raw asbestos but confirmed, on cross-examination, that he had not experimented with asbestos containing products.

Finally, Jerrold L. Abraham, a pathologist and expert in pulmonary pathology, occupational and environmental medicine, and asbestos related disease, reviewed the decedent's medical records, a pathology slide and other evidence in the case.[8] He opined that the decedent had mesothelioma and that a proximate cause of that disease, among others, was the decedent's exposure to asbestos from FM-37 in the blade shop. Prior to rendering his opinion, Abraham explained to the jury the dose-response relationship between asbestos and mesothelioma, and how low levels of exposure to asbestos, above the ambient levels that may exist in the general environment, can contribute to causing that disease. He further explained the concept of fugitive exposure, whereby

[8] The record contains a packet of materials provided to Abraham in January, 2012. Those materials include a pathology report and slide, medical records and the decedent's answers to interrogatories, which describe, in relevant part, his occupational history. They do not include any materials or other information pertaining to FM-37 or any testing or analysis thereof.

individuals may be exposed to asbestos when they are not working directly with an asbestos source but, rather, are in its general vicinity or have contact with other people who work with it, and how even such indirect exposure could cause mesothelioma.

In rendering his opinion on causation, Abraham responded to a hypothetical question from the plaintiff's counsel that presumed that the decedent had worked in the Sikorsky blade shop for ten months, was in and out of the sanding room periodically and was exposed to visible dust from the sanding of FM-37 both in that room and from contact with workers who sanded blades and then moved about the shop. The hypothetical further directed Abraham to assume that FM-37 contained 8.6 percent asbestos. Abraham responded that what counsel had articulated was "a very clear description of an exposure to asbestos being released from working with an asbestos containing material" and that the presence of dust indicated inadequate control. Abraham confirmed that counsel's hypothetical paralleled the facts of the case as they had been described by Petrucci, the testimony of whom Abraham had reviewed. He later opined that a product that was only 8.6 percent asbestos still would contain a large number of asbestos fibers. On cross-examination, however, Abraham agreed that, in preparing his opinion, he did not inspect FM-37 or speak with anyone at Sikorsky about the ventilation in the sanding room in 1979 and 1980.

After the plaintiff rested her case, the defendant moved for a directed verdict, arguing that the plaintiff had failed to establish a prima facie case for liability under the act. Specifically, the defendant argued that the plaintiff had failed to present any evidence of either a design defect in FM-37 or that asbestos dust from FM-37 had caused the decedent's injuries and death. According to the defendant, expert testimony was nec-

essary to prove the dangerousness of FM-37 because it was a complex product for which an ordinary consumer could not form a safety expectation. As to causation, the defendant argued that there was insufficient evidence that the decedent had been exposed to dust in the sanding room, and, further, there was no expert evidence that the dust contained asbestos fibers that were released from FM-37 at a level sufficient to cause mesothelioma. The trial court denied the defendant's motion for a directed verdict, reasoning that the plaintiff had presented sufficient evidence from which the jury could conclude that FM-37 was unreasonably dangerous and that the defendant had been negligent in failing to test it or in selling it, and that defect and negligence had proximately caused the decedent to contract mesothelioma.

Following the court's denial of its motion, the defendant rested its case without presenting any witnesses.[9] The trial court charged the jury, instructing it as to general negligence principles and, in regard to the strict liability claim, as to the ordinary consumer expectation test. While the jury was deliberating, it sent a note to the court asking whether the dust or powder from FM-37 had ever been tested. The court responded that there was no evidence one way or the other on that topic. Thereafter, the jury returned a verdict in the plaintiff's favor on both her negligence and strict liability claims, as well as on her loss of consortium claim. It awarded total damages of $804,777.

