# JAMES A. HARNAGE *v.* RACQUEL LIGHTNER ET AL. (SC 19806)

Palmer, McDonald, Robinson, Mullins and Kahn, Js.

*Syllabus*

The plaintiff brought a civil action against the defendant state employees, alleging that they violated his constitutional rights while he was incarcerated at a state correctional institution. The plaintiff attempted to serve the defendants by leaving a copy of the writ of summons and the complaint with the attorney general or his designee at the Office of the Attorney General. The defendants filed a motion to dismiss, claiming that, insofar as the plaintiff sued them in their individual capacities, the trial court lacked personal jurisdiction over them due to insufficient service of process. The defendants also claimed that, insofar as the plaintiff was suing them in their official capacities, the plaintiff's action should be dismissed because he had failed to post a recognizance bond pursuant to statute ([Rev. to 2013] §§ 52-185 and 52-186). The trial court dismissed the claims against the defendants in their individual capacities on the ground that the plaintiff did not properly serve them pursuant to the statute (§ 52-57 [a]) governing service of process in civil actions. The trial court also ordered the plaintiff to post a recognizance bond or face dismissal of the action in its entirety. Because the plaintiff, who was incarcerated at the time, could not afford to post the recognizance bond, he filed a motion for judgment, which the trial court granted. On appeal to the Appellate Court from the trial court's judgment for the defendants, the plaintiff claimed that the trial court incorrectly concluded that the plaintiff had failed to properly serve the defendants insofar as they were being sued in their individual capacities and that the trial court improperly dismissed the claims brought against the defendants in their official capacities due to the plaintiff's failure to post a recognizance bond. The Appellate Court upheld the trial court's determination that the plaintiff improperly served the defendants insofar as they were being sued in their individual capacities but concluded that the plaintiff's failure to post a recognizance bond did not necessarily require dismissal of the claims against the defendants in their official capacities. The Appellate Court concluded that, in light of constitutional concerns regarding the recognizance bond requirement for indigent inmates who are seeking access to courts to vindicate their constitutional rights, §§ 52-185 and 52-186 must be read to authorize a trial court to waive or significantly reduce an indigent inmate's obligation to post a recognizance bond. The Appellate Court thus remanded the case for a hearing on the issue of whether the plaintiff was entitled to such a waiver. On the granting of certification, the plaintiff appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the trial court properly had dismissed the plaintiff's action against the defendants in their individual capacities for lack of personal jurisdiction; this court concluded, upon examination of the record and its review of the parties' briefs and arguments, that the Appellate Court properly resolved this issue against the plaintiff in its through and well reasoned opinion.
2. The plaintiff having clarified at oral argument before this court, in express and unequivocal terms, that it was never his intention to sue the defendants in their official capacities, the issue of whether the trial court properly dismissed the plaintiff's claims against the defendants in their official capacities on the basis of his failure to post a recognizance bond was rendered moot, and, consequently, there was no reason for the case to be remanded for a hearing on the plaintiff's entitlement to a waiver of the recognizance bond requirement; accordingly, the Appellate Court's remand order was vacated, and the case was remanded with direction to the trial court to render judgment dismissing the plaintiff's action.

Argued November 15, 2017—officially released March 6, 2018

*Procedural History*

Action to recover damages for alleged violations of the plaintiff's constitutional rights, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Peck*, *J.*, granted in part the defendants' motion to dismiss; thereafter, the court, *Hon. Constance L. Epstein*, judge trial referee, granted the plaintiff's motion for judgment and, exercising the powers of the Superior Court, rendered judgment thereon for the defendants, from which the plaintiff appealed to the Appellate Court, *Gruendel*, *Prescott* and *Pellegrino*, *Js.*, which reversed in part the trial court's judgment and remanded the case for further proceedings, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed in part*; *vacated in part*; *judgment directed.*

*James A. Harnage*, self-represented, the appellant (plaintiff).

*Michael A. Martone*, assistant attorney general, with whom were *Steven R. Strom*, assistant attorney general, and, on the brief, *George Jepsen*, attorney general, and

*Terrence M. O'Neill*, assistant attorney general, for the appellees (defendants).

*Opinion*

PER CURIAM. The self-represented plaintiff, James A. Harnage, appeals from the judgment of the Appellate Court; see *Harnage* v. *Lightner*, 163 Conn. App. 337, 362, 137 A.3d 10 (2016); affirming the judgment of the trial court, which dismissed his action against the defendant state employees[1] in their individual capacities for lack of personal jurisdiction due to insufficient service of process. We granted the plaintiff's petition for certification to appeal, limited to the following question: "Did the Appellate Court properly conclude that the plaintiff's action against the defendants in their individual capacities properly was dismissed for lack of personal jurisdiction?" *Harnage* v. *Lightner*, 323 Conn. 902, 150 A.3d 683 (2016). We answer the certified question in the affirmative.

The following undisputed facts and procedural history are set forth in the opinion of the Appellate Court. "The plaintiff is incarcerated at the MacDougall-Walker Correctional Institution. On February 11, 2014, the trial court found that the plaintiff was indigent and granted him a fee waiver for the entry fee, the filing fee, and the cost of service of process. The plaintiff then initiated this action against the defendants, in their official and individual capacities,[2] alleging that [they] had violated

[1] The defendants named in the plaintiff's complaint are nine state employees. Eight of the defendants were employed by the University of Connecticut Correctional Managed Healthcare Program and provided medical services to inmates at the MacDougall-Walker Correctional Institution; they are identified in the complaint as Racquel Lightner, Doctors Pillai, O'Hallaran, and Naqui, "CN Vecchairelli," "PA Rob," "LPN Francis," and Lisa Caldonero. The ninth defendant, identified as "Lieutenant Williams," was an employee of the Department of Correction.

[2] As the Appellate Court observed, "[t]he plaintiff's complaint specifically indicates that the plaintiff is suing the defendants in their individual capacities but is silent as to whether he is also suing them in their official capacities. The defendants and the trial court treated the complaint as if the defendants

his constitutional rights because they were deliberately indifferent to his medical needs. The plaintiff claimed, inter alia, that the defendants reused needles when administering insulin medication to inmates with diabetes . . . [and] refused to provide him with medical treatment for a serious hemorrhoid and an abdominal hernia.

"On March 5, 2014, the plaintiff attempted to serve the defendants by leaving a copy of the writ of summons . . . and [the] complaint with the attorney general or his designee at the Office of the Attorney General. On or about April 15, 2014, the defendants mailed a letter to the plaintiff, requesting that he post a recognizance bond in the amount of $250 within ten days [in accordance with the provisions of General Statutes (Rev. to 2013) §§ 52-185[3] and 52-186].[4] That same day, the defendants also filed a motion to dismiss the complaint against the defendants in their individual capacities for lack of personal jurisdiction due to insufficient service of process, and against the defendants in their official capacities because the plaintiff had failed to post a recognizance bond.

were being sued in both their official capacities and [their] individual capacities." *Harnage* v. *Lightner*, supra, 163 Conn. App. 340–41 n.4.

[3] General Statutes (Rev. to 2013) § 52-185 (a) provides in relevant part: "If . . . in any civil action . . . it does not appear to the authority signing the process that the plaintiff is able to pay the costs of the action should judgment be rendered against him, the plaintiff shall enter into a recognizance to the adverse party with a financially responsible inhabitant of this state as surety, or a financially responsible inhabitant of this state shall enter into a recognizance to the adverse party, that the plaintiff shall prosecute his action to effect and answer all costs for which judgment is rendered against him. . . ."

Hereinafter, all references to § 52-185 are to the 2013 revision.

[4] General Statutes (Rev. to 2013) § 52-186 (a) provides in relevant part: "The court, upon motion of the defendant or on its own motion, may order a sufficient bond to be given by the plaintiff before trial . . . . In determining the sufficiency of the bond to be given, the court shall consider only the taxable costs which the plaintiff may be responsible for under section 52–257 . . . ."

Hereinafter, all references to § 52-186 are to the 2013 revision.

"The plaintiff subsequently filed an objection to the defendants' motion to dismiss. In his objection, the plaintiff argued that he had properly served the defendants in their individual capacities by leaving a copy of the process with the attorney general at the Office of the Attorney General in [the city of] Hartford. Furthermore, he claimed that the requirement of posting a recognizance bond pursuant to § 52-185 and Practice Book § 8-3 did not apply to him, and, even if it did, the amount of the recognizance bond was in the court's discretion and should be limited to the nominal amount of one dollar, which, in essence, is a request for a waiver.

"On June 30, 2014, the court granted the defendants' motion to dismiss in part. Specifically, the court granted the motion to dismiss the claims against the defendants in their individual capacities because the plaintiff failed to properly serve the defendants in their individual capacities pursuant to [General Statutes] § 52-57 (a).[5] The court also ordered the plaintiff to post a recognizance bond in the amount of $250 within two weeks or it would dismiss the case in its entirety upon reclaim of the motion. Because the plaintiff could not afford to post the $250 recognizance bond and desired to appeal from the court's decision, on November 10, 2014, he filed a motion for judgment, which the court subsequently granted." *Harnage* v. *Lightner*, supra, 163 Conn. App. 340–42.

The plaintiff appealed to the Appellate Court from the judgment of the trial court, claiming, first, that the trial court incorrectly concluded that the plaintiff had failed to properly serve the defendants in their individual capacities and, second, that the trial court improperly granted the defendants' motion to dismiss the

[5] General Statutes § 52-57 (a) provides: "Except as otherwise provided, process in any civil action shall be served by leaving a true and attested copy of it, including the declaration or complaint, with the defendant, or at his usual place of abode, in this state."

claims brought against them in their official capacities due to the plaintiff's failure to post a recognizance bond. Id., 342, 347. With respect to his first claim, the plaintiff maintained that, "in a civil action against state employees in their individual capacities, [General Statutes] § 52-64 (a)[6] permits service of process to be made by a proper officer leaving a copy of process with the attorney general at the Office of the Attorney General in Hartford." Id., 342. The plaintiff also contended that "§ 52-57 (a) does not require him to serve the defendants in hand or at their place of abode because the phrase, '[e]xcept as otherwise provided,' contained in § 52-57 (a), is a reference to § 52-64." Id. With respect to his second claim, the plaintiff claimed that, because of his indigency and status as an inmate, "the recognizance bond requirement does not apply to him, or, if it does, it is unconstitutional because it deprives him of his rights to due process and equal protection of the law under the federal constitution." Id., 347. Regarding his constitutional claim, the plaintiff argued, more specifically, that the recognizance bond requirement "is unconstitutional, as applied to him, an indigent inmate, because it denies him his fundamental right of access to the courts, particularly his right to challenge the conditions of his confinement." Id., 352.

The Appellate Court rejected the plaintiff's first claim, explaining that it was foreclosed by well established

[6] General Statutes § 52-64 (a) provides: "Service of civil process in any civil action or proceeding maintainable against or in any appeal authorized from the actions of, or service of any foreign attachment or garnishment authorized against, the state or against any institution, board, commission, department or administrative tribunal thereof, or against any officer, servant, agent or employee of the state or of any such institution, board, commission, department or administrative tribunal, as the case may be, may be made by a proper officer (1) leaving a true and attested copy of the process, including the declaration or complaint, with the Attorney General at the office of the Attorney General in Hartford, or (2) sending a true and attested copy of the process, including the summons and complaint, by certified mail, return receipt requested, to the Attorney General at the office of the Attorney General in Hartford."

precedent holding "that a plaintiff, who serves a state defendant pursuant to § 52-64 (a) by leaving a copy of the process with the attorney general at the Office of the Attorney General, has properly served the defendant only in his or her official capacity and has failed to properly serve the defendant in his or her individual capacity." Id., 344–45. The Appellate Court further explained that the plaintiff also could not prevail under § 52-57 (a), which provides that, "[e]xcept as otherwise provided, process in any civil action shall be served by leaving a true and attested copy of it, including the declaration or complaint, with the defendant, or at his usual place of abode, in this state." As the Appellate Court noted, subsections (b) through (f) of § 52-57 "specifically [enumerate] exceptions to subsection (a), none of which provide[s] that it is permissible to serve process in cases against state employees in their individual capacities by leaving a copy of the process with the attorney general at the Office of the Attorney General. Thus, the legislature's use of the phrase, '[e]xcept as otherwise provided,' does not advance the plaintiff's claim because he has failed to identify any applicable statutory exception to § 52-57 (a)." Id., 346.

With respect to the plaintiff's second contention, the Appellate Court determined that the plaintiff's failure to post a recognizance bond in accordance with §§ 52-185 and 52-186 did not necessarily require dismissal of his claims against the defendants in their official capacities. See id., 362. Although concluding that the recognizance bond provisions applied to the plaintiff; id., 347; the Appellate Court also observed that the plaintiff had raised "valid constitutional concerns regarding the recognizance bond requirement as applied to him, an indigent inmate"; id., 354; because "[p]risoners possess a right of access not only to pursue appeals from criminal convictions or to bring a habeas action, but also to assert civil rights actions to vindicate

their basic constitutional rights, including challenging the conditions of their confinement under the eighth [and fourteenth] amendment[s] to the federal constitution." Id., 354. To alleviate these constitutional concerns, the Appellate Court placed an interpretative gloss on §§ 52–185 and 52-186 as authorizing a trial court to waive or significantly reduce a party's obligation to post a recognizance bond in light of that party's indigency and, as in the present case, status as an inmate. See id., 359. The Appellate Court therefore reversed the trial court's judgment insofar as the plaintiff's action against the defendants in their official capacities was dismissed and remanded the case for a hearing on the issue of whether the plaintiff is entitled to a waiver of the recognizance bond requirement. Id., 362.

We granted the plaintiff's petition for certification to appeal solely on the issue of whether the Appellate Court correctly concluded that the trial court properly had dismissed the plaintiff's action against the defendants in their individual capacities for lack of personal jurisdiction. *Harnage* v. *Lightner*, supra, 323 Conn. 902. Having examined the record on appeal and reviewed the parties' briefs and arguments, we conclude that the issue on which we granted certification was fully considered and properly resolved against the plaintiff in the thorough and well reasoned opinion of the Appellate Court. It would serve no useful purpose for us to repeat the discussion contained therein beyond the summary already provided in this opinion. Accordingly, we affirm the judgment of the Appellate Court insofar as it pertains to the issue raised by the certified question.

Ordinarily, our resolution of the certified question would end our inquiry. Thus, in the present case, we typically would have no occasion to address the Appellate Court's remand of the case to the trial court for a determination of whether the plaintiff is entitled to a waiver of the recognizance bond requirement of §§ 52-

185 and 52-186 with respect to his action against the defendants in their official capacities. At oral argument before this court, however, the plaintiff clarified, in express and unequivocal terms, that, despite the contrary understanding of the Appellate Court, the trial court and the defendants; see footnote 2 of this opinion; it was never his intention to sue the defendants in their official capacities and that, in fact, he was raising no claims against the defendants in their official capacities. In light of that acknowledgement, the recognizance bond issue has been rendered moot, and, consequently, there is no reason for the case to be remanded to the trial court for a hearing on the plaintiff's entitlement to a waiver of the recognizance bond requirement.

The judgment of the Appellate Court is affirmed with respect to the issue of whether the plaintiff's action against the defendants in their individual capacities properly was dismissed for lack of personal jurisdiction, the remand order of the Appellate Court directing the trial court to conduct a hearing on the issue of whether to waive the recognizance bond requirement is vacated, and the case is remanded to the Appellate Court with direction to remand the case to the trial court and to direct the trial court to render judgment dismissing the plaintiff's action.

---

## BERNADINE BROOKS, ADMINISTRATRIX (ESTATE OF ELSIE WHITE) *v.* ROBERT POWERS ET AL.
## (SC 19727)

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

*Syllabus*

The plaintiff, the administratrix of W's estate, sought to recover damages from the defendants, constables in the town of Westbrook, claiming

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

that their alleged negligence in responding to a report that a woman, subsequently identified as W, was standing in a field during a severe thunderstorm, possibly in need of medical attention, was the proximate cause of W's accidental drowning the next morning in a body of water one-half mile from the field. After receiving the report, one of defendants called 911 and relayed the information to a dispatcher, albeit in a lighthearted or flippant manner. The dispatcher did not send anyone to the field, and the defendants attended to other business. The trial court granted the defendants' motion for summary judgment and rendered judgment thereon, concluding that the plaintiff's action was barred by governmental immunity as a matter of law. The plaintiff appealed to the Appellate Court, which reversed the trial court's judgment, concluding that there were genuine issues of material fact as to whether the defendants' conduct fell within the identifiable person, imminent harm exception to governmental immunity. Specifically, the Appellate Court concluded that a jury reasonably could have found that W's drowning was of the same general nature as the risk of harm created by the defendants' conduct and that it would have been apparent to the defendants that the harm was imminent in the sense that it was of such a magnitude that it required immediate action. On the granting of certification, the defendants appealed to this court. *Held* that the Appellate Court incorrectly concluded that a jury reasonably could have found that W was an identifiable person subject to imminent harm for purposes of abrogating the defendants' governmental immunity: the Appellate Court incorrectly determined that W's drowning fell within the scope of the risk created by the defendants' failure to immediately investigate the report to them that a woman was standing in a field during the storm, possibly in need of medical attention, as W's drowning was far too attenuated from the risk of harm created by the storm for a jury reasonably to conclude that it was storm related, or that the drowning was imminent in the sense that it was so likely to occur that the defendants had a clear and unequivocal duty to act to prevent it; moreover, this court could not ascertain how W's drowning in a body of water a distance away from the field many hours after she was observed in that field could be a foreseeable harm, and, even if W's drowning could be characterized as storm related, it strained credulity to conclude that the defendants, in failing to respond to a report of an adult woman standing in a field during a storm, and, instead, relaying that report to a 911 dispatcher, ignored a risk that the woman would drown the next day, after the storm presumably had passed, in water that was not in close proximity to the field.

(*One justice dissenting*)

Argued September 19, 2017—officially released February 2, 2018**

** February 2, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Procedural History*

Action to recover damages for the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the complaint was withdrawn as to the defendant Theresa Smith; thereafter, the court, *Domnarski*, *J.*, granted the motions for summary judgment filed by the named defendant et al. and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court, *Gruendel* and *Mihalakos*, *Js.*, with *Mullins*, *J.*, dissenting, which reversed the judgment of the trial court and remanded the case for further proceedings, and the named defendant et al., on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

*Thomas R. Gerarde*, with whom were *James N. Tallberg* and, on the brief, *Emily E. Holland* and *Dennis Durao*, for the appellants (named defendant et al.).

*Daniel P. Scholfield*, with whom were *Steven J. Errante* and *Marisa A. Bellair*, for the appellee (plaintiff).

*David N. Rosen* and *Alexander Taubes* filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

*Aaron S. Bayer* and *Tadhg Dooley* filed a brief for the Connecticut Conference of Municipalities et al. as amici curiae.

*Opinion*

PALMER, J. The plaintiff in this certified appeal, Bernadine Brooks, administratrix of the estate of Elsie White, brought this action against the defendants, Robert Powers and Rhea Milardo, constables in the town of Westbrook,[1] alleging that their negligence in

[1] The town of Westbrook also is a defendant in this action. Because the town's liability is derivative of that of its employees, Powers and Milardo, all references to the defendants are to Powers and Milardo.

responding to a report that a woman, subsequently identified as White, was standing in a field during a severe thunderstorm was a proximate cause of White's accidental drowning the next morning in Long Island Sound. The defendants filed a motion for summary judgment, claiming, inter alia, that the plaintiff's action was barred by governmental immunity as a matter of law.[2] The trial court granted the motion, and the plaintiff appealed to the Appellate Court, which reversed the judgment of the trial court, concluding that there was a genuine issue of material fact as to whether the defendants' conduct falls within the identifiable person, imminent harm exception to that immunity. *Brooks* v. *Powers*, 165 Conn. App. 44, 47–48, 80, 138 A.3d 1012 (2016). On appeal, the defendants contend that the Appellate Court incorrectly determined that a jury reasonably could find that White was an identifiable person subject to imminent harm for purposes of abrogating the defendants' governmental immunity. We agree and, accordingly, reverse the Appellate Court's judgment.[3]

The opinion of the Appellate Court sets forth the following relevant facts and procedural history. "The parties submitted numerous deposition transcripts, police reports, and other exhibits in support of and in opposition to the [defendants'] motion for summary judgment. Viewed in the light most favorable to the plaintiff as the party opposing summary judgment, that

[2] As we explain more fully hereinafter, governmental immunity shields municipalities and their employees from liability for negligence when the negligent acts are discretionary rather than ministerial in nature. See, e.g., *Haynes* v. *Middletown*, 314 Conn. 303, 312, 101 A.3d 249 (2014). There is an exception to governmental immunity for discretionary acts, however, if a governmental employee fails to act even when it is apparent that an identifiable victim faces imminent harm. See, e.g., id.

