TWILA WILLIAMS, ADMINISTRATRIX (ESTATE OF TIANA N.A. BLACK), ET AL. *v.* HOUSING AUTHORITY OF THE CITY OF BRIDGEPORT ET AL.
(SC 19570)

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

Syllabus

Pursuant to statute (§ 52-557n [b] [8]), municipalities or their employees shall not be liable for damages resulting from, inter alia, the failure to make an inspection of any property to determine whether the property violates any law or contains a hazard to health or safety unless they "had notice of such a violation of law or such a hazard or unless such failure to inspect . . . constitutes a reckless disregard for health or safety under all relevant circumstances . . . ."

The plaintiff, the administratrix of the estates of four family members who died in an apartment fire in a Bridgeport public housing complex, brought an action against the Bridgeport Fire Department and five officials of the city of Bridgeport, including the fire chief, R, alleging, inter alia, that the decedents died as a result of the defendants' failure to inspect the smoke detection equipment in their apartment for compliance with applicable fire safety codes and regulations. The plaintiff specifically alleged that the defendants failed to conduct a statutorily (§ 29-305) required annual fire safety inspection of the apartment and that the defendants knew or should have known about and remedied a number of asserted defects in the apartment, including the absence of fire escapes and photoelectric smoke detectors. The defendants filed a motion for summary judgment, claiming, with respect to their duty to annually inspect the apartment, that they had no actual notice of any defects or violations at the apartment and therefore that the two exceptions to municipal immunity in § 52-557n (b) (8), actual notice and reckless disregard for health or safety, did not apply. In her opposition to the motion for summary judgment, the plaintiff claimed, inter alia, that the defendants were not entitled to immunity because their failure to conduct any inspections constituted a reckless disregard for health or safety. The trial court granted the defendants' motion for summary judgment and concluded, with respect to the defendants' failure to inspect, that § 52-557n (b) (8) afforded them immunity from liability, as the plaintiff had failed to establish that there was a genuine issue of material fact with respect to either the notice exception or the reckless

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

disregard exception of § 52-557n (b) (8). With respect to the reckless disregard exception, the trial court concluded that knowledge of a dangerous condition was necessary to show the type of reckless conduct necessary to defeat immunity pursuant to § 52-557n (b) (8) and that the plaintiff's failure to present any evidence to contradict the defendants' attestations that they were not aware of any of the alleged violations or fire hazards at the apartment defeated the plaintiff's argument that the reckless disregard exception applied. One week before the trial court granted the defendants' motion for summary judgment, the plaintiff had deposed R. In her motion for reconsideration of the trial court's summary judgment ruling, the plaintiff stated that the basis for the motion was R's concession in his deposition that the fire department was required by statute to conduct annual inspections of the apartment but that it did not conduct the inspections due to a claimed lack of resources. The trial court denied the motion for reconsideration and rendered judgment for the defendants, from which the plaintiff appealed to the Appellate Court. The Appellate Court reversed the judgment of the trial court with respect to its determination that there was no question of material fact as to whether the defendants were immune from liability under § 52-557n (b) (8) for failing to inspect the apartment. The Appellate Court concluded that, under the reckless disregard prong of § 52-557n (b) (8), a failure to inspect constitutes a reckless disregard for health or safety if the municipal officer is aware of the duty to inspect, recognizes the possible impact on public or individual health or safety, and makes a conscious decision not to perform that duty. On the granting of certification, the defendants appealed to this court. *Held*:

1. This court determined that neither the trial court nor the Appellate Court properly articulated the standard that governs the reckless disregard exception to municipal immunity contained in § 52-557n (b) (8), and concluded, on the basis of the language and legislative history of that statute, as well as the common law, that, when a municipality's failure to inspect violates a statute or regulation and the municipality did not have actual notice of a hazard or safety violation, the type of conduct that constitutes reckless disregard is more egregious than mere negligence and requires that health and safety inspectors disregard a substantial risk of harm: the trier of fact ordinarily determines whether a municipality's failure to carry out a mandatory inspection demonstrates a reckless disregard for health or safety under all the relevant circumstances, taking into consideration factors such as the nature or severity of the threat to health or safety that the inspection was intended to identify or thwart, whether the failure to inspect was an isolated event or part of a policy or pattern of failing to inspect an entire class of properties over a period of time, the availability and adequacy of alternative means of identifying and thwarting the threats at issue and the existence of burdens associated with precautionary measures.

2. This court concluded that a jury, considering all the relevant circumstances, reasonably could find that the defendants' persistent failure to inspect the decedents' apartment and thousands of other multifamily units in Bridgeport in violation of their statutory duty under § 29-305 arose from and exemplified a pattern of reckless disregard for public health or safety and created a foreseeable and substantial risk that some tragedy of this general sort would occur, and, accordingly, the defendants were not entitled to summary judgment on that issue: R made numerous statements in his deposition that, although not indicating any knowledge or awareness of specific safety violations or hazards at the apartment prior to the fire, arguably created questions of fact as to whether the defendants demonstrated a reckless disregard for health or safety, including R's statements that he was familiar with all relevant legal and regulatory requirements but was not aware either that the fire department was obligated to annually inspect Bridgeport's public housing complexes or that the fire safety code mandated certain smoke detectors, and that the fire department lacked the resources to carry out mandated inspections but that he did not request any additional inspectors until four years after the fire that killed the decedents.

(*Two justices dissenting in one opinion*)

Argued January 19—officially released December 26, 2017

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Sommer*, *J.*, granted the motion for summary judgment filed by the defendant Bridgeport Fire Department et al. and rendered judgment in their favor; thereafter, the court denied the plaintiff's motion for reconsideration and/or reargument and the plaintiff appealed to the Appellate Court, *Lavine*, *Mullins* and *Borden*, *Js.*, which reversed in part the judgment of the trial court, and the defendant Bridgeport Fire Department et al., on the granting of certification, appealed to this court. *Affirmed.*

Daniel J. Krisch, for the appellants (defendant City of Bridgeport Fire Department et al.).

John T. Bochanis, with whom, on the brief, was *Thomas J. Weihing*, for the appellee (plaintiff).

Opinion

ESPINOSA, J. This certified appeal arises out of a tragic fire in which four residents of a Bridgeport public housing complex—Tiana N.A. Black and her three young children—lost their lives. The plaintiff, Twila Williams, as administratrix of the estate of each decedent,[1] brought the present action against the Bridgeport Fire Department and five Bridgeport city officials—Fire Chief Brian Rooney, Fire Marshal William Cosgrove, Mayor William Finch, Zoning Administrator Dennis Buckley, and Building Official Peter Paajanen—(collectively, the municipal defendants) as well as various other defendants who are not parties to the present appeal.[2] The plaintiff alleged, among other things, that the decedents died as a result of the municipal defendants' negligent failure to inspect the smoke detection equipment in their apartment unit for compliance with applicable fire safety codes and regulations. The trial court, *Sommer*, *J.*, rendered summary judgment for the municipal defendants, concluding, with respect to their alleged failure to inspect, that Connecticut's municipal liability statute, General Statutes § 52-557n, afforded them immunity from liability. The Appellate Court reversed, concluding that a jury reasonably could find that the conduct of the municipal defendants demonstrated "a reckless disregard for health or safety under all the relevant circumstances" and, therefore, that they were potentially liable pursuant to § 52-557n (b) (8).[3]

[1] The other decedents were Black's five year old son Nyshon Williams and her twin four year old daughters, Nyaisja Williams and Tyaisja Williams.

[2] The other defendants were the Housing Authority of the City of Bridgeport, Worth Construction Co., Inc., Kasper Group, Inc., Patrick M. Rose, Philip L. Tiso and Bruce Morris.

[3] General Statutes § 52-557n (b) (8) provides in relevant part: "[A] political subdivision of the state or any employee, officer, or agent acting within the scope of his employment or official duties shall not be liable for damages to person or property resulting from . . . (8) failure to make an inspection or making an inadequate or negligent inspection of any property . . . to determine whether the property complies with or violates any law or contains a hazard to health or safety, unless the political subdivision had notice

Williams v. *Housing Authority*, 159 Conn. App. 679, 696, 124 A.3d 537 (2015). We affirm the judgment of the Appellate Court.

I

FACTS AND PROCEDURAL HISTORY

The following undisputed facts and procedural history are relevant to our disposition of this appeal. On November 13, 2009, the date on which the fire occurred, the decedents resided in building 12, unit 205, of the P.T. Barnum Apartments, a group of affordable housing units owned and maintained by the Bridgeport Housing Authority. Unit 205 was located on the second and third floors of a three story apartment building containing twenty residential units. The second floor of the apartment contained a kitchen, a half bath, and a dining/living room area, while the third floor housed three bedrooms and a full bath. Unit 205 had only a single point of ingress and egress, namely, a second floor door that opened onto a porch and an external staircase. Because the building lacked fire escapes, the only means of leaving unit 205 was through that door. This meant that an individual seeking to escape from the bedrooms on the third floor of unit 205 during an emergency had to travel down the internal staircase into the kitchen area, and then traverse the second floor dining/living room area to access the door. Because of frequent false alarms caused by cooking fumes, some residents of the P.T. Barnum Apartments were in the habit of covering or disabling their smoke detectors.

Pursuant to General Statutes § 29-305 (b),[4] the Bridgeport fire marshal's office is required to conduct annual

of such a violation of law or such a hazard or unless such failure to inspect or such inadequate or negligent inspection constitutes a reckless disregard for health or safety under all the relevant circumstances . . . ."

[4] General Statutes § 29-305 (b) provides in relevant part: "Each local fire marshal shall inspect or cause to be inspected, at least once each calendar year . . . in the interests of public safety . . . all occupancies regulated by the Fire Safety Code within the local fire marshal's jurisdiction, except

inspections of all multifamily residential units within Bridgeport. It is undisputed that the neither the municipal defendants nor their employees conducted the mandatory inspection of unit 205 in the year prior to November 13, 2009. Just one day before, however, on the afternoon of November 12, two employees of the housing authority did conduct a routine maintenance inspection of unit 205. The lead inspector, Alexander Guzman, stated that he is certified by the United States Department of Housing and Urban Development to replace smoke detector batteries and carry out health and safety inspections of multiunit residential facilities. In the course of inspecting unit 205, he and his assistant tested the smoke detectors, replaced one nonfunctioning detector, and changed the battery in another. Guzman reported that all of the smoke detectors in unit 205 were functioning properly upon completion of his inspection.

Hours later, in the early morning of Friday, November 13, a fire broke out in the kitchen of unit 205. Although neighbors reported seeing smoke and hearing smoke alarms prior to 12:45 a.m., they assumed that it was a false alarm and did not report the fire via a 911 telephone call until 12:56 a.m. The fire department arrived on the scene at 1:02 a.m. Firefighters extinguished the fire, gained entry to unit 205, and located and attempted to resuscitate the four decedents, each of whom subsequently was pronounced dead at an area hospital. The medical examiner concluded that all four had died of smoke inhalation. In addition, Black's blood alcohol level was found to be 0.23 percent.

Both the fire department and the state police investigated the circumstances surrounding the fire. With

residential buildings designed to be occupied by one or two families . . . for the purpose of determining whether the requirements specified in said codes relative to smoke detection and warning equipment have been satisfied. . . ."

respect to the cause of the fire, both agencies concluded that it was accidental. One neighbor reported that Black had been a heavy drinker, who often drank so much alcohol on weekend evenings that she would pass out on the couch and could not be wakened by her children. That same neighbor further reported that Black's "stove was always very dirty, covered with grease and food." Consistent with this report, fire investigators observed a bottle of alcohol on the floor of unit 205, the remnants of combustible packaging, snack chips, and debris piled on the countertops adjacent to the kitchen stove, and several layers of burned grease caked on the stove itself. They also noted: the right rear burner of the gas stove was found in what was believed to be the "HI" or "ON" position; burn patterns suggested that the fire had originated near that burner; there was evidence of human activity near the stove at the time of the fire; and the burn injuries that Black sustained indicated that she had been in close proximity to the fire at some point, either when it ignited or in the course of trying to extinguish it. On the basis of these observations, investigators concluded that the conflagration was accidental and arose from a fire on the stove with human involvement. Fire department investigators specifically linked the fire to "carelessness," opining that "Black's blood alcohol content would likely have impaired her ability to respond appropriately to the initial alarm and to the fire itself."

Investigators also concluded that the five ionization type smoke detectors within unit 205 were operational at the time of the fire. With respect to the deaths of the decedents, investigators concluded that, given the locations of the bodies within unit 205, it was likely that all four of the decedents had been alerted to the fire and were attempting to leave at the time they died. Specifically, Black and Tyaisja Williams were found in the dining room area, just a few feet from the door;

Nyaisja Williams was found on the living room floor; and Nyshon Williams was found near a window in one of the third floor bedrooms. Investigators concluded that the neighbors' delay of eleven minutes or more[5] in notifying the fire department of the fire, combined with Black's elevated blood alcohol content, may have contributed to the four deaths.

The plaintiff commenced the present action against the defendants. In her revised complaint, the plaintiff alleged, among other things, that the municipal defendants failed to ensure that unit 205 complied with state building and fire safety codes, failed to remedy numerous defects in unit 205, and failed to conduct an annual fire safety inspection of unit 205 as required by § 29-305. The plaintiff specifically alleged that the municipal defendants knew or should have known about and remedied a number of asserted defects in unit 205, including the absence of fire escapes or other adequate means of egress, photoelectric smoke detectors, fire alarm systems, fire suppression systems, fire sprinklers, fire extinguishers, and fire safety or prevention plans. She alleged that such conduct on the part of the municipal defendants was both negligent and reckless.

The municipal defendants moved for summary judgment, claiming, among other things, that they were immune from liability for any claims of negligence pursuant to § 52-557n. With respect to allegations of negligence relating to discretionary conduct, the municipal defendants relied on § 52-557n (a) (2) (B), which provides in relevant part that "a political subdivision of the state shall not be liable for damages to person or property caused by . . . negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or

[5] One witness reported that the delay could have been as long as thirty or forty minutes.

impliedly granted by law." With respect to allegations of negligence relating to any nondiscretionary, ministerial duty, such as the duty annually to inspect unit 205, the municipal defendants relied on § 52-557n (b) (8), which provides in relevant part that "a political subdivision of the state or any employee, officer or agent acting within the scope of his employment or official duties shall not be liable for damages to person or property resulting from . . . failure to make an inspection or making an inadequate or negligent inspection of any property . . . to determine whether the property complies with or violates any law or contains a hazard to health or safety, *unless the political subdivision had notice of such a violation of law or such a hazard or unless such failure to inspect or such inadequate or negligent inspection constitutes a reckless disregard for health or safety under all the relevant circumstances* . . . ." (Emphasis added.) The municipal defendants further contended that they had no actual notice of any defects or violations at unit 205 and, therefore, that there was no question that the two exceptions to municipal immunity contained in § 52-557n (b) (8)—notice of the alleged hazard or violation, and reckless disregard for health or safety—did not apply.

In support of their motion for summary judgment, the municipal defendants submitted affidavits from Finch, Rooney, Cosgrove, Buckley, and Paajanen. Each affiant attested that, prior to November 13, 2009, neither he nor other Bridgeport employees knew of any code violation or safety hazard at unit 205. With the exception of Cosgrove, who offered no opinion as to his office's duty to inspect, each affiant also attested to a belief that he owed no duty to inspect unit 205. Rooney and Cosgrove specifically asserted in their affidavits that they were aware of and familiar with all the responsibilities and duties of the fire department and fire marshal's office, respectively.

In her opposition to the motion for summary judgment, the plaintiff argued, among other things, that the municipal defendants' failure to conduct *any* inspection of unit 205, in alleged violation of § 29-305, constituted the negligent breach of a ministerial duty and, therefore, was not subject to immunity under § 52-557n (a) (2) (B). The plaintiff further contended that the municipal defendants were not entitled to immunity under § 52-557n (b) (8) because both of the exceptions contained in that subdivision allegedly applied to their conduct: (1) they were aware of various code violations at unit 205; and (2) their failure to conduct any inspections constituted a reckless disregard for health or safety. In support of these contentions, however, the plaintiff submitted only the affidavit of Mark Tebbets, an expert on the state building code. Tebbets opined that (1) unit 205 had not been compliant with applicable building and fire safety codes mandating the interconnection of smoke alarms[6] and the size of window openings,[7] (2) the fire department failed to conduct the required annual inspection of unit 205 to identify those violations, and (3) those undetected violations were causally related to the deaths of the decedents insofar as interconnection of the alarms would have provided earlier notice of the smoke and fire conditions in unit 205 and proper window openings would have facilitated escape from the fire.[8]

[6] When smoke alarms are interconnected, the activation of any one alarm triggers all of the other alarms.

[7] The municipal defendants do not concede that relevant building and fire safety codes required these features in unit 205. The parties have not briefed this issue, however, and the record on appeal is inadequate for us to resolve it as a matter of law. Accordingly, in light of the procedural posture in which this case reaches us, we assume without deciding that Tebbets was correct in his assessment.

[8] Notably, in her opposition, the plaintiff failed to proffer any evidence that the municipal defendants had actual notice of the alleged code violations at unit 205 or that they otherwise exhibited reckless disregard of public health or safety. She appears to have been under the mistaken belief that the standard governing a motion for summary judgment is the same as the standard governing a motion to strike, and that she could continue to rest

The trial court granted summary judgment in favor of the municipal defendants. With respect to their alleged failure to inspect unit 205, the court found that the plaintiff had failed to establish that there was a genuine issue of material fact as to either the notice exception or the reckless disregard exception in § 52-557n (b) (8). As to notice, the court observed that the plaintiff had not presented any evidence to contradict the municipal defendants' attestations that they were not aware of any of the alleged violations. As to recklessness, the trial court characterized the law as follows: "In the context of inspections, courts seem to agree that knowledge of a dangerous condition is necessary to show the type of reckless conduct necessary to defeat immunity pursuant to § 52-557n (b) (8)." Accordingly, the court concluded that the lack of any evidence that the municipal defendants were aware of code violations or fire hazards at unit 205 also defeated the plaintiff's argument that the second statutory exception applied.

The municipal defendants filed their motion for summary judgment on May 1, 2013. The plaintiff filed her objection on May 10 of that year, and the trial court issued its memorandum of decision on July 19, 2013, granting summary judgment in favor of the municipal defendants. One week before, on July 11, 2013, the plaintiff had deposed Rooney. During the course of that deposition, Rooney made numerous statements that, while not indicating any knowledge or awareness of specific code violations or safety hazards at unit 205 prior to the fire, arguably created questions of fact as to whether the municipal defendants demonstrated reckless disregard for the health or safety of the citizens of Bridgeport. For example, Rooney testified that:

on her pleadings even after the municipal defendants set forth evidence that they were not aware of any code or safety violations. Ordinarily, this failure to establish a genuine issue of material fact at the summary judgment stage would render her appeal from the trial court's decision moot. But see footnote 11 of this opinion.

• Bridgeport employs only ten fire inspectors, a number that is insufficient to inspect each of the 4000 to 5000 multifamily homes located there.

• Although Rooney requested additional fire inspectors in his 2013 budget, he had not requested additional inspectors in past years' budgets.