Subsequently, the defendant filed a motion to set aside the verdict and for judgment notwithstanding the verdict. As to the jury's finding of negligence, the defendant argued that there was no evidence that it was

[9] The defendant did publish certain exhibits to the jury. They consisted of medical records containing notes that indicated that the decedent had told medical providers that he had not been exposed directly to asbestos.

negligent in selling or in failing to test or conduct research on FM-37, which contained 8.6 percent asbestos encapsulated in resin and was not shown to be dangerous, or that its negligence had caused the decedent's illness and subsequent death. As to the jury's strict liability finding, the defendant contended that there was insufficient evidence that FM-37 was unreasonably dangerous and that a defect in that product had caused the decedent's illness and subsequent death. Regarding causation, the defendant argued that there was insufficient evidence that the decedent was in the sanding room or otherwise in the vicinity of FM-37 or its dust, and also no evidence that sanding FM-37 caused respirable asbestos fibers to be released from that product. The defendant contended that expert testimony was necessary for the plaintiff to prove both dangerousness and causation so as to prevail on either legal theory. The court denied the defendant's motion to set aside the verdict and for judgment notwithstanding the verdict, again concluding that the evidence presented was sufficient to support both theories of recovery. This appeal followed.

The defendant claims on appeal that the trial court improperly denied its motions for a directed verdict and to set aside the verdict and for judgment notwithstanding the verdict because the plaintiff failed to produce expert testimony establishing that FM-37 was a defective product. The defendant argues that such testimony was necessary due to the specialized and technical nature of the product at issue and to prove, among other things, the product's dangerousness and the risks inherent in its use. In the defendant's view, the plaintiff's failure to produce expert testimony pertaining to FM-37 was fatal to both her strict liability claim and her negligence claim[10] because each type of claim necessar-

[10] The plaintiff contends that the defendant failed to preserve its claim that, in order to prove negligence, she needed to show that FM-37 was unreasonably dangerous. In its motion for a directed verdict, the defendant

ily requires proof of an unreasonably dangerous product. The defendant claims additionally that the plaintiff failed to prove that asbestos released from FM-37 was the proximate cause of the decedent's mesothelioma because there was no direct evidence that he worked in the vicinity of FM-37 or any evidence that he was exposed to any asbestos released from that product.[11]

The plaintiff, in response, maintains that expert testimony was unnecessary to prove the existence of a defective product, under either a strict liability theory or a negligence theory. As to strict liability, the plaintiff contends that FM-37 is not a complex product, and, therefore, the ordinary consumer expectation test, which does not require expert testimony and on which the jury was instructed, applies. Specifically, she claims, it is within the ken of ordinary jurors to understand that sanding a product creates dust, and, in the present case, the product at issue contained asbestos that, as the evidence introduced at trial established, is dangerous to inhale. In the plaintiff's view, "it is easy to see that sanding a product containing asbestos would create dust containing asbestos." In regard to negligence, the plaintiff claims that that cause of action may be proven

argued generally that expert testimony was necessary to prove product dangerousness and causation as required by the act. At that point in the proceedings, the defendant disputed the viability of a separate cause of action for negligence, contending instead that, under the act, all claims are merged into a single, statutory product liability cause of action. The trial court rejected that claim, however, and the defendant, in its subsequent motion to set aside the verdict and for judgment notwithstanding the verdict, then argued that the evidence was insufficient to support either theory of recovery, specifically that, as to each theory, the plaintiff had failed to prove both product dangerousness and causation. Under the circumstances, we disagree that the defendant has waived its claim as it pertains to negligence or that the plaintiff has been subject to an ambuscade.

[11] The defendant also claims that the plaintiff improperly was permitted to prevail on a "no-threshold" or "single fiber" theory of causation that is contrary to Connecticut's law governing proximate cause. Because we agree with the defendant's other arguments, which are dispositive of the appeal, we need not reach this claim.

by applying ordinary negligence principles and without a showing that a defendant's product is unreasonably dangerous as contemplated by the strict liability standard. Regarding causation, the plaintiff contends that there was ample circumstantial evidence that the decedent was exposed to dust from the sanding of FM-37 either directly or when it drifted throughout the blade shop, and, further, the expert testimony she introduced established that, when it comes to mesothelioma, there is no safe level of exposure to asbestos. In the plaintiff's view, because there is no safe level of exposure, the jury reasonably could infer that FM-37's 8.6 percent asbestos was a significant amount and, moreover, that dangerous levels of asbestos were present in the dust.