[3] After this appeal was filed, we granted the applications of the Connecticut Trial Lawyers Association, the Connecticut Conference of Municipalities and the Connecticut Interlocal Risk Management Agency to file amicus curiae briefs in support of the parties' respective claims.

evidence would permit the following findings of fact. At roughly 6 p.m. on June 18, 2008, a storm rolled into the coastal town of Westbrook (town). Powers testified at the internal affairs investigation into his conduct, the transcript of which the plaintiff included in her opposition to the defendants' motion for summary judgment, that '[i]t was . . . a dark and stormy night. . . . Very, very dark and very stormy.'

"The defendants were scheduled for boat patrol that evening from 6 . . . until 10 p.m. By the time they arrived for work, however, the weather was already severe. The thunderstorm brought with it both torrential downpours and lightning. Due to the storm, the defendants were unable to take the boat out onto the water for the regular boat patrol and were not required to work that night. If they did work, they were to patrol the marinas and other parts of town, ensure that the boat was ready to go out if necessary, and respond to any emergencies that arose.

"When the defendants arrived for work, they punched in, got into a cruiser, and drove to [a donut shop]. After that, they drove to the marina to inspect the boat. Milardo testified at her deposition that 'the main concern [was] that the bilge pumps were operating properly.' Powers testified at his deposition that they did not need to get out of the [cruiser] to inspect the boat: '[W]e would just look to make sure that the boat was still there and check the pumps. I don't know.' Milardo testified at her deposition that she and Powers 'just sat in the parking lot and could see that the water was being discharged from the back of the boat through the bilge pumps.' The bilge pumps were brand new.

"Once they completed their inspection, the defendants drove to a [convenience store] on [Boston Post Road in Westbrook]. Powers stayed with the cruiser while Milardo went in to get some snacks. At [approxi-

mately 7:30 p.m.], the town tax collector drove up to the [store]. She appeared concerned and told Powers that there was a woman who needed medical attention in a field just up the road. She said that the woman was wearing a shirt and pants, without a coat or any other rain gear, and was standing with her hands raised to the sky. At that time, [although it was still light outside] it was raining heavily and there was thunder and lightning. The field was about one-half mile from the ocean and less than one-half mile from the [convenience store].

"Powers told the tax collector that he would take care of the situation, and [the tax collector] drove away under the impression that she no longer needed to call 911 because the constable was going to take care of [the matter]. Powers then called the 911 dispatcher and told her that 'a person stopped by and they said there's a lady up on [Boston Post Road] up by Ambleside [Apartments] . . . standing in a field with a raincoat on, looking up at the sky.' While Powers and the dispatcher chuckled over this, he told the dispatcher that '[t]hey think she might need medical help,' to which the dispatcher replied, '[g]eez, do you think?' Powers asked the dispatcher to send 'Rizzo or one of [the other constables],' explaining that 'I can't leave the boat.' The dispatcher asked where the person was, and Powers said that she was in a field on the side of [Boston Post Road] near Ambleside Apartments. 'She should be the person standing out in the rain,' he said, chuckling, before saying goodbye.

"The dispatcher never sent anyone to the field. She testified at her deposition: 'I didn't put [Powers' 911 call] in the computer like I normally do. I didn't write it down to remind me to send someone.' She testified that she simply 'forgot.'

"After speaking with the dispatcher, the defendants drove back to the marina to check the boat again. They

did not get out of the [cruiser] . . . but looked at the boat from [inside] the [cruiser]. The bilge pumps were still pumping. Powers testified at his deposition that he knew the pumps were new.

"The defendants then heard a call on the police scanner about a baby choking and joined the fire department in responding to that call. A couple of hours later, the defendants drove along [Boston Post Road] past the field by Ambleside Apartments out to the town line and then looped back toward the center of town. As they passed the field where the tax collector had seen the woman, they drove more slowly and turned the cruiser's spotlight on. The grass in the field was knee-high. They did not see anyone. Neither constable got out of the [cruiser]. Powers testified at the internal affairs investigation . . . that, '[n]o. I wouldn't go out and walk through a field in the pouring rain.' When asked if [he and Milardo] could have gotten out to do a more thorough sweep of the area, since the woman 'could have fallen down or something,' Powers replied: '[C]ould have gone home. Could have gone for a walk. Could have.'

"A former police officer, whom the plaintiff deposed as to the adequacy of the defendants' response, remarked that 'the single most important thing that I saw [was] that [the tax collector] clearly told [Powers] that [there was] a woman that needed medical attention. . . . If you've got somebody that might need [medical attention] or somebody that does need it, you go. . . . The fact that you have somebody that's a human needing something that someone else interprets as medical attention, whether it's might or does, you respond.' Powers testified at his deposition that, '[i]f a person was in physical danger . . . [he] would respond,' but that he did not think the woman in the field presented a 'true emergency.'

"The morning after the storm, on June 19, 2008, a fisherman went out on the water in his boat at about 7 a.m. When he returned from fishing at about 10 a.m., he noticed something washed up among the large rock boulders near the shore just west of his house, less than one mile from where White was last seen. When the fisherman went to inspect [what he noticed], he discovered that it was a body floating face down in the water. [The] [p]olice identified the body as White by the CVS pharmacy and Stop & Shop [scan] cards attached to a keychain clenched in her fist. The tax collector, who knew White personally, later confirmed that this was the same woman she had seen in the field the night before. White was pronounced dead at 11:01 a.m. The cause of death was accidental drowning.

"As to time of death, the police incident report stated that the 'investigation did not conclusively pinpoint a time when White entered the water.' [The defendants, however, submitted the deposition testimony of Julie Wolf, a special investigator for the state medical examiner's office, who arrived at the scene at approximately 12:30 p.m. on June 19, 2008, and examined White's body. Wolf] testified that she observed rigor mortis of the fingers, elbows, and knees, but not of the hips, and no lividity of the body. . . . The defendants also submitted a single page of [a] transcript from an arbitration hearing at which Ira Kanfer, an associate medical examiner, [estimated the time of death to be between 7 and 10 a.m. on June 19, 2008, which, according to Kanfer, was consistent with the beginning stages of rigor mortis observed by Wolf at 12:30 p.m.]."[4] (Footnote omitted.) Id., 48–52.

[4] We further note that the police also interviewed White's next-door neighbor, Patricia Martin, who reported hearing White's apartment door slam twice on the night of June 18, 2008, once at approximately 8 p.m., shortly after the tax collector had observed White standing in the field, and a second time at approximately 10 p.m. Martin was subsequently deposed and testified that the apartments in which she and White resided shared a common wall and that White was the only person in her building who slammed her

The plaintiff commenced this action, alleging that the defendants' actions on the night of June 18, 2008, were negligent and the cause of White's death. The defendants moved for summary judgment, claiming that they were shielded from liability as a matter of law by the immunity afforded municipal employees for their discretionary acts. In response, the plaintiff maintained that the defendants' conduct fell within the identifiable victim, imminent harm exception to that immunity and that summary judgment was therefore inappropriate because the defendants' entitlement to such immunity presented a factual issue to be decided by the jury.

The trial court granted the defendants' motion. First, however, the court reviewed the principles pertaining to the doctrine of governmental immunity, which may be summarized as follows: "[Section] 52-557n[5] abandons the common-law principle of municipal sovereign immunity and establishes the circumstances in which a municipality may be liable for damages. . . . One

apartment door upon entering or exiting the building. Martin further stated that, on the evening of June 18, 2008, at approximately 10 p.m., she had just gotten into bed when the door to White's apartment was slammed so hard that the wall between their two apartments vibrated, startling Martin.

[5] General Statutes § 52-557n (a) provides: "(1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties; (B) negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit; and (C) acts of the political subdivision which constitute the creation or participation in the creation of a nuisance; provided, no cause of action shall be maintained for damages resulting from injury to any person or property by means of a defective road or bridge except pursuant to section 13a-149. (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct; or (B) 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."

such circumstance is a negligent act or omission of a municipal officer acting within the scope of his or her employment or official duties. . . . [Section] 52–557n (a) (2) (B), however, explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions [that] require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." (Footnote added; internal quotation marks omitted.) *Coley* v. *Hartford*, 312 Conn. 150, 161, 95 A.3d 480 (2014). "The hallmark of a discretionary act is that it requires the exercise of judgment."[6] (Internal quotation marks omitted.) Id. In the present appeal, the plaintiff makes no claim that the defendants' conduct was ministerial in nature; she concedes, rather, that their acts were discretionary.[7]

This protection for acts requiring the exercise of judgment or discretion, however, is qualified by what has become known as the identifiable person, imminent harm exception to discretionary act immunity. That exception, which we have characterized as "very limited"; *Strycharz* v. *Cady*, 323 Conn. 548, 573, 148 A.3d

[6] As we have explained, "[m]unicipal officials are immune from liability for negligence arising out of their discretionary 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. . . . Therefore, [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. . . . 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." (Citations omitted; footnote omitted; internal quotations marks omitted.) *Coley* v. *Hartford*, supra, 312 Conn. 161–62.

[7] In the trial court, the plaintiff asserted that the acts of the defendants were ministerial and, therefore, not subject to immunity. The trial court rejected that claim, however, and the plaintiff has not challenged that ruling on appeal.

1011 (2016); "applies when the circumstances make it apparent to the [municipal] officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . . By its own terms, this test requires three things: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm. . . . If the [plaintiff] fail[s] to establish any one of the three prongs, this failure will be fatal to [his] claim that [he] come[s] within the imminent harm exception." (Internal quotation marks omitted.) Id., 573–74. Finally, "the proper standard for determining whether a harm was imminent is whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm." *Haynes* v. *Middletown*, 314 Conn. 303, 322–23, 101 A.3d 249 (2014).

Applying these principles, the trial court concluded in relevant part: "The evidence submitted establishes the absence of a genuine issue of material fact that the harm to which the decedent was ultimately exposed, drowning in Long Island Sound, was not [evident] to the defendants . . . . The defendants were made aware only that the decedent was standing in a field during a severe storm on the night before her death, and that she may have been in need of medical attention. . . . The uncontroverted evidence submitted demonstrates that the decedent drowned the next morning in Long Island Sound, although she was initially reported to be located in a field on [Boston Post Road] . . . the previous night. [In view of] the allegations [contained in] the plaintiff's complaint, and the evidence presented, the identifiable victim, imminent harm exception does not apply in this case."

The trial court further determined that, even if White were an identifiable person subject to imminent harm,

the plaintiff's claim would nevertheless fail under the apparentness prong of the identifiable person, imminent harm exception. In support of this conclusion, the court explained that, "[i]n order to meet the apparentness requirement, the plaintiff must show that the circumstances would have made the government agent aware that his or her acts or omissions would likely have subjected the victim to imminent harm. . . . This is an objective test pursuant to which we consider the information available to the government agent at the time of [his or] her discretionary act or omission. . . . We do not consider what the government agent could have discovered after engaging in additional inquiry. . . . Imposing such a requirement on government officials would run counter to the policy goal underlying all discretionary act immunity, that is, keeping public officials unafraid to exercise judgment." (Internal quotation marks omitted.) In light of the facts presented by the plaintiff, the court concluded that, once the defendants were told by the dispatcher that another officer would be dispatched to check on White, it could not possibly have been apparent to the defendants that their failure to check on her themselves would subject White to a risk of imminent harm.

The plaintiff appealed to the Appellate Court, and that court, with one judge dissenting, reversed the judgment of the trial court. *Brooks* v. *Powers*, supra, 165 Conn. App. 48, 80. The Appellate Court concluded that there was a genuine issue of material fact as to whether, on the night of the storm, White was an identifiable victim subject to imminent harm. See id., 47–48. In reaching its decision, the Appellate Court reasoned, "[a]s to the scope of the harm, [that] at least on the facts of this case, 'harm from the storm' is an appropriate framing. The defendants were told of a woman out in a severe storm by the ocean who needed medical attention. Ultimately, she drowned. Although there

were many ways that the storm could have taken White's life, the general nature of the harm was the same—exposure to the elements while she was in a vulnerable state. For purposes of the imminent harm analysis, that is what matters." Id., 76–77. The Appellate Court further concluded that the proper test for determining whether harm is imminent is whether, "on a given day, it is more likely than not to occur." Id., 71. Applying this test to the facts of the case, the Appellate Court explained that "a jury reasonably could conclude from the evidence submitted in support of and in opposition to the defendants' summary judgment motion that it was apparent that the joking manner in which Powers called in the emergency to dispatch, together with the defendants' failure to respond themselves, made it more likely than not that White would become a victim of the storm." Id., 55.

In reaching this conclusion, the Appellate Court acknowledged that this court repeatedly has stated that, under the identifiable person, imminent harm exception to the discretionary act immunity that ordinarily protects municipal employees, "a plaintiff 'must be identifiable as a potential victim of a *specific* imminent harm.' " (Emphasis in original.) Id., 68, quoting *Doe* v. *Petersen*, 279 Conn. 607, 620–21, 903 A.2d 191 (2006).[8] According to the Appellate Court, because this court previously has likened governmental immunity to a duty of care; see, e.g., *Durrant* v. *Board of Education*, 284 Conn. 91, 100–101, 931 A.2d 859 (2007) ("immunity . . . is in effect a question of whether to impose a duty of care"); and because, in ordinary negligence cases, a duty of

[8] In addition to *Doe* v. *Petersen*, supra, 279 Conn. 620-21, this court has characterized the identifiable victim, imminent harm exception as requiring proof of the apparentness of the *specific* harm that befell the plaintiff on at least three separate occasions. See *St. Pierre* v. *Plainfield*, 326 Conn. 420, 436, 165 A.3d 148 (2017); *Grady* v. *Somers*, 294 Conn. 324, 353–54, 984 A.2d 684 (2009); *Cotto* v. *Board of Education*, 294 Conn. 265, 276, 984 A.2d 58 (2009).

care arises when harm of the same general nature as that which occurred was foreseeable; see, e.g., *Doe* v. *Saint Francis Hospital & Medical Center*, 309 Conn. 146, 174–75, 72 A.3d 929 (2013) ("[t]he test for the existence of a legal duty of care entails . . . a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result" [internal quotation marks omitted]); the plaintiff was not required to prove that it was apparent to the defendants that there was an imminent risk that White would drown, only that harm of the same general nature as that which occurred was foreseeable.[9] See *Brooks* v. *Powers*, supra, 165 Conn. App. 67–68; see also id. ("although a much higher level of risk is needed to establish an imminent harm than to establish a foreseeable harm . . . the harm should be defined at the same level of generality in each case" [emphasis omitted]). Viewing the facts most favorably to the plaintiff, the Appellate Court concluded that a jury reasonably could find that White's drowning was of the same general nature as the risk of harm created by the defendants' conduct and that it would have been apparent to the defendants that the harm was imminent in the sense that it was of such a magnitude that it required immediate action. See id., 76–77. Accordingly, the Appellate Court reversed the judgment of the trial court. Id., 80.

Judge (now Justice) Mullins dissented from the majority opinion. Among other concerns, he disagreed

[9] The Appellate Court also reasoned that, in those cases in which this court has used the word "specific" to delimit the term "imminent harm" for purposes of the identifiable person, imminent harm exception, "the specificity of the harm played no role in [this] court's analysis, and the court gave no indication that by including the word 'specific' in one sentence it intended to overrule the prior consensus—at least in duty of care cases, to which the court has likened immunity cases—that the general nature of the harm is what matters." *Brooks* v. *Powers*, supra, 165 Conn. App. 69.

with the majority that White's drowning was of the same general nature as the risk of harm attendant to standing outside during a severe storm. See id., 90 (*Mullins*, *J.*, dissenting). Judge Mullins concluded that, "[i]n this case, the plaintiff and the [Appellate Court] majority seem to imply that the dangerous condition was the severe storm on the night of June 18, 2008, and that [White] suffered an imminent harm as a result thereof. The fact remains, however, that [White] died on the night of the storm or in the early morning of June 19, 2008, from drowning in Long Island Sound, which was approximately one-half mile from the field in which she was seen during the severe storm. There . . . are no facts alleged in the pleadings or presented in the record that tie her drowning to the storm and her presence in the field. She did not drown in the field, nor was she struck by lightning or injured in the field as result of the storm, i.e., struck by a downed tree limb, flying debris, etc.

"Additionally, nothing in the record or in the pleadings indicates that the defendants knew that [White] would accidentally drown after she ventured from the field . . . . Although the storm may have been a dangerous condition that *could have* subjected [White] to harm, the zone of such harm is not limitless. The harm suffered must be related to the dangerous condition. . . . [T]he general risk of harm presented by standing in the middle of a field during a severe storm is too attenuated from the harm that the decedent suffered, which was drowning later that night or the next morning in . . . Long Island Sound, approximately one-half mile away from that field. Thus, the nexus between the alleged dangerous condition . . . and the imminent harm actually suffered by [White] simply is not there." (Citation omitted; emphasis in original.) Id.

Judge Mullins further concluded that, even if there were a nexus between the storm and White's drowning,

the plaintiff's claim would still fail because the plaintiff could not establish that the harm that White suffered was imminent when the defendants were informed about her presence in the field. See id., 90–92 (*Mullins*, *J.*, dissenting). "As to imminent harm . . . 'the proper standard for determining whether a harm was imminent is whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm.' *Haynes* v. *Middletown*, supra, 314 Conn. 322–23. Obviously, the harm that [White] suffered . . . was her tragic death by drowning in Long Island Sound. [It] cannot [be] ascertain[ed], however, how that harm was imminent when [White] was in the field and the defendants were notified that she needed medical help, or how that imminent harm was or should have been apparent to the defendants." Id., 90–91 (*Mullins*, *J.*, dissenting). "The plaintiff's contention that once the defendants failed to respond to [White's] need for medical help, any harm that befell [her] after their failure to act, no matter how attenuated from the dangerous condition, was imminent harm of which the defendants were aware is inconsistent with . . . precedent." Id., 92 (*Mullins*, *J.*, dissenting).

On appeal to this court following our grant of certification,[10] the defendants urge us to adopt Judge Mullins' reasoning and to conclude that the Appellate Court incorrectly determined both that White's drowning was of the same general nature as the risk of harm created by the storm and that it was imminent within the meaning of the identifiable person, imminent harm exception.

[10] Our grant of certification to appeal was limited to the following issue: "Did the Appellate Court use the correct standard for determining whether the 'harm' was imminent, and properly apply the identifiable victim, imminent harm standard to the facts of this case, in determining that the trial court improperly granted summary judgment in favor of the defendants?" *Brooks* v. *Powers*, 322 Conn. 907, 143 A.3d 603 (2016).

The defendants further contend that, as a matter of law, once they were informed by the 911 dispatcher that another officer would be dispatched to check on White, it could not possibly have been apparent to them that White was at risk of imminent harm or that they themselves—rather than the officer whom they were told would be sent to check on her—had a clear and unequivocal duty to protect White from that harm. The plaintiff, on the other hand, maintains that the Appellate Court correctly determined that a jury reasonably could find that the harm that befell White was foreseeable and so likely to occur that the defendants had a clear and unequivocal duty to take immediate steps to avert it.

We agree with the defendants and Judge Mullins that the Appellate Court incorrectly determined that White's drowning fell within the scope of the risk created by the defendants' failure to immediately investigate the tax collector's report that a woman was standing in a field during the storm, possibly in need of medical attention. Rather, consistent with Judge Mullins' well reasoned dissent, we conclude that White's drowning was far too attenuated from the risk of harm created by the storm for a jury reasonably to conclude that it was storm related, much less imminent in the sense that it was so likely to occur that the defendants had a clear and unequivocal duty to act to prevent it, as the plaintiff was required to prove.

Indeed, it is clear that the plaintiff cannot prevail, even under ordinary negligence principles. To establish a claim of negligence, a plaintiff must demonstrate that the defendant was under a duty of care, that the defendant's conduct breached that duty, and that the breach caused an actual injury to the plaintiff. See, e.g., *Doe* v. *Saint Francis Hospital & Medical Center*, supra, 309 Conn. 174. The test for whether a legal duty exists is an objective one and seeks to determine, first, "whether an ordinary person in the defendant's position, knowing

what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result" and, second, whether, "on the basis of a public policy analysis . . . the defendant's responsibility for [his] negligent conduct should extend to the particular consequences or particular plaintiff in the case." (Internal quotation marks omitted.) Id., 175.