• Rooney previously had been named as a defendant in a lawsuit arising from a 2005 fire at a three-family residence located on Iranistan Avenue in which a mother and her two children lost their lives. The plaintiffs in that action alleged that the fire department had failed to inspect the property, as required by statute, and thus had failed to identify the fact that there were no smoke alarms present.

• Prior to that 2005 fire, Bridgeport's fire inspectors "weren't doing the [mandatory] inspections annually on [Bridgeport's more than 3000 three-family homes] unless there was a complaint." Rooney conceded: "I don't know what they were doing." Subsequently, in late 2007 and early 2008, all but one of Bridgeport's inspectors were fired for failing to carry out their inspection duties.

• In 2007 or 2008, Rooney spoke with then Fire Marshal Bruce Collins about the inspection procedure for public housing facilities in Bridgeport. Collins informed him that those facilities carried out their own inspections and, therefore, that the fire marshal's office within the fire department did not inspect them unless there was a complaint. Rooney explained that "[w]e didn't have the resources to do it when we knew that the housing authority was doing it." Rooney conceded, however, that the housing authority's internal inspections were not being conducted by a certified fire marshal—who must pass an examination and study code enforcement at the state fire marshal school—as

required by law, and he did not know specifically what the internal inspections entailed.

• In 2013, upon concluding that the fire department lacked the resources to satisfy its statutory duty to conduct a certified inspection of every multifamily residence each year, Rooney began asking his fire officers to assist by conducting informal inspections to identify the most glaring violations. Those officers were to complete approximately 3600 inspections per year. Nevertheless, Rooney made no changes to fire department policy with respect to inspecting public housing facilities after the 2009 fire, due to an alleged lack of resources. Specifically, as of 2013, there still was no procedure in place to inspect the P.T. Barnum Apartments.

• Rooney claimed that he previously was unaware that the fire department was required by law to inspect public housing facilities each year, but that counsel for Bridgeport recently had made him aware of that obligation.

• Rooney was not familiar with any requirement that smoke detectors in multifamily dwelling units be interconnected. The fire department, with assistance from AmeriCorps volunteers, has installed 40,000 smoke alarms in Bridgeport, none of which was interconnected.

• Rooney did not know the specific difference between ionization and photoelectric smoke detectors. He was not aware of the alleged benefits of photoelectric detectors, and he had never considered whether the fire department should install those detectors in addition to or in lieu of ionization types. He also was not familiar with breakaway windows.

• Subsequent to the 2009 fire at issue in this case, Rooney and his staff spent several nights each week

visiting each unit in the P.T. Barnum Apartments and checking the smoke detectors. In the course of those visits, he discovered that many of the residents had taken down or covered their smoke alarms in response to previous false alarms. Rooney was able to complete all of these visits in the course of three weeks to one month, after which he proceeded to visit other public housing complexes.

• Subsequent to the 2009 fire, Rooney and other town officials formed a task force to determine what could be done to prevent similar tragedies in the future. The first meeting of the task force was disrupted, however, and he did not recall that the group ever met again.[9]

The transcript of Rooney's deposition was not before the trial court at the time the court decided the motion for summary judgment. On August 7, 2013, the plaintiff filed a motion for reconsideration and/or reargument of the court's July 19 summary judgment ruling in favor of the municipal defendants. The stated basis for the motion was that, in his deposition, Rooney now conceded that the fire department was required by statute to conduct annual inspections of unit 205, but that the fire department did not in fact conduct these inspections due to a claimed lack of resources.[10]

The municipal defendants raised both procedural and substantive arguments in response to the plaintiff's motion for reconsideration and/or reargument. Proce-

[9] We express no opinion as to whether any evidence of post-2009 conduct would be admissible at trial. See Conn. Code Evid. § 4-7 (a) (evidence of subsequent remedial measures admissible to show feasibility of precautionary measures); *Streeter* v. *Executive Jet Management, Inc.*, Docket No. X-01-020179481-S, 2005 WL 4357633, *7 (Conn. Super. November 10, 2005) (rule does not necessarily preclude testimony that no subsequent remedial measures were taken).

[10] Curiously, the plaintiff did not draw to the court's attention any of Rooney's other statements that arguably could permit a jury to conclude that the municipal defendants had demonstrated a reckless disregard for public health or safety. However, the plaintiff did submit the full deposition transcript in support of her motion.

durally, they argued that the motion was improper because it did not present any newly discovered evidence that could not have been included with the plaintiff's initial objection. Specifically, they argued that, at the time they sought summary judgment in May, 2013, the action had been pending for nearly two and one-half years, during which time the plaintiff had not even noticed the defendants' depositions. Substantively, they argued that Rooney's deposition did not afford a basis for reconsideration because there still was no indication that any of the municipal defendants were aware of dangerous conditions in unit 205. After holding a hearing, the trial court denied the motion for reconsideration and/or reargument without memorandum and rendered judgment for the municipal defendants.[11]

The plaintiff appealed to the Appellate Court, which reversed the judgment of the trial court with respect to the determination that there is no question of material fact as to whether the municipal defendants are immune from liability under § 52-557n (b) (8) for failing to

[11] Because the trial court did not issue a memorandum of decision, it is unclear whether the court (1) was persuaded by the municipal defendants' procedural arguments that the Rooney deposition was not properly before the court, or (2) entertained the new deposition evidence but concluded that Rooney's statements did not create, as a matter of law, a material question as to whether the municipal defendants demonstrated reckless disregard for public health or safety under all the relevant circumstances. We note, however, that the court allowed extensive argument as to the substantive issues raised by the deposition. Moreover, on appeal to this court, the municipal defendants did not move to strike the plaintiff's appendix, which contains the deposition transcript in its entirety, and, at oral argument, the appellants' counsel conceded that we may consider the full deposition transcript. Finally, the municipal defendants have not raised as an issue on appeal the propriety of the Appellate Court's reliance on the Rooney deposition in concluding that questions of material fact rendered summary judgment improper. See *Williams* v. *Housing Authority*, supra, 159 Conn. App. 686–95. Accordingly, we will assume for purposes of this appeal that the Rooney deposition is properly in the record. See *Hirsch* v. *Braceland*, 144 Conn. 464, 469, 133 A.2d 898 (1957); cf. *State* v. *Manfredi*, 213 Conn. 500, 512, 517, 569 A.2d 506 (1990).

inspect unit 205.[12] *Williams* v. *Housing Authority*, supra, 159 Conn. App. 681–82. After determining that § 52-557n (b) (8) is ambiguous and that the legislative history sheds no light on the meaning of the phrase "reckless disregard for health or safety under all the relevant circumstances," the Appellate Court looked to the common-law definition of recklessness. *Williams* v. *Housing Authority*, supra, 692–94. The court rejected the trial court's interpretation, concluding that treating the recklessness exception as imposing a notice requirement would conflate the two statutory exceptions—actual notice and reckless disregard—and render the latter superfluous. Id., 694 n.13. Instead, the Appellate Court construed the statute as follows: "A failure to inspect that constitutes a reckless disregard for health or safety under § 52-557n (b) (8) [is] one in which an individual is aware of the duty to inspect, recognizes the *possible impact* on public or individual health or safety, and makes the conscious decision not to perform that duty." (Emphasis altered.) Id., 694. Applying that interpretation of the statute, the Appellate Court concluded that a jury reasonably could find that the municipal defendants' failure to inspect unit 205 was reckless. Specifically, the court opined that "[i]t is counterintuitive to an average person that a purported expert, familiar with the duties and procedures of his own office, cannot appreciate the consequences when such duties are not carried out, especially when those duties involve the prevention of life-threatening fires. Thus, a reasonable juror could conclude that [the municipal defendants] would appreciate the natural consequences of their actions."[13] Id., 696.

[12] The plaintiff's other claims of error before the Appellate Court are not at issue in the present appeal.

[13] The Appellate Court also determined that there was a question of material fact as to whether Rooney and Cosgrove were aware of their duty to inspect at the time of the fire. *Williams* v. *Housing Authority*, supra, 159 Conn. App. 695. The municipal defendants do not challenge this determination.

The municipal defendants appealed from the judgment of the Appellate Court. We granted certification, limited to the following question: "Did the Appellate Court correctly conclude that there was a genuine issue of material fact as to whether the [municipal] defendants' failure to inspect [unit 205] pursuant to . . . § 29-305 (b) constituted a 'reckless disregard for health or safety' under . . . § 52-557n (b) (8)?" *Williams* v. *Housing Authority*, 319 Conn. 947, 125 A.3d 528 (2015).

II

LEGAL ANALYSIS

We are in agreement with—and the parties do not challenge—much of the Appellate Court's legal analysis. In brief, the decision of the Appellate Court correctly states the legal standards governing a motion for summary judgment and appellate review thereof; *Williams* v. *Housing Authority*, supra, 159 Conn. App. 688–89; determines that § 52-557n (b) (8) is ambiguous with respect to the exception for municipal immunity for conduct constituting "a reckless disregard for health or safety under all the relevant circumstances"; id., 692–93; and, therefore, looks to external sources such as the common law and the legislative history of the statute to clarify the meaning of that phrase and the standards by which it is to be applied. Id., 692–94.

The primary source of disagreement between the parties is with respect to the legal standard that the Appellate Court ultimately adopted. The municipal defendants note that, under both our common law and our Penal Code, conduct is reckless only if it involves the disregard of a substantial risk or high probability of danger that is either known or so obvious that it should be known. See General Statutes § 53a-3 (13);[14] *Matthies-*

[14] General Statutes § 53a-3 (13) provides: "A person acts 'recklessly' with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists.

sen v. *Vanech*, 266 Conn. 822, 832–33, 836 A.2d 394 (2003). They argue that the Appellate Court applied an anomalous definition of recklessness and set the bar too low when it held that the reckless disregard exception in § 52-557n (b) (8) is satisfied when public officials merely recognize that failure to conduct a required inspection will have a *possible impact* on public or individual health or safety. See *Williams* v. *Housing Authority*, supra, 159 Conn. App. 694, 696. Adopting this possible impact standard, they contend, unjustifiably waters down the concept of recklessness and places an undue burden on overworked and underresourced municipal employees.

For her part, the plaintiff makes little effort to defend the Appellate Court's novel possible impact standard, conceding in her brief that "[r]ecklessness or w[a]nton behavior implies a conscious disregard of a *high risk*, such as embarking upon a particularly dangerous course of action after actual warning."[15] (Emphasis added.) Instead, she contends that, especially in light of the fact that the fire department's noninspection policy was alleged to have contributed to multiple deaths in the 2005 Iranistan Avenue fire, the trial court should have left to the jury the question of whether the fire department's ongoing failure to conduct any annual inspections of unit 205 constituted a reckless disregard of public health or safety.

For the reasons discussed hereinafter, we conclude that neither of the lower courts properly articulated the

The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. . . ."

[15] At oral argument before this court, the plaintiff's counsel took a different tact, arguing that there is no meaningful distinction between a possible risk and a likely one. That can't be right. The reasonable man may walk to lunch on a drizzly day, despite the *possibility* that he might get caught up in a storm and struck by lightning. But once the tempest rages, such that any pedestrian *likely* will be struck, it would be foolhardy not to call a taxicab.

standard that governs the reckless disregard exception contained in § 52-557n (b) (8). See part II A of this opinion. When the proper standard is applied, we agree with the Appellate Court that the plaintiff has created a genuine issue of material fact as to whether the municipal defendants, in failing to inspect unit 205, exhibited a reckless disregard for public health or safety under all the relevant circumstances and, therefore, that the trial court should not have granted summary judgment on that issue. See part II B of this opinion.

A

As an initial matter, we agree with the Appellate Court that the plain language of § 52-557n (b) (8) will not support the trial court's interpretation of the reckless disregard exception. After reviewing *Smart* v. *Corbitt*, 126 Conn. App. 788, 14 A.3d 368, cert. denied, 301 Conn. 907, 19 A.3d 177 (2011), and several decisions of the Superior Court, the trial court concluded that "[i]n the context of inspections, courts seem to agree that knowledge of a dangerous condition is necessary to show the type of reckless conduct necessary to defeat immunity pursuant to § 52-557n (b) (8)." Leaving aside the question of whether the trial court correctly parsed the cited case law, we note that the municipal liability statute carves out two distinct exceptions to municipal immunity for failure to inspect: when a political subdivision has notice of a violation or hazard, and when it demonstrates a reckless disregard for health or safety under all the relevant circumstances. See General Statutes § 52-557n (b) (8). Adopting the trial court's rule that reckless disregard can be proven only when public officials have knowledge of a dangerous condition would render the two exceptions essentially redundant, in violation of cardinal principles of statutory interpretation. See, e.g., *American Promotional Events, Inc.* v. *Blumenthal*, 285 Conn. 192, 203, 937 A.2d 1184 (2008).

Nor are we persuaded, however, by the Appellate Court's alternative interpretation of the statute. Our own analysis diverges from that of the Appellate Court in three primary respects.

1

First, with regard to the statutory language itself, the Appellate Court decision focuses more or less exclusively on the meaning of the word "reckless" in § 52-557n (b) (8) and does not address how, if at all, the phrase "under all the relevant circumstances" modifies the meaning of "a reckless disregard for health or safety . . . ." See *Williams* v. *Housing Authority*, supra, 159 Conn. App. 693–95. At first blush, it may be tempting to assume that the relevant circumstances language is mere surplusage, as it is well established that recklessness, like negligence, generally can be assessed only in the context of particular factual circumstances. See *State* v. *Montanez*, 219 Conn. 16, 24 n.7, 592 A.2d 149 (1991); *Bowen* v. *Hartford Accident & Indemnity Co.*, 122 Conn. 621, 624–25, 191 A. 530 (1937). With respect to § 52-557n (b), however, we find it noteworthy that, whereas subdivision (8) carves out an exception for failures to inspect that constitute "a reckless disregard for health or safety *under all the relevant circumstances*"; (emphasis added); the immediately preceding subdivision, which addresses municipal liability for harms arising from the issuance or denial of licenses and permits, contains a similar recklessness exception, but omits the highlighted language. Section 52-557n (b) (7) provides in relevant part that "a political subdivision of the state or any employee, officer or agent acting within the scope of his employment or official duties shall not be liable for damages to person or property resulting from . . . the issuance, denial, suspension or revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization, when such

authority is a discretionary function by law, unless such issuance, denial, suspension or revocation or such failure or refusal *constitutes a reckless disregard for health or safety* . . . ." (Emphasis added.) We must assume that the legislature's decision to include the "relevant circumstances" language in subdivision (8), but to omit it from the otherwise identical exclusion provision in subdivision (7), was a purposeful one. See, e.g., *State* v. *Heredia*, 310 Conn. 742, 761, 81 A.3d 1163 (2013).

Although the statute itself provides no guidance as to the specific types of circumstances that are to be taken into account when assessing the recklessness of a municipality's decision not to conduct a health or safety inspection,[16] the legislature's use of the modifying phrase "under *all* the relevant circumstances"; (emphasis added) General Statutes § 52-557n (b) (8); suggests that we are to view the exception through a broad lens. In the context of a failure to inspect, it is reasonable to assume that any of the following factors, among others, may be relevant: whether the inspection is mandated by statute or regulation; how frequently inspections are required to be conducted; the nature and severity of the threat to health or safety that the inspection is intended to identify or thwart; whether, and how frequently, threats of that sort have come to pass in the past, either at the location in question or at similar locations; whether the premises involved featured any unique or atypical susceptibilities to risk; the reasons why the inspection was not conducted; whether the failure to inspect was an isolated event or part of a policy or pattern; the number of properties or locations that went without inspection; whether other municipalities or jurisdictions routinely neglect to carry out

[16] Because it is uncontested that the municipal defendants failed to conduct any inspection of unit 205, we need not decide what standards would apply to a case in which an allegedly inadequate or negligent inspection was conducted.

inspections of the type at issue; the availability and adequacy of alternative means of identifying and thwarting the threats at issue; and whether the municipal officials involved were aware or should have been aware of the answers to each of these questions. As we discuss more fully in part II B of this opinion, in the present case, many, if not most, of these factors would appear, on the record before us as construed in the light most favorable to the plaintiff, to support a potential finding that the municipal defendants' longstanding policy of not inspecting any of Bridgeport's public or three-family housing facilities for fire risks and not educating themselves as to the adequacy of the housing authority's own internal inspections demonstrated a reckless disregard for health or safety under the circumstances.

2

Second, we disagree with the Appellate Court's assessment that the legislative history of § 52-557n (b) (8) fails to illuminate the meaning of the reckless disregard exception. *Williams* v. *Housing Authority*, supra, 159 Conn. App. 693. That provision was enacted as part of No. 86-338 of the 1986 Public Acts. It is true that, in other contexts, we have characterized the legislative history of § 52-557n as "worse than murky . . . ." (Internal quotation marks omitted.) Id., quoting *Sanzone* v. *Board of Police Commissioners*, 219 Conn. 179, 188, 592 A.2d 912 (1991). The lengthy legislative debates do reveal, however, that the drafters of the tort reform legislation of 1986 envisioned that the question of whether the violation of a statutory obligation constitutes reckless disregard for public health or safety for purposes of municipal immunity ordinarily would be one for the trier of fact. For example, when asked to clarify how the reckless disregard standard would apply to injuries caused by a school bus driven with tires lacking sufficient tread, an author of the bill, Represen-

tative Robert G. Jaekle, responded: "[I]f I were the attorney for the children . . . I would certainly make a case that the driving of that school bus with tread below the legal limit was more than mere negligence and would probably cite some statutes or [Department of Motor Vehicles] regulations about tread on tires as an indication that that was reckless. . . . [*T*]*hat I believe would at least get me into court to try that issue* and see whether I could prove how bad that negligence was and whether that crossed the line into reckless action on the part of the municipality."[17] (Emphasis added.) 29 H.R. Proc., Pt. 16, 1986 Sess., pp. 5899–900; see also id., p. 5936, remarks of Representative Robert G. Jaekle ("as in so many of these hypotheticals, much is left to a decision of fact as to whether we are into negligence or into wilful or wanton or reckless"); 29 H.R. Proc., Pt. 22, 1986 Sess., pp. 8116–17, remarks of Representative Robert G. Jaekle (suggesting that, depending on specific facts of case, municipal inspector's total failure to visit building site might amount to "reckless disregard for . . . health and safety under all the relevant circumstances"). But see 29 H.R. Proc., Pt. 22, 1986 Sess., p. 8120, remarks of Representative Robert G. Jaekle (opining that when municipal inspector fails to identify defect in new construction caused by third party, third party should bear liability for injuries resulting from defect).