In its reply brief, the defendant contends that, regardless of what theory of liability is employed, the plaintiff failed to prove, as required by the act, that FM-37 was defective and that the defect caused the decedent to contract mesothelioma. Specifically, there was no evidence showing that respirable asbestos fibers could have been released from FM-37, given that there was no witness, lay or expert, who performed any testing, examination or analysis of that product. The defendant further maintains that, under either a strict liability or negligence theory, the plaintiff was required to show that FM-37 was unreasonably dangerous, and the plaintiff failed to do so.

We agree with the defendant that the plaintiff failed to prove that respirable asbestos fibers were released from FM-37 during sanding in the blade shop. Without such proof, there was insufficient evidence to show either that FM-37 was dangerous or that it was a legal cause of the decedent's mesothelioma. Because lack of proof on these matters was fatal both to the plaintiff's strict liability claim and to her negligence claim, the trial court improperly denied the defendant's motion

for a directed verdict and its motion to set aside the verdict and for judgment notwithstanding the verdict.

We begin with the applicable standard of review and general governing principles. "The standards for appellate review of a directed verdict are well settled. Directed verdicts are not favored. . . . A trial court should direct a verdict only when a jury could not reasonably and legally have reached any other conclusion. . . . In reviewing the trial court's decision [to deny the defendant's motion for a directed verdict] we must consider the evidence in the light most favorable to the plaintiff. . . . Although it is the jury's right to draw logical deductions and make reasonable inferences from the facts proven . . . it may not resort to mere conjecture and speculation. . . . A directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party." (Internal quotation marks omitted.) *Metropolitan Property & Casualty Ins. Co.* v. *Deere & Co.*, 302 Conn. 123, 150, 25 A.3d 571 (2011). The foregoing standard of review also governs the trial court's denial of the defendant's motion for judgment notwithstanding the verdict because that motion "is not a new motion, but [is] the renewal of [the previous] motion for a directed verdict." (Internal quotation marks omitted.) *Haynes* v. *Middletown*, 314 Conn. 303, 312, 101 A.3d 249 (2014). A directed verdict properly is rendered when expert testimony is necessary to prove a plaintiff's claim and the plaintiff has failed to produce such expert testimony. See, e.g., *Grody* v. *Tulin*, 170 Conn. 443, 451, 365 A.2d 1076 (1976); *Young* v. *Rutkin*, 79 Conn. App. 355, 363–64, 830 A.2d 340, cert. denied, 266 Conn. 920, 835 A.2d 60 (2003); *Vona* v. *Lerner*, 72 Conn. App. 179, 190–92, 804 A.2d 1018 (2002), cert. denied, 262 Conn. 938, 815 A.2d 138 (2003).

"Expert opinions concerning scientific, technical or other specialized knowledge may be necessary to assist

the trier of fact in understanding the evidence or in determining a fact in issue. Conn. Code Evid. § 7-2." (Internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 700, 138 A.3d 868 (2016). Such testimony is required "when the question involved goes beyond the field of ordinary knowledge and experience of the trier of fact. . . . [Conversely] [t]he trier of fact need not close its eyes to matters of common knowledge solely because the evidence includes no expert testimony on those matters.[12] . . . Whether expert testimony is required in a particular case is determined on a case-by-case basis and its necessity is dependent on whether the issues are of sufficient complexity to warrant the use of the testimony as assistance to the . . . [trier of fact]." (Citation omitted; footnote added; internal quotation marks omitted.) Id. The trial court's determination as to whether expert testimony was necessary is a legal one subject to plenary review. See, e.g., *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 373, 119 A.3d 462 (2015).