The first step in any duty analysis requires a determination of whether the plaintiff's injury was a "reasonably foreseeable" result of the defendant's conduct. *Ruiz* v. *Victory Properties, LLC*, 315 Conn. 320, 330, 107 A.3d 381 (2015). Although, typically, this is a question of fact for the jury; see id.; it becomes an issue of law for the court if "no reasonable fact finder could conclude that the injury was within the foreseeable scope of the risk such that the defendant should have recognized the risk and taken precautions to prevent it. . . . In other words, foreseeability becomes a conclusion of law . . . when . . . a fair and reasonable [person] could reach only one conclusion . . . ." (Citation omitted; internal quotation marks omitted.) Id. Moreover, it is well established that an injury is not reasonably foreseeable as a matter of law when the undisputed facts, considered in the light most favorable to the plaintiff, establish that the connection between the defendant's conduct and the harm suffered by the plaintiff is simply too attenuated. See, e.g., *Lodge* v. *Arett Sales Corp.*, 246 Conn. 563, 574–75, 717 A.2d 215 (1998); *RK Constructors, Inc.* v. *Fusco Corp.*, 231 Conn. 381, 385–86, 650 A.2d 153 (1994). This fundamental negligence principle—which establishes a standard that is indisputably less demanding than the burden on the plaintiff to demonstrate the applicability of the identifiable person, imminent harm exception to discretionary act immunity[11]—is dispositive of the appeal in the pre-

[11] See, e.g., *Haynes* v. *Middletown*, supra, 314 Conn. 321 (contrasting "demanding imminent harm standard" with ordinary negligence standard); *Edgerton* v. *Clinton*, 311 Conn. 217, 228 n.10, 86 A.3d 437 (2014) ("[i]mposing

sent case.[12] As Judge Mullins observed, the zone of harm created by the storm was not without limits, for there are only so many ways in which a person standing in a field during a storm might be injured by the storm. See *Brooks* v. *Powers*, supra, 165 Conn. App. 90 (*Mullins*, *J.*, dissenting). For example, as Judge Mullins noted, such person may be struck by a downed tree limb, flying debris, or even lightning. Id. Neither the plaintiff nor the Appellate Court has explained, however, and we are unable to ascertain, how drowning in a body of water one-half mile away from the field many hours after she was observed in that field can be included on the list of foreseeable harms under even the broadest or most expansive conception of foreseeability. This may explain why, as Judge Mullins stated, the record is devoid of any facts or allegations tying White's drowning to conditions during the storm or to her presence in the field. Id.

We also agree with the defendants that White's drowning was too attenuated from the risk of harm created by the defendants' conduct for a jury reasonably to conclude that it was imminent. Indeed, even if White's drowning reasonably could be characterized as storm related, it nevertheless strains credulity to conclude that the defendants, in failing to respond to a report of a woman out in a field during a storm—and instead, relaying that report to a 911 dispatcher, albeit in a light-

liability when a municipal officer deviated from an ordinary negligence standard of care would render a municipality's liability under § 52-557n no different from what it would be under ordinary negligence"); *Brooks* v. *Powers*, supra, 165 Conn. App. 68 (explaining that significantly higher degree of risk is needed to establish imminent harm than to establish foreseeable harm in ordinary negligence case).

[12] In light of this conclusion, we have no occasion to revisit our prior cases characterizing the identifiable person, imminent harm exception as requiring a showing that the specific harm that that the identifiable person imminently faced is the harm that actually occurred. Suffice it to say that the Appellate Court's contrary determination finds little if any support in this court's relevant precedent.

hearted or even flippant manner—ignored a risk that the woman would drown in waters one-half mile away from the field, most likely the next day, after the storm presumably had passed. Indeed, it is no less implausible to believe that that harm was so likely to occur that "the defendant[s] had a clear and unequivocal duty to act immediately to prevent the harm." *Haynes* v. *Middletown*, supra, 314 Conn. 323. As we explained in *Haynes*, it is "the magnitude of the risk" that determines whether a harm is imminent. (Emphasis omitted.) Id., 322. In the present case, although it may be inadvisable for an adult to stand outside during a severe summer rainstorm, doing so does not pose a risk of such magnitude as to give rise to a clear duty to act immediately to obviate that risk.[13] See id., 322–23.

Of course, whether harm in any particular case was imminent necessarily is a fact bound question. Thus, under different factual circumstances, an individual's presence in a field during a storm may give rise to a duty on the part of a police officer to take immediate steps to prevent harm to that person. See, e.g., id., 315 n.7 ("[a] condition that is not an imminent harm in one context may be an imminent harm in another context"). For example, if White had been a child rather than an adult, the defendants quite likely would have been under a duty to take immediate steps to ensure the child's safety. The facts in the present case, however, are that an adult woman was seen standing in a field

[13] It bears mention, moreover, that uncontroverted evidence indicates that White made it safely out of the field after being observed there between 7:30 and 8 p.m.—her next-door neighbor twice heard White slam her front door between 8 and 10 p.m. that evening, and, as the trial court noted, the unchallenged evidence established her time of death at between 7 and 10 a.m. the next morning. See footnote 4 of this opinion. The fact that she was able to make her way home after leaving the field cannot be squared with a finding that her standing in the field during the storm was "so dangerous that it merit[ed] an immediate response." *Brooks* v. *Powers*, supra, 165 Conn. App. 71, citing *Haynes* v. *Middletown*, supra, 314 Conn. 325.

during a severe summer rainstorm—unusual behavior, to be sure, but not so obviously dangerous as to give rise to a duty on the part of the defendants to take immediate steps to protect the woman. See id., 317–18 ("if a harm is not so likely to happen that it gives rise to a clear duty to correct the dangerous condition creating the risk of harm immediately upon discovering it, the harm is not imminent"). Accordingly, we conclude, contrary to the conclusion of the Appellate Court, that the trial court correctly determined, as a matter of law, that the plaintiff cannot establish that the defendants' conduct falls within the identifiable person, imminent harm exception to governmental immunity.[14]

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to

[14] Asserting that "the legislature intends for police officers to be the first line of defense when helping people with mental illness who could be dangerous to themselves or [to] others," the dissenting justice contends that the trial court should not have granted the defendants' motion for summary judgment because, in light of White's conduct, there existed a "reasonable likelihood" that "she could [have been] trying to hurt herself" due to a mental illness, and that such a risk should have been apparent to the defendants. According to the dissenting justice, it is that risk, and not the risk that she would be harmed by the storm, that should be our focus for purposes of this appeal. The plaintiff, however, has never even attempted to explain how the evidence demonstrates, first, that it should have been obvious to the defendants that White suffered from a serious mental illness and, second, that such mental illness gave rise to an imminent risk of self-inflicted harm. Indeed, we do not see how the plaintiff could have prevailed on that claim if she had made it, which she did not. With respect to defeating the defendants' governmental immunity, it is undisputed that the plaintiff's claim—as advanced in the trial court, in the Appellate Court and in this court—consistently has been that the defendants should have been aware that White was exposed to a serious risk of harm *from the storm*. For that reason alone, it would improper for us to entertain the claim that the dissenting justice raises for the first time in this certified appeal. See, e.g., *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 632, 99 A.3d 1079 (2014) (unfair to consider claim when defendants "had no meaningful chance to discover facts related to, and [to] make a record to defend against, an entirely different theory of liability"); *State* v. *Fauci*, 282 Conn. 23, 26 n.1, 917 A.2d 978 (2007) (in certified appeal, "[w]e ordinarily decline to consider claims that [were] not raised properly before the Appellate Court").

render judgment affirming the judgment of the trial court.

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

EVELEIGH, J., dissenting. I respectfully dissent. My concurrence in *Haynes* v. *Middletown*, 314 Conn. 303, 331, 101 A.3d 249 (2014), notes that "our law surrounding the identifiable person, imminent harm exception to municipal immunity is, to put it mildly, less than clear." The majority opinion in the present case showcases the murkiness of that exception and, therefore, I reiterate that concern today. Moreover, I am also concerned because the constables in the present case, the defendants Robert Powers and Rhea Milardo,[1] appeared to ignore the plight of a person obviously suffering from mental illness and the injuries that could result from that illness if left untreated. Unfortunately, the majority does not consider the condition of the decedent, Elsie White, to constitute a threat of imminent harm and, therefore, does not believe that the defendants, who joked about the incident and may have lied about their availability to a police dispatcher, were under any duty to investigate White's condition. In view of White's psychological state, I disagree. Therefore, I respectfully dissent.

As a preliminary matter, I adopt the reasoning set forth in my concurring opinion in *Haynes* and apply it to the present case. The test announced by the majority in *Haynes* regarding imminence was "whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to

[1] I note that the town of Westbrook is also a defendant in the present action. For the sake of consistency with the majority opinion, however, I refer to Powers and Milardo as the defendants.

prevent the harm." Id., 323. I responded by concluding that "the majority's solution only throws our jurisprudence regarding this exception into even greater confusion. . . . In my view, the conclusion adopted by the majority collapses the apparentness and imminent prongs into one, and it does so in a way that only further tangles a doctrine which is already full of snarls." (Citation omitted.) Id., 336–37. I suggested that the proper test for determining whether harm was imminent should be "whether it was, or should have been, apparent to the municipal defendant that the dangerous condition was so likely to cause harm in the near future that the defendant had a clear and unequivocal duty to act to prevent the harm. In my view, this test would make it clear that situations such as those presented in [*Shore* v. *Stonington*, 187 Conn. 147, 444 A.2d 1379 (1982)] and [*Edgerton* v. *Clinton*, 311 Conn. 217, 86 A.3d 437 (2014)] present issues of fact to be decided by the jury." *Haynes* v. *Middletown*, supra, 314 Conn. 338. I based this proposed test on precedent from this court and the plain language of General Statutes § 52-557n, which provides in relevant part "a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . ." Section 52-557n (a) (1) (A) explicitly includes negligence as a standard for whether governmental immunity exists; therefore, it should be incorporated into the identifiable person, imminent harm exception in order to create a cohesive standard. See *Haynes* v. *Middletown*, supra, 338 (*Eveleigh*, *J.*, concurring). In my view, combining a negligence standard with the identifiable person, imminent harm exception would satisfy this legislative mandate and leave many issues regarding governmental immunity for the jury to decide. Id.

Due to the disparity between the test established in *Haynes* and this court's prior precedent, the Appellate Court was placed in a difficult position of trying to reconcile our case law and formulate a coherent and workable test for the imminent harm exception. Ultimately, the Appellate Court concluded that a harm is imminent if it is "more likely than not to occur"; *Brooks* v. *Powers*, 165 Conn. App. 44, 71,138 A.3d 1012 (2016); a test which both the majority and I agree is incorrect. The majority, however, continues to use the three-pronged test for the exception; see *Edgerton* v. *Clinton*, supra, 311 Conn. 229; a test which this court's decision in *Haynes* essentially precludes by collapsing, into a single standard, the test governing the imminence of harm. *Haynes* v. *Middletown*, supra, 314 Conn. 323. Instead, this court should be examining whether the harm was "so likely" to occur in the "near future" that the municipal defendant should have been aware that he or she had an unequivocal duty to act. Id., 338 (*Eveleigh*, *J.*, concurring.) This standard provides a framework for determining whether the exception to governmental immunity exists; it is an objective test looking at the totality of the circumstances to determine whether there was such a high degree of certainty that the harm would occur that the municipal defendant should have been aware of the need for his or her intervention.

I would also conclude that the present case should not be decided on a motion for summary judgment. In *Edgerton* v. *Clinton*, supra, 311 Conn. 245 (*Eveleigh*, *J.*, dissenting), I agreed with the majority that "the determination of whether the identifiable person-imminent harm exception to the doctrine of qualified immunity is a matter of law," but, nevertheless, concluded that the court "must make this determination in light of the factual findings of the jury." The same is true in the present case. The majority in *Edgerton* recognized as

much. "Unlike sovereign immunity, which includes immunity from suit and immunity from liability, governmental immunity shields a municipality from liability only. . . . Immunity from suit on the basis of sovereign immunity implicates subject matter jurisdiction, and, therefore, sovereign immunity issues are resolved prior to trial. . . . In contrast, because governmental immunity shields a governmental entity from liability rather than litigation to which it does not consent, unresolved factual issues concerning a governmental immunity claim can be decided by a jury." (Citations omitted.) Id., 227 n.9.

In *Edgerton*, this court was able to proceed with its analysis because the case had already gone to trial. Id., 225. In the present case, however, there have been no factual findings upon which to base our decision, as the present appeal concerns a motion for summary judgment. The identifiable person, imminent harm exception requires a determination of not only the facts of which the municipal defendant was aware, but also what factors actually were present for that defendant to have considered. See *Purzycki* v. *Fairfield*, 244 Conn. 101, 107–108, 708 A.2d 937 (1998), overruled in part on other grounds by *Haynes* v. *Middletown*, 314 Conn. 303, 101 A.3d 249 (2014). Additionally, under the test I propose—determining what the officer *should* have been aware of—requires a factual determination of what a reasonable officer would have known; a determination that should be made by the fact finder after weighing all the evidence. See *Hernandez* v. *Mesa*, U.S. , 137 S. Ct. 2003, 2006–2007, 198 L. Ed. 2d 625 (2017). Nevertheless, I examine the present case in the context of our existing case law as established by *Haynes* and its progeny.

The concept of police officers helping patients with mental illness has been codified in General Statutes § 17a-503 (a), which provides in relevant part: "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 plain language of this statute makes it is apparent that the legislature intends for police officers to be the first line of defense when helping people with mental illness who could be dangerous to themselves or others. Police officers were, in fact, one of the first groups of professionals granted power to involuntarily commit a mentally ill person in the original language of that statute. See General Statutes (Rev. to 1979) § 17-183a. This statutory language demonstrates the legislature's intention to rely on police officers to perform this duty.[2]

Part of the intent behind § 17a-503 was to give greater power to police officers to help patients without having to bring criminal charges. Number 77-595 of the 1977 Public Acts (P.A. 77-595), which first enacted this provision, was referred to by Representative Virginia Connolly as ''a mental health patient's bill of rights because [the patient] is protected from the mental health standpoint and from the legal standpoint.'' 20 H.R. Proc., Pt. 14, 1977 Sess., p. 5787. Part of this legislation was intended to give greater clarity to police officers who tried to help patients with mental illness. Before the enactment of P.A. 77-595 police had to arrest people who are mentally ill in order to get them treatment, which police were hesitant to do, leaving many without the help they needed. See Conn. Joint Standing Commit-

[2] In its present form, § 17a-503 also allows phycologists and clinical social workers, to involuntarily hospitalize a mentally ill person. See General Statutes § 17a-503 (c) and (d). Psychologists were included in No. 93-227 of the 1993 Public Acts, and nurses and social workers were added in No. 00-147 of the 2000 Public Acts.

tee Hearings, Judiciary, Pt. 1, 1977 Sess., p. 196–97. The portion of the act concerning police powers was primarily focused on encouraging officers to help people with mental illness rather than arrest them. "The second question, is the question of police officer discretion, we've introduced provisions . . . to allow police officers to take people to the emergency room to be evaluated within [twenty-four] hours, to see if they need hospitalization. In the past and currently often police officers will feel the need to file charges [against] someone to justify the detention, where no charges needed to be filed given the nature of the case. If we make it express that the police officers can initiate an emergency evaluation then perhaps we will reduce the number of criminal charges that have to be processed by the criminal system and also, reduce the number of instances [when] people have had charges filed [against them when] it wasn't necessary." Id., p. 200, remarks of Attorney Lance Crane.

Connecticut precedent has recognized the importance of police involvement in mental health issues as well. In *Rockville General Hospital* v. *Mercier*, Superior Court, judicial district of Tolland, Docket No. CV-90-44838-S (November 9, 1992) (7 Conn. L. Rptr. 558), Judge Lawrence Klaczak commented on the state's interest in the welfare of citizens regarding their mental health. "In appropriate circumstances, the right of an individual to refuse medical treatment is subject to being overridden by state interests, including preservation of life, protection of interests of innocent third persons, prevention of suicide, and maintenance of the ethical integrity of the medical profession." Id., 558–59. Attorney General Clarine Riddle also commented on the necessity of police intervention with patients who are disabled or a danger to themselves or others. "[O]nly patients admitted on written application may be subject to involuntary confinement either for up to five days

after giving notice of a desire to leave, or up to fifteen days after notice is given if an application for confinement is filed with the [P]robate [C]ourt. . . . During this period, rehospitalization provisions of [General Statutes (Rev. to 1989) § 17-198] would apply and the state or local police *would be required* to assist in such rehospitalization at the request of authorities." (Citation omitted; emphasis added; internal quotation marks omitted.) Opinions, Conn. Atty. Gen., No. 89-006 (March 3, 1989), p. 6. Attorney General Riddle also analyzed General Statutes (Rev. to 1989) § 17-183a and, specifically, what information could be used to establish "reasonable cause," observing that "the decision as to whether reasonable cause exists . . . is a discretionary function which must be exercised by the police officer."[3] Id., p. 7.

Encouraging police officers to engage in matters that are both welfare and health related is not a new concept, but can be seen as arising from their function as a "community caretak[er]," as identified by the United States Supreme Court in *Cady* v. *Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). "Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Id. In *Cady*, the community caretaker function was seen as an exception to the search warrant rule for searching vehicles; id., 447–48; but the concept of a community caretaker has been applied to

[3] Although this could be interpreted to mean that police have unlimited discretion when responding to calls involving mental illness, it is important to recognize that Attorney General Riddle is referring not to the response, but the determination of whether reasonable cause exists to hospitalize a person.

other exceptions from the warrant rule when searching homes or businesses. *Mincey* v. *Arizona*, 437 U.S. 385, 392, 98 S Ct. 2408, 57 L. Ed. 2d 290 (1978). In *Mincey*, the United States Supreme Court specifically approved of the "emergency assistance" exception, whereby police officers could legally enter a building to search for a person whom the police officers reasonably believe is in need of aid, or to search the surrounding area of a homicide scene to determine if there are any other victims. Id. In *Mincey*, the United States Supreme Court explained, "[t]he *need* to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." (Emphasis added; internal quotation marks omitted.) Id.

Although the emergency assistance exception to the search warrant requirement is couched in discretionary language regarding the right to search a premise, the United States Supreme Court recognizes the necessity of protecting and preserving life, and the government's obligation to perform this task. Id.; see also *Brigham City* v. *Stuart*, 547 U.S. 398, 403–404, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006). The court has extended the caretaking concept to other areas of government functions, even before it was commonly identified as a community caretaking function. See *Michigan* v. *Tyler*, 436 U.S. 499, 509–10, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978) (entry into building to extinguish fire was sufficient exigency to protect people and property); *Camara* v. *Municipal Court of San Francisco*, 387 U.S. 523, 538–9, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) (performing health inspections in emergency situation is permissible); *Jacobson* v. *Commonwealth of Massachusetts*, 197 U.S. 11, 31–32, 25 S. Ct. 358, 49 L. Ed. 643 (1905) (emergency mandatory smallpox vaccination constitutional); *Compagnie Francaise de Navigation a Vapeur* v. *Board of Health*, 186 U.S. 380, 391–92, 22 S. Ct. 811, 46 L. Ed.

1209 (1902) (states are permitted to detain citizens in mandatory quarantine under emergency situations).

Recently, the United States Supreme Court has recognized the emergency assistance exception for police aid to a mentally ill person. In *San Francisco* v. *Sheehan*, U.S. , 135 S. Ct. 1765, 1769–70, 191 L. Ed. 2d 856 (2015), police responded to a group home where a patient diagnosed with a schizoaffective disorder had threatened staff, was no longer taking her medication, no longer spoke with her psychiatrist, and was not changing her clothes or eating. When police arrived they attempted to make entry into the patient's room, only to be threatened with a knife. Id., 1770. They retreated and closed the door, but, realizing that this could be a tactical error and possibly lead to the patient harming herself, the police officers chose to make entry again rather than wait for backup. Id., 1770–71. After the police were threatened with the knife again, and the patient did not respond to pepper spray, the patient was shot several times. Id., 1771.

The patient commenced an action claiming that the officers had violated the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq., by not subduing her in a way to accommodate her disability and also sought to recover for violation of her rights under the fourth amendment to the United States Constitution pursuant to 42 U.S.C. § 1983. Id. The United States Supreme Court determined that, in reference to the fourth amendment claim, the entry into the patient's room was permissible under the emergency assistance exception to the search warrant rule. Id., 1774–75. The use of force was also permissible, as the police officers continued to escalate their use of force in an attempt to subdue the patient, only using lethal force when other options failed. Id., 1775. Both the original entry into the room and the second entry were found reason-

able in the circumstances, considering the patient's deteriorating mental state. Id., 1777–78.