The legislative history of the municipal immunity statute thus supports the plaintiff's argument that reckless-

[17] We recognize that other statements in the legislative history suggest that recklessness will be difficult to prove in the context of a failure to inspect or inadequate inspection. See, e.g., 29 H.R. Proc., Pt. 16, 1986 Sess., pp. 5919–20, remarks of Representative John Wayne Fox; id., pp. 5921–22, remarks of Representative Martin Looney; see also id., p. 5941, remarks of Representative Richard D. Tulisano (cautioning supporters of bill that future plaintiffs "might get in the door by the allegation [of recklessness], but [they] will never be able to sustain the burden"). Those statements, however, were made by opponents of the municipal immunity provisions of the 1986 tort reform legislation and, therefore, are not as clearly indicative of the legislative intent of the bill as are the comments of the author.

ness ordinarily presents a question of fact for the jury and controverts the municipal defendants' contention that, especially in the context of a failure to inspect, "it [is] a daunting task just to get to a jury on recklessness."[18] In this respect, the apparent legislative intent with respect to municipal inspections is consistent with the general rule that, when a defendant's conduct represents more than mere "momentary thoughtlessness or inadvertence," whether it rises to the level of "reckless or wanton misconduct on any given state of facts [ordinarily] is a question of fact for the jury." (Internal quotation marks omitted.) *Brock* v. *Waldron*, 127 Conn. 79, 83, 14 A.2d 713 (1940); accord *Frillici* v. *Westport*, 264 Conn. 266, 277, 823 A.2d 1172 (2003); *Craig* v. *Driscoll*, 64 Conn. App. 699, 721, 781 A.2d 440 (2001), aff'd, 262 Conn. 312, 813 A.2d 1003 (2003).[19]

[18] The municipal defendants offer various arguments as to why allowing claims of this sort to be decided by juries constitutes bad public policy. Such arguments are more appropriately addressed to the legislature than to this court. See, e.g., *Savings & Loan League of Connecticut, Inc.* v. *Connecticut Housing Finance Authority*, 184 Conn. 311, 316, 439 A.2d 978 (1981).

[19] To support their argument to the contrary, the municipal defendants direct our attention to two cases in which this court concluded that allegations of recklessness were, as a matter of law, insufficient to create a jury question, namely, *Elliott* v. *Waterbury*, 245 Conn. 385, 715 A.2d 27 (1998), and *Brock* v. *Waldron*, supra, 127 Conn. 79. Both are readily distinguishable.

In *Elliott*, the plaintiff's decedent was accidentally shot and killed while jogging near a public watershed area on which the defendants permitted recreational hunting. *Elliott* v. *Waterbury*, supra, 245 Conn. 389. This court upheld the trial court's grant of summary judgment in favor of the defendants on the plaintiff's reckless conduct claim, concluding that a trier of fact could not reasonably conclude that, in allowing hunting on the watershed land, the defendants had engaged in "highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." (Internal quotation marks omitted.) Id., 418. In so concluding, this court relied on unique considerations that do not apply to the present case. We emphasized, for example, that Connecticut has a clear policy of encouraging landowners to open their land for recreational hunting and that an independent regulatory regime governs hunting safety. Id., 416–18.

The municipal defendants turn back nearly eighty years, to *Brock*, to muster another case in support of their argument that plaintiffs must pass

Third, although it was not improper for the Appellate Court to look to the common law for guidance as to the meaning of the term "reckless disregard," the decision of that court does not cite—and our own research has not revealed—any authority in the common law for the "possible impact" standard that the court ultimately adopted. See *Williams* v. *Housing Authority*, supra, 159 Conn. App. 694, 696. It is well established, in both the civil and criminal contexts, that a person acts with reckless disregard when he ignores a substantial risk of harm. See, e.g., *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 382–83, 119 A.3d 462 (2015); *State* v. *Dyson*, 217 Conn. 498, 502, 586 A.2d 610 (1991). There is no indication that the legislature intended to adopt a lower standard for recklessness in the context of municipal inspections, one requiring that a defendant merely disregard a possible impact on public or individual health or safety. Indeed, adopting such a standard would effectively eliminate the distinction between negligence and recklessness that has long been

a "high threshold" to reach a jury on a claim of recklessness. *Brock* involved a motor vehicle accident in which a driver, travelling too fast on a slick road and with a dirty windshield, struck and killed a pedestrian. *Brock* v. *Waldron*, supra, 127 Conn. 81–82. In that case, the complaint did not clearly plead a cause of action in recklessness, and the trial court did not become aware of the plaintiff's recklessness claim until after the close of evidence, when it reviewed the plaintiff's request to charge. Id., 80–81. The plaintiff's counsel arguably abandoned the claim during the charging conference, but new appellate counsel later raised the court's refusal to charge the jury on recklessness as a potential ground for appeal. Id., 80. In upholding the trial court's refusal to charge, this court observed that the recklessness claim rested primarily on an unquantified allegation of excess speed that "depend[ed] entirely on inferences from doubtful physical facts in evidence." Id., 84. Accordingly, even if we were to put aside the question of whether a case that grappled with the concept of reckless driving during the early days of the mass-produced automobile has any bearing on the standards governing municipal fire safety inspections in the twenty-first century, it is clear that *Brock* was a procedurally and factually unique case that does not support the general rule for which the municipal defendants cite it.

a cornerstone of our public liability/immunity law. See, e.g., General Statutes § 4-165 (a); *Spears* v. *Garcia*, 263 Conn. 22, 36, 818 A.2d 37 (2003).

Finally, having rejected the Appellate Court's possible impact standard for reckless disregard, we must resolve a dispute between the parties as to the whether the risk disregarded must be substantial not only in its impact or consequence but also in its likelihood. The municipal defendants contend that "[p]robable consequences are the hallmark of recklessness," and that the reckless disregard exception applies only if the municipal defendants ignored (1) a likely harm (2) specific to unit 205. The plaintiff, by contrast, avers that it may be reckless to disregard a grave risk, such as a life threatening fire in a multifamily dwelling, even if it is relatively uncommon, and also that the risk involved can be a generalized one that is not specific to the premises in question. In the limited and specific context of a failure to inspect under § 52-557n (b) (8), we agree with the plaintiff.

With respect to the probability of risk, we begin by recognizing that the magnitude of a potential risk generally is understood to be the product of "the likelihood that [the person's] conduct will injure others [multiplied by] the seriousness of the injury if it happens . . . ." (Internal quotation marks omitted.) *Considine* v. *Waterbury*, 279 Conn. 830, 868 n.20, 905 A.2d 70 (2006). It is true that this court, on occasion, has suggested that a defendant is guilty of reckless misconduct only when he knows or should know that there is "a high degree of *probability* that substantial harm will result" from his actions. (Emphasis added; internal quotation marks omitted.) *Brock* v. *Waldron*, supra, 127 Conn. 84; see, e.g., *State* v. *Bunkley*, 202 Conn. 629, 645, 522 A.2d 795 (1987). In most instances, however, we have defined recklessness simply as disregarding a high *degree* or *substantial risk* of danger, leaving open the question

whether it may be reckless to engage in conduct that carries a relatively low likelihood of causing momentous harm.[20] See, e.g., *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 317 Conn. 381–83; *Matthiessen* v. *Vanech*, supra, 266 Conn. 830–34. In any event, regardless of what standards govern allegations of recklessness in other contexts, we conclude that, in the context of § 52-557n (b) (8), a municipal actor may demonstrate reckless disregard for health or safety when it is clear that the failure to inspect may result in a catastrophic harm, albeit not a likely one. There is little doubt that it might be reckless if federal regulators adopted a policy of not conducting safety inspections at nuclear power plants or airlines of their passenger planes, notwithstanding the relatively low probability of a disaster occurring in any particular instance. Representative Jaekle's comments suggest that the failure regularly to inspect school bus tires also would present a jury question as to recklessness, despite the general infrequency of fatal bus crashes. See 29 H.R. Proc., Pt. 16, 1986 Sess., pp. 5899–900. We see no reason why the same principles should not apply to a fire department's failure to carry out fire safety inspections at multifamily apartment buildings, especially ones such as the one occupied by the decedents, where limited means of egress increase the likelihood that any particular fire will result in casualties.

We also agree with the plaintiff that, particularly when a municipality has adopted a policy of not carrying

[20] The municipal defendants draw our attention to a comment in the Restatement (Second) of Torts that indicates that the violation of a statute is reckless only to the extent that it involves "a high degree of probability that serious harm will result." 2 Restatement (Second), Torts § 500, comment (e), p. 589 (1965). Other comments to that section suggest, however, that recklessness does not require an actual likelihood of harm, such that the probability of injury is greater than 50 percent, but merely that the risk is "substantially in excess of that necessary to make the conduct negligent." Id., comment (a), p. 588. We read comment (e) in that light.

out any inspections of a certain type, § 52-557n (b) (8) permits the finder of fact to assess the aggregate level of risk associated with that policy, and not only the limited risk posed to the specific premises at which the hazard happened to transpire. As we have discussed, the reckless disregard exception applies when a municipality does not have actual notice of a hazard or violation at particular premises. Under those circumstances, it would make little sense to construe the exception to apply only when a municipal actor disregards a particular, premise-specific risk. Moreover, mandated inspections such as fire safety inspections are, by their very nature, standardized procedures that are intended and designed to identify general risks of the sort that may occur rarely but can affect any property of a certain type. If a municipality adopts a policy of not conducting any such inspections, it presumably does so with a view toward the total resources that can be saved thereby. On the other side of the ledger, we see no reason why a jury should not be permitted to weigh the aggregate risks that may ensue if hundreds or thousands of premises go uninspected.

4

With regard to the governing legal standard, the dissent contends that we have "(1) fail[ed] to sufficiently distinguish reckless disregard from negligence, (2) fail[ed] to recognize that the burden of preventing the risk of harm is an essential element of recklessness, (3) fail[ed] to recognize that the reckless disregard prong of § 52-557n (b) (8) generally requires proof specific to the subject premises, and (4) improperly allow[ed] for aggregation of risk based solely on the shared circumstance of noninspection." We address each concern in turn.

With respect to the dissent's first concern, to the extent that we have not made it abundantly clear, we

take this opportunity to reiterate that the type of conduct that constitutes reckless disregard for purposes of § 52-557n (b) (8) is more egregious than mere negligence and requires that health and safety inspectors disregard a substantial risk of harm. See *Matthiessen* v. *Vanech*, supra, 266 Conn. 833–34. Although the dissent is correct that certain conduct, on its face, might qualify as either negligent or reckless, the dissent seemingly fails to recognize that, where either conclusion is possible, whether any particular (mis)conduct rises to the level of recklessness—in light of the actor's mental state and the magnitude of the potential harm involved—is to be determined by the trier of fact. Accordingly, the principal question before this court is whether, on the evidence of record, a jury reasonably could conclude that the municipal defendants chose to ignore a substantial risk of harm.

We also categorically reject the dissent's suggestion that we have embraced a per se theory of recklessness with respect to the failure to perform mandated health or safety inspections. Rather, we have identified numerous factors that the trier of fact may consider in assessing whether any particular failure to carry out a statutorily mandated inspection demonstrates a reckless disregard for health or safety *under all the relevant circumstances*.

With respect to the second concern, the dissent cites no controlling authority for the proposition that the burden of preventing the risk of harm is an "essential element" of recklessness. Indeed, the dissent concedes, as it must, that this novel theory only recently has been proposed in the Restatement (Third) of Torts and that it has not been adopted as the law of Connecticut. Notably, the Restatement (Third) itself recognizes that its novel, law and economics definition of recklessness may not be appropriate in every context in which recklessness is at issue. 1 Restatement (Third) Torts, Liabil-

ity for Physical and Emotional Harm, § 2, comment (b), p. 19 (2010). The authors of the Restatement (Third) also acknowledge that, in many instances, disregard of a high probability of harm is itself indicative of recklessness, without the need to consider the existence of or burdens associated with precautionary measures. Id., comment (e), p. 21. We do not dispute, however, that, in many circumstances, such burdens will be among those factors to be weighed by the trier of fact in making a finding of recklessness. The jury is certainly free to consider them here.

With respect to the dissent's third concern—that it would somehow be internally inconsistent to read the second exception contained in § 52-557n (b) (8) to encompass risks and considerations beyond those specific to the subject premises—the dissent's crabbed interpretation of the statute finds no more support in the text than it does in the cannons of construction to which the dissent appeals. In short, we fail to understand in what sense there is even a tension, let alone a contradiction, in the legislature having intended what the plain language of the statute clearly suggests, namely, carving out two exceptions to governmental immunity: a more specific one for public safety officials who fail to inspect a property known to have a particular code violation or safety hazard, and a more general one for officials whose failure to inspect demonstrates a disregard for public health or safety "under all the relevant circumstances . . . ." It can hardly be disputed that a public official who routinely ignores his duty to carry out important fire safety inspections demonstrates greater disregard for the public's health or safety than does an official who misses only one such inspection. The dissent has suggested no reason why the legislature would not have intended for a jury to take such considerations into account. Indeed, given that § 52-557n (b) (8) provides for the imposition of liability when

a failure to inspect constitutes a reckless disregard for health or safety *under all the relevant circumstances*, the statute itself clearly invites, if not requires, the trier of fact to take into account broader considerations, such as inspection policies and the history of conflagrations at residences of this type.

Finally, the dissent contends that we improperly have concluded that a public safety official's failure to inspect a class of properties necessarily implies that the official has adopted a general, unitary policy of not carrying out such inspections. Nothing could be further from the truth. Once again, all we have held herein is that, when confronted with evidence that an official has failed to inspect an entire class of properties over a period of time, a *jury* is not precluded either from finding as a matter of fact that those failures to inspect were the result of a general policy of noninspection or from concluding that the adoption of such a policy demonstrated a reckless disregard for public health or safety. The present record contains sufficient evidence to allow a jury to make such determinations.

B

In part II A of this opinion, we clarified the second exception to municipal immunity contained in § 52-557n (b) (8) and, specifically, the standards governing when the failure to conduct a municipal inspection constitutes "a reckless disregard for health or safety under all the relevant circumstances . . . ." We concluded that, particularly when the failure to inspect violates some statute or regulation, the question of recklessness ordinarily will be one for the jury, taking into account all relevant circumstances. We also concluded that when the failure to inspect is not an isolated incident but results from a general policy of not conducting inspections of a certain type, the jury reasonably may

consider whether the policy itself indicates a reckless disregard for public health or safety.

In this subpart of the opinion, we consider whether the Appellate Court properly determined that a jury reasonably could find, on the basis of the proof submitted in opposition to the motion for summary judgment and the inferences reasonably to be drawn therefrom, that the conduct of the municipal defendants demonstrated a reckless disregard for public health or safety under the circumstances. We conclude that the plaintiff met her burden in this respect and that the municipal defendants were not entitled to summary judgment on that issue.

1

The Rooney deposition and the various affidavits submitted in support of and in opposition to the motion for summary judgment, construed in the light most favorable to the plaintiff as the nonmoving party, suggest that, over the course of many years, the municipal defendants maintained a policy of not conducting *any* routine fire safety inspections of the thousands of public housing units in Bridgeport in the absence of a complaint or request,[21] and also of not routinely inspecting certain of its more than 3000 three-family homes, in violation of their statutory duty under § 29-305 (b). These policies remained in effect after 2005, despite the fact that the failure to inspect allegedly resulted in multiple fatalities during the Iranistan Avenue fire. Rooney also delayed for eight years after that fire before implementing the stopgap measure of asking his officers to assist by carrying out informal inspections of high risk dwellings. Following the 2009 fire at issue

[21] See Park City Communities, "About Us," available at http://www.parkcitycommunities.org/about-us/ (last visited December 6, 2017) (agency manages approximately 2600 public housing equivalent units). We note that Park City Communities was formerly known as the Bridgeport Housing Authority.

in this case, the municipal defendants failed to follow through on measures such as a task force that had been formed to determine what could be done to prevent similar tragedies in the future.

Moreover, Rooney's stated rationales for the fire department's noninspection policy raise additional questions as to whether he and the other municipal defendants acted in reckless disregard of public safety. He claimed to have been familiar with all relevant legal and regulatory requirements, but also not to have been aware either that the fire department was obligated to annually inspect Bridgeport's public housing complexes or that the fire safety code mandated that the smoke alarms in unit 205 be interconnected. See footnote 6 of this opinion. Rooney claimed that the fire department lacked the resources to carry out the mandated inspections, but he did not request any additional inspectors until 2013. He claimed that his ten person fire marshal division lacked the manpower to inspect Bridgeport's public housing complexes, but conceded that, by setting aside a few hours in the evenings following the 2009 fire, he had been able to personally visit, over the course of just several weeks, each unit in the P.T. Barnum Apartments to check smoke detectors. He claimed that he saw no need for the fire department to carry out its mandated inspections when the housing authority was conducting its own internal inspections, but conceded that he did not know and had never inquired as to the nature or extent of the inspections that were conducted by the housing authority's unlicensed inspectors. Finally, Rooney appeared to be unfamiliar with common smoke detection technologies and not to have educated himself as to their potential advantages and shortcomings.[22]

[22] Rooney's testimony, construed in the light most favorable to the plaintiff, tended to establish, among other things, that the Bridgeport fire marshal division pursued a long-standing policy of not inspecting any public housing facilities, in the absence of a complaint or request, and also of not routinely inspecting multifamily housing units, despite its knowledge that that policy

In light of this factual record, we agree with the Appellate Court that a jury, considering all the relevant circumstances, reasonably could find that the municipal defendants' persistent failure to inspect unit 205 and thousands of others like it both arose from and exemplified a pattern of reckless disregard for public health or safety. We understand that it may have been extremely unlikely that the municipal defendants' noninspection policy would result in fire related fatalities of this sort at this particular apartment. Such fires are, in general, a rare and unpredictable occurrence. See *Evon* v. *Andrews*, 211 Conn. 501, 508, 559 A.2d 1131 (1989). Moreover, if the plaintiff's allegations are true, in this instance, it appears that the housing authority's internal fire safety inspections may have been inadequate only because an unfortunate and unlikely confluence of factors—a heavily inebriated parent of young children apparently operated her gas stove late at night, in close proximity to highly combustible debris, in a building where false alarms were sufficiently common that neighbors delayed before calling emergency services—meant that interconnection of the unit's smoke alarms could have changed the outcome. As we have explained, however, the jury is free to consider not only whether this particular hazard at this particular location was a predictable result of the failure to inspect, but also whether, in light of the allegations surrounding the 2005 Iranistan Avenue fire, the municipal defendants' admitted lack of diligence and decision not to inspect thousands of multifamily units that are home to Bridgeport's least affluent residents created a foreseeable and substantial risk that some tragedy of this general sort would

had resulted in fatal fires on previous occasions. We agree with the dissent that, pursuant to § 29-305, Rooney himself was not responsible for carrying out the mandatory annual inspections. Because the issue is not before us, we need not determine whether any of Rooney's own actions subjected either him or Bridgeport to potential liability under § 52-557n.

occur, thus constituting a reckless disregard for health or safety.

2

We are not persuaded by the dissent's argument that we improperly have decided this case on the basis of a "theory of liability"—the municipal defendants' apparent policy of not conducting mandatory inspections of many multifamily housing units in Bridgeport over a period of years—that the plaintiff never advanced. The dissent misperceives the governing law, the nature of our decision, and the appellate record in this case.

Under modern pleading practice, "pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 253, 990 A.2d 206 (2010). For this reason, the dissent's reliance on *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 621, 99 A.3d 1079 (2014), is misplaced. *White* stands for the proposition that a plaintiff, having pleaded and presented his case according to one theory of liability, cannot on appeal seek to have the case resolved according to a fundamentally different theory, one that involves distinct essential elements and of which the defendant was never given notice. See id., 619–20. That is not the case here. Here, the plaintiff alleged in her complaint that the municipal defendants acted recklessly by failing to conduct the mandatory annual inspection *of unit 205*, and it is on that theory of liability that the case has been resolved. The question at issue is merely whether, in assessing whether the municipal defendants' failure to inspect *that particular unit* was reckless, the jury may consider various *factors* that put that decision into context. These include whether the failure to inspect was intentional, whether it was part of a broader policy of nonenforcement, whether it

reflected an improper delegation of the municipal defendants' statutory duties to unqualified housing authority employees, whether it was justified by a lack of available inspection resources, and whether it was preceded by other instances in which the municipal defendants' failure to inspect resulted in catastrophic fire losses. Each of those questions bears directly on the plaintiff's theory of the case.