After our careful review of the record, we conclude that the plaintiff's case lacked essential expert testimony to prove a vital fact in support of her negligence and strict liability claims, namely, that respirable asbestos fibers in a quantity sufficient to cause mesothelioma were released from FM-37 when it was used in the manner that it was in the Sikorsky blade shop during

[12] "Common knowledge is limited, however, to those well substantiated facts that are obvious to the general community." *State* v. *Padua*, 273 Conn. 138, 193, 869 A.2d 192 (2005) (*Katz, J.*, dissenting and concurring). Common knowledge is defined as a "fact that is so widely known that a court may accept it as true without proof." Black's Law Dictionary (10th Ed. 2014) p. 334. In contrast, a matter is not common knowledge if it "involves obscure and abstruse . . . factors such that the ordinary layman cannot reasonably possess well-founded knowledge of the matter and could only indulge in speculation in making a finding . . . ." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Padua*, supra, 200 (*Katz, J.*, dissenting and concurring).

the decedent's tenure there. Proof of this fact was necessary to prove both that (1) FM-37 was dangerous, and (2) FM-37's dangerous condition caused the decedent to develop mesothelioma. Although the plaintiff proved that breathing respirable asbestos fibers above ambient levels can cause mesothelioma, that FM-37 contained 8.6 percent asbestos and was sanded, producing dust, and that the decedent was exposed to that dust, both directly and secondarily, she nevertheless failed to establish that the dust from the FM-37 necessarily contained respirable asbestos fibers. Moreover, the question of whether respirable asbestos fibers are released by sanding a modified epoxy adhesive product with 8.6 percent asbestos, after it has been heated and cured, is a technical one whose answer is not within the common knowledge of lay jurors. Accordingly, competent expert testimony was necessary to assist them in answering it. Because the plaintiff did not present such testimony, the trial court should have granted the defendant's motion for a directed verdict or its motion to set aside the verdict and for judgment notwithstanding the verdict.

This case is akin to *In re R.O.C.*, 131 S.W.3d 129, 131 (Tex. App. 2004), a product liability action in which the Court of Appeals of Texas upheld a trial court's summary judgment in favor of the defendant manufacturers of asbestos containing paints and other coating substances. The plaintiffs, who had contracted asbestosis, claimed that respirable asbestos was released when the products were sprayed or when they were sanded or ground off of the surfaces to which they had been applied. Id. The plaintiffs testified that, when they worked with the products, there was grinding and scraping occurring all of the time, and that those activities produced a thick dust. Id., 137. Because the plaintiffs failed to produce expert testimony that spraying, sanding or grinding the products at issue produced the release of asbestos fibers that could cause asbestosis,

however, the court concluded that they had failed to prove an exposure to asbestos that could have caused their injuries. Id., 136–37. In short, in the absence of expert testimony, proof that there was dust did not equate to proof that the dust contained respirable asbestos fibers.

Similarly, in *DiSantis* v. *Abex Corp.*, Docket No. 87-0515, 1989 WL 150548, *1 (E.D. Pa. December 8, 1989), aff'd, 908 F.2d 961, 962 (3d Cir. 1990), a product liability action, the United States District Court for the Eastern District of Pennsylvania rendered summary judgment in favor of defendant suppliers of asbestos containing electrical equipment used in subway cars, because there was no evidence to support the plaintiff's claim of injury due to his occupational exposure to respirable asbestos fibers. The plaintiff, who had performed service and maintenance work on the subway cars, testified that he and others had cleaned the motors of the cars by blowing them out with an air hose, which caused a good deal of accumulated dust to float up around them. Id., *6–7. The court concluded that this was insufficient to establish asbestos exposure, however, explaining that the "[p]laintiff's testimony establishe[d] that his job did expose him to a lot of dust. But he has supplied no testimony which would establish [that] the dust he came in contact with contained asbestos." Id., *7; see also *Sterling* v. *P & H Mining Equipment, Inc.*, 113 A.3d 1277, 1281–83 (Pa. Super. 2015) (testimony of crane operator and his coworkers that operator worked in vicinity of cranes equipped with defendant's asbestos containing brakes and wiring and saw dust emanating from crane's wheels was insufficient to show that operator had inhaled dust containing asbestos).[13]

[13] But see *John Crane, Inc.* v. *Linkus*, 190 Md. App. 217, 225–26, 241, 988 A.2d 511 (2010) (holding, in case in which evidence showed that claimant was directly exposed for seven years to large amounts of dust from defendant's dry rope and wicking products that contained 60 to 90 percent unencapsulated asbestos, that expert testimony was not necessary to prove release of respirable asbestos fibers).