Although most of the foregoing cases are examples of search and seizure jurisprudence, the policy rationale that underlies them all carries weight in the present case; courts seek to protect officers who engage in activities to protect the general public, regardless of whether they may have "made 'some mistakes.' " Id., 1775; see also *Heien* v. *North Carolina*, U.S. , 135 S. Ct. 530, 536, 190 L. Ed. 2d 475 (2014). This is the exact same reasoning behind governmental immunity. "General Statutes § 52-557n abandons the common-law principle of municipal sovereign immunity and establishes the circumstances in which a municipality may be liable for damages. . . . One such circumstance is a negligent act or omission of a municipal officer acting within the scope of his or her employment or official duties. . . . [Section] 52-557n (a) (2) (B), however, 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.

"Municipal officials are immune from liability for negligence arising out of their discretionary 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. . . . Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers 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. . . . In contrast, municipal officers are not immune from liability for negligence arising out of their ministe-

rial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Doe* v. *Petersen*, 279 Conn. 607, 614–15, 903 A.2d 191 (2006).

"The immunity from liability for the performance of discretionary acts by a municipal employee is subject to three exceptions or circumstances under which liability may attach even though the act was discretionary: first, where the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm; see, e.g., *Sestito* v. *Groton*, 178 Conn. 520, 528, 423 A.2d 165 (1979); second, where a statute specifically provides for a cause of action against a municipality or municipal official for failure to enforce certain laws; see, e.g., General Statutes § 7-108 [creating municipal liability for damage done by mobs]; and third, where the alleged acts involve malice, wantonness or intent to injure, rather than negligence. See, e.g., *Stiebitz* v. *Mahoney*, 144 Conn. 443, 448–49, 134 A.2d 71 (1957)." *Evon* v. *Andrews*, 211 Conn. 501, 505, 559 A.2d 1131 (1989).

In the present case, the plaintiff, Bernadine Brooks, the administratrix of White's estate, challenges the trial court's award of summary judgment in favor of the defendants. Given that procedural posture, it is axiomatic that this court must interpret the facts in favor of the nonmoving party—namely, the plaintiff. *St. Pierre* v. *Plainfield*, 326 Conn. 420, 426, 165 A.3d 148 (2017). The defendants were working as a marine patrol, but were unable to do so due to the severe storms in the area. *Brooks* v. *Powers*, supra, 165 Conn. App. 48. Instead, they chose to perform a patrol on land and, on one occasion, responded to an emergency call regarding an infant who was choking. Id., 48–51. After reporting for their scheduled shift, they drove to a local store where they encountered a tax collector employed

by the town of Westbrook, who informed Powers that there was a woman "wearing a shirt and pants, without a coat or any other rain gear, and was standing with her hands raised to the sky." Id., 49. There appears to have been some debate between the parties as to whether the tax collector told Powers that the woman "needs" help or "might need" help but, regardless, it is undisputed that the tax collector sought help; she relayed information to Powers indicating that there was a woman outside without proper outerwear that was acting very strangely considering the severe storm. In my view, the differences in the interpretation of what the tax collector actually said would create a material issue of fact for the jury on the question of imminent harm. Powers' account of these events is subject to even further scrutiny in view of the possible prevarications to the dispatcher regarding the defendants' ability to travel; specifically, the statement that they could not leave the boat, when in fact, they already had left.

Rather than respond to the woman wearing improper clothing and acting strangely in the middle of an open field during an intense storm, Powers chose to place a telephone call to the dispatcher to report the situation. Id. Instead of giving a proper report, however, Powers proceeded to laugh and then claimed that, because he could not leave the boat, another officer would need to be sent.[4] Id., 50 and n.3. The dispatcher did not send anyone to check on the woman, claiming that she " 'forgot.' " Id., 50. Whether her doing so was a product of Powers trivializing the situation presents a separate question of fact, which should have been left for the jury. The defendants eventually drove by the field where White was last seen, but when they arrived they did not see anyone and drove away without even getting

[4] Not only could the officers leave the boat, they were actually gone from the boat when all these events occurred. *Brooks* v. *Powers*, supra, 165 Conn. App. 49–50.

out of their car. Id., 51. The next day, White's body was found among some rocks near the shore less than a mile from where the tax collector had reported seeing her. Id., 52.

It is important to note that this was not a circumstance where officers needed to make "split second, discretionary decisions on the basis of limited information." *Edgerton* v. *Clinton*, supra, 311 Conn. 228 n.10. The defendants had all available information before making a decision regarding how to respond, and there were no immediate time constraints placed upon them other than the general urgency created by a person in need. Unlike affirmative actions taken to help people where a mistake is made; see, e.g., *Heien* v. *North Carolina*, supra, 135 S. Ct. 536; the defendants in the present case took no action to help White. The defendants emphasize that they did take action by calling dispatch, but this same action—calling a dispatcher but not taking any additional steps—is the same behavior that this court did not reference as sufficient in *Sestito* v. *Groton*, supra, 178 Conn. 523. In *Sestito*, one of the defendants, a police officer in the city of Groton, witnessed a large fight outside of a local bar. Id., 522–23. He continued watching the group fight, and when he heard gunshots, he called the police station but did not receive any instructions. Id., 523. When the decedent was shot, he then drove over and arrested the attacker. Id. Although § 52-557n was not in existence at that time, the concept that proceeded it—namely, the distinction between public and private duties—was in force and provided a background for the policy reasons underlying governmental immunity and exceptions. See, e.g., *Shore* v. *Stonington*, supra, 187 Conn. 152–53. This court determined that the matter of whether the officer in *Sestito* could be liable was a question for the jury to decide and, rather than foreclose recovery altogether, implic-

itly concluded that the telephone call was insufficient to relieve him of liability. *Sestito* v. *Groton*, supra, 528.

The application of the identifiable victim, imminent harm exception to governmental immunity should be guided by the exception's purpose: identifying a specific category of cases where "the policy rationale underlying discretionary act immunity—to encourage municipal officers to exercise judgment—has no force." *Doe* v. *Petersen*, supra, 279 Conn. 615. The fact that the harm in the present case happened in an unexpected way should not be relevant as long as the standard rules of foreseeability bring it within the scope of the danger that was imminent and, therefore, against which the defendants had a duty to guard. The reason for this is that the scope of the harm is unrelated to the need for immediate action. If a danger was slight, but the victim by chance was injured anyway, then the exception would not apply. If, however, the danger was great and the victim was injured by a foreseeable event that was within the scope of that danger, then there is no public policy reason to bar recovery. If there is an apparent imminent harm, the officer has a duty to act. A jury could find that there was such harm in the present case. The defendants' duty to act arose not from the specific way in which harm might befall White. That duty arose from the fact that White was in grave danger, or so a jury could find. The level of generality at which the danger is defined is simply a product of the nature of the danger. For example, the foreseeable danger of an icy walkway is probably limited to injuries from slipping. See, e.g., *Burns* v. *Board of Education*, 228 Conn. 640, 642, 638 A.2d 1 (1994), overruled in part on other grounds by *Haynes* v. *Middletown*, 314 Conn. 303, 101 A.3d 249 (2014). The danger of a boisterous, out of control party where there is fighting and a gunshot certainly includes a shooting but would also include, in my view, other forms of physical injury, such as a

broken jaw, that could have been found to be imminent in in light of the circumstances presented. See, e.g., *Sestito* v. *Groton*, supra, 178 Conn. 523. The facts at issue in the present case, in my view, are is not too attenuated; a jury could reasonably find that a woman who appears to be delusional and suffering from mental illness, who is out walking in the middle of an intense storm, may harm herself by walking off a cliff, falling, or stepping in front of a car. A jury could find that the information given to Powers—that White was improperly clothed and standing in the middle of the field during a severe storm—demonstrated that she was unable to appreciate risks appropriately.

There is no public policy reason to confer immunity on the defendants in this situation. The obviousness of the danger and the need to act triggers the duty that underlies the exception. It would be reasonable for a jury to find that Powers recognized this danger because he called the dispatcher, but avoided the duty that danger created by lying. While there is not an exception to discretionary act immunity for lying, the fact that Powers may have lied regarding the defendants' ability to travel remains relevant because of its evidentiary value. In light of Powers' response, a jury could infer that he knew that he had a duty to drive the short distance to the field where White had been seen. At that point, his discretion was irrelevant because he had already concluded that he should respond. A jury could certainly find that such a conclusion was, in fact, compelled by the immediately apparent existence of an identifiable victim in imminent danger. Such a finding is made much easier because, in the present case, Powers himself appreciated the fact that he should go to search for the woman seen by the tax collector. In light of these facts, a jury could have reasonably concluded that, because Powers just didn't want to go, he lied and said that he couldn't. Where there is lying to get out of

a recognized duty, any exercise of discretion involved is certainly not one the law should have any interest in encouraging.

The defendants observe that the method of informing the dispatcher—a joking telephone call—was not enough to make it "apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm." *Haynes* v. *Middletown*, supra, 314 Conn. 323. I disagree, however, that a telephone call with joking laughter, rather than using the police radio so others could learn of the situation, could be interpreted as a serious effort to obtain help for White.[5] Indeed, the only inference I could possibly draw from the defendants' actions was that they did not take the call seriously and sought actively to pass the buck. They should have been aware that their flippant method of notifying the dispatcher could prevent White from receiving the help she needed. It is extremely doubtful that the defendants would have taken the same attitude if the tax collector had reported a person bleeding along the side of the road.

The majority also contends that the harm could not be "immediate" because White ultimately died less than a mile from the field where she was seen, died sometime after being seen by the tax collector, and died of drown-

[5] The amicus brief filed by, inter alia, the Connecticut Conference of Municipalities vehemently opposes this interpretation of the officer's actions, stating "humour [is] a key component of the working relationship between police officers and ambulance staff." S. Charman, "Sharing a Laugh: The Role of Humour in Relationships between Police Officers and Ambulance Staff," 33 International J. of Soc. & Soc. Policy 152, 162 (2013). No doubt, humor is a necessary defense mechanism to help guard police and emergency responders from the horrors they witness; however, when that humor interferes with the ability to properly respond to another's need and becomes an emergency responders chosen response rather than to help, then the line may been crossed from humor into negligence. At the very least that question should be resolved by a jury.

ing and not directly from the storm. The problem with this reasoning, however, is that the majority assumes that the dangerous condition confronting White was the storm. The storm, however, was only one factor that should have weighed toward the defendants' decision to respond; the real danger that White faced was her own disregard for her safety, which evinced a reasonable likelihood that she was suffering from mental illness. As stated previously in this dissenting opinion, officers are imbued with the power to help such people through General Statutes § 17a-503. Instead of investigating and determining whether White needed help, the defendants instead chose to ignore their duty.

A determination of whether the harm in the present case is immediate necessarily involves a determination of whether that harm was apparent to the defendants. *Haynes* v. *Middletown*, 314 Conn. 336. Although I have commented previously in this dissenting opinion about the need to present evidence to the fact finder regarding this element, I think that a report of conduct consistent with mental illness, such as the one at issue in the present case, clearly creates an apparent risk that someone is in danger of being hurt. The majority believes that the actual harm which White incurred, that of drowning, is not one that the defendants could have been aware of from the information which they received. The defendants had information, however, which should have made it apparent that White was in peril of immediate harm *from herself*. Perhaps she fell into the water or wandered in. The only information apparent to the defendants at the time was that she was acting strangely, improperly dressed, in the middle of a field during a thunderstorm; facts which everyone can agree are inherently dangerous. The risk is not that White could be hurt by the storm but, rather, that she could be trying to hurt herself. That is the danger involved. That danger was reported to the defendants

and was made apparent to them, but the defendants chose to ignore it. Indeed, the only person who witnessed White that evening believed that she was in need of medical attention.

Accordingly, I would affirm the judgment of the Appellate Court. Therefore, for the reasons stated, I respectfully dissent.

---

## PAUL VALLIERE ET AL. *v.* COMMISSIONER OF SOCIAL SERVICES (SC 19701)

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

*Syllabus*

Pursuant to statute (§ 45a-655 [b] and [d]) the conservator of the estate of a married person may apply to the Probate Court for a support order in favor of the conserved person's spouse, but, "[i]n the case of an institutionalized person who has applied for or is receiving [Medicaid benefits], no conservator shall apply and no court shall approve the application of . . . the net income of the conserved person to the support of the conserved person's spouse in an amount that exceeds the monthly income allowed a community spouse as determined by the Department of Social Services . . . ."

Pursuant further to federal statute (42 U.S.C. § 1396r-5 [d] [5] [2012]): "If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance . . . shall be not less than the amount of the monthly income so ordered."

The plaintiffs, P and S, appealed to the trial court from the decision of an administrative hearing officer for the defendant, the Commissioner of Social Services, upholding a determination that P was not entitled to a community spouse allowance in connection with the calculation of certain Medicaid benefits for long-term residential care provided to P's late wife, M. Subsequent to M's admission to a skilled nursing facility, the Probate Court appointed S as conservator of M's estate. S then filed an application with the Probate Court pursuant to § 45a-655, seeking spousal support from M's income. Following a hearing, the Probate Court issued a decree that, inter alia, directed S to pay M's total net monthly

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

income to P as spousal support. The commissioner was provided with timely notice of the application, hearing, and decree. An application was subsequently filed with the Department of Social Services seeking Medicaid benefits for M. The department granted that application after M's death but, in doing so, declined to follow the community spouse allowance set by the Probate Court's decree, determining that no such allowance was available to P under department policy. After the department's decision was upheld by the hearing officer, the plaintiffs appealed to the trial court, claiming that the calculation of the community spouse allowance was controlled by the Probate Court's spousal support order. The trial court agreed and, accordingly, rendered judgment sustaining the administrative appeal. On the commissioner's subsequent appeal, *held* that the trial court properly sustained the plaintiffs' administrative appeal, this court having concluded that the Probate Court's spousal support decree was binding on the commissioner: the language of § 45a-655 indicated the legislature's desire to carve out an exception to the Probate Court's authority to award spousal support in cases where the institutionalized spouse has applied for or is receiving Medicaid benefits, insofar as that language limits awards in such cases to the amount approved by the department, and, in the present case, the Probate Court had issued its decree before M had applied for or received such benefits; moreover, construing § 45a-655 in a manner precluding a conservator from paying spousal support pursuant to a preexisting Probate Court order in an amount exceeding that permitted by the department would be inconsistent with the statute's plain language, would require the conservator to act contrary to an effective Probate Court order, and would render meaningless a statutory (§ 17b-261b) provision permitting the commissioner to intervene in such proceedings before the Probate Court; furthermore, continued enforcement of a spousal support order issued by the Probate Court is wholly consistent with 42 U.S.C. § 1396r-5, which expressly contemplates orders in existence when eligibility for Medicaid benefits is determined.

Argued September 12, 2017—officially released February 1, 2018**

*Procedural History*

Appeal from the decision of the defendant calculating certain Medicaid benefits, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Noble, J.*; judgment sustaining the appeal, from which the defendant appealed. *Affirmed.*

** February 1, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Jennifer L. Callahan*, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Hugh Barber*, assistant attorney general, for the appellant (defendant).

*Carmine Perri*, with whom, on the brief, was *Bruce A. Fontanella*, for the appellees (plaintiffs).

*Daniel J. Klau* filed a brief for the Office of the Probate Court Administrator as amicus curiae.

*Opinion*

ROBINSON, J. In this appeal, we consider the relationship between General Statutes § 45a-655 (b) and (d)[1] in determining whether a spousal support order

[1] General Statutes § 45a-655 provides in relevant part: "(a) The conservator shall manage all the estate and apply so much of the net income thereof, and, if necessary, any part of the principal of the property, which is required to support the conserved person and those members of the conserved person's family whom the conserved person has the legal duty to support and to pay the conserved person's debts, and may sue for and collect all debts due the conserved person. The conservator shall use the least restrictive means of intervention in the exercise of the conservator's duties and authority.

"(b) Any conservator of the estate of a married person may apply such portion of the property of the conserved person to the support, maintenance and medical treatment of the conserved person's spouse which the Court of Probate, upon hearing after notice, decides to be proper under the circumstances of the case. . . .

"(d) In the case of any person receiving public assistance, state-administered general assistance or Medicaid, the conservator of the estate shall apply toward the cost of care of such person any assets exceeding limits on assets set by statute or regulations adopted by the Commissioner of Social Services. Notwithstanding the provisions of subsections (a) and (b) of this section, in the case of an institutionalized person who has applied for or is receiving such medical assistance, no conservator shall apply and no court shall approve the application of (1) the net income of the conserved person to the support of the conserved person's spouse in an amount that exceeds the monthly income allowed a community spouse as determined by the Department of Social Services pursuant to [42 U.S.C. § 1396r-5 (d) (2) through (4)], or (2) any portion of the property of the conserved person to the support, maintenance and medical treatment of the conserved person's spouse in an amount that exceeds the amount determined allowable by the department pursuant to [42 U.S.C. § 1396r-5 (f) (1) and (2)], notwithstanding the provisions of [42 U.S.C. § 1396r-5 (f) (2) (A) (iv)], unless such limitations on income would result in significant financial duress. . . ."

previously rendered by the Probate Court is binding on the defendant, the Commissioner of Social Services (commissioner), when calculating the allowance that may be diverted to the support of the community spouse of a Medicaid eligible institutionalized person pursuant to 42 U.S.C. § 1396r-5, a provision originally enacted as part of the Medicare Catastrophic Coverage Act of 1988 (catastrophic coverage act), Pub. L. No. 100-360, § 303 (a) (1) (B), 102 Stat. 683, 754. The commissioner appeals[2] from the judgment of the trial court sustaining the administrative appeal brought by the plaintiffs, Paul Valliere (Paul) and Ellen Shea, the conservatrix and executrix of the estate of Paul's late wife, Marjorie Valliere (Marjorie), from the commissioner's decision to set a community spouse allowance for Paul in the amount of $0 with respect to the Medicaid benefit that paid for Marjorie's long-term residential care. On appeal, the commissioner contends that, because § 45a-655 (b) and (d) must be construed in light of the federal single state agency requirement that is implemented by General Statutes § 17b-261b,[3] the trial court improperly

[2] The commissioner 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.

[3] General Statutes § 17b-261b provides: "(a) The Department of Social Services shall be the sole agency to determine eligibility for assistance and services under programs operated and administered by said department.

"(b) Any person filing an application with a probate court for spousal support, in accordance with section 45a-655, shall certify to that court that a copy of the application and accompanying attachments have been sent by regular mail, postage prepaid, to the Commissioner of Social Services. The probate court shall provide a notice of hearing to the commissioner at least fifteen business days prior to the hearing. The commissioner or a designee shall have the right to appear at such hearing and may present the commissioner's position as to the application in person or in writing. Any final order by the court on such application for spousal support shall be sent to the commissioner within seven business days of the order.

"(c) No probate court shall approve an application for spousal support of a community spouse unless (1) notice is provided in accordance with subsection (b) of this section, and (2) the order is consistent with state and federal law."

concluded that the community spouse allowance was controlled by a spousal support order rendered by the Probate Court prior to the application for, and award of, Medicaid benefits. We disagree and, accordingly, affirm the judgment of the trial court.

The record reveals the following undisputed facts and relevant procedural history. On November 18, 2012, Marjorie was admitted to MidState Medical Center (MidState). On November 24, 2012, MidState discharged Marjorie to the Meriden Center, a skilled nursing facility, where she resided until her death on October 17, 2013. Paul continued to reside in their family home in Meriden. On March 18, 2013, the Probate Court appointed Shea, Marjorie's daughter, as conservatrix of Marjorie's estate.[4]

On March 21, 2013, Shea filed an application in the Probate Court seeking an order of spousal support for Paul pursuant to § 45a-655, contending that, in order to continue to reside in the community and pay the cost of his own "support, maintenance and medical treatment,"[5] Paul needed to "own, use and exercise control over all or some of the [nonincome] producing assets, the income producing assets, [Marjorie's] total net income and [his own] total net income, all retroactive to March 18, 2013," the date that the Probate Court appointed Shea as conservatrix. The application further represented that Marjorie was "not receiving public assistance, state administered general assistance, or

[4] In granting the application, the Probate Court accepted Shea's representation that Marjorie "suffers from severe dementia that makes it impossible for her to manage her financial and business affairs without complete assistance."

[5] In the application, Shea claimed that Marjorie "has the legal duty to support [her] spouse," and is "unable to provide for her own support, maintenance, and medical treatment." Shea also represented that, "[u]nless there is an unanticipated, major improvement [in her] physical, emotional and mental health, [Marjorie] will reside at a skilled nursing facility or a long-term care facility until her death."