Moreover, to the extent that the dissent is particularly concerned with the question of the municipal defendants' broader history of noncompliance with their statutory duties, it is clear that they were on notice that that policy fell within the ambit of the plaintiff's complaint. Whereas some of the plaintiff's interrogatory requests sought information specific to the municipal defendants' inspections of unit 205, many others sought information regarding their general "policies or procedures that relate to the inspection of properties for fire and safety code violations," as well as their past history of inspecting the entire P.T. Barnum Apartments housing complex. Relatedly, as the dissent concedes, during Rooney's deposition, the plaintiff's counsel questioned Rooney on multiple occasions and at some length regarding the municipal defendants' general inspection policies with respect to multifamily housing units. Then, in her motion for reconsideration and/or reargument, the plaintiff emphasized that reconsideration was warranted in part because "Rooney admitted in his deposition that he was aware [that] [Bridgeport] did not conduct inspections of three family residences (which would include the premises which are the subject of the fire in the instant case) because of a claimed lack of resources." It also is noteworthy that the trial court, in its memorandum of decision, framed the question as "whether the fire marshal, by allegedly neglecting to undertake annual *inspections* as required by § 29-305, engaged in a 'reckless disregard for health or safety

under all the relevant circumstances.' " (Emphasis added.) The court's use of the plural here is noteworthy, insofar as the statute only would have required one inspection of unit 205 in the year prior to the fire. Also notable is the court's recognition that *Pinos* v. *Mystic Fire District*, Docket No. CV-09-5012096, 2011 WL 1565874 (Conn. Super. March 30, 2011), favored the plaintiff's position. In that case, the trial court found that a material fact existed as to whether the Mystic Fire District's failure to inspect the subject premises prior to a fatal fire constituted recklessness for the purposes of § 52-557n (b) (8) in large part because the fire marshal's office had conducted fewer than one half of the mandated inspections citywide during the two years prior to the fire. See id., *2–4. Accordingly, we reject the dissent's suggestion that these considerations do not fall within the ambit of the plaintiff's complaint.

The judgment of the Appellate Court is affirmed.

In this opinion ROGERS, C. J., and EVELEIGH and VERTEFEUILLE, Js., concurred.

McDONALD, J., with whom PALMER, J., joins, dissenting. The question before this court is a simple one, but the majority does not directly answer it. Specifically, we are asked whether a municipal defendant's knowing failure to conduct any fire safety code inspection of a particular premises, despite a known statutory duty to do so, constitutes a reckless disregard of health or safety sufficient to waive governmental immunity pursuant to General Statutes § 52-557n (b) (8). Instead of answering that question, the majority implicitly acknowledges the inadequacy of such a claim by answering a different question: whether a municipality's blanket policy not to conduct inspections of premises to which this duty applies constitutes reckless disregard because such a policy inevitably creates the risk of

unlikely, but potentially grave, harm to this class.[1] In so doing, the majority not only relies on a theory of the case never advanced by the plaintiff and contradicted by the evidence, but also adopts a novel standard of reckless disregard that is contrary to legislative intent and our case law. Under those circumstances, I am compelled to dissent.

The plaintiff, Twila N.A. Williams, as administratrix of the estates of four victims of an apartment fire, claimed that the failure of the municipal defendants[2] to conduct any fire safety code inspection of the public housing apartment at which the fatal fire occurred, despite knowing that it was their statutory duty to do so and that they had not done so, was the proximate cause of the deaths of the decedents, a mother and her young children. The plaintiff's theory in regard to this claim was that, had the municipal defendants conducted such an inspection, it would have revealed, among other things, that the apartment's smoke detectors were not interconnected as required by the state fire safety code. Although allegations that a mandated inspection could have prevented such a loss of life might engender feelings of anger toward the authorities in whom such responsibilities were vested, and empathy for the decedents' family, our legislature has decided, as a matter of public policy, that municipalities generally should be immune from liability for their failure to

[1] More specifically, the majority characterizes the evidence as sufficient to establish "the municipal defendants' long-standing policy of not inspecting any of Bridgeport's public or three-family housing facilities for fire risks and not educating themselves as to the adequacy of the housing authority's own internal inspections . . . ."

[2] The plaintiff brought the present action against the following municipal defendants: the City of Bridgeport Fire Department, and five Bridgeport city officials: Fire Chief Brian Rooney, Fire Marshal William Cosgrove, Mayor William Finch, Zoning Administrator Dennis Buckley, and Building Official Peter Paajanen. The plaintiff also named several nonmunicipal defendants in the complaint, who are not parties to the present appeal.

conduct such inspections.[3] Recognizing the competing strains on limited municipal resources, even when such inspections are mandated by law, our legislature has provided narrow exceptions to this immunity. A municipality's negligent failure to inspect, standing alone, is not enough to overcome governmental immunity; the municipality must have actual notice of a violation of law or a hazard to health or safety, or its failure to inspect must constitute a "reckless disregard for health or safety under all the relevant circumstances . . . ." General Statutes § 52-557n (b) (8). Because the municipal defendants presented uncontroverted proof that they had no such notice, the present appeal turns on the latter.

Under a proper view of the law and the record, the municipal defendants were entitled to summary judgment on the claim of failure to inspect, given the theory of reckless disregard that the plaintiff advanced. The majority's conclusion to the contrary unfairly penalizes the municipal defendants for failing to disprove a theory that the plaintiff never advanced, and could not succeed upon had she advanced such a theory in light of the evidence before the trial court. More troubling, the majority effectively adopts a negligence per se standard that will likely have broad implications for every city, town, and borough in this state.

I

I begin with the question of what the standard of "reckless disregard for health or safety under all the relevant circumstances" contained in § 52-557n (b) (8) means. The majority's analysis of this issue is largely framed by questions that it deems relevant to evidence

[3] The legislature also has determined that "[a]ny officer of a local fire marshal's office, if acting without malice and in good faith, shall be free from all liability for any action or omission in the performance of his or her official duties." General Statutes § 29-298 (c).

in the present case. As I explain in part II of this dissenting opinion, however, some of those questions are not implicated by the evidence or the plaintiff's theory of the case. Nonetheless, because its analysis has far reaching implications beyond this case, it is necessary to address the majority's standard in its entirety.

Although I find the majority's standard deficient in several significant respects, there are certain aspects of its analysis with which I agree. For the sake of avoiding redundancy, I acknowledge those aspects first and then turn to the basis of my profound disagreement.

I agree with the majority that the Appellate Court improperly interpreted the reckless disregard prong of § 52-557n (b) (8) to allow for recovery against a municipality when the failure to conduct a fire safety code inspection could have a "possible impact" on health and safety. See *Williams* v. *Housing Authority*, 159 Conn. App. 679, 694, 124 A.3d 537 (2015). As the majority properly notes, a possible impact standard finds no support in our case law addressing recklessness. More significantly, that standard contravenes the narrow construction that we are bound to give § 52-557n (b) (8), as it abrogates common-law municipal immunity. See *Ugrin* v. *Cheshire*, 307 Conn. 364, 382, 384, 54 A.3d 532 (2012); *Martel* v. *Metropolitan District Commission*, 275 Conn. 38, 57–58, 881 A.2d 194 (2005). Because inspections generally are mandated for the protection of health and/or safety, a possible impact standard would improperly afford a broad construction of the statute allowing for recovery for any injuries arising from any failure to inspect.

I also agree in part with the majority regarding the proper interpretation of reckless disregard of health or safety under § 52-557n (b) (8). Specifically, I agree that reckless disregard of health or safety could be established when there is a risk of life threatening injuries,

even if there is a relatively low probability of such a danger occurring.[4] I agree that fire safety code violations could contribute to such a risk, and that any reasonable person charged with inspecting for such violations; see General Statutes § 29-305; would be aware of that fact. With respect to the probability of such a harm occurring and the municipality's conscious disregard of that risk, I also agree that facts and circumstances that extend beyond the premises at which that risk actually manifested may be relevant.

However, I fundamentally disagree with significant aspects of the majority's standard. As I explain subsequently in this dissenting opinion, the principal flaws in its analysis are that the majority (1) fails to sufficiently distinguish reckless disregard from negligence, (2) fails to recognize that the burden of preventing the risk of harm is an essential element of recklessness, (3) fails to recognize that the reckless disregard prong of § 52-557n (b) (8) generally requires proof specific to the subject premises, and (4) improperly allows for aggregation of risk based solely on the shared circumstance of noninspection. The first two flaws relate to the proper meaning of "reckless disregard," and the latter two relate to the proper meaning of that term "under all the relevant circumstances."

I turn first to the meaning of reckless disregard. I begin with the undisputed proposition that, although § 52-557n (b) (8) refers to "reckless disregard," under our law, that term is synonymous with recklessness.

[4] I note that there is a textual argument supporting this conclusion that is not advanced by the majority. In my view, it is significant that § 52-557 (b) (8) provides two circumstances under which liability can arise from a municipality's failure to conduct a mandated inspection. The first of these—notice of a violation of law or a hazard—plainly does not require the plaintiff to establish that the violation or hazard creates a high probability of a risk of harm, let alone, a serious harm. Therefore, I see no reason why we are compelled to conclude that the circumstance of reckless disregard should not be read to impose a comparable standard of proof.

See *Doe* v. *Boy Scouts of America Corp.*, 323 Conn. 303, 330, 147 A.3d 104 (2016) ("Wanton misconduct is reckless misconduct. . . . It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action." [Internal quotation marks omitted.]).

The statute provides no definition for the term, thus suggesting that our interpretation should be guided by the well developed body of common law using this term. The legislative history of § 52-557n, while not particularly illuminating,[5] also points us in that direction. In clarifying the contours of the immunity afforded to municipalities, one of the bill's authors, Representative Robert G. Jaekle, stated: "In law there is a distinction between mere negligence and intentional actions. And in between would be negligence that is just so outrageous that it is wilful, reckless, wanton." 29 H.R. Proc., Pt. 16, 1986 Sess., pp. 5834–35. Representative Jaekle's statement is consistent with the common law. See *Doe* v. *Boy Scouts of America Corp.*, supra, 323 Conn. 330 (recklessness "is more than negligence, more than gross negligence" and "[w]anton misconduct is reckless misconduct" [internal quotation marks omitted]); *Begley* v. *Kohl & Madden Printing Ink Co.*, 157 Conn. 445, 450, 254 A.2d 907 (1969) ("[t]here is a wide difference between negligence and a reckless disregard of the rights or safety of others" [internal quotation marks omitted]).

[5] The majority asserts that a lower standard of recklessness than under the common law is supported by certain legislators' statements to the effect that whether negligent conduct rises to the requisite level of recklessness is an issue of fact left to the trier of fact. Although such a statement is undoubtedly true as a general matter, it does not clarify what standard the trier of fact would apply to determine whether the facts establish that the municipal actor's failure to inspect was in reckless disregard of health or safety. Further, an element of proof that is ordinarily a question of fact becomes a question of law when a fair and reasonable person could reach but one conclusion. *Heisinger* v. *Cleary*, 323 Conn. 765, 781 n.18, 150 A.3d 1136 (2016).

Indeed, under the common law, recklessness is typically defined in relation to negligence, distinguished from the latter by degree and by mental state. "Recklessness requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man, and the actor must recognize that his conduct involves a risk substantially greater . . . than that which is necessary to make his conduct negligent. . . . [W]e have described recklessness as a state of consciousness with reference to the consequences of one's acts. . . . The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them. . . . It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action." (Internal quotation marks omitted.) *Doe* v. *Boy Scouts of America Corp.*, supra, 323 Conn. 330. "[R]eckless conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." (Internal quotation marks omitted.) *Matthiessen* v. *Vanech*, 266 Conn. 822, 833, 836 A.2d 394 (2003).

The key distinctions between negligence and recklessness, then, are the extreme departure from ordinary care and the conscious choice of this course of action with knowledge of the serious risk of harm involved. See 2 Restatement (Second), Torts § 500, comment (g), p. 590 (1965). With respect to the magnitude of risk, the Restatement (Second) explains: "The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, *but*

this difference of degree is so marked as to amount substantially to a difference in kind." (Emphasis added.) Id.

Typically, recklessness has been cast in terms of requiring a high probability of a serious harm. See, e.g., *Doe* v. *Boy Scouts of America Corp.*, supra, 323 Conn. 330 (serious danger and risk substantially greater than negligence); *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 382, 119 A.3d 462 (2015) (same); *Matthiessen* v. *Vanech*, supra, 266 Conn. 832–33 (same); *Frillici* v. *Westport*, 264 Conn. 266, 277–78, 823 A.2d 1172 (2003) (same); *Craig* v. *Driscoll*, 262 Conn. 312, 342–43, 813 A.2d 1003 (2003) (same); *Brock* v. *Waldron*, 127 Conn. 79, 84, 14 A.2d 713 (1940) ("high degree of probability that substantial harm will result" [internal quotation marks omitted]).

Although this court has not previously considered recklessness in the context of a violation of a statute, the Restatement (Second) of Torts and its predecessor similarly have indicated that a high probability of serious harm would be required to establish recklessness in this context. See 2 Restatement (Second), supra, comment (e), p. 589 ("[i]n order that the breach of the statute constitute reckless disregard for the safety of those for whose protection it is enacted, the statute must not only be intentionally violated, but the precautions required must be such that their omission will be recognized as involving a high degree of probability that serious harm will result"); 2 Restatement (First), Torts § 500, comment (e), p. 1295 (1934) (substantially same language). In applying this standard, courts have looked not only to the general risk associated with a violation of the statute, but also to facts known to the actor that would make the actor aware of an increased risk of harm under the specific circumstances that gave rise to the plaintiff's injury. See, e.g., *Boyd* v. *National Railroad Passenger Corp.*, 446 Mass. 540, 552-53, 845

N.E.2d 356 (2006) (applying Restatement [Second] definition of recklessness and concluding that there was genuine issue of material fact whether failure of train operator to blow horn at crossing and obey speed limit, as mandated by statute, was reckless because train operator knew that individuals had been crossing specific tracks where injuries occurred and death was near certainty to result should accident occur).

Other sources have, as the majority has indicated, collectively characterized the likelihood and gravity of harm, using terms such as "great danger," which leave open the possibility that it may be reckless to disregard a less probable risk of grave injury. See 1 Restatement (Third), Torts, Liability for Physical and Emotional Harm, § 2, comment (d), p. 20 (2010) ("[t]he 'magnitude' of the risk includes both the likelihood of a harm-causing incident and the severity of the harm that may ensue"); W. Keeton et al., Prosser and Keaton on the Law of Torts (5th Ed. 1984) § 34, p. 214 (reckless conduct must be more than "even . . . an intentional omission to perform a statutory duty, except in those cases where a reasonable person in the actor's place would have been aware of great danger, and proceeding in the face of it is so entirely unreasonable as to amount to aggravated negligence" [footnote omitted]); see also *Frillici* v. *Westport*, supra, 264 Conn. 278 ("extreme departure from ordinary care . . . in a situation where a *high degree of danger* is apparent" [emphasis added; internal quotation marks omitted]). Consistent with this view, the Restatement (Third) of Torts no longer distinguishes a violation of a statute as a specific circumstance under which recklessness requires a high probability of serious harm. See 1 Restatement (Third), supra, § 2.

Nothing in these authorities, however, can be read to abandon the fundamental principle that more egregious conduct is required to distinguish reckless disregard

from negligence. A contrary conclusion would effectively result in negligence per se for any violation of a statute intended to safeguard against the possibility of grave harm.[6]

Accordingly, it is important to point out that we have recognized that the failure to protect against a low probability of grave harm may constitute *negligence*, as long as the burden of prevention is not substantial in relation to that risk. See *Munn* v. *Hotchkiss School*, 326 Conn. 540, 568, 165 A.3d 1167 (2017) ("Although . . . tick-borne encephalitis is not a widespread illness, when it strikes, the results can be devastating. At the same time, some of the measures one might take to protect against it are simple and straightforward . . . ."). This balancing test has a long and venerable history. See id., 568–69 ("The case thus brings to mind the risk-benefit calculus articulated long ago by Judge Learned Hand to determine whether, in given circumstances, reasonable care has been exercised. Pursuant to that formulation, both the likelihood and the gravity of potential harm should be taken into consideration, as well as the burden of taking adequate precautions to prevent that harm from occurring. See *United States* v. *Carroll Towing Co.*, 159 F.2d 169, 173 [2d Cir. 1947]. In short, '[g]iven a balancing approach to negligence, even if the likelihood of harm stemming from the actor's conduct is small, the actor can be negligent if the sever-

[6] A similar untenable result flows from the distinction drawn by the Appellate Court between the two exceptions to immunity under § 52-557n (b) (8), one requiring awareness of a defect and the other requiring awareness of a *duty*. *Williams* v. *Housing Authority*, supra, 159 Conn. App. 694 n.13. If all that recklessness required was knowledge of a statutory duty then recklessness would be synonymous with negligence per se. As I explain later in this dissenting opinion, the reckless disregard exception to immunity can be distinguished from the actual notice exception in that the former involves awareness of a *substantial risk*.

[7] Specifically, "[a]s a result of contracting tick-borne encephalitis, the plaintiff suffered permanent brain damage that has impacted severely the course of her life." *Munn* v. *Hotchkiss School*, supra, 326 Conn. 544.

ity of the possible harm is great and the burden of precautions is limited.' 1 Restatement [Third], supra, § 3, comment (f), p. 31; see also 3 F. Harper et al., Harper, James & Grey on Torts [3d Ed. 2007] § 16.9 [2], p. 523 ['[i]f the harm that may be foreseen is great, conduct that threatens it may be negligent even though the statistical probability of its happening is very slight indeed']; 3 F. Harper et al., supra, § 16.9 [3], p. 528 ['the law imposes liability for failure to take precautions, even against remote risks, if the cost of the precautions would be relatively low']." [Emphasis omitted.]).

Because the deviation from the standard of care distinguishing negligence from recklessness is, in part, a matter of degree, it follows that a low risk of grave harm theoretically could also constitute recklessness. To constitute the requisite extreme departure from ordinary care, however, the imbalance between the magnitude of the danger and the burden of prevention would have to be significantly greater than the imbalance that gives rise to a duty of care for negligence. Although this court has not adopted the Restatement (Third) definition of recklessness,[8] it is nonetheless instructive on this point: "A person acts recklessly in engaging in

[8] The majority describes the balancing approach of the Restatement (Third) as a "novel" approach to recklessness. On the contrary, the Restatement (Third) makes explicit what was previously implied in the Restatement (Second); see J. Henderson & A. Twerski, "Intent and Recklessness in Tort: The Practical Craft of Restating Law," 54 Vand. L. Rev. 1133, 1151–52 (2001); is simply a "shift of focus"; id., 1156; and does not represent a departure from the established common law. I agree with the majority that where there is a *high probability* of a grave harm it may be so obvious that the risk of harm far outweighs the burden of prevention that it is unnecessary to articulate the balancing of those two considerations. But where, as here, there is an *unlikely* risk of grave harm, it cannot be said that an actor was indifferent to a risk unless he was aware of the relative ease of preventing the risk from materializing. Id., 1155–56 ("even a relatively smallish risk that materializes in harm can support a finding of recklessness if the actor knows that the risk can be eliminated at much less cost and goes ahead and acts with conscious indifference to the risk being thereby gratuitously created").

conduct if . . . the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and . . . the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk." 1 Restatement (Third), supra, § 2, pp. 16–17. The comments to this section elaborate on this balancing. "The 'magnitude' of the risk includes both the likelihood of a harm-causing incident and the severity of the harm that may ensue. . . . When . . . the imbalance between the magnitude of the foreseeable risk and the burden of precaution becomes sufficiently large, that imbalance indicates that the actor's conduct is substantially worse than ordinary negligence." Id., comment (d), pp. 20–21. "In most cases, a finding of recklessness is not appropriate unless the prospect of injury is especially high; but a requirement that harm be 'probable' should not be a rigid prerequisite for a finding of recklessness.§ Id., comment (e), p. 21.