In contrast, in cases in which courts have found sufficient evidence of exposure to asbestos fibers causing an asbestos related disease, there has been, in addition to testimony that there was visible dust attendant to the use of a defendant's product, expert testimony that the product, when used under conditions similar to those presented by the case, emitted respirable asbestos fibers. For example, in *John Crane, Inc.* v. *Puller*, 169 Md. App. 1, 17–19, 899 A.2d 879, cert. denied, 394 Md. 479, 906 A.2d 943 (2006), the Court of Appeals of Maryland concluded that there was sufficient evidence that the defendant's asbestos containing gaskets and valve packing were a substantial, contributory factor in the development of the plaintiff's mesothelioma. In addition to the plaintiff's testimony that he had worked extensively around those products, which released substantial dust when used; id., 11–13; and testimony from an industrial hygienist that a visible dust cloud from an asbestos product indicates a likely health hazard; id., 14–15; there was expert testimony from (1) a doctor of engineering specializing in materials science who performed testing on asbestos gaskets and valve packing, along with air sampling, to measure the fiber release during operations described by the plaintiff, which revealed that significant amounts of asbestos fibers were released, and (2) an environmental scientist who found protruding fibers when examining the gaskets, demonstrated that fibers would be released if a gasket was tapped with a screwdriver, cut the gaskets and observed microscopically that fibers were released and simulated use of a gasket as the plaintiff described using it while testing the air, which then contained a large amount of asbestos fibers. Id., 15–16. The court described this expert testimony as "[i]mportant links in the chain of evidence . . . ." Id., 15.

In *Becker* v. *Baron Bros. Coliseum Auto Parts, Inc.*, 138 N.J. 145, 157, 649 A.2d 613 (1994), the plaintiff's

expert examined brake shoes manufactured by the defendant with specialized equipment and determined that they contained respirable asbestos fibers that potentially were capable of becoming airborne if disturbed. Although the defendant presented testimony to the contrary, the Supreme Court of New Jersey concluded that the conflicting evidence was sufficient to create a factual dispute for the jury to resolve whether dust emitted from the brake shoes could have caused the plaintiff's mesothelioma. Id., 158–59; see also *In re Tire Worker Asbestos Litigation*, Docket Nos. 88-4540, 88-4704, 88-4706, 88-4850, 88-4852, 88-7749, 1991 WL 195575, *3 and n.5, *5–6 (E.D. Pa. September 25, 1991) (report of expert in chemistry and environmental matters concluded that respirable asbestos fibers were released from defendant's brake linings during normal operation and maintenance, which created triable issue of fact as to whether plaintiffs had inhaled such fibers, thereby precluding summary judgment for defendant).

In *Estate of Hicks* v. *Dana Companies, LLC*, 984 A.2d 943, 952 (Pa. Super. 2009), appeal denied, 610 Pa. 586, 19 A.3d 1051, 1052 (2011), the Superior Court of Pennsylvania, reviewing a decision of the Court of Common Pleas, concluded that there was sufficient evidence for a jury to find that the defendant's asbestos containing gaskets and rope packing had caused plaintiff's mesothelioma. The plaintiff testified that he had worked with and near those products throughout his career and that they had created dust; id., 952–53; and a physician testified that asbestos fibers were unsafe and caused mesothelioma with no known safe threshold. See id., 953–55. Although the plaintiff did not present expert evidence that the gaskets and packing emitted respirable asbestos fibers, the defendants' experts, an industrial hygienist and a chemical engineer, had conceded that the products emitted some respirable asbestos fibers and that the defendants had begun to put warning labels on their products advising users against inhaling their dust as it could result in serious bodily harm. Id., 956.