Medicaid, and [she] has not applied for or is receiving such medical assistance, but [she] reserves, and does not waive, *her* right to prepare, file and prosecute in the future [an] application, claiming [Medicaid] benefits." (Emphasis in original.) Shea provided notice of the application to the commissioner and to the Department of Administrative Services.

Following a hearing, on June 25, 2013, the Probate Court issued a decree, pursuant to §§ 45a-655 (a) and (b), and 17b-261b, which made findings in accordance with the representations in the application, namely, that, "[i]n order to continue to reside in the community and pay the cost of [his own] support, maintenance and medical treatment," Paul "now requires, and in the future will continue to require, to own, to use, and to exercise control over all or some of the [nonincome] producing assets, of the income producing assets, of [Marjorie's] total net income and [his own] total net income." In addition to directing Shea to transfer Marjorie's assets to Paul, the Probate Court ordered Shea, inter alia, to pay Marjorie's total net monthly income of $1,170.33 to Paul as spousal support, "which amount . . . is known, identified, and defined as . . . the community spouse allowance in [42 U.S.C. § 1396r-5 (d) (5)][6] and in [Dept. of Social Services, Uniform Policy Manual § 5035.30 (B) (1) (b)]."[7] (Footnote added.) The

[6] Title 42 of the 2012 edition of the United States Code, § 1396r-5 (d) (5), provides: "If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered."

[7] Dept. of Social Services, Uniform Policy Manual § 5035.30 provides:

"A. Use of Community Spouse Allowance (CSA)

"1. The CSA is used as an income deduction in the calculation of the [posteligibility] applied income of an institutionalized spouse (IS) only when the IS makes the allowance available to the community spouse (CS) or for the sole benefit of the CS. . . .

"2. For the purpose of using a CSA, the [d]epartment considers a CS to include a spouse receiving home and community based services under a Medicaid waiver.

Probate Court directed that this payment be made retroactive to November 18, 2012, the date Marjorie was admitted to MidState. The Probate Court provided notice of the hearing and a copy of the decree to the commissioner.

On July 15, 2013, an application was filed with the Department of Social Services (department) seeking Medicaid assistance for Marjorie. The department granted that application but, in doing so, declined to follow the community spouse allowance set in the Probate Court's decree. Instead, the department determined that Marjorie had an applied income obligation that required her to pay $898.45 monthly toward her care from April, 2013, through her death in October,

"B. Calculation of CSA

"1. The CSA is equal to the greater of the following:

"a. the difference between the Minimum Monthly Needs Allowance (MMNA) and the community spouse gross monthly income; or

"b. the amount established pursuant to court order for the purpose of providing necessary spousal support.

"2. The MMNA is that amount which is equal to the sum of:

"a. the amount of the community spouse's excess shelter cost as calculated in section 5035.30 [(B) (3)]; and

"b. 150 percent of the monthly poverty level for a unit of two persons.

"3. The community spouse's excess shelter cost is equal to the difference between his or her shelter cost as described in section 5035.30 [(B) (4)] and 30 [percent] of 150 percent of the monthly poverty level for a unit of two persons.

"4. The community spouse's monthly shelter cost includes:

"a. rental costs or mortgage payments, including princip[al] and interest; and

"b. real estate taxes; and

"c. real estate insurance; and

"d. required maintenance fees charged by condominiums or cooperatives except those amounts for utilities; and

"e. Standard Utility Allowance (SUA) used in the FS program for the community spouse.

"5. The MMNA may not exceed the greatest of either:

"a. the maximum MMNA; or

"b. an amount established through a [f]air [h]earing."

2013, and that no community spouse allowance was available pursuant to department policy.[8]

On February 13, 2014, Shea requested an administrative fair hearing for the purpose of challenging the department's refusal to accept the community spouse allowance set by the Probate Court. After a hearing, the commissioner, acting through a hearing officer, issued a decision on October 10, 2014, upholding the denial of the requested community spouse allowance and the determination of Marjorie's applied income obligation. The hearing officer concluded that, under § 17b-261b, the department is the "sole agency" tasked with determining eligibility for Medicaid benefits under state and federal law, and the Probate Court lacked the authority to set the community spouse allowance for Medicaid purposes. Specifically, the hearing officer concluded that, once an individual applies for Medicaid under § 45a-655 (d), only the department may set the community spouse allowance. Rejecting the plaintiffs' reliance on 42 U.S.C. § 1396r-5 (d) (5), the federal Medicaid statute addressing preexisting court orders, the hearing officer criticized the plaintiffs for what he described as "obvious" forum shopping, observing that it was "clear from a review of the Probate Court decree and the sequence of events that . . . the Probate Court [was being used] to make a Medicaid eligibility determination, which the law does not permit." The hearing officer subsequently denied a timely request for reconsideration.

On December 8, 2014, the plaintiffs filed an administrative appeal pursuant to General Statutes § 4-183 challenging the commissioner's decision. In its comprehensive memorandum of decision, the trial court

[8] This determination had the concomitant effect of reducing Medicaid assistance in the form of payment to the long-term care facility by $898.45 monthly during that period.

observed that this case concerned the interplay between the federal and state statutes implementing the catastrophic coverage act. Emphasizing that no party had challenged the Probate Court's determination with respect whether the support ordered was " 'proper under the circumstances of the case,' " the trial court concluded that, consistent with 42 U.S.C. § 1396r-5 (d) (5), § 45a-655 (b) authorized the Probate Court to set the community spouse allowance at the time that it did because Marjorie had not yet applied for or received Medicaid benefits. The trial court further determined that the restriction in § 45a-655 (d) applies only when "an institutionalized conserved person 'has applied for or is receiving [Medicaid benefits].' " The trial court determined that these subsections of § 45a-655 "thus harmonized the standards the Probate Court must utilize in the approval of a [community spouse allowance] with the Medicaid scheme. If no prior court order has entered then the department is free, indeed required, to apply the standard enunciated by [42 U.S.C. § 1396r-5 (d) (2) through (4)].[9] Where a prior court order regard-

[9] Title 42 of the 2012 edition of the United States Code, § 1396r-5 (d), provides in relevant part: "Protecting income for community spouse

"(1) Allowances to be offset from income of institutionalized spouse

"After an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the spouse's monthly income the following amounts in the following order:

"(A) A personal needs allowance (described in section 1396a [q] [1] of this title), in an amount not less than the amount specified in section 1396a (q) (2) of this title.

"(B) A community spouse monthly income allowance (as defined in paragraph [2]), but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

"(C) A family allowance, for each family member, equal to at least [one-third] of the amount by which the amount described in paragraph (3) (A) (i) exceeds the amount of the monthly income of that family member.

"(D) Amounts for incurred expenses for medical or remedial care for the institutionalized spouse (as provided under section 1396a [r] of this title).

"In subparagraph (C), the term 'family member' only includes minor or dependent children, dependent parents, or dependent siblings of the institutionalized or community spouse who are residing with the community spouse.

"(2) Community spouse monthly income allowance defined

"In this section (except as provided in paragraph [5]), the 'community spouse monthly income allowance' for a community spouse is an amount by which—

"(A) except as provided in subsection (e) of this section, the minimum monthly maintenance needs allowance (established under and in accordance with paragraph [3]) for the spouse, exceeds

"(B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance).

"(3) Establishment of minimum monthly maintenance needs allowance

"(A) In general

"Each State shall establish a minimum monthly maintenance needs allowance for each community spouse which, subject to subparagraph (C), is equal to or exceeds—

"(i) the applicable percent (described in subparagraph [B]) of [one-twelfth] of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with section 9902 [2] of this title) for a family unit of 2 members; plus

"(ii) an excess shelter allowance (as defined in paragraph [4]).

"A revision of the official poverty line referred to in clause (i) shall apply to medical assistance furnished during and after the second calendar quarter that begins after the date of publication of the revision.

"(B) Applicable percent

"For purposes of subparagraph (A) (i), the 'applicable percent' described in this paragraph, effective as of . . .

"(iii) July 1, 1992, is 150 percent.

"(C) Cap on minimum monthly maintenance needs allowance

"The minimum monthly maintenance needs allowance established under subparagraph (A) may not exceed $1,500 (subject to adjustment under subsections [e] and [g] of this section).

"(4) Excess shelter allowance defined

"In paragraph (3) (A) (ii), the term 'excess shelter allowance' means, for a community spouse, the amount by which the sum of—

"(A) the spouse's expenses for rent or mortgage payment (including principal and interest), taxes and insurance and, in the case of a condominium or cooperative, required maintenance charge, for the community spouse's principal residence, and

"(B) the standard utility allowance (used by the State under section 2014 [e] of Title 7) or, if the State does not use such an allowance, the spouse's actual utility expenses,

"exceeds 30 percent of the amount described in paragraph (3) (A) (i), except that, in the case of a condominium or cooperative, for which a maintenance charge is included under subparagraph (A), any allowance under subparagraph (B) shall be reduced to the extent the maintenance charge includes utility expenses. . . ."

ing a [community spouse allowance] has entered, however, the department is obliged to adopt that amount pursuant to [42 U.S.C.] § 1396r-5 (d) (5)."[10] (Footnote added.) Accordingly, the trial court rendered judgment sustaining the plaintiffs' administrative appeal from the department's community spouse allowance calculation "that would have resulted in [no] community spouse allowance and $898.45 in applied income rather than [the] prior Probate Court . . . calculation [that] would have resulted in a [community spouse allowance] of $1170.33 and no applied income." This appeal followed.

On appeal, the commissioner argues that 42 U.S.C. § 1396r-5 (d) (2) and (3) sets a uniform national standard for the calculation of community spouse allowances, subject to an exception in 42 U.S.C. § 1396r-5 (d) (5) for court-ordered support, and for "exceptional circumstances resulting in significant financial duress" under 42 U.S.C. § 1396r-5 (e) (2), which provides a fair hearing procedure for spouses dissatisfied with their allowances.[11] The commissioner then contends that

[10] The trial court also rejected the commissioner's argument that § 17b-261b (a), which renders the department the "sole agency" to administer Medicaid in Connecticut; see footnote 3 of this opinion; gives the department the exclusive right to determine the community spouse allowance. The trial court described this contention as "an absurd and untenable position" that would allow the department "to ignore the federal Medicaid statutory framework which [it is] obliged to follow pursuant to [§ 17b-261b]." Specifically, the trial court concluded that the commissioner is required "to administer the Medicaid program in accordance with [federal law], which, in turn, explicitly require[s] the [community spouse allowance] to be not less than an amount ordered by a court." The trial court further emphasized that the commissioner was not without remedy in the Probate Court proceeding, insofar as § 17b-261b (b) requires notice to the commissioner and confers standing upon him to seek a provision in the Probate Court's order modifying its community spouse allowance "upon the application or receipt of Medicaid benefits by a conserved person."

[11] Title 42 of the 2012 edition of the United States Code, § 1396r-5 (e) (2), provides: "Fair hearing

"(A) In general

"If either the institutionalized spouse or the community spouse is dissatisfied with a determination of—

§ 17b-261b implements the federal "single state agency" requirement of 42 U.S.C. § 1396a (a) (5), which renders the department the "sole agency to determine eligibility" for Medicaid and, therefore, restricts the Probate Court's authority to approve community spousal support to an "order [that] is consistent with state and federal law." The commissioner further contends that the Probate Court exceeded its authority under § 46b-655 (b) because only the department may determine the Medicaid community spouse allowance. As such, the commissioner then argues that the Probate Court exceeded its limited authority under § 45a-655 (d) by

"(i) the community spouse monthly income allowance;

"(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection [d] [2] [B] of this section);

"(iii) the computation of the spousal share of resources under subsection (c) (1) of this section;

"(iv) the attribution of resources under subsection (c) (2) of this section; or

"(v) the determination of the community spouse resource allowance (as defined in subsection [f] [2] of this section);

"such spouse is entitled to a fair hearing described in section 1396a (a) (3) of this title with respect to such determination if an application for benefits under this subchapter has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

"(B) Revision of minimum monthly maintenance needs allowance

"If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d) (2) (A) of this section, an amount adequate to provide such additional income as is necessary.

"(C) Revision of community spouse resource allowance

"If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f) (2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance."

ordering community spouse support in an amount that exceeded that which the department could order pursuant to 42 U.S.C. § 1396r-5 (2) through (4). To this end, the commissioner cites *Gomprecht* v. *Gomprecht*, 86 N.Y.2d 47, 652 N.E.2d 936, 629 N.Y.S.2d 190 (1995), and *M.E.F.* v. *A.B.F.*, 393 N.J. Super. 543, 925 A.2d 12 (App. Div.), cert. denied, 192 N.J. 479, 932 A.2d 29 (2007), for the proposition that the retroactive nature of the Medicaid determination, which precedes the date of the probate decree, limited the court's discretion under § 46b-655 (d) to render an award that exceeded the federal limitations.

In response, the plaintiffs, supported by the amicus curiae, the Office of the Probate Court Administrator,[12] emphasize the complementary roles of the Probate Court and the department within the Medicaid scheme as envisioned by § 17b-261b (b), which requires the Probate Court and the applicant to provide notice of the spousal support application and order to the department, which then has the right to appear at the hearing on the application. Consistent with the federal single state agency requirement, the plaintiffs contend that § 17b-261b (b) allows the commissioner to take a position on a proposed spousal support order before it is rendered by the court pursuant to § 45a-655 (b), insofar as the federal and state statutes and § 5035.30 (B) (1) (b) of the Uniform Policy Manual require it to follow preexisting court orders. Also relying on *M.E.F.* v. *A.B.F.*, supra, 393 N.J. Super. 543, the plaintiffs argue that the trial court's interpretation of the federal and state statutes is consistent with the plain language of § 45a-655 (b) and, particularly, the tense of the verbs

[12] On September 12, 2017, after oral argument before this court, we, sua sponte, invited the Office of the Probate Court Administrator to file an amicus curiae brief in this appeal. We are grateful to the Probate Court Administrator for filing a comprehensive brief that was responsive to the practical concerns raised at oral argument.

used therein; they contend that the federal single state agency requirement under §§ 17b-261b and 45a-655 (d) was not triggered because the Probate Court application and decree preceded the application for Medicaid. Citing *Dept. of Social Services* v. *Saunders*, 247 Conn. 686, 715, 724 A.2d 1093 (1999), the plaintiffs further argue that the department's argument improperly seeks to diminish the Probate Court's statutory authority. We agree with the plaintiffs and conclude that, under the plain and unambiguous language of §§ 45a-655 and 17b-261b, and 42 U.S.C. § 1396r-5 (d) (5), the department was bound by the Probate Court's preexisting spousal support order when it determined that there would be no community spouse allowance under department policy.

In considering whether the Probate Court's order was binding upon the department's determination of the community spouse allowance, we first observe that the "Probate Court is a court of limited jurisdiction prescribed by statute, and it may exercise only such powers as are necessary to the performance of its duties. . . . As a court of limited jurisdiction, it may act only when the facts and circumstances exist upon which the legislature has conditioned its exercise of power. . . . Such a court is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." (Citations omitted; internal quotation marks omitted.) *Heussner* v. *Hayes*, 289 Conn. 795, 802–803, 961 A.2d 365 (2008); see also *In re Bachand*, 306 Conn. 37, 59–61, 49 A.3d 166 (2012) (Probate Court's limited jurisdiction creates constraints over its authority, even with respect to matter over which Superior Court has concurrent jurisdiction). Thus, whether the Probate Court had jurisdiction to render the decree challenged by the commissioner presents a question of statutory interpretation. See *In re Bachand*, supra, 42.

Given the procedural posture of this case, we review "the trial court's judgment pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. Under the UAPA, it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . [Similarly], this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . . Even if time-tested, we will defer to an agency's interpretation of a statute only if it is reasonable; that reasonableness is determined by [application of] our established rules of statutory construction. . . .

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent

of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and 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. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . The question of statutory interpretation presented in this case is a question of law subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 525–27, 93 A.3d 1142 (2014).

For purposes of the UAPA, no special deference is required because there is no claim that the department's construction of the applicable statutes is time-tested, or has previously been subject to judicial scrutiny. Thus, "[i]n order properly to characterize the issues on appeal, it is necessary to overview the complex of statutes and regulations governing [M]edicaid eligibility for institutionalized applicants. The [M]edicaid program, established in 1965 as Title XIX of the Social Security Act, and codified at 42 U.S.C. § 1396 et seq., is a joint federal-state venture providing financial assistance to persons whose income and resources are inadequate to meet the costs of necessary medical care. . . . States participate voluntarily in the [M]edicaid program, but participating states must develop a plan, approved by the

[S]ecretary of [H]ealth and [H]uman [S]ervices, containing reasonable standards . . . for determining eligibility for and the extent of medical assistance . . . . Connecticut has elected to participate in the [M]edicaid program and has assigned to the department the task of administering the program. . . . The department, as part of its uniform policy manual, has promulgated regulations governing the administration of Connecticut's [M]edicaid system. See General Statutes § 17b-260.

"In 1988, Congress passed into law the . . . catastrophic [coverage] act . . . . [The provision subsequently codified as 42 U.S.C. § 1396r-5] was intended . . . to ease the financial burden placed on a community spouse[13] under the prior statutory regime that required the institutionalized spouse to spend down a large portion of the couple's resources, and thus impoverish the community spouse, before becoming eligible for [M]edicaid. See, e.g., *Krueger Estate* v. *Richland County Social Services*, 526 N.W.2d 456, 458 (N.D. 1994) . . . . Under the catastrophic [coverage] act, a community spouse is entitled to receive a community spouse resource allowance (resource allowance), which is approximately one half of the couple's total liquid resources or $60,000, adjusted annually for inflation, whichever is less. 42 U.S.C. § 1396r-5 (f) (2) . . . . The resource allowance is protected from the institutionalized applicant's health care obligations and does not count against the applicant's financial eligibility.

"In addition, under the catastrophic [coverage] act, a community spouse is entitled to a minimum monthly maintenance needs allowance (minimum needs allow-

[13] "A 'community spouse' is defined as 'an individual who resides in the community [and] who is married to an individual who resides in a medical facility or [long-term] care facility . . . .' " *Burinskas* v. *Dept. of Social Services*, 240 Conn. 141, 148 n.8, 691 A.2d 586 (1997).

ance).[14] 42 U.S.C. § 1396r-5 (d) (3) . . . . If the community spouse's income from outside sources is insufficient to meet his minimum needs allowance, the institutionalized spouse is permitted to bridge this deficit by transferring income to the community spouse. 42 U.S.C. § 1396r-5 (d) (1) (B) and (2). If the transferred income is insufficient to reach the minimum needs allowance, the community spouse may then apply for an increase in his resource allowance to an amount adequate to fund his minimum needs allowance. 42 U.S.C. § 1396r-5 (e) (2) (C); see also *Krueger Estate* v. *Richland County Social Services*, supra, 526 N.W.2d 459. Because this increase in the resource allowance results from a transfer of resources from the institutionalized spouse to the community spouse,[15] the value of the institutionalized spouse's resources is brought closer to the eligibility level.[16]

[14] "This amount is equal to 150 percent of [one-twelfth of] the official poverty line for a family of two plus an 'excess shelter allowance.' 42 U.S.C. § 1396r-5 (d) (3)." *Burinskas* v. *Dept. of Social Services*, 240 Conn. 141, 149 n.9, 691 A.2d 586 (1997); see also footnote 9 of this opinion.

[15] "The income generated by the transferred resources is calculated as a percentage of those resources." *Burinskas* v. *Dept. of Social Services*, 240 Conn. 141, 150 n.10, 691 A.2d 586 (1997).

[16] As the United States District Court for the District of Connecticut recently explained: "When an institutionalized spouse first applies [for] Medicaid, the [s]tate [a]gency totals the assets of both the institutionalized [spouse] and the community spouse 'as of the beginning of the first continuous period of institutionalization . . . of the institutionalized spouse,' and divides that sum in half resulting in what is called a 'spousal share.' 42 U.S.C. § 1396r-5 (c) (1) (A). . . . This spousal share then becomes the basis for the [resource allowance]. 42 U.S.C. § 1396r-5 (f) (2). Thus, at the 'initial determination of eligibility,' the [s]tate Medicaid [a]gency treats 'the resources held by either the institutionalized spouse, the community spouse, or both' to be available to the institutionalized spouse, 42 U.S.C. § 1396r-5 (c) (2) (A), except that 'the [resource allowance] is considered unavailable to the institutionalized spouse . . . [so] all resources [exceeding the resource allowance] (excluding a . . . personal allowance reserved for the institutionalized spouse . . .) must be spent before eligibility can be achieved.' [*Wisconsin Dept. of Health & Human Services* v. *Blumer*, 534 U.S. 473, 482–83, 122 S. Ct. 962, 151 L. Ed. 2d 935 (2002), citing 42 U.S.C. § 1396r-5 (c) (2)]. In other words, aside from the calculated [resource allowance], all other community resources are considered in determining whether an

"Under 42 U.S.C. § 1396r-5 [(e) (2)][17] a community spouse may obtain an increase in his [resource allowance or] his minimum needs allowance [as determined by the department] by establishing, at a fair hearing, a need for additional income due to exceptional circumstances resulting in significant financial duress . . . ." (Citations omitted; footnotes added and omitted; internal quotation marks omitted.) *Burinskas* v. *Dept. of Social Services*, 240 Conn. 141, 148–50, 691 A.2d 586 (1997); see *Fagan* v. *Bremby*, 244 F. Supp. 3d 280, 281–82 (D. Conn. 2017); see also *Palomba-Bourke* v. *Commissioner of Social Services*, 312 Conn. 196, 203–206, 92 A.3d 932 (2014).