When, as here, the preventative act is mandated by statute, that mandate is evidence that the legislature viewed the burden of performing the mandated act as proportionately less than the general risk of harm it was intended to protect against. Nonetheless, such evidence does not conclusively establish that failure to assume that burden was the extreme departure from ordinary care necessary to render that failure reckless rather than merely negligent. *Matthiessen* v. *Vanech*, supra, 266 Conn. 833–34. To hold otherwise would replace the standard for recklessness with one of negligence per se whenever there is a knowing departure from the statutory mandate to inspect. Thus, a plaintiff must plead and prove more than a knowing statutory violation to prevail on a claim of recklessness; the plaintiff

must present evidence from which a trier of fact could conclude that the magnitude of the risk of harm arising from the defendant's failure to perform the mandated act was so great in relation to the burden of performing, under the circumstances of the plaintiff's injury, that it constituted an extreme departure from ordinary care when the defendant failed to abide by the statute despite knowing the risk that would result from such failure. Should a defendant present competent evidence to demonstrate that the burden of performing the mandated act was great in relation to the magnitude of the danger the statute was intended to prevent, such evidence necessarily would bear on that question, as such evidence would be relevant to determine whether the failure to perform the duty was a conscious choice to ignore the risk of harm posed by such failure. See 1 Restatement (Third), supra, § 2, comment (d), p. 20. Whether the imbalance between the burden of precaution and the magnitude of the foreseeable risk in a particular case is sufficiently great to constitute recklessness, rather than ordinary negligence, would generally be a question of fact for the trier. *Brock* v. *Waldron*, supra, 127 Conn. 83.

A comparison of these principles with the majority's opinion reveals several defects in its analysis. First, the majority fails to sufficiently distinguish reckless disregard from negligence. The majority agrees with the plaintiff that "it may be reckless to disregard a grave risk . . . even if it is relatively uncommon, and also that the risk involved can be a generalized one that is not specific to the premises in question," and further concludes that "a municipal actor may demonstrate reckless disregard for health or safety when it is clear that the failure to inspect may result in a catastrophic harm, albeit not a likely one." Nothing in these statements accounts for the greater magnitude of risk necessary to distinguish recklessness from negligence. Under

the majority's articulation of reckless disregard, it would always be reckless to fail to perform a health or safety inspection because such inspections are intended to prevent not only harms of lesser consequence but also grave, but unlikely, harms.

The examples cited by the majority of circumstances under which they claim it would be per se reckless to fail to perform an inspection intended to prevent a grave, but unlikely, harm are materially distinguishable. The failure of safety equipment at a nuclear power plant or on a passenger airplane will *almost certainly* lead to catastrophic loss of human life should conditions trigger the operation of such equipment. Cf. *Boyd* v. *National Railroad Passenger Corp.*, supra, 446 Mass. 552–53 (deeming it significant for purposes of recklessness analysis that, if moving train struck pedestrian at railroad crossing due to failure to obey safety requirements designed to prevent such accidents, catastrophic injury or death would be near certainty). Moreover, should nuclear or aeronautical safeguards fail, there would be no means to protect oneself from the harm. In contrast, although the failure of fire safety measures could potentially result in catastrophic harm, in many cases far less serious harm will result and other means may exist to protect oneself from the harm. For example, a fire may occur when a building is unoccupied, with damage to property only. A building without functioning smoke detectors may be occupied but the resident may discover and extinguish the fire, or escape the fire, before the resident is seriously harmed. Thus, even accepting the majority's proposition that the failure to conduct certain kinds of safety inspections could be per se reckless—a proposition for which it cites no authority—the failure to conduct a fire safety code inspection is not on par with those circumstances.

Second, rather than requiring the jury to balance the magnitude of the danger against the burden of inspec-

tion, the majority relegates the burden of inspection to an optional consideration, one factor among many that a jury may consider in determining whether failure to inspect was in reckless disregard of health or safety under all the relevant circumstances. Even under a negligence standard, failure to inspect would only be negligent if the burden to inspect was less than the magnitude of the danger. See *Munn* v. *Hotchkiss School*, supra, 326 Conn. 568 (no requirement to take every measure to prevent harm, jury could have found several simple measures to be sufficient); see also *Considine* v. *Waterbury*, 279 Conn. 830, 868 n.20, 905 A.2d 70 (2006). For conduct, including a failure to inspect, to be reckless, the departure from ordinary care must be extreme. *Matthiessen* v. *Vanech*, supra, 266 Conn. 833–34. Evidence of the burden of inspection would be essential to the jury's determination of whether the defendant's failure to inspect constituted such an extreme departure and reflected a conscious choice to ignore the risk of harm arising from failure to inspect. By failing to require a balancing of the likelihood and degree of harm that may arise from failure to perform a fire safety code inspection against the burden of performing such inspection, the majority effectively imposes a lesser standard than that which would be required to establish negligence.[9]

[9] In this context, the burden may best be understood as "[t]he interest that must be sacrificed to avoid the risk." 3 F. Harper et al., supra, § 16.9 (3), p. 524. Further, evidence of the ability of other municipalities to perform similar inspections would not preclude a finder of fact from concluding that the municipal defendants were not reckless in failing to do the same. Id., § 16.9 (3), p. 533 ("[t]he same risk, furthermore, may be avoidable at different sacrifices or other costs by different actors, and the reasonableness or unreasonableness of a failure to avoid that risk may vary correspondingly among the actors"). The majority equates a policy of not inspecting with a purpose of saving resources and suggests that a trier of fact could weigh that policy against the aggregate risks of failing to inspect premises subject to the policy. This reasoning misses the mark on several fronts. A policy of not inspecting certain types of premises may not be motivated in any way, or even primarily, by monetary considerations. The balancing test does not weigh the decision not to inspect against the magnitude of the risk; it

Having explained why the majority's interpretation of "reckless disregard" falls short of the mark, I turn to my concerns with the majority's analysis of that phrase as it relates to "under all the relevant circumstances." As previously indicated, § 52-557n (b) (8) sets forth two circumstances under which a failure to inspect could give rise to municipal liability: notice of a violation of law or hazard, or reckless disregard under all the relevant circumstances.

The majority concludes that the statute's inclusion of the modifying phrase "under *all* the relevant circumstances"; (emphasis added); suggests that we are to view the exception through a broad lens. The majority then hypothesizes a host of relevant circumstances, principally focused on the inspection duty itself—whether it is mandated, the nature of harm that it is intended to prevent, how frequently it is to be conducted, etc.—and the execution of that duty generally. There are at least three problems with the majority's construction.

First, the majority applies a broad lens when we are bound by a rule of strict construction. See *Ugrin* v. *Cheshire*, supra, 307 Conn. 382, 384; *Martel* v. *Metropolitan District Commission*, supra, 275 Conn. 57–58. The word "all" is not clear evidence to the contrary, as it logically does not expand the scope of the statutory waiver. Although we generally do not read a statute to render a word superfluous; *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010); the statute's meaning would be the same without it. Any circumstance that is "relevant" to reckless disregard of health or safety must be considered.

Second, the majority fails to consider evidence that the requisite relevant circumstances for reckless disre-

weighs the burden of performing inspections of the premises subject to the policy against the magnitude of the risk of not performing that duty. See 1 Restatement (Third), supra, § 2.

gard, like the actual notice prong, are those circumstances that increase the risk to health or safety at the subject premises. It cannot reasonably be disputed that the actual notice prong is directed at conditions existing at the subject premises, despite no express reference to such premises. Construing the reckless disregard prong similarly renders the two prongs more internally consistent. See *Indian Spring Land Co.* v. *Inland Wetlands & Watercourses Agency*, 322 Conn. 1, 18, 145 A.3d 851 (2016) (noting preference for construction that renders statute internally consistent). Such parity of construction also adheres more consistently to the two prongs of common-law recklessness, which require either knowledge of the risk that manifested or knowledge of facts that would give notice of such a risk. See 2 Restatement (Second), supra, § 500. To the extent that the majority appears to assume that such a construction would conflate the reckless disregard prong of § 52-557n (b) (8) with the notice of a violation of law or hazard prong of the statute, that is clearly not the case. Examples of circumstances that would not require notice of a violation or hazard but would be relevant to reckless disregard might include a defendant's knowledge of a history of code violations in the subject property or in properties owned or managed by the same person(s) that own or manage the subject property, a building's design or materials that could exacerbate the risk of harm should a fire occur or increase the risk of a fire, or conditions that would make it more difficult for firefighters to respond to a fire at the subject premises.[10] Certainly, facts relating to circumstances

[10] A recent tragic fire provides examples of many of these circumstances. On June 14, 2017, a fire engulfed Grenfell Tower, a west London residential tower block, resulting in an estimated eighty deaths, numerous injuries, and the destruction of more than 150 residences. See BBC News, "London Fire: What Happened at Grenfell Tower?" (July 19, 2017), available at http://www.bbc.com/news/uk-england-london-40272168 (last visited December 7, 2017). Firefighters had equipment that only was able to reach the twelfth floor of the twenty-four story tower. Id. Although the fire is still under investigation, initial reports indicate that flammable cladding used on the

beyond the subject premises may be relevant to a defendant's knowledge of the risk from failure to inspect, the burden of inspecting the subject premises, and, thus, whether the failure to inspect was the result of the defendant's conscious choice to disregard the magnitude of the risk of harm arising from failure to inspect the subject premises. Yet these facts are only relevant because they illuminate the defendant's actions in relation to the risk of harm from failure to inspect the subject premises.

Third, in addition to ignoring the relevant circumstances most consistent with the statute and the definition of recklessness, the majority's focus on the general duty to inspect has other shortcomings. The majority hypothesizes that "when the failure to inspect is not an isolated incident but results from a general policy of not conducting inspections of a certain type, the jury reasonably may consider whether the policy itself indicates a reckless disregard for public health or safety." In the discussion that follows, the majority appears to effectively equate the known failure to inspect certain premises with a general policy of not performing those inspections. As a legal matter, this standard either improperly ignores the requirement that there must be knowledge of facts relating to the risk for there to be reckless disregard or improperly suggests that mere knowledge of nonperformance of inspection evidences such recklessness. As a factual matter, as explained in part II of this dissenting opinion, a failure to inspect may not have resulted from a decision not to inspect or a decision to ignore the risk of not inspecting. Even

building during a recent renovation led to the rapid spread of the fire. Id. Fire crews noted that low water pressure, radio problems, and equipment issues also hampered fire suppression efforts. Id. Prior to the fire, there also had been complaints that access to the site for emergency vehicles was " 'severely restricted.' " Id. All of these conditions, if known to the defendants, would be relevant to the magnitude of the danger arising from a failure to perform fire safety inspections.

if a municipality has decided not to inspect a broad range of premises, such a decision may not be based on a "general policy," but different circumstances particular to subsets of the broad class. Thus, any aggregation of inspection practices, or aggregation of risks and burdens attendant to the failure to conduct mandatory inspections, should be based on proof of an actual "policy" of noninspection, as well as sufficiently similar conditions to the subject premises to establish a related class.

In sum, the majority's construction of the reckless disregard prong of § 52-557n (b) (8) is fatally flawed in numerous respects. Instead of the majority's approach, I would construe the statute to mean that the failure to perform a mandatory fire safety code inspection is in reckless disregard of health or safety when the municipal actor consciously chooses to ignore the risk of serious harm from failing to perform the inspection, as evidenced by an extreme imbalance between the magnitude of the danger and the burden of performing the inspection under all the relevant circumstances. Where the likelihood of a grave harm is low, the burden of inspection must be slight in comparison to establish a conscious disregard of health or safety. The circumstances relevant to conscious disregard focus on those facts known to the municipal actor that establish a greater likelihood or severity of harm at the subject premises of the type that the inspection is generally intended to protect against.

II

Having elaborated on the proper legal standard, I turn to the question of whether the municipal defendants proved that there was no material issue of fact as to whether the plaintiff could meet this standard. I first explain how the majority improperly analyzes this question under a theory of the case that the plaintiff never

advanced and that the evidence does not support. I then explain why, in light of the plaintiff's actual theories and the evidence, the municipal defendants were entitled to summary judgment.

In resolving that inquiry to the contrary, the majority determines that the plaintiff proffered evidence to create a material issue of fact as to whether the municipal defendants had a policy not to conduct any of the statutorily mandated fire safety code inspections of residences for three or more families, or a policy not to inspect public housing. However, any fair reading of the operative (fourth amended) complaint, the plaintiff's opposition to the motion for summary judgment, her supplemental opposition, the trial court's decision on the motion, the plaintiff's motion for reconsideration of that decision, the plaintiff's briefs to the Appellate Court, and the Appellate Court's decision manifestly demonstrates that the plaintiff advanced no such theory.[11] With respect to the duty to inspect, all of these documents clearly reflect that the plaintiff advanced two, and only two, theories: the municipal defendants either knew of fire safety code violations or hazards in the subject premises or they had recklessly disregarded a risk to health and safety from such violations or hazards by failing to conduct "any" inspection of the prem-

[11] Although the municipal defendants did not file a special defense of governmental immunity, the plaintiff had ample notice that the municipal defendants were asserting such a claim prior to their motion for summary judgment. The municipal defendants twice moved to strike the counts against them on the basis of governmental immunity. As it relates to the issue before this court, in their second motion to strike, the municipal defendants argued that the plaintiff had failed to sufficiently plead recklessness because she had failed to allege that "the defendants were aware of a substantially greater risk with respect to this specific situation." In response, the plaintiff argued that she had sufficiently pleaded recklessness because she had alleged "that the municipal defendants KNEW that policies and/or laws were violated and/or knew hazards to the health and safety of the decedents existed which violations and/or hazards were causative factors in the deaths of the decedents."

ises despite a known, statutory duty to do so annually.[12] The plaintiff's motion for reconsideration, the only submission to the trial court that made any reference to the municipal defendants' conduct regarding citywide inspections, used that evidence to demonstrate the municipal defendants' knowledge of their duty to inspect the subject premises.[13]

The plaintiff's focus on the subject premises with regard to the duty to inspect was not inadvertent, as

[12] With regard to the second theory, any reasonable contextual reading of the plaintiff's comments emphasizing the municipal defendants' failure to conduct "any" inspections yields the conclusion that the plaintiff was referring to their failure to conduct any sort of inspection at the subject premises or any of the requisite annual inspections at the premises over a period of time. The plaintiff's brief to this court likewise focuses exclusively on the municipal defendants' failure to inspect the premises at issue.

[13] In her motion for reconsideration to the trial court, in connection with her argument that the evidence established that the municipal defendants had a duty to inspect the subject premises and had not done so, the plaintiff repeatedly referred to the their obligations with regard to "the apartment," "that apartment," "the premises where the fire occurred," "the apartment or the building where the fire occurred," "the apartment where the fire occurred," and "the P.T. Barnum Apartment Building #12, Apartment 205." To make her case that the municipal defendants knew that they had not complied with this obligation, the plaintiff asserted in the penultimate sentence before her request for relief: "Finally, Fire Chief Rooney admitted in his deposition that he was aware the city of Bridgeport did not conduct inspections of three family residences (*which would include the premises which are the subject of the fire in the instance case*) because of a claimed lack of resources." (Emphasis added.) In other words, the plaintiff asserted that, because Rooney was aware of his obligation to inspect three family residences, he necessarily was aware of the duty to inspect the subject premises and the city's failure to fulfill that duty. I do not read the plaintiff's motion for reconsideration to argue that Rooney admitted that the city had conducted *no* inspection of *any* three family houses, in part because, as I explain later in this dissenting opinion, I presume that the plaintiff was aware that his testimony was to the contrary.

Insofar as the plaintiff cited (for the first time in her brief to this court) Rooney's deposition admissions regarding the fatal 2005 Iranistan Avenue fire, she did so to demonstrate that the city "was aware of the substantial risk to public safety by consciously failing to conduct mandatory fire inspections of residences as required by statute."

None of the plaintiff's submissions to any court, ours included, advanced the majority's additional theory that the municipal defendants demonstrated

she clearly was aware of the distinction between a theory specific to the subject premises and one generally applicable to citywide practices and policies. Although fifteen of the plaintiff's seventeen allegations of wrongful conduct against the municipal defendants were specific to the subject premises, including failure to inspect, two allegations were made with regard to citywide practices—failure to provide fire safety training for all of the city of Bridgeport's residents (including the decedents) and failure to formulate fire safety plans for all residents. The municipal defendants proffered evidence to disprove those two general theories, the plaintiff offered none to rebut that evidence, and the trial court's conclusions as to those allegations are not before us.[14] It is unsurprising, therefore, that the municipal defendants did not submit any evidence regarding citywide inspection practices in support of their motion for summary judgment, and that neither the trial court nor the Appellate Court discussed such a theory in their respective decisions.

It is true that city inspection practices were the subject of one of several lines of inquiry in a deposition submitted to the trial court in support of the plaintiff's motion for reconsideration of the decision granting summary judgment. The majority relies heavily on this deposition of Fire Chief Brian Rooney. However, almost all of the testimony cited by the majority is absent from

reckless disregard by "not educating themselves as to the adequacy of the housing authority's own internal inspections . . . ."

[14] To the extent that the plaintiff, for the first time, included in her brief to the Appellate Court cases addressing the effect of a municipality's failure to enact policies and procedures that allegedly could have prevented the harm, these cases were in support of the allegations related to such policies and her theory of negligence. At no time did she connect these cases with the allegation of the failure to inspect. The absence of those cases from her brief to this court, in which neither her allegations of negligence nor allegations of deficiencies regarding citywide training of residents and development of safety plans are at issue, demonstrates the purpose of those cases.

any of the plaintiff's submissions to any court, including ours, and the lone exception cited in those submissions was not cited for the theory advanced by the majority. See footnote 13 of this dissenting opinion. Although the municipal defendants' counsel conceded at oral argument before this court that we are not limited to consideration of the portions of the deposition cited by the plaintiff in her motion for reconsideration, it is manifestly clear that this concession was made in connection with any such evidence that was related to the plaintiff's theory of the case on which the municipal defendants had sought summary judgment.