In the present case, the plaintiff adequately established, through the testimony of Petrucci, that the decedent had been exposed to dust from the sanding of FM-37. Furthermore, she presented experts to assist the jury in understanding that: the inhalation of asbestos fibers is dangerous, and that this hazard has been known by manufacturers of industrial products, such as the defendant, for a very long time; the inhalation of asbestos fibers is, essentially, the only cause of mesothelioma, and the precise disease process is well understood; respirable asbestos fibers, once released into the air, can drift or be carried on an individual's clothing for some distance; and the decedent, who had worked with or near a number of asbestos containing products, including FM-37, during his lifetime, had contracted mesothelioma. An important link in the chain of causation, however, was missing: the plaintiff failed to prove that FM-37, when sanded, emitted respirable asbestos fibers that the decedent could have inhaled. Because the defendant did not concede this point and it is not a matter within the common knowledge of lay jurors, the plaintiff was required to prove it with competent expert testimony.[14]

[14] A recent federal product liability case is particularly illustrative, given the type of product at issue in the present case. In *Dugas* v. *3M Co.*, Docket No. 3:14-cv-1096-J-39JBT, 2016 WL 3965953, *1–3 (M.D. Fla. June 22, 2016), the plaintiff alleged that the decedent had contracted mesothelioma due to his exposure to asbestos from the defendant's epoxy adhesive, which was used in the repair of naval aircraft. The decedent had testified that, after the product was applied and had dried, he would sand and file it, creating a dusty environment. Id., *3. The defendant moved for summary judgment, contending that there was no evidence the decedent had inhaled asbestos fibers released from the adhesive. Id., *6. The United States District Court for the Middle District of Florida denied the defendant's motion in light of the fact that, one day earlier, it had ruled, over the defendant's objections, that certain expert testimony proffered by the plaintiff on the contested issue was admissible. Id. The court allowed, however, that prior to the admissibility ruling, the defendant's position was "understandable." Id.

The court's published ruling on the admissibility of the expert's opinion provides an example of the type of evidence that the plaintiff in the present case might have introduced. See *Dugas* v. *3M Co.*, Docket No. 3:14-cv-

As we previously noted, Abraham, one of the plaintiff's expert pathologists, in responding to a hypothetical question from the plaintiff's counsel concerning whether dust from sanding FM-37, which contained 8.6 percent asbestos, under the conditions about which Petrucci had testified, could have caused the decedent's mesothelioma, opined that Petrucci clearly had described an exposure to asbestos released from working with an asbestos containing material. Abraham's opinion, however, was not based on any evidence in the case. Specifically, none of the experts who testified, including Abraham, or any other witness, had done any testing or examination of FM-37 or a similar product to establish that respirable asbestos fibers are emitted when the product is sanded.[15] Moreover, there is no

1096-J-39JBT, 2016 WL 3946802 (M.D. Fla. June 21, 2016). Specifically, the plaintiff's expert conducted experiments in which he attempted to recreate the product and to test it under work practices similar to those utilized by the decedent in that case. Id., *3. The ruling also makes reference to a study conducted by the manufacturer of the product contemporaneous with its use that demonstrated the different amounts of asbestos fibers that were released when it was sanded, with and without local exhaust. Id., *4 and n.4.

The arguments advanced in that ruling suggest that fiber release may be affected by the composition of the product, the temperature at which it is cured, the grit of the sandpaper used and the speed of the sander. Id., *3–6. This further illustrates the need for evidence of fiber release that is directed at a particular product or class of similar products. See *Borg-Warner Corp.* v. *Flores*, 232 S.W.3d 765, 773 (Tex. 2007) (requiring defendant-specific evidence of asbestos exposure, recognizing that proof of causation can differ across products depending on whether asbestos is embedded or friable and noting that "all asbestos products cannot be lumped together in determining their dangerousness" [internal quotation marks omitted]); see also *Marshall* v. *Celotex Corp.*, 651 F. Supp. 389, 393 (E.D. Mich. 1987) (The court refused to adopt the market share theory of liability, which was developed for fungible products, because "[a]sbestos products . . . have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others. . . . This divergence is caused by a combination of factors, including: the specific type of asbestos fiber incorporated into the product; the physical properties of the product itself; [and] the percentage of asbestos used in the product." [Internal quotation marks omitted.]).