As is required by § 1-2z, we begin with the text of the statutes at issue, starting with § 45a-655 (b) and (d), which governs spousal support orders. Section 45a-655 (b) provides that the "conservator of the estate of a married person may apply such portion of the property of the conserved person to the support, maintenance and medical treatment of the conserved person's spouse which the Court of Probate, upon hearing after notice, decides to be proper under the circumstances of the case." Section 45a-655 (d), however, limits the authority of the conservator and the Probate Court with respect to "an institutionalized person who has applied for or is receiving . . . medical assistance," by providing that, "[n]otwithstanding the provisions of subsections (a) and (b) of this section, in the case of an institutionalized person *who has applied for or is receiving such medical assistance, no conservator shall apply and no court*

institutionalized spouse is eligible for Medicaid, meaning that if the remaining resources exceed the Medicaid limit, the institutionalized spouse must 'spend down' the remaining resources to qualify. . . . This statutory scheme permits the institutionalized spouse to qualify for Medicaid while also allowing the community spouse to retain the [resource allowance] to support him[self] or herself." (Citations omitted; emphasis omitted; footnote omitted.) *Fagan ex rel. Fagan* v. *Bremby*, 244 F. Supp. 3d 280, 282 (D. Conn. 2017).

[17] See footnote 11 of this opinion.

*shall approve* the application of (1) the net income of the conserved person to the support of the conserved person's spouse in an amount that exceeds the monthly income allowed a community spouse as determined by the [department] pursuant to [42 U.S.C. 1396r-5 (d) (2) through (4)], *or* (2) any portion of the property of the conserved person to the support, maintenance and medical treatment of the conserved person's spouse in an amount that exceeds the amount determined allowable by the department pursuant to [42 U.S.C. § 1396r-5 (f) (1) and (2)], notwithstanding the provisions of [42 U.S.C. § 1396r-5 (f) (2) (A) (iv)], unless such limitations on income would result in significant financial duress." (Emphasis added.)

When these subsections are read in juxtaposition, it is apparent that the legislature's use of the word "notwithstanding" in subsection (d) indicates its desire to carve out an exception to the authority of the Probate Court and conservator when a person has sought or is receiving medical assistance, insofar as it limits the court's authority to award support to the amount approved by the department pursuant to 42 U.S.C § 1396r-5 (d) (2) through (4). See *Gay & Lesbian Law Students Assn.* v. *Board of Trustees*, 236 Conn. 453, 473, 673 A.2d 484 (1996). "[If] there are two provisions in a statute, one of which is general and designed to apply to cases generally, and the other is particular and relates to only one case or subject within the scope of a general provision, then the particular provision must prevail; and if both cannot apply, the particular provision will be treated as an exception to the general provision." (Internal quotation marks omitted.) *Gifford* v. *Freedom of Information Commission*, 227 Conn. 641, 652–53, 631 A.2d 252 (1993). "[W]e have long held that provisos and exceptions to statutes are to be strictly construed with doubts resolved in favor of the general rule rather than the exception and that those who claim

the benefit of an exception under a statute have the burden of proving that they come within the limited class for whose benefit it was established." (Internal quotation marks omitted.) *Gay & Lesbian Law Students Assn.* v. *Board of Trustees*, supra, 473–74; see also *Gifford* v. *Freedom of Information Commission*, supra, 655 n.15 (describing use of language following word "notwithstanding" to broaden or narrow scope of exception).

Moreover, the legislature's use of the present perfect and present progressive verb tenses in § 45a-655 (d) is significant. Specifically, the legislature has restricted the Probate Court's authority only in those situations in which the institutionalized spouse "has applied for or is receiving" medical assistance. General Statutes § 45a-655 (d); see also *Schieffelin & Co.* v. *Dept. of Liquor Control*, 194 Conn. 165, 175, 479 A.2d 1191 (1984) ("[t]he use of the present perfect tense of a verb indicates an action or condition that was begun in the past and is still going on or was just completed in the present"); *Pollansky* v. *Pollansky*, 144 Conn. App. 188, 193, 71 A.3d 1276 (noting that present perfect tense as used in notice to quit statute, General Statutes § 47a-23 [a] [3], contemplates "termination [of tenancy] that occurs simultaneously with the delivery of a notice to quit"), cert. denied, 310 Conn. 919, 76 A.3d 633 (2013). Moreover, "[w]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed." (Internal quotation marks omitted.) *State* v. *B.B.*, 300 Conn. 748, 759, 17 A.3d 30 (2011). Put differently, it appears that the commissioner asks us to rewrite § 45a-655 by importing restrictions from subsection (d) into subsection (b) where none exists, which violates the well established maxim that, "[a]s a general matter, this court does not read language into a statute.

. . . [W]e are bound to interpret legislative intent by referring to what the legislative text contains, not by what it might have contained." (Citation omitted; internal quotation marks omitted.) *State* v. *George J.*, 280 Conn. 551, 570, 910 A.2d 931 (2006), cert. denied, 549 U.S. 326, 127 S. Ct. 1919, 167 L. Ed. 2d 573 (2007).

The commissioner, however, contends to the contrary, arguing that, under the plain language of § 45a-655 (d), the conservator is precluded from paying spousal support in excess of that permitted under the Medicaid scheme, despite the existence of a preexisting Probate Court order mandating a greater support amount. We disagree. First, it is inconsistent with the plain language of the statute in two different ways. The use in § 45a-655 (d) of the conjunctive word "and" between the phrases "no conservator shall apply" and "no court shall approve the application" does not suggest a statutorily mandated change to an existing court order but, rather, imparts a limitation on the conservator's authority to file an application, and the court's authority to approve that application once made by the conservator, upon the existence of certain conditions precedent—namely, an application for, or the receipt of, medical assistance. Put differently, had the legislature intended to limit the authority of the conservator independent of the Probate Court, it, as it did in defining the condition precedent in the preceding clause, could have used the disjunctive word "or" to link those terms. See, e.g., *State* v. *Dennis*, 150 Conn. 245, 248, 188 A.2d 65 (1963) ("[t]he use of the disjunctive 'or' between the two parts of the statute indicates a clear legislative intent of separability"). That this sentence governs only the actions of the conservator and the Probate Court in concert is further demonstrated by the structure of the statute, insofar as the first sentence of § 45a-655 (d) pertains only to the obligations of the conservator by herself, providing: "In the case of any person receiving public assistance, state

administered general assistance or Medicaid, the conservator of the estate shall apply toward the cost of care of such person any assets exceeding limits on assets set by statute or regulations adopted by the Commissioner of Social Services."

Second, as the Office of the Probate Court Administrator aptly points out in its amicus brief, the commissioner's interpretation, which would potentially require the conservator to act contrary to an existing Probate Court support order, puts the conservator in an "untenable" situation because "when the Probate Court has expressly authorized or approved specific conduct by the conservator, the conservator is not acting on behalf of the conservatee, but as an agent of the Probate Court." *Gross* v. *Rell*, 304 Conn. 234, 251, 40 A.3d 240 (2012); see also *Elmendorf* v. *Poprocki*, 155 Conn. 115, 118, 230 A.2d 1 (1967) (Probate Court "is primarily entrusted with the care and management of the ward's estate, and, in many respects, the conservator is but the agent of the court. . . . A conservator has only such powers as are expressly or impliedly given to him by statute. . . . In exercising those powers, he is under the supervision and control of the Probate Court." [Citations omitted.]); *Johnson's Appeal from Probate*, 71 Conn. 590, 598, 42 A. 662 (1899) (noting that conservator "exercises his statutory power . . . subject to [the Probate Court's] power to approve or disapprove of his action"); cf. *Gross* v. *Rell*, supra, 254 (conservator is fiduciary of conservatee when action has not been approved or authorized by Probate Court). In the absence of clear and unambiguous statutory language nullifying the existing Probate Court order, that order remains effective; we decline to interpret statutes in a manner that would require an agent or officer of that court to disregard such an order.[18]

[18] Although not informative of our decision given the plain and unambiguous statutory language; see General Statutes § 1-2z; it is nevertheless interesting to note the testimony of Audrey Rowe, the Commissioner of Income

Although we agree with the commissioner that we must read § 45a-655 in conjunction with § 17b-261b, which sets out the obligations of the Probate Court to the commissioner with regard to applications for spousal support, such a reading does not dictate the result sought by the commissioner. Section 17b-261b implements the single state agency requirement under the federal Medicaid statutes; see 42 U.S.C. § 1396a (a) (5) (2012); insofar as it provides that the department "shall be the sole agency to determine eligibility for assistance and services under programs operated and administered by said department." General Statutes § 17b-261b (a). It also, however, contemplates the Probate Court having a role in that process, particularly with respect to the issuance of spousal support orders. Section 17b-261b (c) limits the authority of the Probate Court to approve an application for an order of community spousal support, providing: "No probate court shall approve an application for spousal support of a community spouse unless (1) notice is provided in accordance with subsection (b) of this section, and (2) the order is consistent with state and federal law." Section 17b-

Maintenance, in support of the bill that ultimately was enacted as § 45a-655 (d). See Public Acts 1992, No. 92-233, § 2. Commissioner Rowe's testimony in support of the bill provided that it "limits the authority of the Probate Court when dealing with an individual who has applied for, or receives, Medicaid. The [catastrophic coverage act] included provisions regarding the amount of income and assets that the spouse of an institutionalized Medicaid recipient was allowed to retain. The maximums . . . are generous amounts when one realizes that the taxpayers are paying to maintain this individual's spouse in a nursing home.

"Federal law requires us to accept the amount set by court order, but permits us to define which courts have jurisdiction in this matter. This proposal establishes that definition. Situations are now occurring whereby probate courts are allowing higher income and asset allowances than those listed [previously]. This proposal limits their authority by preventing them from ordering higher settlements than we could allow under the law. We would, however, continue to recognize court orders from [the] Superior Court." Conn. Joint Standing Committee Hearings, Human Services, Pt. 4, 1992 Sess., pp. 1121–22.

261b (b), in addition to setting forth the obligations of "[a]ny person filing an application" and the Probate Court to provide notice of the application, the hearing on the application, and the court's order to the commissioner, specifically affords the "commissioner or a designee" the right to "appear at such hearing and [to] present the commissioner's position as to the application in person or in writing." As the Office of the Probate Court Administrator contends in its amicus brief, if the terms of § 45a-655 (d) effectively nullified any existing order of spousal support upon an application for Medicaid, there would be no need for § 17b-261b, which the legislature enacted nine years after § 45a-655 (d),[19] mandating that the commissioner receive notice and the opportunity to be heard in the first instance with respect to any application for spousal support. "In cases in which more than one [statutory provision] is involved, we presume that the legislature intended [those provisions] to be read together to create a harmonious body of law . . . and we construe the [provisions], if possible, to avoid conflict between them." (Internal quotation marks omitted.) *Cardenas* v. *Mixcus*, 264 Conn. 314, 326, 823 A.2d 321 (2003); see also id., 322–23 ("[w]e presume that laws are enacted in view of existing relevant statutes" [internal quotation marks omitted]). Accordingly, the commissioner's suggested reading of the statutes at issue in this appeal would run afoul of the "basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provi-

[19] The legislature enacted § 17b-261b in 2001. See Public Acts, Spec. Sess., June, 2001, No. 01-2, § 5. This legislation also amended General Statutes (Rev. to 2001) § 45a-655 (d) slightly to eliminate the Probate Court's authority to grant increased assets and income distributions if necessary to generate income, and allowed the court to grant such increases only to avert "significant financial distress." Public Acts, Spec. Sess., June, 2001, No. 01-2, § 6. This, of course, suggests that the legislature was well aware of § 45a-655 (d) when it enacted § 17b-261b, strengthening the long established presumption to that effect even further. See, e.g., *Cardenas* v. *Mixcus*, 264 Conn. 314, 322–23, 823 A.2d 321 (2003).

sions. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or word is superfluous, void or insignificant." (Internal quotation marks omitted.) *Tomick* v. *United Parcel Service, Inc.*, 324 Conn. 470, 483, 153 A.3d 615 (2016).

Indeed, the continued enforcement of an order rendered under § 45a-655 (b) is wholly consistent with federal law, as is required by § 17b-261b (c). The federal statute governing community spouse support sets forth a detailed formula for calculating the community spouse allowance; see 42 U.S.C. § 1396r-5 (d) (2) through (4) (2012); subject to the exception governing preexisting court orders. 42 U.S.C. § 1396r-5 (d) (5) (2012). That exception provides: "If a court *has entered* an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered." (Emphasis added.) 42 U.S.C. § 1396r-5 (d) (5) (2012). Congress' use of the words "has entered," stated in the present perfect tense, indicates that 42 U.S.C. § 1396r-5 (d) (5) contemplates only court orders in existence at the time of the eligibility determination, such as the Probate Court decree at issue in the present appeal.[20] See *Schieffelin & Co.* v. *Dept. of Liquor Control*, supra, 194 Conn. 175.

The sister state cases upon which the parties rely do not directly counsel a result with respect to the language

[20] The commissioner contends that the decree rendered by the Probate Court in this case was not the kind of support order envisioned by Congress in its enactment of 42 U.S.C. § 1396r-5 (d) (5), insofar as it is representative of judicial overreach in its timing and use of Medicaid verbiage in setting forth the obligations of the payor spouse. Because neither federal nor state statutes create a look back period that restricts the timing of the court orders that would bind the commissioner in its Medicaid determination, the commissioner's criticism of the phrasing of the Probate Court's order ultimately exalts form over substance.

of our state statutes, but simply stand for the proposition that the relief available in the judicial forum is uniquely dependent on the state laws that intersect with the federal Medicaid statute. We do, however, find most persuasive *M.E.F.* v. *A.B.F.*, supra, 393 N.J. Super. 543, a decision from New Jersey's intermediate appellate court that, in many ways, presents the mirror image of the present case. In *M.E.F.*, the court directly considered the "relationship between the '[court-ordered] support' and 'fair hearing' provisions of the [catastrophic coverage act] in determining the [minimum monthly needs allowance] of a community spouse who seeks an upward modification of the allowance provided by the state . . . ." Id., 547. In that case, the institutionalized spouse had spent down his assets and was already receiving Medicaid. Id., 548. Rather than challenge the agency's determination of her minimum needs allowance through the fair hearing process, the community spouse renewed a motion for support previously filed in state family court, with notice to the state's social services agency. Id., 548–49. After reviewing the legislative history of the catastrophic coverage act, the New Jersey court stated that the "use of the past tense" in 42 U.S.C. § 1396r (d) (5) with respect to court-ordered support "suggests . . . that a community spouse . . . cannot, at this point, seek such an order, *not having previously obtained one. Indeed, a strong argument can be made that the* [*court-ordered*] *support provision is applicable only when such support has been obtained during spend-down and prior to a determination of Medicaid eligibility.* Such an interpretation would be consistent with a Congressional concern, expressed in the context of a discussion of the treatment of income, protection of income for the community spouse, and transfer of resources, that spouses not be worse off under proposed legislation than they were under existing law, which in some instances recognized spou-

sal support orders."[21] (Emphasis added.) Id., 554. The court nevertheless declined to resolve whether the fair hearing and court order provisions present two parallel alternatives for relief, given the posture of the case. Id., 557. Instead, to avoid the potential for "forum shopping" and "parallel litigation," the court held that, once the community spouse "embarked upon the administrative path by receiving and challenging the [monthly needs allowance] provided to her, [she was] limited to that path until a final administrative determination has been reached."[22] Id., 557–59; see also *H.K.* v. *Division of*

[21] The New Jersey court deemed it "noteworthy" that the federal statutes governing Medicaid do "not authorize the community spouse to obtain a court order after eligibility has been determined, nor [do they] explicitly permit parallel proceedings. [They] merely [recognize] the effect of an order of support *if it has been previously obtained*." (Emphasis added.) *M.E.F.* v. *A.B.F.*, supra, 393 N.J. Super. 555.

[22] We note that the reasoning of *M.E.F.* appears to have been undermined, but not expressly overruled, by a more recent decision from the same court. In *R.S.* v. *Division of Medical Assistance & Health Services*, 434 N.J. Super. 250, 272–75, 83 A.3d 868 (App. Div. 2014), the community spouse obtained a support order in family court prior to the filing of a Medicaid application by the institutionalized spouse; the administrative agency, however, declined to enforce the court order in determining the applicable resource allowance. In that case, the institutionalized spouse claimed that the "final agency decision, declining to enforce the [court order], violate[d] the plain language of [statutes] and regulations [governing the Medicaid program]." Id., 261. Specifically, the institutionalized spouse requested "a strict application of the canons of statutory interpretation," contending that the "plain language" of the relevant statutes directed that the court order should "control the [agency's] review." Id., 262. The court disagreed with these assertions and specifically held that "[s]uch a crabbed construction cannot stand as it abrogates the clear intent and purpose of the statute and obviates the [agency's] role in safeguarding limited Medicaid resources." Id. Rather, the court considered the legislative history of state and federal statutes governing the Medicaid program, and concluded that permitting the agency to disregard the court order would better effectuate "the broad federal and state goals of preventing the impoverishment of community spouses, while ensuring limited Medicaid resources are allocated prudently among those most in need." Id., 264; see id., 267 (positing that "the obvious intent of the [court order] was to maintain [community spouse's] lifestyle prior to . . . institutionalization at the expense of the Medicaid program"). We find *R.S.* unpersuasive. The reasoning in that case ignores the tense of the verbs employed with respect to court orders in both federal and state legislation

*Medical Assistance & Health Services*, 379 N.J. Super. 321, 329–31, 878 A.2d 16 (App. Div.) (declining to give effect to nonadversarial divorce order of support, rendered after filing of Medicaid application), cert. denied,

in attempting to reach a desired result, an approach to statutory analysis that, we note, would be wholly inconsistent with § 1-2z. We also note that the New Jersey Supreme Court has not yet considered the apparent inconsistency between *R.S.* and *M.E.F.*

We similarly disagree with *Arkansas Dept. of Health & Human Services* v. *Smith*, 370 Ark. 490, 491–92, 262 S.W.3d 167 (2007), in which a wife sought a judicial order of support prior to applying for Medicaid benefits to cover long-term care costs for her disabled husband. The Arkansas Supreme Court agreed with the argument of the state social services agency that, because the husband "had not applied for Medicaid and [the agency] had made no determination of his eligibility for benefits, [the husband and wife] had failed to exhaust their administrative remedies," thus, depriving the courts of subject matter jurisdiction. Id., 491. The court rejected an interpretation of 42 U.S.C. § 1396r-5 as providing "two alternative means by which a community spouse might obtain a higher resource or income allowance," that would have given the wife "discretion to choose which method she wanted to use to obtain a higher allowance." Id., 492. Emphasizing that the state social services agency is "the sole entity charged with administering Medicaid and determining eligibility for Medicaid benefits"; id., 499; the court agreed with the agency's argument that the wife was not "entitled to proceed directly to . . . court to obtain an order of support" and "was first required to avail herself of the administrative procedures set out in the [catastrophic coverage act]." Id., 493. The court concluded that the reference to a preexisting court order of support in 42 U.S.C. § 1396r-5 (d) (5) was "insufficient to confer jurisdiction, even [implicitly] . . . . This is particularly so when one considers that [42 U.S.C. § 1396r-5 (d) (5)] only generally reference[s] an order of spousal support . . . [and does] not mention a court-ordered [community spouse resource allowance, community spouse monthly income allowance, or minimum monthly needs allowance]. One who wishes to apply for Medicaid must go through the process established by Congress and the [s]tate and cannot do an 'end run' around that process by seeking a preemptive court order of spousal support." Id., 499. We disagree with the Arkansas court's construction of the federal statute and find it further distinguishable given the lack of a coordinate state statute like § 45a-655, which provides a clear delineation of the Probate Court's powers before and after an application for Medicaid. For these same reasons, we disagree with *Alford* v. *Mississippi Division of Medicaid*, 30 So. 3d 1212, 1220–21 (Miss.), cert. denied, 562 U.S. 889, 131 S. Ct. 224, 178 L. Ed. 2d 135 (2010), which followed *Arkansas Dept. of Health & Human Services* v. *Smith*, supra, 490, and *Amos* v. *Estate of Amos*, 267 S.W.3d 761, 763–64 (Mo. App. 2008), which employed a similar exhaustion analysis.