I am unaware of any authority that would allow a reviewing court to rely on such evidence to craft a theory of liability that the plaintiff never advanced in any submission to the court.[15] On the contrary, "[t]he

[15] The majority's reliance on the deposition raises an additional concern. The plaintiff deposed Rooney after the motion for summary judgment had been submitted to the trial court for a decision. Only after the trial court granted the municipal defendants' motion for summary judgment did the plaintiff submit Rooney's deposition to the trial court, in support of her motion for reconsideration. In order, however, for the trial court to have considered new evidence, the plaintiff would have had to move to open the evidence and then seek reconsideration after the evidence had been opened, each a matter subject to its own burden of proof. The trial court conducted a hearing on that motion, at which time the parties argued both about whether it was proper for the trial court to consider the deposition and about the merits of the motion in relation to the deposition evidence. The trial court summarily denied the motion, instead of granting the motion and denying the relief sought, which would imply that the trial court did not reach the merits. The trial court's summary order gave no indication of whether it had treated the motion to reargue as both a motion to open and a motion to reargue. The plaintiff did not seek articulation of this ruling. Cf. *Mazziotti* v. *Allstate Ins. Co.*, 240 Conn. 799, 810, 695 A.2d 1010 (1997) (where it is unclear on which of several bases trial court decided motion, responsibility of appellant to secure adequate record for review). On appeal, both parties seem to proceed from the assumption that the trial court considered the deposition in making its ruling. Therefore, the majority determines that it properly may rely on this evidence. Nonetheless, it is unclear whether the majority is relying on deposition testimony that was not part of the evidence considered by the trial court in deciding the municipal defendants' motion for summary judgment. Although I find this potential

pleadings determine which facts are relevant and frame the issues for summary judgment proceedings or for trial. . . . The principle that a plaintiff may rely only [on] what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations [in] his complaint." (Citations omitted; internal quotation marks omitted.) *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 621, 99 A.3d 1079 (2014). "[A] court's ability to review the evidence, in order to determine whether a genuine issue of fact exists, is not limited to the pleadings. As our law makes clear, however, a plaintiff's theories of liability, and the issues to be tried, are limited to the allegations [in the] complaint." (Internal quotation marks omitted.) Id., 622 n.5; id. (rejecting dissent's assertion in *White* that court may look beyond pleadings to evidence submitted in opposition to summary judgment for theories of liability not pleaded). The majority's attempt to distinguish *White* from the present case is unconvincing because here the plaintiff has *never* advanced the theory of liability advanced by the majority in any court. The majority's reliance on an objection to an interrogatory and a phrase and a citation taken out of context from the trial court's memorandum of decision granting summary judgment are not compelling evidence to the contrary.

Moreover, the majority's emphasis on Rooney's statements regarding his lack of knowledge about fire inspection techniques, equipment, and procedures, as evidence of the municipal defendants' reckless disregard, demonstrates its fundamental misapprehension regarding the distinct roles and responsibilities of a

defect troubling, I do not reach this issue because the result would be the same in either case. As I later explain, even if one properly could consider the deposition testimony, which is not at all clear to me, it does not create a genuine issue of material fact based on the theories of liability actually raised by the plaintiff.

municipal fire chief and a municipal fire marshal. The majority apparently assumes that Rooney, as fire chief, was the supervisor of the fire marshal, and charged with the knowledge of a fire marshal, and, therefore, his understanding of the fire safety code and how it relates to the subject premises can be imputed to the fire marshal. The majority apparently is unaware that, in accordance with long established law, Rooney, as fire chief, had no statutory authority, much less a *duty*, to conduct any fire inspections. Instead, that distinct statutory duty rests solely with the fire marshal and specially trained fire inspectors under the marshal's direction and control. See General Statutes § 29-305. Moreover, a municipal fire chief does not have the authority to appoint the local fire marshal, to establish the qualifications of the individual appointed as fire marshal, to determine whether the fire marshal can be certified to meet those qualifications, to investigate the fire marshal for negligent or incompetent performance of his duties, or dismiss the fire marshal from his position.[16] Such authority rests squarely with the state fire marshal and/or the state's Codes and Standards Committee; see General Statutes § 29-251; and, although the authority to appoint or terminate a local fire marshal may be delegated by the state fire marshal to a municipality, that does not mean that the municipal fire chief

[16] In describing the termination of several fire inspectors for failing to conduct inspections prior to 2009, Rooney stated in his deposition that the city had discharged those inspectors. He did not state that he personally discharged them, presumably because he lacked the statutory authority to do so. Rooney also discussed "supervising" the fire marshal division, but principally in connection with administrative tasks, such as preparing budgets, providing information to the division on upcoming events, and meeting with the division to receive information on the status of inspections and investigations. Significantly, when specifically asked about supervision of the fire marshal division's performance of inspections, Rooney clearly stated that he was neither trained nor tasked with conducting inspections and that he left the work of inspections to the fire marshal and his subordinates. The plaintiff did not plead a theory of liability based upon inadequate supervision of the fire marshal division by Rooney.

has that authority. See General Statutes §§ 29-297, 29-298, 29-298b, and 29-299.

Indeed, in its decision on both the municipal defendants' motion to strike and motion for summary judgment, the trial court recognized that the duty to conduct fire safety code inspections under § 29-305 is applicable only to local fire marshals, and, as a consequence, was inapplicable to Rooney. The court denied the motion to strike count three, which was the sole count brought against Rooney, only because that count also was brought against the fire marshal and thus was legally sufficient on that basis.[17]

Putting aside the aforementioned colossal impediments, the evidence submitted to the trial court in connection with the motion for summary judgment and the motion for reconsideration does not support the majority's newly minted theory that the municipal defendants had a "policy" of not inspecting any residences occupied by three of more families prior to the 2009 fire. The evidence also does not establish, or even leave open the possibility, that the municipal defendants conducted no such inspections and deliberately chose not to do so. Rather, uncontroverted evidence established that the municipal defendants principally conducted inspections of properties against which complaints had been lodged, and, after a 2005 fire, they assigned streets with clusters of multifamily residences to fire inspectors to inspect; they terminated several such fire inspectors, prior to the 2009 subject fire, for failing to adequately perform their inspection duties. Although there is some evidence that, prior to 2009, the

[17] The suggestion by the majority and the Appellate Court that the municipal defendants had not distinguished themselves with regard to the allegations is not only belied by the trial court's decisions but also by the municipal defendants' argument in support of their motion for summary judgment in which they asked the court to view the allegations and the record mindful of such distinctions.

fire marshal was not routinely conducting inspections of all public housing units, the housing authority was conducting some form of inspection at that time and the fire marshal was conducting inspections of public housing units if there had been a complaint. Therefore, the evidence does not support the existence of a policy of not performing any inspections of public housing units either. [18] Thus, there is simply no basis to conclude that the plaintiff sufficiently rebutted the municipal defendants' evidence to defeat their motion for summary judgment on the basis of any general policy of noninspection.

Therefore, I turn to the theories that the plaintiff did advance. Insofar as the plaintiff alleged that the municipal defendants knew about fire safety code violations in the subject apartment and building, the municipal defendants proffered affidavits from Fire Marshal William Cosgrove and Rooney, attesting that they had no such notice. The plaintiff did not proffer evidence in rebuttal. Consequently, the Appellate Court concluded that she had abandoned that theory on appeal. See *Williams* v. *Housing Authority*, supra, 159 Conn. App. 691 n.11. Insofar as the plaintiff alleged that the municipal defendants had a duty to inspect the subject premises and knew that they personally had not fulfilled that duty, the municipal defendants effectively conceded those facts to be true in arguments on the plaintiff's motion for reconsideration. However, such a theory is not a legally sufficient basis to establish that the municipal defendants acted in reckless disregard of

[18] Insofar as the majority asserts that the municipal defendants demonstrated a reckless disregard by "not educating themselves as to the adequacy of the housing authority's own internal inspections," the plaintiff never raised this claim and, even if she had, the plaintiff failed to provide evidence that would support a conclusion that delegation of the duty to inspect public housing, including the decedents' apartment, to the housing authority created such a magnitude of danger that it was in reckless disregard of health or safety.

health and safety, even if conditions in the premises did not conform to the fire safety code, a fact on which there was conflicting evidence. The plaintiff has advanced no theory and presented no evidence that establishes that the risk of harm arising from failure to inspect the subject premises was any greater than the risk of harm arising from failure to inspect any other premises in the city.[19] See *Boyd* v. *National Railroad Passenger Corp.*, supra, 446 Mass. 552–53 (even when accident resulting from violation of statute would be almost certain to cause grave harm in unlikely event of accident, facts known to actor that increased likelihood of harm at particular location critical to issue of recklessness). If a municipal actor's mere awareness of the statute mandating inspection and knowing failure to make any inspection were sufficient to constitute reckless disregard under § 52-557n (b) (8), then any failure to inspect would be considered reckless, and the alternative actual notice prong would be superfluous. More significantly, such a result would effectively render the exclusion from liability for negligent failure to inspect illusory. The standard under such a theory would be no different than the "possible impact" standard that both the majority and I have deemed improper. Therefore, under the only theory that the

[19] To the extent that the majority relies on the 2005 Iranistan Avenue fire to create a genuine issue of material fact whether the municipal defendants had notice of an elevated risk from failure to inspect the subject premises, such reliance is misplaced. The circumstances are materially different. The Iranistan Avenue fire involved a private multifamily residence whereas the subject fire involved a public housing unit. Rooney testified in his deposition, and the plaintiff presented no evidence to contradict his testimony, that the risk of fire for private multifamily residences is greater than the risk of fire for public housing units because of absentee landlords in the former. More importantly, the defect identified in the Iranistan Avenue fire, namely, the lack of any smoke detectors, was not present in the subject premises. The uncontroverted evidence establishes that housing authority employees inspected and repaired the smoke detectors in the subject premises one day before the fire and that these detectors were functioning at the time of the fire.

plaintiff did advance, she failed to establish a genuine issue of material fact whether failure to inspect the subject premises was in reckless disregard of health or safety.

Accordingly, the trial court properly concluded that the municipal defendants were shielded from liability under § 52-557n (b) (8) for failure to inspect the subject premises. Therefore, I disagree with the majority and conclude that the Appellate Court improperly reversed the judgment of the trial court on this ground. Because the Appellate Court also concluded that the trial court's grant of summary judgment in the municipal defendants' favor as to the plaintiff's allegations regarding certain discretionary acts was improper; see *Williams* v. *Housing Authority*, supra, 159 Conn. App. 702–707; a matter that is not before us in this certified appeal, I would reverse in part the judgment of the Appellate Court as to the certified issue, but affirm the judgment of the Appellate Court insofar as it relates to the identifiable victim/imminent harm exception to discretionary act immunity.

I respectfully dissent.

ANDREW HULL ET AL. *v.* TOWN OF NEWTOWN (SC 19656)

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

Syllabus

The plaintiffs, A and his wife, sought to recover damages for personal injuries that A sustained when he was shot by L, a patient at the hospital where A was employed as a nurse. An officer with the Newtown Police Department had arranged for L to be transported to the hospital after L approached the officer and complained that he was experiencing auditory hallucinations and shortness of breath. Without searching L, the

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

officer took him into involuntary custody and arranged for him to be transported to the hospital pursuant to a civil mental health commitment statute (§ 17a-503 [a]). The plaintiffs alleged that the officer had a ministerial, nondiscretionary duty to search L pursuant to the police department's arrest policy, which provided that officers must conduct a search of any person arrested, and defined "arrest" as the taking of a person into custody. The defendant, the town of Newtown, moved for summary judgment, claiming, inter alia, that it was immune from liability pursuant to statute (§ 52-557n) because any duty to search L was discretionary, and, because L was not in custody pursuant to the arrest policy, there was no duty to search him. The trial court denied the town's motion. Thereafter, in response to the plaintiffs' motion for a ruling as to whether "custody" under § 17a-503 (a) equated to arrest under the arrest policy, the trial court concluded that taking a person into custody pursuant to § 17a-503 (a) was not an arrest and that L was not arrested under the arrest policy. The town filed a second motion for summary judgment, contending that the police had no duty to search L because he had not been arrested under the arrest policy or under § 17a-503 (a). The plaintiffs then moved to amend their complaint to include the alternative theory that the police had a duty to search L pursuant to the police department's prisoner transportation policy, which provided that, prior to transport, all prisoners were required to be searched for any weapons or contraband. The trial court denied the plaintiffs' motion to amend, granted the town's second motion for summary judgment, and rendered judgment for the town, from which the plaintiffs appealed. *Held*:

1. This court concluded that, because the police department's arrest policy applies solely in the criminal context and because the term "custody" in § 17a-503 (a), the statute pursuant to which L was taken into custody, did not denote criminal custody or arrest but, rather, custody to facilitate an emergency evaluation of a person for whom the police have reasonable cause to believe has psychiatric disabilities and is a danger to himself or others, or is gravely disabled and in need of immediate care and treatment, L was not taken into custody under the arrest policy, and, thus, L was not subject to the search requirement in that policy; accordingly, the arrest policy did not impose a ministerial, nondiscretionary duty on the police to search L when they took him into custody pursuant to § 17a-503 (a).
2. The plaintiffs could not prevail on their claim that L was a prisoner under the police department's prison transportation policy and, therefore, that the police had a ministerial, nondiscretionary duty to search him under that policy when he was taken into custody pursuant to § 17a-503 (a): the text of the transportation policy having indicated that its purview was criminal and did not implicate mental health custody, L was not in custody or arrested within the meaning of that policy and it was therefore inapplicable; accordingly, the trial court properly granted the town's motion for summary judgment.

(*One justice dissenting*)

Argued September 12—officially released December 26, 2017

Procedural History

Action to recover damages for personal injuries sustained by the named plaintiff as a result of the alleged negligence of the defendant's employees, brought to the Superior Court in the judicial district of Danbury, where the court, *Ozalis*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed. *Affirmed.*

David N. Rosen, for the appellants (plaintiffs).

Aaron S. Bayer, with whom was *Tadhg Dooley*, for the appellee (defendant).

Kathleen M. Flaherty and *Kirk W. Lowry* filed a brief for the Connecticut Legal Rights Project et al. as amici curiae.

Opinion

ESPINOSA, J. This appeal requires us to determine whether certain policy and procedures of the Newtown Police Department (department) imposed a ministerial duty on its officers to search Stanley Lupienski, an individual suffering from auditory hallucinations and shortness of breath, when they took him into custody pursuant to General Statutes § 17a-503 (a).[1] The plain-

[1] General Statutes § 17a-503 (a) provides: "Any police officer who has reasonable cause to believe that a person has psychiatric disabilities and is dangerous to himself or herself or others or gravely disabled, and in need of immediate care and treatment, may take such person into custody and take or cause such person to be taken to a general hospital for emergency examination under this section. The officer shall execute a written request for emergency examination detailing the circumstances under which the person was taken into custody, and such request shall be left with the facility. The person shall be examined within twenty-four hours and shall not be held for more than seventy-two hours unless committed under section 17a-502."

tiffs, Andrew Hull and Erica Hull,[2] appeal[3] from the judgment of the trial court granting summary judgment in favor of the defendant, the town of Newtown. The plaintiffs contend that the arrest section of the department's policy (arrest policy) imposes a ministerial, nondiscretionary duty on the police to search anyone taken into custody, including those taken into custody pursuant to § 17a-503 (a). See Newtown Board of Police Commissioners, Newtown Police Policy and Procedure 3.00 (revised February 1, 2005) (Police Policy). Alternatively, the plaintiffs argue that Lupienski was a prisoner and, therefore, subject to mandatory search under the department's prisoner transportation section of the policy (transportation policy). See id., 3.07 (revised May 5, 2009). The defendant counters that the arrest policy applies only in the context of criminal arrest and does not apply in the context of civil mental health custody, which is governed by § 17a-503 (a). The defendant also argues that the transportation policy does not apply to those under custody pursuant to § 17a-503 (a). We agree with the defendant and, therefore, affirm the judgment of the trial court.

The following undisputed facts are relevant to this appeal. The plaintiffs' claims arise from an incident at Danbury Hospital on March 2, 2010. While a patient at the hospital, Lupienski shot Andrew Hull, an assistant nurse manager. Lupienski had been transported to the hospital approximately thirty-eight hours earlier, after he went to the department complaining of auditory hallucinations and shortness of breath. Without searching Lupienski, Officer Steven Borges took him into involuntary custody and arranged for him to be trans-

[2] Erica Hull, Andrew Hull's wife, alleged loss of care, companionship, and consortium. She is also a party to this appeal. We refer to the plaintiffs individually by name when appropriate.

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

ported to the hospital by Newtown Emergency Management Services, as provided by § 17a-503 (a).

The plaintiffs subsequently brought this action, seeking damages for, inter alia, the injuries sustained by Andrew Hull, and alleging that the police had a ministerial, nondiscretionary duty to search Lupienski pursuant to the arrest policy. The defendant moved for summary judgment, arguing that (1) it was immune from liability because any duty to search was discretionary rather than ministerial, (2) any requirement to search would have been a public duty resulting in a public injury rather than an individual injury, (3) there was no custody pursuant to the arrest policy and therefore no duty to search Lupienski, and (4) the plaintiffs had submitted no proof that a search would have revealed a weapon. The trial court denied the motion. The plaintiffs subsequently filed a motion seeking a legal ruling from the trial court as to whether "custody" under § 17a-503 (a) equates to "arrest" under the arrest policy. In its memorandum of decision, the court concluded that "as a matter of law . . . taking a person into custody pursuant to § 17a-503 (a) is not an 'arrest' and that Lupienski was not 'arrested' under the [Police Policy]." As a result of the trial court's decision, the defendant filed a second motion for summary judgment, contending that the police had no duty to search Lupienski because he was not arrested under the arrest policy or under § 17a-503 (a). Several weeks later, the plaintiffs moved to amend the complaint to include their alternative theory that alleged that the police had a duty to search Lupienski pursuant to the transportation policy. The trial court denied the plaintiffs' motion to amend and granted the defendant's motion for summary judgment. The court also denied the plaintiffs' subsequent motion for reconsideration, which argued that the trial court improperly declined to consider the transporta-

tion policy as an alternative legal basis for the duty to search. This appeal followed.

The plaintiffs' primary argument implicates governmental immunity. Their theory of liability is that the police had a ministerial or mandatory, nondiscretionary duty to search Lupienski. The plaintiffs rest this conclusion on two premises. First, the plaintiffs contend that the arrest policy requires officers to search arrestees, and that individuals, like Lupienski, who are taken into custody pursuant to § 17a-503 (a), have been "arrested" for the purposes of the arrest policy. Second, the plaintiffs offer as an alternative argument that the transportation policy imposed a ministerial, nondiscretionary duty to search Lupienski. The defendant counters that neither § 17a-503 (a) nor the arrest or transportation policies imposed such a duty and that, as a result, the defendant is shielded from liability due to governmental immunity.

We begin by setting forth the applicable standard of review. "Summary judgment shall be rendered forthwith if the pleadings, affidavits and 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. . . . The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. . . . When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Marchesi* v. *Board of Selectmen*, 309 Conn. 608, 620, 72 A.3d 394 (2013).

With respect to governmental immunity, under General Statutes § 52-557n, a municipality may be liable for the "negligent act or omission of a municipal officer acting within the scope of his or her employment or

official duties." (Internal quotation marks omitted.) *Coley* v. *Hartford*, 312 Conn. 150, 161, 95 A.3d 480 (2014). The determining factor is whether the act or omission was ministerial or discretionary. See id., 161–62 (contrasting extent of municipal liability for ministerial versus discretionary acts). "[Section] 52-557n (a) (2) (B) . . . explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." (Internal quotation marks omitted.) Id., 161. In contrast, "municipal officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion." (Internal quotation marks omitted.) Id., 162.