[15] "Under the rules of evidence, [a]n expert may testify in the form of an opinion and give reasons therefor, provided sufficient facts are shown as the foundation for the expert's opinion. Conn. Code Evid. § 7-4 (a). An expert

indication in the record that Abraham possesses any specialized knowledge, from his familiarity with published studies or research or otherwise, about how modified epoxy adhesives containing asbestos behave when they are utilized as they were under the conditions in Sikorsky's blade shop.[16] Cf., e.g., *Caruolo* v. *John Crane, Inc.*, 226 F.3d 46, 52–54 (2d Cir. 2000) (jury, in finding that asbestos fibers released from defendant's pipe packing and gaskets caused worker to contract mesothelioma, properly could have relied on testimony of expert witness that visible dust from products indicated asbestos exposure, given that witness also testified about his familiarity with study measuring fiber release when asbestos containing pipe packing and gaskets are removed); *Vedros* v. *Northrop Grumman Shipbuilding, Inc.*, Docket No. 11-1198, 2015 WL 3916248, *3–4, *6

may have personal knowledge of the underlying facts or may obtain the requisite information by attending the trial and hearing the factual testimony. C. Tait, Connecticut Evidence [(4th Ed. 2008)] § 7.91, p. [429]. . . . Finally, an expert may obtain information at trial by having factual testimony summarized in the form of a hypothetical question at trial. Id.; Conn. Code Evid. § 7-4 (c)." (Citations omitted; internal quotation marks omitted.) *Viera* v. *Cohen*, 283 Conn. 412, 444, 927 A.2d 843 (2007). It is established, however, that, "on direct examination, the stated assumptions on which a hypothetical question is based must be the essential facts established by the evidence." (Internal quotation marks omitted.) Id., 449; see *Graybill* v. *Plant*, 138 Conn. 397, 403, 85 A.2d 238 (1951); see also Conn. Code Evid. § 7-4 (c) (1) ("[a]n expert may give an opinion in response to a hypothetical question provided that the hypothetical question . . . presents the facts in such a manner that they bear a true and fair relationship . . . to the evidence in the case").

[16] In February, 2012, prior to trial, Abraham authored a brief report after receiving case specific materials from the plaintiff's counsel. Those materials did not include any information pertaining to FM-37 or testing thereon. See footnote 8 of this opinion. A cover letter accompanying the materials stated that the decedent had been exposed to various asbestos containing products while working at Sikorsky, and prefatory language in Abraham's report indicates that he relied on that assumption in arriving at his conclusions. The report then describes Abraham's interpretation of the pathology material and sets forth Abraham's opinion that the decedent has mesothelioma and that, because mesothelioma is caused by asbestos and the decedent was exposed to asbestos, the cause of his mesothelioma was the asbestos exposure.

(E.D. La. June 25, 2015) (court found no reason to exclude industrial hygienist's expert testimony regarding fiber release from defendant's adhesive product when hygienist, who testified that he had examined " 'tens of thousands' " of asbestos products throughout his career, relied on, inter alia, published study by United States Environmental Protection Agency measuring fiber release from similar product); *In re Asbestos Litigation*, Docket No. 05C-11-257 (ASB), 2009 WL 1034487, *6 (Del. Super. April 8, 2009) (in opining that friction brakes released respirable asbestos fibers during installation and removal, expert witness properly relied on research of other expert witnesses, his own research, agency reports and peer-reviewed scientific data), aff'd, 981 A.2d 531 (Del. 2009); *In re New York City Asbestos Litigation*, 148 App. Div. 3d 233, 238, 48 N.Y.S.3d 365 (2017) (expert testimony that visible dust contains hazardous levels of asbestos must reference studies or reports measuring fibers released by products at issue). In light of these gaps in the evidentiary record, the jury could not have relied on Abraham's conclusory testimony to find that the decedent had been exposed to respirable asbestos fibers from FM-37.