185 N.J. 393, 886 A.2d 663 (2005); *Gomprecht* v. *Gomprecht*, supra, 86 N.Y.2d 49–52 (family court required to apply minimum monthly needs and resource allowance standard under social services statute, along with "exceptional circumstances" standard for justification of increased support, in support action brought by community spouse against institutionalized spouse who was receiving Medicaid); *Blumberg* v. *Dept. of Human Services*, Docket No. M2000-00237-COA-R3-CV, 2000 WL 1586454, *2–34 (Tenn. App. October 25, 2000) (rejecting social services agency's reliance on single state agency provision set forth in 42 U.S.C. § 1396a [a] [5], and holding that agency was "without the authority" to ignore family court order of support to the community spouse because, had Congress wanted to foreclose courts from setting community spouse allowance, "it could simply have stated in precise language that the administrative process is the only procedure available").

Finally, at oral argument before this court, certain colloquies suggested that this interpretation of §§ 17b-261b and 45a-655 (b) and (d), and might well result in potential inequities among Medicaid recipients and a greater drain on the public fisc, insofar as persons with greater access to professional estate planning services would have the ability to maximize the preservation of their assets and income simply by obtaining a spousal support order from the Probate Court prior to filing the institutionalized spouse's application for Medicaid.[23] The department is not, however, powerless to protect the public fisc from such estate planning maneuvers. We emphasize that the department has statutory standing to appear in Probate Court under § 17b-261b (b) in

[23] Indeed, counsel for the plaintiffs posited that, under existing law, this sequence would properly form the basis of a long-term care plan optimized to maximize the family's estate. Cf. *M.E.F.* v. *A.B.F.*, supra, 393 N.J. Super. 558 ("recogniz[ing] the legitimacy of Medicaid spend-down plans as a means of apportioning assets in order to achieve Medicaid eligibility, even if, by the use of such plans, the funds reserved for public purposes are decreased").

response to any application for spousal support under § 45a-655,[24] and may advocate for the issuance of a spousal support order that reflects the potential for the future issuance of Medicaid benefits, consistent with "the circumstances of the case."[25] General Statutes § 45a-655 (b); see *M.E.F.* v. *A.B.F.*, supra, 393 N.J. Super. 558 ("dual purposes" of catastrophic coverage act—"to ensure that the community spouse has sufficient, but not excessive, income and to ensure that individuals not be permitted to avoid payment of their own fair

[24] Whether such appearances—which might take place in any one of our fifty-four probate districts—would pose an undue burden for the department was a topic of considerable discussion at oral argument before this court. The Probate Court Administrator's amicus brief assures us that such appearances would not be particularly onerous for the department or, by extension, the Office of the Attorney General. First, according to data maintained by the Probate Court Administrator, relatively few spousal support petitions are filed in Probate Court; in recent years, sixteen were filed in 2014, three were filed in 2015, and nine were filed in 2016. Second, the Probate Court Rules permit procedures allowing the commissioner to "participate in a hearing, conference or deposition by telephonic or other electronic means." Probate Court Rules § 66.1 (a). In determining whether to permit such a procedure in a particular case, the Probate Court may consider, inter alia, "the convenience of the parties and witnesses, including representatives of state agencies . . . ." Probate Court Rules § 66.1 (b) (8). Finally, the commissioner may be heard at the Probate Court hearing without using the Attorney General's resources because General Statutes § 45a-131 permits employees of certain state agencies, including the department, to participate in such proceedings without an attorney. Accordingly, it appears that the practical ramifications of our interpretation of the plain language of § 45a-655 are minimal, insofar as it is not unduly onerous for the department to participate in the Probate Court process with respect to requests for spousal support orders.

[25] Indeed, as the department conceded at oral argument, § 17b-261b (b) necessarily confers upon the department standing to appeal from a Probate Court spousal support order to the Superior Court pursuant to General Statutes § 45a-186. See *Bucholz's Appeal from Probate*, 9 Conn. App. 413, 423, 519 A.2d 615 (1987) ("The plaintiff's statutory aggrievement is based upon the statutory provision which enabled the plaintiff to file an application for guardianship. . . . Because the right to file an application for guardianship was expressly given to any adult person, it naturally follows that an adult person who filed an application but was denied the guardianship should be afforded an opportunity to appeal from the Probate Court's decision." [Citation omitted.]).

share for long-term care—are certainly relevant considerations" with respect to family court's application of statute that "permit[s] consideration of spousal 'actual need,' ability to pay, and '[a]ny other factors which the court may deem relevant' "); see also *Gomprecht* v. *Gomprecht*, supra, 86 N.Y.2d 52 (concluding that "due regard to the circumstances of the respective parties" standard of spousal support statute requires consideration of Medicaid factors with respect to institutionalized spouse already receiving Medicaid, including requiring showing of "exceptional circumstances" to justify increase in support, and "[t]he fact that one spouse is institutionalized at the public expense is a factor to be considered"). Should the department still deem this process insufficient to protect the public fisc, it is always free to seek corrective legislative action.[26] See, e.g., *Morris* v. *Oklahoma Dept. of Human Services*, 685 F.3d 925, 928 (10th Cir. 2012) ("[a]lthough we understand the district court's concerns regarding the exploitation of what can only be described as a loophole in the Medicaid statutes, we conclude that the problem can only be addressed by Congress"); accord *Commissioner of Public Safety* v. *Freedom of Information Commission*, supra, 312 Conn. 550 ("[t]he General Assembly retains the prerogative to modify or clarify [General Statutes] § 1-215 as it sees fit").

[26] For example, in the wake of the Tennessee Court of Appeals' decision in *Blumberg* v. *Dept. of Human Services*, supra, 2000 WL 1586454, that state's legislature enacted Tenn. Code Ann. § 71-5-121, which requires "court [to] apply the standards utilized to determine [M]edicaid eligibility in this state, regardless of any state laws relating to community property or the division of marital property," in "all actions" seeking support of community spouse. In a later case, *McCollom* v. *McCollom*, Docket No. M2011-00552-COA-R3-CV, 2012 WL 1268296, *6–7 (Tenn. App. April 12, 2012), the court relied on that statute to conclude that a trial court considering a support application had improperly failed to apply the "exceptional circumstances resulting in significant financial distress" standard under 42 U.S.C. § 1396r-5 (e) (2) (B).

Accordingly, insofar as the department failed to take advantage of its opportunity to seek appropriate relief in the Probate Court before an application for Medicaid was filed, we conclude that the Probate Court's spousal support order, rendered pursuant to the plain and unambiguous language of § 45a-655, was binding upon the department. The trial court, therefore, properly sustained the plaintiffs' administrative appeal.

The judgment is affirmed.

In this opinion the other justices concurred.

---

## TOWN OF GLASTONBURY *v.* METROPOLITAN DISTRICT COMMISSION
## (SC 19843)

Palmer, Robinson, D'Auria, Mullins and Vertefeuille, Js.*

*Syllabus*

The plaintiff town sought a judgment declaring that the defendant, a quasi-municipal corporation that provides potable water to certain member and nonmember towns, unlawfully imposed surcharges on the plaintiff and other nonmember towns. While this action was pending, legislation (S.A. 14-21) was passed that amended the defendant's charter and authorized it to impose a surcharge on nonmember towns. The trial court granted the plaintiff's motion for summary judgment, finding that the plaintiff's claim was justiciable, that the nonmember surcharges imposed on the plaintiff prior to the passage of S.A. 14-21 were unlawful, and that the plaintiff's claim was not barred by the equitable doctrine of laches. The defendant appealed from the judgment rendered in favor of the plaintiff, claiming that the passage of S.A. 14-21 had rendered the plaintiff's claim moot and that the trial court had improperly granted the plaintiff's motion for summary judgment. *Held* that the trial court having fully addressed in its memorandum of decision the arguments raised in this appeal, this court adopted the trial court's thoughtful and comprehensive memorandum of decision as a proper statement of the

* This appeal originally was argued before a panel of this court consisting of Justices Palmer, McDonald, Robinson, D'Auria, Mullins and Vertefeuille. Thereafter, Justice McDonald recused himself and did not participate in the consideration of this case.

facts and applicable law on those issues, and, accordingly, the trial court's judgment was affirmed.

Argued November 9, 2017—officially released March 6, 2018

*Procedural History*

Action for a judgment declaring whether the defendant possesses statutory authority to impose surcharges on certain of its customers, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Hon. Susan A. Peck*, judge trial referee, granted the plaintiff's motion for summary judgment and, exercising the powers of the Superior Court, rendered judgment thereon, from which the defendant appealed. *Affirmed*.

*Jeffrey J. Mirman*, with whom, on the brief, was *Alexa T. Millinger*, for the appellant (defendant).

*Proloy K. Das*, with whom were *Joseph B. Schwartz* and *Robert E. Kaelin*, for the appellee (plaintiff).

*Opinion*

PER CURIAM. The defendant in this declaratory judgment action, the Metropolitan District Commission, a quasi-municipal corporation that provides potable water to eight member and five nonmember towns in the greater Hartford area, appeals[1] from the judgment rendered by the trial court in favor of the plaintiff, the town of Glastonbury. The plaintiff, one of the nonmember towns, brought this action, seeking a determination by the court that, prior to 2014, the defendant unlawfully had imposed surcharges on it and the other nonmember towns. Thereafter, the trial court denied the defendant's motion to strike the plaintiff's complaint on the ground that the plaintiff was required but failed to join the other nonmember towns as indispensable parties. While

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

this action was pending, the legislature enacted No. 14-21 of the 2014 Special Acts (S.A. 14-21),[2] which amended the defendant's charter by authorizing the defendant to impose a surcharge on nonmember towns in an amount not to exceed the amount of the customer service charge. Following the passage of S.A. 14-21, the defendant filed a motion to dismiss, claiming that the special act was retroactive and rendered the plaintiff's claim moot because it answered in the affirmative the question then pending before the court, namely, whether the defendant had the authority to impose a surcharge on nonmember towns. The trial court disagreed and denied the motion, concluding that S.A. 14-21 was not retroactive, and, therefore, it remained to be determined whether the plaintiff was entitled to relief because the surcharges imposed prior to the passage of the special act were unlawful. Thereafter, the parties filed motions for summary judgment, and the trial court concluded that the surcharges imposed on the plaintiff prior to the passage of S.A. 14-21 were unlawful, the plaintiff's claim was not barred by the equitable doctrine of laches, and the plaintiff's claim was justiciable

[2] Number 14-21, § 1, of the 2014 Special Acts provides in relevant part: "The Metropolitan District is authorized to supply water to any town or city that is not a member town or city of the district, any part of which is situated not more than twenty miles from the state capitol at Hartford, or to the inhabitants thereof, or to any state facility located within such area, upon such terms as may be agreed upon . . . . Except as otherwise agreed between the district and a customer, the district shall supply water at water use rates and with customer service charges uniform with those charged within said district. Any nonmember town surcharge imposed on any such customer or inhabitant shall not exceed the amount of the customer service charge. The cost of constructing the pipe connection between the district and such town or city and the cost for capital improvements within such town or city shall be paid by such town or city or by the customers inhabiting such town or city. The cost of constructing the pipe connection between the district and any such state facility shall be paid by the state of Connecticut. Nothing herein shall authorize The Metropolitan District to supply any water in competition with any water system in any town or city, except by agreement."

because the plaintiff was entitled to reimbursement for the payments it had made to the defendant on account of the unlawful surcharges. In accordance with these conclusions, the trial court granted the plaintiff's motion for summary judgment and denied the defendant's motion for summary judgment. On appeal, the defendant claims that the trial court incorrectly determined that the plaintiff's claim was justiciable and not rendered moot by S.A. 14-21 or barred by the doctrine of laches.

After examining the record and briefs and considering the arguments of the parties, we are persuaded that the judgment of the trial court should be affirmed. The issues raised by the parties in their motions for summary judgment were resolved properly in the thoughtful and comprehensive memorandum of decision filed by the trial court.[3] Because that memorandum of decision also fully addresses the arguments raised in the present appeal, we adopt the trial court's well reasoned decision as a statement of the facts and the applicable law on those issues. See *Glastonbury* v. *Metropolitan District Commission*, Superior Court, judicial district of Hartford, Docket No. HHD-CV-14-6049007-S (May 12, 2016) (reprinted at 328 Conn. 326, 330, A.3d [2018]). It would serve no useful purpose for us to repeat that discussion here.[4] See, e.g., *Tzovolos* v. *Wiseman*, 300 Conn. 247, 253–54, 12 A.3d 563 (2011).

The judgment is affirmed.

[3] We note that the trial court's memorandum of decision on the parties' motions for summary judgment incorporated by reference that court's prior ruling on the defendant's motion to dismiss, in which the court rejected the defendant's contention that the plaintiff's claim was rendered moot by S.A.14-21. See *Glastonbury* v. *Metropolitan District Commission*, Superior Court, judicial district of Hartford, Docket No. HHD-CV-14-6049007-S (October 10, 2014) (59 Conn. L. Rptr. 108).

[4] The defendant also claims that the trial court improperly denied its motion to strike because the plaintiff failed to join as indispensable parties the approximately 9000 individual customers in the nonmember towns. The defendant did not claim before the trial court that the 9000 individual

## APPENDIX

## TOWN OF GLASTONBURY *v.* METROPOLITAN DISTRICT COMMISSION*

Superior Court, Judicial District of Hartford
File No. CV-14-6049007-S

Memorandum Filed May 12, 2016

*Proceedings*

Memorandum of decision on motions for summary judgment. *Defendant's motion denied; plaintiff's motion granted.*

*Joseph B. Schwartz* and *Robert E. Kaelin*, for the plaintiff.

*Jeffrey J. Mirman* and *Alexa T. Millinger*, for the defendant.

*Opinion*

PECK, J. This case concerns an action brought pursuant to General Statutes § 52-29 by the plaintiff, the town of Glastonbury, against the defendant, the Metropolitan District Commission, on February 21, 2014. The plaintiff seeks a declaratory judgment to establish that a surcharge imposed by the defendant on the plaintiff and other nonmember towns for water usage prior to October 1, 2014, was illegal. The complaint sets forth the following allegations. The plaintiff is a municipal corporation organized and existing under the laws of the state of Connecticut. The defendant is a quasi-municipal

customers in the nonmember towns were indispensable parties but claimed only that the nonmember towns themselves were indispensable parties. We decline to address the defendant's unpreserved challenge to the trial court's ruling on the motion to strike. See, e.g., *Safford* v. *Warden*, 223 Conn. 180, 189–90, 612 A.2d 1161 (1992) ("our general rule [is] that legal claims not raised at trial are not cognizable on appeal").

* Affirmed. *Glastonbury* v. *Metropolitan District Commission*, 328 Conn. 326, A.3d (2018).

corporation, established in 1929 by the Connecticut General Assembly. See 20 Spec. Acts 1204, No. 511 (1929). The defendant provides drinking water, water pollution control, mapping and household hazardous waste collection to eight member towns.[1] In addition, the defendant provides drinking water to residents and businesses in portions of Farmington, Glastonbury, East Granby, Portland and South Windsor. These towns are referred to as "[n]on-member" towns. Customers in the nonmembers towns receive only drinking water from the defendant. Approximately 9000 customers are located in the nonmember town areas. The plaintiff is a customer of the defendant. The plaintiff receives and pays for drinking water at various town facilities and properties.

The powers, duties, and obligations of the defendant are compiled in the Charter of the Metropolitan District (charter). When authorizing the defendant to provide water to nonmember towns in 1931, the General Assembly expressly mandated that the defendant must charge customers in nonmember towns "rates uniform with those charged within said district . . . ." 21 Spec. Acts 328, No. 358 (1931). The only additional charge the General Assembly authorized during this change was that the cost of pipe construction between the district and the nonmember town would be paid by the nonmember town. The plaintiff asserts that the defendant currently imposes a "nonmember surcharge" on recipients of water in nonmember towns, including the plaintiff. In 2011, the defendant added a nonmember surcharge of $52.68 to the annual bill of all water recipients in nonmember towns, irrespective of how much water, if any, was used. The surcharge was subsequently increased in 2013 to $423. In 2014, the amount was reduced to $198.96 after complaints from various non-

[1] Member towns are Bloomfield, East Hartford, Hartford, Newington, Rocky Hill, West Hartford, Wethersfield and Windsor.

member towns. According to the defendant, it intended to offset the 2014 surcharge reduction by extending the time period during which it would be paid to twenty-five years. The plaintiff further asserts that, although the defendant's representatives have stated that the addition of the foregoing surcharges reflect costs associated with capital improvements necessary to provide or maintain water service to each particular nonmember town, other information from the defendant has indicated that the surcharges in fact were an attempt to recapture district wide costs long ago incurred for capital improvements to the defendant's water infrastructure, beyond those relating to providing or maintaining water service to a particular community.

The plaintiff asserts that the General Assembly has not authorized the defendant to impose such surcharges, that the defendant does not have any legislative authority to impose these nonmember surcharges on the plaintiff, and, therefore, the surcharges are unlawful. Pursuant to § 52-29,[2] the plaintiff seeks a declaratory judgment ruling that the defendant has acted unlawfully, exceeded its legislative authority, and acted to the detriment of the plaintiff. On May 7, 2014, the Senate passed No. 14-21 of the 2014 Special Acts (S.A. 14-21), amending the charter to allow for surcharges.

On August 13, 2015, the plaintiff filed a motion for summary judgment on the ground that the defendant, as a matter of law, exceeded its statutory authority by imposing a nonmember surcharge on the plaintiff and cannot establish any of its special defenses. On December 11, 2015, the defendant filed a memorandum in opposition. That same day, the defendant filed its own motion for summary judgment on the ground that there

[2] General Statutes § 52-29 (a) provides: "The Superior Court in any action or proceeding may declare rights and other legal relations on request for such a declaration, whether or not further relief is or could be claimed. The declaration shall have the force of a final judgment."

is no justiciable case or controversy between the parties. On February 2, 2016, the plaintiff filed a brief in reply to the defendant's opposition and in opposition to the defendant's motion. The defendant filed a reply on February 10, 2016. The parties submitted evidence in support of their own motions and in opposition to the motions against them, which will be discussed below as necessary. Oral argument was held on the motions on February 11, 2016.

## I

## THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant's motion for summary judgment is premised on the ground that the plaintiff's claim is moot and otherwise nonjusticiable. Because this motion implicates the court's subject matter jurisdiction, it is addressed first. "Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction . . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. . . . Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . A case is considered moot if [the trial] court cannot grant . . . any practical relief through its disposition of the merits . . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Valvo* v. *Freedom of Information Commission*, 294 Conn. 534, 540–41, 985 A.2d 1052 (2010).

The defendant argues that there is no practical or effective relief being sought by the plaintiff, or which could otherwise be awarded, because members of the plaintiff's town council were unable to identify the plaintiff's objectives in seeking a declaratory judgment. Additionally, the defendant argues that S.A. 14-21 clarified and affirmed the defendant's right to impose a nonmember surcharge on the plaintiff, such that the defendant, by imposing such surcharges prior to that legislation, was acting within its statutory authority. In opposition, the plaintiff argues there is practical relief available to it and that the statements of the town council members cannot be interpreted as an admission to the contrary.

The defendant's argument concerning mootness arises from S.A. 14-21, which provides in relevant part: "The Metropolitan District is authorized to supply water to any town or city that is not a member town or city of the district, any part of which is situated not more than twenty miles from the state capitol at Hartford, or to the inhabitants thereof, or to any state facility located within such area, upon such terms as may be agreed upon, but all other sources belonging to any such town or city shall be developed by such consumer or made available for development by said district. Except as otherwise agreed between the district and a customer, *the district shall supply water at water use rates and with customer service charges uniform with those charged within said district. Any nonmember town surcharge imposed on any such customer or inhabitant shall not exceed the amount of the customer service charge.* The cost of constructing the pipe connection between the district and such town or city and the cost for capital improvements within such town or city shall be paid by such town or city or by the customers inhabiting such town or city. The cost of constructing the pipe connection between the district and

any such state facility shall be paid by the state of Connecticut. Nothing herein shall authorize The Metropolitan District to supply any water in competition with any water system in any town or city, except by agreement." (Emphasis added.)