Discretionary acts are treated differently from ministerial acts "in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . [D]iscretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officials and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury." (Citation omitted; footnote omitted; internal quotation marks omitted.) Id., 161.

These concerns are particularly appropriate in the present case, in light of the "broad scope of governmental immunity that is traditionally afforded to the actions of municipal police departments." Id., 164. "[I]t is firmly established that the operation of a police department is a governmental function, and that acts or omissions in connection therewith ordinarily do not give rise to

liability on the part of the municipality. . . . [Accordingly] [t]he failure to provide, or the inadequacy of, police protection usually does not give rise to a cause of action in tort against a city." (Internal quotation marks omitted.) Id. For example, in *Coley*, we held that governmental immunity shielded the city of Hartford in a wrongful death action stemming from alleged police negligence where two officers failed to stay on the scene of a domestic violence call that later turned fatal. Id., 152, 155–56. The plaintiff in *Coley* claimed that the General Statutes and a Hartford police departmental policy that set forth procedures for police response to domestic violence imposed a nondiscretionary duty to "remain at the scene for a reasonable amount of time until the likelihood of imminent violence had been eliminated . . . ." Id., 152. This court held that "the police officers' allegedly negligent acts . . . required the exercise of discretion, and, accordingly, the [city of Hartford] [was] immune from liability for its discretionary acts." Id., 172.

In the present case, the police would have been required to search Lupienski only if the arrest policy in conjunction with § 17a-503 (a), or the transportation policy, imposed a ministerial duty to do so. We address each possibility in turn.

I

The plaintiffs' first argument in support of their claim that the police had a ministerial duty operates in three parts: (1) the arrest policy expressly requires officers to search arrestees; (2) the arrest policy defines arrest as taking a person into custody; and (3) custody under the arrest policy encompasses custody as it is used in § 17a-503 (a). As a result, we must examine the meaning of custody in each context, interpreting the arrest policy first and then § 17a-503 (a). Although we agree that the policy requires that arrestees be searched, we conclude that the arrest policy applies solely to the criminal con-

text and therefore does not apply when the police take a person into custody pursuant to § 17a-503 (a).

The department's arrest policy mandates that "[o]fficers shall conduct a thorough search of the person arrested"; Police Policy, supra, 3.00, pt. IV H, p. 4; and defines arrest as "[t]aking a person into custody." Id., pt. III, p. 1. Assuming, without deciding, that the arrest policy imposes a ministerial duty to search those arrested, the question is what the policy means by "custody." Looking to the text of the arrest policy, custody applies in the criminal context alone. Despite the lack of a definition of custody[4] in the arrest policy, our conclusion finds support in that policy's provisions.

First, under the arrest policy, arrest requires either an arrest warrant or probable cause. Id., pt. IV, p. 4. The arrest policy defines probable cause for an arrest as "[t]he existence of facts and circumstances that would lead a reasonably prudent officer to believe that a person had committed a *criminal offense*." (Emphasis added.) Id., pt. III, p. 1. This requirement of probable cause of a criminal offense corresponds closely with the state and federal understanding of probable cause. See, e.g., *State* v. *Johnson*, 286 Conn. 427, 435–36, 944 A.2d 297 ("In order for a warrantless felony arrest to be valid, it must be supported by probable cause. . . . Probable cause exists when the facts and circumstances within the knowledge of the officer and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that a felony has been committed." [Citations omitted; internal quotation marks omitted.]), cert. denied, 555 U.S. 883, 129 S. Ct. 236, 172 L. Ed. 2d 144

[4] A different section of the policy, entitled "Interrogations and Confessions," defines custody as existing when "an officer tells a suspect that he is under arrest." Police Policy, supra, 5.14, pt. III, p. 1 (revised May 6, 2008). In the present case, the plaintiffs' argument would fail under this definition unless Lupienski was explicitly told he was under arrest.

(2008); see also *Devenpeck* v. *Alford*, 543 U.S. 146, 152, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004) ("a warrantless arrest by a law officer is reasonable under the [f]ourth [a]mendment where there is probable cause to believe that a criminal offense has been or is being committed"). Thus, in the absence of an arrest warrant, the arrest policy allows arrests only where there is probable cause to believe that the arrestee committed a criminal offense. The reverse is also informative; under the arrest policy, any arrest not grounded in probable cause requires an arrest warrant. That option requires an officer to obtain an arrest warrant from a "judge, magistrate, or other legal authority empowered to issue such warrants . . . ." Police Policy, supra, 3.00, pt. IV C, p. 2. Thus, under the arrest policy, there is no arrest unless there is such a warrant, or there is probable cause for a criminal offense.

Second, the arrest policy imposes procedural requirements that further clarify that the policy applies solely to the criminal context. For example, "arresting officers shall identify themselves, inform the suspect of his or her arrest, and *specify the charges for which the arrest is being made*." (Emphasis added.) Id., pt. IV D, p. 3. This requirement would be irrational and impossible beyond the criminal context. The same is true of the arrest policy mandate that "[a]ll arrested persons shall be handcuffed after being taken into custody, except as otherwise provided by departmental policy . . . ." Id., pt. IV F, p. 3. Relatedly, the arrest policy also directs that "[a]rrestees shall be advised of their *Miranda*[5] rights before any questioning," inherently indicating criminal arrest. (Footnote added.) Id., pt. IV *I*, p. 4.

[5] *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

These procedures underpin a scheme that would be absurd and troubling outside of the criminal context.[6]

Having established that custody under the arrest policy applies in the criminal context, it is useful to summarize what the resulting meaning of custody is, as doing so further illustrates the criminal purview of the arrest policy. Custody in this court's criminal law jurisprudence is closely linked to the parameters of custodial interrogation set forth by the United States Supreme Court in *Miranda* v. *Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and its progeny. See, e.g., *State* v. *Arias*, 322 Conn. 170, 177, 140 A.3d 200 (2016) (listing factors for determining existence of custody for purposes of *Miranda*). As a result, the constitutional concerns underpinning custody are related to the danger of coercion in police interrogation, and they are generally discussed in conjunction with *Miranda*. See *State* v. *Mangual*, 311 Conn. 182, 193, 85 A.3d 627 (2014) ("[as] used in . . . *Miranda* [and its progeny], custody is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion" [internal quotation marks omitted]).

Determining whether custody exists under *Miranda* is circumstance dependent, but "the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. . . . Further, the United States Supreme Court has adopted an objective, reasonable person test for determining whether a defendant is in custody. . . .

[6] The plaintiffs warn that reading the arrest policy as limited to the criminal context would lead to absurd, illogical, and unworkable results. In particular, the plaintiffs list a range of custodial situations outside of the criminal context that would not be covered by the arrest policy, including failure to respond to a subpoena and debtors prison under the common law. Although we conclude that custody pursuant to § 17a-503 (a) is beyond the scope of the policy, it is irrelevant to this holding whether other civil forms of custody are within the scope of the arrest policy.

Thus, in determining whether *Miranda* rights are required, the only relevant inquiry is whether a reasonable person in the defendant's position would believe that he or she was in police custody of the degree associated with a formal arrest." (Internal quotation marks omitted.) *State* v. *Jackson*, 304 Conn. 383, 416, 40 A.3d 290 (2012). Nonexclusive factors to consider in determining "whether a suspect was in custody for purposes of *Miranda* [include]: (1) the nature, extent and duration of the questioning; (2) whether the suspect was handcuffed or otherwise physically restrained; (3) whether officers explained that the suspect was free to leave or not under arrest; (4) who initiated the encounter; (5) the location of the interview; (6) the length of the detention; (7) the number of officers in the immediate vicinity of the questioning; (8) whether the officers were armed; (9) whether the officers displayed their weapons or used force of any other kind before or during questioning; and (10) the degree to which the suspect was isolated from friends, family and the public." (Internal quotation marks omitted.) *State* v. *Arias*, supra, 322 Conn. 177.

Therefore, custody, as it is used in the criminal context and under the arrest policy, is a close relative of formal arrest. Indeed, many of the factors that suggest custody—such as handcuffing—would also suggest a formal arrest. See *State* v. *Mangual*, supra, 311 Conn. 208 ("[h]andcuffs are generally recognized as a hallmark of a formal arrest" [internal quotation marks omitted]). Relatedly, custody often presents itself in the context of police interrogations in criminal investigations, where there is a risk of coercing testimony in violation of *Miranda*.

We next turn to the state statute. Determining whether custody has the same meaning pursuant to § 17a-503 (a) and pursuant to the arrest policy presents a question of statutory interpretation, over which we

exercise plenary review, guided by well established principles regarding legislative intent. See, e.g., *Kasica* v. *Columbia*, 309 Conn. 85, 93, 70 A.3d 1 (2013) (explaining plain meaning rule under General Statutes § 1-2z and setting forth process for ascertaining legislative intent). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning . . . § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *State* v. *Agron*, 323 Conn. 629, 633–34, 148 A.3d 1052 (2016).

Applying these principles as directed by § 1-2z, we begin with the text of § 17a-503 (a). Section 17a-503 (a) provides that "[a]ny police officer who has reasonable cause to believe that a person has psychiatric disabilities and is dangerous to himself or herself or others or gravely disabled, and in need of immediate care and treatment, may take such person into custody and take or cause such person to be taken to a general hospital for emergency examination under this section. The officer shall execute a written request for emergency examination detailing the circumstances under which the person was taken into custody, and such request shall be left with the facility. The person shall be examined within twenty-four hours and shall not be held for more than seventy-two hours unless committed under section 17a-502."

The text of section § 17a-503 (a) uses the term custody in a manner inconsistent with criminal custody or arrest. In § 17a-503 (a), custody is justified by a reasonable cause belief that a person is suffering from a psychiatric disability and may pose a danger to himself or others, or that a person is "[g]ravely disabled, and in need of immediate care and treatment . . . ." This stands in contrast to the criminal arrest requirement that there be either a warrant or a probable cause belief of a criminal offense. See, e.g., *Devenpeck* v. *Alford*, supra, 543 U.S. 152 ("a warrantless arrest by a law officer is reasonable under the [f]ourth [a]mendment where there is probable cause to believe that a criminal offense has been or is being committed"). Thus, it does not matter whether reasonable cause for custody under § 17a-503 (a) is the same standard as probable cause for arrest, because they are clearly standards for two distinct purposes.

Other language in § 17a-503 (a) illustrates that custody is not used in the criminal context. Specifically, § 17a-503 (a) allows the police to take a psychiatrically or gravely disabled "person into custody and take or cause such person to be taken to a general hospital for *emergency examination* under this section." (Emphasis added.) As a result, the scope of custody is narrow under the statute—its purpose is to facilitate emergency evaluation, not to serve as the initial volley in an interrogation or a criminal investigation. This conclusion comports with this court's previous interpretation of § 17a-503. See *Hopkins* v. *O'Connor*, 282 Conn. 821, 824, 848 n.12, 925 A.2d 1030 (2007) (explaining that officer who took individual into "involuntary custody and caused him to be transported" to hospital for psychiatric evaluation pursuant to § 17a-503 [a] was "serving less in a law enforcement capacity than in a health and safety capacity").

The other subsections of § 17a-503 further confirm the scope of subsection (a). They outline alternative

procedures for obtaining emergency treatment for individuals dangerous to themselves or others due to psychiatric disability, or with a grave disability. For example, pursuant to § 17a-503 (b),[7] probate courts may issue warrants "for the apprehension [of] and bringing before it" a person in need, and may order that such person "be taken to a general hospital for examination."[8] Alternatively, licensed psychologists or licensed clinical social workers can obtain immediate care or treatment for a person in need under § 17a-503 (c)[9] and (d),[10] respectively. Thus, the focus of § 17a-503 is on

[7] General Statutes § 17a-503 (b) provides: "Upon application by any person to the court of probate having jurisdiction in accordance with section 17a-497, alleging that any respondent has psychiatric disabilities and is dangerous to himself or herself or others or gravely disabled, and in need of immediate care and treatment in a hospital for psychiatric disabilities, such court may issue a warrant for the apprehension and bringing before it of such respondent and examine such respondent. If the court determines that there is probable cause to believe that such person has psychiatric disabilities and is dangerous to himself or herself or others or gravely disabled, the court shall order that such respondent be taken to a general hospital for examination. The person shall be examined within twenty-four hours and shall not be held for more than seventy-two hours unless committed under section 17a-502."

[8] It is telling that probate courts may issue warrants under § 17a-503 (b), because they do not have the power to issue criminal arrest warrants. See, e.g., General Statutes § 45a-98 (enumerating powers of probate court, none of which includes power to issue criminal arrest warrants); *In re Bachand*, 306 Conn. 37, 41–42, 49 A.3d 166 (2012) (probate courts " 'can exercise only such powers as are conferred on them by statute' ").

[9] General Statutes § 17a-503 (c) provides: "Any psychologist licensed under chapter 383 who has reasonable cause to believe that a person has psychiatric disabilities and is dangerous to himself or herself or others or gravely disabled, and in need of immediate care and treatment, may issue an emergency certificate in writing that authorizes and directs that such person be taken to a general hospital for purposes of a medical examination. The person shall be examined within twenty-four hours and shall not be held for more than seventy-two hours unless committed under section 17a-502."

[10] General Statutes § 17a-503 (d) provides: "Any clinical social worker licensed under chapter 383b or advanced practice registered nurse licensed under chapter 378 who (1) has received a minimum of eight hours of specialized training in the conduct of direct evaluations as a member of (A) any mobile crisis team, jail diversion program, crisis intervention team, advanced supervision and intervention support team, or assertive case management

providing emergency medical care to the psychiatrically or gravely disabled. Police custody under § 17a-503 (a) is just one route by which medical attention may be obtained, and the role of the police under the statute is roughly equivalent to probate courts in § 17a-503 (b), psychologists in § 17a-503 (c), or social workers pursuant to § 17a-503 (d). Thus, custody, as it is employed in § 17a-503 (a), is merely a tool in affording the medical relief embodied in the other provisions of § 17a-503—not a Trojan horse to import criminal procedure jurisprudence into an unrelated statute.

The relationship between § 17a-503 (a) and other statutes further illustrates that its use of the term custody does not denote criminal custody.[11] Section 17a-503 (a) is located in chapter 319i of the General Statutes, which governs "Persons with Psychiatric Disabilities." Specifically, § 17a-503 (a) is in part II of that chapter, which sets forth general provisions for civil commitment. Other statutes in part II cover subjects such as the procedures for commitment hearings, confidentiality in cases involving persons with psychiatric disabilities, and commitment under an emergency certificate. See General Statutes §§ 17a-498, 17a-500 and 17a-502. Sec-

program operated by or under contract with the Department of Mental Health and Addiction Services, or (B) a community support program certified by the Department of Mental Health and Addiction Services, and (2) based upon the direct evaluation of a person, has reasonable cause to believe that such person has psychiatric disabilities and is dangerous to himself or herself or others or gravely disabled, and in need of immediate care and treatment, may issue an emergency certificate in writing that authorizes and directs that such person be taken to a general hospital for purposes of a medical examination. The person shall be examined within twenty-four hours and shall not be held for more than seventy-two hours unless committed under section 17a-502. The Commissioner of Mental Health and Addiction Services shall collect and maintain statistical and demographic information pertaining to emergency certificates issued under this subsection."

[11] In the General Statutes, the term "custody" has a variety of different uses, many of which are not criminal custody or criminal arrests. See, e.g., General Statutes §§ 15-140c (f) (4), 22-329a and 46b-1.

tion 17a-503, then, is part of a broader legislative scheme focused on psychiatric disability, mental health, and commitment, not criminal procedure.

Although we recognize that there is an aspect of involuntariness to custody under § 17a-503 (a), it is not enough to transform the act of taking into custody into criminal arrest. Section 17a-503 (a) is distinguishable: its aim is psychiatric treatment, rather than criminal justice; it requires reasonable cause to believe a person has a psychiatric or grave disability rather than probable cause for a criminal offense; and it prescribes an entirely different procedure grounded in its mental health purpose. As a result, under § 17a-503 (a), the police are not required to follow the same procedures that they would have been bound by in a criminal arrest.

Thus, the term custody is used differently in § 17a-503 (a) and in the arrest policy. The arrest policy plainly and unambiguously uses the term custody in the context of criminal arrest. In contrast, § 17a-503 (a) uses the term in the context of providing emergency medical treatment. In the present case, the police did not have a ministerial duty to search Lupienski under the arrest policy. Lupienski was taken into custody pursuant to § 17a-503 (a), but not into "custody" as understood in the arrest policy. Therefore, any duty to search arrestees under the arrest policy was not triggered, and no search of Lupienski was required.

The plaintiffs' other arguments in favor of this theory of liability are not persuasive. The plaintiffs caution that relegating the arrest policy to the criminal context would result in unfettered police discretion and deprive those taken into custody under § 17a-503 (a) of the procedural protections for arrestees under the policy. In the context of § 17a-503 (a), however, the only statute at issue in the present case, police discretion is limited by the narrowly cabined justification and procedures

outlined in its text. See *Hopkins* v. *O'Connor*, supra, 282 Conn. 848 n.12 (observing that § 17a-503 [a] contains "other safeguards against any abuse of power by the officer, which are provided by the unique statutory scheme at play in this case—such as immediate psychiatric evaluation"). For example, in addition to the reasonable cause requirement, custody is qualified in § 17a-503 (a) by a requirement that a person be "examined within twenty-four hours and . . . not be held for more than seventy-two hours unless committed under section 17a-502." Should custody evolve beyond these narrow limitations, it very well may give rise to other legal and constitutional protections.

Additionally, it is well established that this court has a duty "to construe statutes, whenever possible, to avoid constitutional infirmities . . . ." *Dernado* v. *Bergamo*, 272 Conn. 500, 506 n.6, 863 A.2d 686 (2005). The plaintiffs' interpretation of § 17a-503 (a) appears to raise constitutional infirmities because it would allow the police to conduct arrests without probable cause or a warrant. See, e.g., *Devenpeck* v. *Alford*, supra, 543 U.S. 152.

The plaintiffs also argue that there are similarities between criminal arrest and custody of the sort envisioned by § 17a-503 (a), because mental health related seizures under New York's civil commitment statute; N.Y. Mental Hyg. Law § 9.41 (McKinney 2011); have been described as arrests by the United States Court of Appeals for the Second Circuit. See *Payne* v. *Jones*, 711 F.3d 85, 88 (2d Cir. 2013) (characterizing that statute as "authoriz[ing] the arrest of a person who appears to be mentally ill and acts in a manner likely to result in serious harm to himself or others"). None of the authorities cited by the plaintiffs provides support for the argument that taking a person into custody pursuant to a civil statute can constitute a criminal arrest.