As a final matter, we must address the question of whether our holding in this appeal is compelled by the law as it existed in Connecticut when the case was tried or, rather, whether it stems from principles newly articulated in this court's recent product liability jurisprudence, namely, our decisions in *Bifolck* v. *Philip Morris, Inc.*, 324 Conn. 402, 152 A.3d 1183 (2016), and *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, 321 Conn. 172, 136 A.3d 1232 (2016), both of which were decided while this appeal was pending and, to some degree, concern the question of when expert testimony is necessary in a product liability action. The plaintiff contends that, if a reversal of the judgment is a result of our reliance on newly articulated standards, she is entitled to a new

trial so that she may have the opportunity to prove her case under those standards. We conclude that the requirement of an expert witness on the issue of whether FM-37 emitted respirable asbestos fibers when sanded was required under the law predating *Bifolck* and *Izzarelli* and, therefore, that the plaintiff is not entitled to a new trial.

First, as to the plaintiff's strict liability claim, it was well established law at the time of trial that the plaintiff was required to prove, inter alia, that the product at issue "was in a defective condition unreasonably dangerous to the consumer or user" and that the product's "defect caused the injury for which compensation was sought . . . ." (Internal quotation marks omitted.) *Potter* v. *Chicago Pneumatic Tool Co.*, 241 Conn. 199, 214, 694 A.2d 1319 (1997). Additionally, a plaintiff could prove the unreasonably dangerous requirement, as the plaintiff in this case attempted to do, by showing that the product was "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[17] (Internal quotation marks omitted.) Id., 214–15. The plaintiff was required to show, therefore, that FM-37 was dangerous because it emitted respirable asbestos fibers when sanded and that FM-37's emission of respirable asbestos fibers caused the decedent to contract mesothelioma. As we explain, the plaintiff failed to do so.

With respect to the plaintiff's negligence claim, pursuant to black letter principles, the plaintiff bore the bur-

[17] In *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, supra, 321 Conn. 172, we clarified that the range of cases in which the consumer expectation test, employed in the present case, would be appropriate is narrow, and that a risk-benefit test, which requires consideration of additional factors, is our primary test for claims of design defects. See id., 202–203; see also *Bifolck* v. *Philip Morris, Inc.*, supra, 324 Conn. 415–16; id., 432 (renaming tests).

den of proving that the defendant's failure to test or conduct research on FM-37 or to remove it from the marketplace was unreasonable and was a legal cause of the decedent's mesothelioma. See, e.g., *Murdock* v. *Croughwell*, 268 Conn. 559, 566, 848 A.2d 363 (2004) (identifying essential elements of negligence action). The plaintiff could not do this without showing that, had the defendant performed testing or research, it would have learned that sanding FM-37 emitted respirable asbestos fibers; otherwise, the defendant's lack of testing or research would be of no consequence. Similarly, the jury could not find that a failure to remove FM-37 from the marketplace was unreasonable and that it caused the decedent to develop mesothelioma unless the plaintiff proved that, under ordinary use, FM-37 would emit dangerous, respirable asbestos fibers. See, e.g., *Johnson* v. *Newell*, 160 Conn. 269, 273–74, 278 A.2d 776 (1971) (to recover in negligence action for selling dangerous and defective tire without having properly inspected it, plaintiff was required "to have proved a defect in the condition of the tire").

In sum, proof that FM-37 emitted respirable asbestos fibers was essential for the plaintiff to prevail on either of her theories of recovery under well established law that existed at the time of trial. Such proof required the assistance of an expert because the subject matter was technical in nature and beyond the field of ordinary knowledge of a lay juror. Because the plaintiff did not produce an expert, she failed to prove her case.

The judgment is reversed and the case is remanded with direction to grant the defendant's motion to set aside the verdict and for judgment notwithstanding the verdict.

In this opinion the other justices concurred.