In support of this claim, the plaintiffs rely on *Disability Advocates, Inc.* v. *McMahon*, 279 F. Supp. 2d 158, 164 (N.D.N.Y. 2003), aff'd, 124 Fed. Appx. 674 (2d Cir. 2005), which held that "while [N.Y. Mental Hyg. Law §] 9.41 may not use the term 'arrest,' the authority it grants to the police is, in fact, the legal authority to arrest." The court made clear however, that arrests under that statute are not *criminal* arrests. See id., 165 (noting that, "by its plain terms, New York's Criminal Procedure Law is inapplicable to custodial detentions under the Mental Hygiene Law . . . [and] courts have noted that conduct equivalent to mental illness which can result in custody under the Mental Hygiene Law cannot be considered an offense" [citation omitted; internal quotation marks omitted]). Further evidence that arrest under § 9.41 is not a criminal arrest is apparent in the fact that "the procedures employed by the police for [m]ental [h]ygiene pickups [under that statute] are significantly different [from] those employed in criminal matters." Id. The same is true with § 17a-503 (a); taking someone into custody under the statute does not trigger the same procedures that the police would be bound by during a criminal arrest. Therefore, even though mental health seizures have been described as "arrests," they are not criminal arrests.

Finally, we reject the plaintiffs' argument that those in custody under § 17a-503 (a) are subject to search incident to arrest because civil arrestees are subject to search incident to arrest in other contexts, such as civil immigration arrests or under the New York civil commitment statute. Those issues are not before the court. Even if a search may be possible in such contexts, it does not mean that it is mandatory. That is the relevant question in the present case.

Thus, we hold that the arrest policy does not impose a ministerial duty on officers to search those taken into custody pursuant to § 17a-503 (a). Lupienski was not

taken into custody under the policy, and, therefore, he was not arrested and he was not subject to the search requirement.

II

The plaintiffs' second claim is that the police had a ministerial, nondiscretionary duty to search Lupienski under the transportation policy. See Police Policy, supra, 3.07. We disagree.[12]

The transportation policy states that, "[p]rior to transport, all prisoners shall be thoroughly searched for any weapons or contraband." Id., pt. IV, p. 1. According to the transportation policy statement of purpose, the policy is in place to "provide guidelines for transporting persons in the custody [of the] . . . officers." Id., pt. I, p. 1. The text of the prisoner transportation policy indicates that its purview is criminal and does not implicate mental health custody. For example, the policy requires officers to "handcuff (double-locked) all prisoners with their hands behind their back with palms facing outward." Id., pt. IV B, p. 1. There is an exception to this requirement for the "medically ill," but not for the psychiatrically disabled. Id., p. 2.

In the present case, Lupienski was not in custody or arrested within the meaning of the policy for the reasons discussed in the preceding section, and, therefore, the transportation policy is inapposite. There was no prisoner to search. Furthermore, the focus of the transportation policy on criminal arrest procedures, like handcuffing, illustrates that the policy is not intended to govern transport to the hospital pursuant to § 17a-503 (a).

[12] Because we conclude that this claim is meritless, we need not discuss the parties' arguments regarding whether the trial court improperly declined to consider it, as the plaintiffs contend. The defendant argues that the trial court was not required to consider the transportation policy argument because it was not raised in a timely manner or briefed adequately.

According to the plaintiffs, the transportation policy has a broad definition of prisoner because it applies not only to those prisoners in custody, but also to those "awaiting interrogation, arrest processing, transfer to court, or other administrative procedures . . . ." Police Policy, supra, 2.01, pt. II, p. 1 (revised July 1, 2008). The plaintiffs' reliance on this language is misplaced because it comes not from the transportation policy, but rather from a separate chapter of the policy focused on prisoner holding facilities. Id. The full sentence states that "[i]t is the policy of this agency to provide secure temporary holding cells for prisoners awaiting interrogation, arrest processing, transfer to court, or other administrative procedures, and to maintain these facilities in a sanitary and safe manner." Id. This statement does not expand the definition of prisoner, or list reasons someone may be in custody, but merely details situations in which holding cells should be available to someone who is already a prisoner.

We therefore reject the plaintiffs' argument that Lupienski was a prisoner under the transportation policy and that, as a result, the officers were required to search him before sending him to the hospital. Accordingly, the trial court properly concluded that the defendant did not have a ministerial duty to search Lupienski under the policy when he was taken into custody pursuant to § 17a-503 (a) and properly granted the defendant's motion for summary judgment.

The judgment is affirmed.

In this opinion ROGERS, C. J., and PALMER, McDONALD, ROBINSON, and VERTEFEUILLE, Js., concurred.

EVELEIGH, J., dissenting. I respectfully disagree with the majority conclusion that the arrest policy of the Newtown Police Department (department) "applies solely to the criminal context and therefore does not

apply when the police take a person into custody pursuant to [General Statutes] § 17a-503 (a)." See Newtown Board of Police Commissioners, Newtown Police Policy and Procedure 3.00 (revised February 1, 2005) (Policy Manual). Instead, I would conclude that the plain meaning of the word "[a]rrest," which is defined in the policy as "[t]aking a person into custody," creates a ministerial duty requiring the police to search anyone who has been taken into custody for whatever reason. Id., pt. III A, p. 1. Therefore, I respectfully dissent.

I begin by noting my agreement with the facts and law set forth in the majority opinion. There is, therefore, no need to repeat either at length in this dissent. My differences with the majority opinion lie in the interpretation of the Policy Manual. I will add facts and law only when necessary to advance the discussion set forth in this dissent.

It should be noted that, after his interaction with Stanley Lupienski, Officer Steven Borges proceeded to fill out a "police emergency examination request" form to be provided to both the ambulance driver and the hospital. The form, which is issued by the Connecticut Department of Mental Health and Addiction Services, contains the following language: "Any police officer who has reasonable cause to believe that a person has psychiatric disabilities and is dangerous to himself or herself or others or gravely disabled, and in need of immediate care and treatment, may take such person into custody and take or cause such person to be taken to a general hospital for emergency examination under this section. The officer shall execute a written request for emergency examination detailing the circumstances under which the person was taken into custody and such request shall be left with the facility. The person shall be examined within twenty-four hours and shall not be held for more than seventy-two hours unless committed under section 17a-502." This language

comes, almost verbatim, from § 17a-503 (a). Borges signed the form in a box beneath a sentence stating: "It is my belief that the above named person is mentally ill and dangerous to himself, herself or others or gravely disabled and is need of immediate care and treatment." At no point did any member of the department make any effort to search or frisk Lupienski.

The department's manual contains a policy governing the subject of arrests. Policy Manual, supra, 3.00. This policy begins with a section entitled "definitions," and the first term listed therein is "[a]rrest," which is defined as "[t]aking a person into custody." Id., pt. III, p. 1. A later section of the policy, entitled "[s]earch [i]ncident to [a]rrest" provides that "[o]fficers shall conduct a thorough search of the person arrested." Id., pt. IV H, p. 4. The defendant, the town of Newtown, admitted in the underlying pleadings that the policy governing arrests would have applied any time one of its police officers "took a person into custody" and that "it was mandatory for officers to conduct a thorough search of any person taken into custody." The defendant further admitted that "[u]nder the policy governing arrests, officers did not have discretion to decline to search a person taken into custody," and that "[u]nder the policy . . . the duty of an officer to search a person who had been taken into custody was not left to the judgment or discretion of the officer." The defendant admitted these statements and then added that the policy applied when someone was arrested. In my view, it is clear that the policy applied when someone is arrested. It is also clear that the policy defines an arrest to be whenever someone is taken into custody. The policy does not define arrest to mean someone is taken into custody "for a criminal offense." The majority has now added words to the definition which do not appear in the policy. In my view, respectfully, since both the policy

and definition are plain and unambiguous we should not be placing our own judicial gloss on that definition.

The policy explicitly requires that, in the case of an arrest, "[o]fficers shall conduct a thorough search of the person arrested." Policy Manual, supra, 3.00, pt. IV H 1, p. 4. As this court has previously explained, "the word shall creates a mandatory duty when it is juxtaposed with [a] substantive action verb." (Internal quotation marks omitted.) *Wiseman* v. *Armstrong*, 295 Conn. 94, 101, 989 A.2d 1027 (2010). In light of the policy's use of the word "shall," together with the absence of any "qualifying words" like "should"; see *Ugrin* v. *Cheshire*, 307 Conn. 364, 391–92, 54 A.3d 532 (2012); conducting a search incident to an arrest is a ministerial act "required by [a] city charter provision, ordinance, regulation, rule, policy, or any other directive . . . ." *Violano* v. *Fernandez*, 280 Conn. 310, 323, 907 A.2d 1188 (2006). The only question in the present case, therefore, is whether the policy applies only to criminal arrests, which the policy does not say, or to anyone who is taken into custody, which is precisely the manner in which the policy itself defines arrests.

If the language of a municipal regulation is plain and unambiguous, "we need look no further than the words themselves . . . ." *State* v. *Spears*, 234 Conn. 78, 86, 662 A.2d 80, cert. denied, 516 U.S. 1009, 116 S. Ct. 565, 133 L. Ed. 2d 490 (1995).[1] The court cannot "engraft amendments" onto the policy to alter its plain meaning; (internal quotation marks omitted) *Costantino* v. *Skolnick*, 294 Conn. 719, 736, 988 A.2d 257 (2010); and must proceed by "referring to what the . . . text contains, not by what it might have contained." (Internal quota-

[1] I note that, "[i]n construing [municipal] regulations, the general rules of statutory construction apply." *Smith* v. *Zoning Board of Appeals*, 227 Conn 71, 89, 629 A.2d 1089 (1993), cert. denied, 510 U.S. 1164, 114 S. Ct. 1190, 127 L. Ed. 2d 540 (1994); see also *Schwartz* v. *Planning & Zoning Commission*, 208 Conn. 146, 153, 543 A.2d 1339 (1988).

tion marks omitted.) *Local 218 Steamfitters Welfare Fund* v. *Cobra Pipe Supply & Coil Co.*, 207 Conn. 639, 645, 541 A.2d 869 (1988); cf. *Doe* v. *Norwich Roman Catholic Diocesan Corp.*, 279 Conn. 207, 216, 901 A.2d 673 (2006) ("It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is the function of the legislature." [Internal quotation marks omitted.]).

These principles teach that "custody" means custody—not custody for a criminal offense. The majority opinion would engraft this additional language onto the policy's definition of arrest. "When legislation defines the terms used therein such definition is exclusive of all others." (Internal quotation marks omitted.) *Feldman* v. *Sebastian*, 261 Conn. 721, 728, 805 A.2d 713 (2002). This principle is equally applicable to municipal regulations. See footnote 1 of this opinion; cf. *Neptune Park Assn.* v. *Steinberg*, 138 Conn. 357, 362, 84 A.2d 687 (1951) ("The zoning ordinance involved in this case, however, defines the word 'family' as it is used therein. When any piece of legislation defines the terms as they used in it, such definition is exclusive of all others.").

This court has explained that § 17a-503 (a) contemplates "transportation of a person involuntarily for a psychiatric examination"; *Hopkins* v. *O'Connor*, 282 Conn. 821, 840, 925 A.2d 1030 (2007); and a police officer's "mandatory report pursuant to § 17a-503" is such an "essential step in . . . involuntary commitment" that the act of filling out the form is protected by absolute immunity. Id. "Involuntary civil confinement is a massive curtailment of liberty"; (internal quotation marks omitted) *Rzayeva* v. *Foster*, 134 F. Supp. 2d 239, 248 (D. Conn. 2001); and, accordingly, compulsory hospitalization may only be accomplished upon a showing of probable cause—the same standard used in criminal arrests. *Glass* v. *Mayas*, 984 F.2d 55, 58 (2d Cir. 1993). Moreover, in addition to the seventy-two hour confine-

ment authorized by § 17a-503 (a) itself, this court has recognized that "a police officer's actions under § 17a-503 result in a person being detained in a psychiatric hospital for evaluation to determine whether further detention and ultimately commitment are proper" and are, thus, "the first step in the distinct possibility of a judicial proceeding" for more permanent, involuntary commitment. (Internal quotation marks omitted.) *Hopkins* v. *O'Connor*, supra, 837.

The term "arrest" has been used to describe civil mental health related seizures. For example, the United States Court of Appeals for the Second Circuit described New York's civil commitment statute; N.Y. Mental Hyg. Law § 9.41 (McKinney 2011); as authorizing "the arrest of a person who appears to be mentally ill and acts in a manner likely to result in serious harm to himself or others." *Payne* v. *Jones*, 711 F.3d 85, 88 (2d Cir. 2013); see id. (noting that plaintiff was placed under arrest pursuant to civil commitment statute). Similarly, in *Disability Advocates*, *Inc.* v. *McMahon*, 124 F. Appx. 674, 677 (2d Cir. 2005), the Second Circuit quoted Black's Law Dictionary (7th Ed. 1999), for the proposition that " 'arrest' [is] defined as a 'seizure or forcible restraint' " in support of its determination that New York's civil commitment statute granted police the "legal authority to arrest."

The opinion of the United States District Court for the Northern District of New York that was affirmed by the Second Circuit in *Disability Advocates*, *Inc.*, supra, 124 F. Appx. 674, gives a thorough explanation of why police seizure for purposes of involuntary hospitalization may reasonably be considered an arrest: "[W]hile [the civil commitment statute] may not use the term 'arrest,' the authority it grants to the police is, in fact, the legal authority to arrest. As used in the law, the word 'arrest' is defined as 'to seize [a person] by legal authority or warrant; take into custody.' The Random

House [Dictionary of the English Language (1979)] . . . .[2] This is exactly what [the civil commitment statute] does—it authorizes the police to take a person into custody by legal authority. The term 'arrest' is not limited to use in criminal law. . . .[3] There are numerous instances where New York law gives police the authority to take a person into custody outside of the criminal context. . . .[4] Although there are some negative connotations in the use of the word 'arrest,' it is not improper for [the government] to use a word, or a document that uses a word, that accurately describes their actions when they take an individual into custody pursuant to [the civil commitment statute]." (Citations omitted; footnotes added and omitted.) *Disability Advocates, Inc.* v. *McMahon*, 279 F. Supp. 2d 158, 164–65 (N.D.N.Y. 2005).

Likewise, Connecticut has numerous statutes which provide for arrests in a civil context. See, e.g., General Statutes § 52-143 (e) (if witness fails to respond to subpoena to testify in court, the court "may issue a capias directed to some proper officer to arrest the witness and bring him before the court to testify," though no criminal offense has been committed); see also General

[2] See Black's Law Dictionary (7th Ed. 1999) ("[a] seizure or forcible restraint"); Black's Law Dictionary (6th Ed. 1990) ("[to] deprive a person of his liberty by legal authority"); see also *People* v. *Gilmore*, 76 App. Div. 2d 548, 552–53, 430 N.Y.S.2d 854 (1980) (" '[a]rrest' has been defined as 'the taking, seizing, or detaining of the person of another, (1) by touching or putting hands on him; (2) or by any act that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest; or (3) by the consent of the person to be arrested' "), quoting 5 Am. Jur. 2d 695, Arrest § 1 (1962).

[3] See, e.g., Black's Law Dictionary (7th Ed. 1999) (containing entries for "arrest in execution," "arrest in quarters," "arrest on final process," "arrest on mesne process," and "civil arrest"); Black's Law Dictionary (6th Ed. 1990) (containing entries for "arrest of inquest," and "arrest of judgment").

[4] See, e.g., N.Y. Fam. Ct. Act §§ 718, 724, 1024 (McKinney 2010); N.Y. Mental Hyg. Law §§ 9.27, 9.37, 9.41 (McKinney 2011); N.Y. Soc. Servs. Law § 417 (McKinney 2010).

Statutes § 17b-745 (a) (8) (authorizes judges and family magistrates to enforce family support orders through noncriminal contempt, and if defendant fails to appear for contempt hearing judge or magistrate may order official "to arrest such defendant and bring such defendant before the Superior Court for a contempt hearing"); General Statutes § 53a-32 (a) ("[a]ny probation officer may arrest any defendant on probation without a warrant or may deputize any other officer with power to arrest to do so by giving such other officer a written statement setting forth that the defendant has, in the judgment of the probation officer, violated the conditions of the defendant's probation"). Similar authority exists for the arrest of parolees who have committed technical, i.e., noncriminal-parole violations. See General Statutes § 54-127 (police officers "shall arrest and hold any parolee or inmate when so requested, without any written warrant"); see also General Statutes § 17a-503 (a) (authorizes police officer to take person into custody when officer has reasonable cause to believe "has psychiatric disabilities and is dangerous to himself or herself or others or gravely disabled, and in need of immediate care and treatment"); General Statutes § 17a-503 (b) (court of probate may, on application, "issue a warrant for the apprehension" of person alleged to suffer from psychiatric disability); General Statutes § 52-489 (courts may, through writ of ne exeat, order person taken into custody to compel bond ensuring continued presence within state). Therefore, in my view, it is clear that the meaning of the term "arrest" in the law quite commonly extends to civil as well as criminal confinement.

Application of the policy requiring police to conduct mandatory searches to civil arrests, such as those under § 17a-503 (a), is required by that policy's plain text. Persons taken into custody under § 17a-503 are subject to search incident to that arrest. As the United States

Supreme Court has held, in upholding a search incident to a civil immigration arrest: "There can be no doubt that a search for weapons has as much justification here as it has in the case of an arrest for crime, where it has been recognized as proper. . . . It is no less important for government officers, acting under established procedure to effect a deportation arrest rather than one for crime, to protect themselves and to insure that their prisoner retains no means by which to accomplish an escape." *Abel* v. *United States*, 362 U.S. 217, 236, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960). As another court has explained: "When an officer takes a suspect into custody, it does not matter if it is for a criminal offense or on a civil warrant. The key is custody, not the underlying reason for it." *People* v. *Miller*, 354 Ill. App. 3d 476, 480, 820 N.E.2d 1216 (2004), cert. denied, 214 Ill. 2d 544, 830 N.E.2d 7 (2005). Thus, the definition of "arrest" set forth in the definitions section of the policy, which refers explicitly to people who have been taken into custody, makes even more sense when considered in this context. Policy Manual, supra, 3.00, pt. III, p. 1.

The majority cites to the policy's definition of "probable cause for arrest" in support of its conclusion. See id. That phrase is defined as, "[t]he existence of facts and circumstances that would lead a reasonably prudent officer to believe that a person had committed a criminal offense." Id. This phrase is the one point in which the policy uses the term "criminal offense." The phrase is neither located in the definition of "arrest," nor the identification of the lawful bases for an arrest. In my view, it is clear that the department knew how to insert the phrase "a criminal offense" when it wanted to. The fact that the department chose not to insert the phrase when defining the term "arrest," and further chose not to use the term to further clarify the phrase "taken into custody," evinces a clear intent that the term

should apply to any custodial situation. The majority further recites the procedural requirements which it maintains make it clear that the arrest policy only applies in the criminal context. For example, it recites language in the policy requiring that "arresting officers shall identify themselves, inform the suspect of his or her arrest, and specify the charges for which the arrest is being made." Policy Manual, supra, 3.00, pt. IV D 3, p. 3. Again, these procedures apply equally to any civil arrest. The officer need only recite the statute pursuant to which he is exercising authority over the person detained and seized. The term arrest is equated with seizure. The fact that Lupienski was taken into custody is not disputed. Pursuant to the Policy Manual, the officer was required to perform a search of Lupienski at that time. The fact that a search was not performed exposes the defendant, in my view, to potential liability. Therefore, I would reverse the judgment of the trial court and remand the case with instructions to deny the defendant's motion for summary judgment and for further proceedings according to law.

Therefore, I respectfully dissent.