The defendant raised a similar argument claiming mootness in a motion to dismiss, which was rejected by the court in a memorandum of decision filed on October 10, 2014. See *Glastonbury* v. *Metropolitan District Commission*, Superior Court, judicial district of Hartford, Docket No. HHD-CV-14-6049007-S (October 10, 2014) (59 Conn. L. Rptr. 108). Despite the defendant's suggestion to the contrary, there is no basis for the court to revisit its previous ruling that S.A. 14-21 is not a clarifying amendment and, therefore, is not retroactive. As previously stated in the October 10, 2014 memorandum of decision, nothing in the 2014 amendment or its legislative history evidences a clear intent that the surcharge component be applied retroactively. "A statute should not be applied retroactively to pending actions unless the legislature clearly expressed an intent that it should be so applied." *McNally* v. *Zoning Commission*, 225 Conn. 1, 9, 621 A.2d 279 (1993); accord *New Haven* v. *Public Utilities Commission*, 165 Conn. 687, 726, 345 A.2d 563 (1974). "It is a rule of construction that statutes are not to be applied retroactively to pending actions, unless the legislature clearly expresses an intent that they shall be so applied. . . . 'The passage or repeal of an act shall not affect any action then pending.' General Statutes § 1-1 [u]." (Citations omitted.) *New Haven* v. *Public Utilities Commission*, supra, 726.

The defendant's remaining argument in support of its motion for summary judgment concerns a different matter of justiciability, namely, whether there is any practical or effective relief available to the plaintiff. Although this argument was also rejected by the court

in its October 10, 2014 memorandum of decision, nonetheless, for the sake of completeness, the court further articulates as follows. "The test for determining mootness is not [w]hether the [plaintiff] would ultimately be granted relief . . . . The test, instead, is whether there is any practical relief this court can grant the [plaintiff]." (Internal quotation marks omitted.) *In re David L.*, 54 Conn. App. 185, 189, 733 A.2d 897 (1999). Thus, while practical relief may be difficult to articulate or implement, if there is any practical relief available, then the court may exercise jurisdiction. See *Pamela B.* v. *Ment*, 244 Conn. 296, 313, 709 A.2d 1089 (1998) ("specter of difficulties in crafting 'practical relief' " did not bar court's assumption of jurisdiction).

The plaintiff is seeking a declaration by the court that certain surcharges imposed by the defendant were unlawful. The plaintiff is not presently seeking damages and is not obligated to do so. See General Statutes § 52-29 (a); see also *England* v. *Coventry*, 183 Conn. 362, 364, 439 A.2d 372 (1981) (Superior Court has subject matter jurisdiction over suits for declaratory relief despite adequacy of other legal remedies). There is no question that if the surcharges are unlawful, then the plaintiff can demonstrate damages for those years the surcharges were imposed. It may be that the plaintiff has not articulated the specific legal theory under which it would recover those damages, and it is uncertain whether the plaintiff will seek to recover those damages at all. This does not mean, however, that as a matter of law, there is no practical relief available to the plaintiff. See, e.g., *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 8–9, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978) ("[a]lthough we express no opinion as to the validity of respondents' claim for damages, that claim is not so insubstantial or so clearly foreclosed by prior decisions that this case may not proceed" [footnote omitted]). Rather, allegations of ascertainable damages

in the form of a wrongfully imposed surcharge indicate that practical relief may be available. Finally, as this court has previously quoted in its October 10, 2014 memorandum of decision, "[a] plaintiff who wins a declaratory judgment may go on to seek further relief, even in an action on the same claim which prompted the action for a declaratory judgment. This further relief may include damages which had accrued at the time the declaratory relief was sought . . . ." (Internal quotation marks omitted.) *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 361, 15 A.3d 601 (2011) (*Palmer, J.*, dissenting), quoting 1 Restatement (Second), Judgments § 33, comment (c), p. 335 (1982). Accordingly, the court finds that the plaintiff's action for declaratory relief is justiciable. Thus, the defendant's motion for summary judgment must be denied.

## II

## THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The plaintiff's motion for summary judgment asks the court to determine, as a matter of law, that the surcharges imposed by the defendant from 2011 to 2014 were unlawful. "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 a judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Citation omitted; internal quotation marks omitted.) *Vendrella* v. *Astriab Family Ltd. Partnership*, 311 Conn. 301, 313, 87 A.3d 546 (2014). "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party

for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle[s] him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue." (Internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 319–20, 77 A.3d 726 (2013).

The plaintiff argues that, at the time the defendant imposed the surcharges, the General Assembly had not authorized the defendant to recover general or capital costs arising from maintenance of and improvements to the defendant's properties, facilities, and water supply infrastructure. Thus, the surcharges from 2011 to 2014 were unlawful. In its opposition, the defendant argues that it always possessed the authority to impose the surcharge.

The defendant "is a political subdivision of the state, specially chartered by the Connecticut General Assembly for the purpose of water supply, waste management and regional planning." *Martel* v. *Metropolitan District Commission*, 275 Conn. 38, 41, 881 A.2d 194 (2005). "It is settled law that as a creation of the state, a municipality has no inherent powers of its own. . . . A municipality has only those powers that have been expressly granted to it by the state or that are necessary for it to discharge its duties and to carry out its objects and purposes. . . . This principle applies with equal force to quasi-municipal corporations." (Citations omitted; internal quotation marks omitted.) *Wright* v. *Woodridge*

*Lake Sewer District*, 218 Conn. 144, 148, 588 A.2d 176 (1991). In order to determine what powers were granted to the defendant by the state, it is appropriate to examine the legislation that undergirded the defendant's claimed authority.

Prior to the passage of S.A. 14-21, the General Assembly provided the defendant with the following powers: "The Metropolitan District is authorized to supply water, at rates uniform with those charged within said district, to any town or city, any part of which is situated not more than twenty miles from the state capitol at Hartford, or to the inhabitants thereof, or to any state facility located within such area, upon such terms as may be agreed upon, but all other sources belonging to any such town or city shall be developed by such consumer or made available for development by said district. The cost of constructing the pipe connection between the district and such town or city shall be paid by such town or city. The cost of constructing the pipe connection between the district and any such state facility shall be paid by the state of Connecticut. Nothing herein shall authorize The Metropolitan District to supply any water in competition with any water system in any town or city, except by agreement." Special Acts 1977, No. 77-62.

Under certain circumstances the defendant was additionally empowered to assess additional costs pursuant to 25 Spec. Acts 1018, No. 272 (1949), which provided: "The Metropolitan District is authorized to assess the cost of laying water mains in streets or highways and the cost of laying or replacing water service pipes upon public or private property upon the land and buildings benefitted thereby in any town which is not a member of said district, but in which it shall have the right either under the terms of its charter or otherwise to supply or distribute water, and to secure payment thereof by lien. Such assessment and lien rights may be exercised

by the water bureau of said district under procedure substantially similar to that for like assessments made upon property located within the territorial limits of said district."

Thus, the defendant's authorization to impose fees on the plaintiff was limited to the following: (1) a charge for supplying water; (2) a charge for constructing the pipe connection between the district and the municipality; and (3) a charge for laying water mains and for laying or replacing water service pipes upon the land and buildings benefitted thereby. Nevertheless, beginning in 2011, the plaintiff saw a marked increase in the amount of the surcharge. In a February 15, 2013 letter from Scott Jellison, Deputy Chief Executive Officer of the defendant, the complained of increase was explained as reflecting the "fixed costs associated with producing drinking water," such as "watershed lands" and "treatment plants."[3] The evidence indicates that, at

[3] The relevant portions of the letter provided as follows: "Generally, water bills for customers in our member and [nonmember] towns are the same with the exception of the [Nonmember] Town (NMT) charge. Per [the defendant's] ordinances, [nonmember] town customers may also pay a Special Capital Improvement Surcharge to reimburse the [defendant] for the cost of capital improvements necessary to provide or maintain water service to their specific community. These charges are applied, in whole or in part, to fairly distribute and offset operational, maintenance and infrastructure improvement costs which cannot be passed on to our member towns.

"As a nonprofit municipal corporation, the [defendant] bases its water rates and projected revenue on anticipated consumption for the year in order to recover costs to produce drinking water. However, the fixed cost to maintain the water utility infrastructure, such as watershed lands, treatment plants, and pipes, typically increases annually, as we are subject to the same increases in price that consumers experience for electricity, fuel, natural gas, chemicals and other commodities. As with most water utilities across the country, declining water consumption makes it impossible to predict revenue for budgeting purposes to recover annual operating cost. Due to this decline, and upon recommendation of our rating agencies, the fixed costs associated with producing drinking water were shifted to the Water Customer Service Charge and NMT charges. These charges provide a more stable source of revenue than the Water Consumption Charge and are not subject to the same environmental and economic facts that affect consumption."

least as of the time of the increase, the surcharge was not confined to the cost of laying and repairing water service pipes and water mains to benefit particular customers. Rather, it encompassed the defendant's costs in maintaining the entire water utility infrastructure, spread among all of its customers in nonmember towns.

Moreover, the General Assembly authorized the defendant to recover costs associated with the construction and maintenance of water pipes only from those customers whose property was directly benefitted from those pipes. Because the General Assembly did not authorize the defendant to recover its water utility infrastructure or capital improvement costs, the surcharge included costs that the defendant was not authorized to impose upon the plaintiff, and, therefore, it was illegal as a matter of law.

In light of the determination that the surcharge was illegal as a matter of law, the defendant is left to rely on its special defenses. As a bar to judgment, the defendant raises the defense of laches.[4] "A conclusion that a plaintiff has been guilty of laches is one of fact for the trier and not one that can be made [as a matter of law], unless the subordinate facts found make such a conclusion inevitable . . . . The defense of laches, if proven, bars a plaintiff from seeking equitable relief . . . . First, there must have been a delay that was inexcusable,

[4] The two other special defenses asserted by the defendant are either not viable or contingent on the defense of laches. The defendant's third special defense, that the plaintiff lacks standing to bring an action on behalf of the defendant's other customers, concerns an issue of subject matter jurisdiction. The plaintiff argues that it is not acting on behalf of the defendant's other customers and concedes that the court may limit the granting of declaratory relief to the plaintiff. This court has already determined that the plaintiff has standing to bring this action in its own name. Therefore, the third special defense does not bar summary judgment in favor of the plaintiff.

The fourth special defense of equitable jurisdiction is derivative of the laches defense such that it rises and falls with the validity or invalidity of the laches defense.

and, second, that delay must have prejudiced the defendant. . . . The mere lapse of time does not constitute laches . . . unless it results in prejudice to the [opposing party] . . . as where, for example, the [opposing party] is led to change his position with respect to the matter in question." (Citations omitted; internal quotation marks omitted.) *Caminis* v. *Troy*, 112 Conn. App. 546, 552, 963 A.2d 701 (2009), aff'd, 300 Conn. 297, 12 A.3d 984 (2011).

In support of the defense of laches, the defendant notes that the complained of surcharge on nonmember towns goes back to 1942. The defendant argues that the passage of almost seventy years between the first surcharge and the plaintiff's first objection in 2011 constitutes an unreasonable delay that has prejudiced the defendant. The plaintiff counters that its claim is limited to a declaration regarding the surcharges from 2011 to 2014 and does not concern the surcharges prior to 2011. Consequently, the defendant is not prejudiced by being asked to address such recent concerns. Finally, the plaintiff contends that its delay in complaining about the surcharge was not unreasonable because the surcharges before 2011 were for only nominal amounts, and the surcharges thereafter reflect substantial increases, which prompted the plaintiff to investigate the nature of the surcharge.

The defendant has submitted evidence indicating that the plaintiff became a nonmember town in 1941 and that the nonmember town surcharge was first imposed in 1942. The surcharge was increased in the years 1949 and 1955, and then annually between 2006 and 2014. In the period from 2006 to 2011, the amount of the quarterly surcharges wavered between $10 and $13. The quarterly surcharge increased from $13.17 in 2011 to $39.54 in 2012. It jumped to $105.75 in 2013 before decreasing to $49.74 in 2014. The plaintiff did not complain about the surcharge until 2012. The defendant

maintains that the surcharge provided stability and the foundation to equitably distribute the cost of maintenance and improvements to the system and that it is prejudiced by the plaintiff's untimely pursuit of this claim. According to the defendant, had the plaintiff made a complaint earlier, the defendant could have addressed it by making changes to the way customers were charged for water.

Upon review of the evidence submitted by the defendant in support of its special defense of laches, the court finds, under all the circumstances, it was not unreasonable for the plaintiff to have delayed challenging the surcharge until 2014. For most of the time that the surcharge was in place, it was for a small amount. After remaining relatively stable for many years, it increased by nearly 300 percent in 2012 and nearly 800 percent in 2013. It was the sharp increase that prompted the plaintiff to complain about the surcharge and to investigate its origins. Upon concluding that there was no legal basis for the surcharge, the plaintiff swiftly set to challenge the defendant's interpretation of its assessment authority under the charter. Communications thereafter indicated that the recent increase in the surcharge included costs that were not within the defendant's power to impose. Additionally, other than its argument that an earlier complaint may have led to earlier action, the defendant has failed to demonstrate how it was led to change its position with respect to the imposition of the surcharge, as is necessary for a showing of prejudice. Therefore, based on the subordinate facts, the evidence presented by the defendant does not support a special defense of laches. Therefore, the special defense of laches does not bar the plaintiff's motion for summary judgment.

## III

## CONCLUSION

The General Assembly did not provide the defendant with any express authority to impose a nonmember town surcharge until the enactment of S.A. 14-21, which amended the defendant's governing legislation. As discussed at length in the court's earlier decision denying the defendant's motion to dismiss, S.A. 14-21 does not apply retroactively so as to sanction the defendant's imposition of the nonmember town surcharge. Likewise, as noted elsewhere in the present memorandum of decision, S.A. 14-21 is not a confirmation or clarification of any implicit authority that the defendant already possessed. The defendant has otherwise failed to offer an interpretation of the governing legislation that supports its contention that it possessed the authority to impose the surcharge. Upon review of the grants of authority made to the defendant, the court is compelled to conclude that the surcharge, which encompassed general costs that the defendant was not expressly empowered to impose upon the plaintiff, was unlawful.

For all the foregoing reasons, the court finds that (1) the plaintiff's action for declaratory relief is justiciable, (2) the surcharge imposed by the defendant on the plaintiff was illegal, and (3) none of the claimed special defenses serves to bar judgment. Accordingly, the defendant's motion for summary judgment is hereby denied and the plaintiff's motion for summary judgment is hereby granted.

# ROGER J. BOUCHARD ET AL. *v.* STATE EMPLOYEES RETIREMENT COMMISSION (SC 19754)

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

*Syllabus*

The plaintiffs, three retired state employees, had begun receiving state employment retirement benefits that had been audited and finalized by the defendant retirement commission prior to this court's 2007 decision in *Longley* v. *State Employees Retirement Commission* (284 Conn. 149), which held that the commission had improperly interpreted statutes governing retirement benefits by failing to directly add a retiree's final, prorated longevity payment to the salary earned in the retiree's final year of state employment for the purpose of calculating the retiree's base salary. The court in *Longley* did not express a view as to whether its decision applied retroactively. The commission subsequently ordered the recalculation and award of increased retirement benefits, in accordance with *Longley*, to any person who had retired or whose benefits were not finalized on or after October 2, 2001, the six year period preceding the date of the *Longley* decision. The plaintiffs followed a series of administrative steps including administrative proceedings before the commission in an unsuccessful effort to challenge its limited retroactive application of *Longley* that excluded them and other similarly situated retirees. The plaintiffs then filed an administrative appeal, challenging the commission's imposition of the six year time limitation and, incorporating the allegations of the administrative appeal, sought a declaratory judgment that the action was brought on behalf of a class of all state employees who had retired and had begun collecting retirement benefits before October 2, 2001. The trial court sustained the plaintiffs' administrative appeal, determining that the commission's decision to award increased benefits only to those persons who had retired on or after October 2, 2001, based on the application of an analogous statutory (§ 52-576) six year statute of limitations for contract claims, was arbitrary and capricious. The court concluded that, because there was no statute or regulation in effect when *Longley* was decided that prescribed a time limitation for filing a petition for a declaratory

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Rogers, and Justices Palmer, Eveleigh, McDonald, Robinson and Espinosa. Although Chief Justice Rogers was not present when the case was argued before the court, she has read the briefs and appendices, and listened to a recording of oral argument prior to participating in this decision. The listing of justices reflects their seniority status on this court as of the date of oral argument.

ruling with the commission, the commission's reliance on case law that permitted the borrowing of an analogous statute of limitations to fill that void was improper as that precedent did not apply to administrative proceedings and should not apply because the commission had the authority to promulgate a regulation that prescribed time limits. In the absence of any governing time limits, the trial court concluded that the plaintiffs' retirement benefits were pending and not final at the time *Longley* was decided, that *Longley* presumptively applied retroactively to those pending benefits, and that the commission had not proven that retrospective application of the rule would retard its operation. The court accordingly ordered the commission to apply *Longley* retroactively to the plaintiffs' retirement benefits calculations from the date of their retirement. With respect to the plaintiffs' request for a declaratory judgment, the court rendered judgment in favor of the commission, concluding that, because case law dictated that the timeliness of a declaratory judgment action is to be assessed by the time limitation applicable to the underlying right being enforced, and that a claim for retirement benefits was akin to a claim for a breach of a statutory duty, to which the tort statute of limitations applied, the claim was time barred because that three year period applicable to such claims would have commenced when the class members first sustained injury, that is, when they received their finalized retirement benefits calculations, not when they discovered the wrong. Because the class was defined as persons collecting benefits prior to October 2, 2001, the statute of limitations would have expired before the plaintiffs filed the present action in 2012. The trial court also rejected the plaintiffs' argument that the statute of limitations was tolled under a continuing violation theory. Thereafter, the plaintiffs appealed and the commission cross appealed from the trial court's judgment. *Held*:

1. This court concluded that the analogous six year statute of limitations for contract actions under § 52-576 applied to the administrative proceedings before the commission to determine whether the plaintiffs' claims were timely: the same policy reasons for applying a statute of limitations can apply regardless of whether the proceeding is initiated in a judicial or administrative forum, including that, after the passage of time, evidence has been lost, memories have faded, and witnesses may be more difficult to secure, and lengthy delays and stale claims may upset the settled expectations of defendants; furthermore, the legislature's prescription (§ 4-183 [c] [1]) of a forty-five day period to appeal from an adverse administrative decision was evidence that the legislature did not intend an unlimited period in which to commence the administrative proceedings giving rise to such an appeal, as an unlimited period to advance claims challenging the calculation of retirement benefits could cause financial and administrative hardship; moreover, even though the commission claimed before the trial court that the shorter limitation period for tort actions applied, the commission had maintained throughout the administrative proceedings that the six year statute of limitations

applied to the plaintiffs' claims, the weight of authority favored application of the contract limitation period and, when there is ambiguity as to which limitation period is applicable, courts should apply the longer limitation period.

2. The plaintiffs' claims challenging the calculation of their retirement benefits accrued so as to commence the running of the applicable six year limitation period when their applications for retirement benefits were approved and finalized, and, because that limitation period expired before they commenced the administrative proceedings, their claims were untimely, and, because there was no independent basis on which the class' claim could proceed, that claim failed for the same reason: when the plaintiffs received their final audits and began receiving retirement benefits, which occurred more than six years before they commenced the administrative proceedings that gave rise to this appeal, all of the operative facts to successfully assert a claim under the State Employees Retirement Act (§ 5-152 et seq.) existed, as they had met the conditions for retirement, they had received a final longevity payment, and that longevity payment had not been included in their benefits calculations; moreover, this court concluded that neither the continuing violation theory nor the continuous course of conduct doctrine served to toll the statute of limitations and render the plaintiffs' claims timely, as the commission's nondiscriminatory calculation of the plaintiffs' retirement benefits was not a continuing violation but a single decision that resulted in lasting negative effects, and the plaintiffs failed to identify any case law supporting their claim that pension administration created a special relationship between the parties that gave rise to a continuing duty that was related to the original wrong.

Argued September 13, 2017—officially released February 2, 2018**

*Procedural History*

Administrative appeal, in the first count, from the decision of the defendant denying the plaintiffs' claims regarding the calculation of certain retirement income and, in the second count, action seeking a declaratory judgment on behalf of similarly situated individuals, brought to the Superior Court in the judicial district of New Britain, where the court, *Hon. Howard T. Owens, Jr.*, judge trial referee, granted the plaintiffs' motion for certification as a class action; thereafter, the case was tried to the court, *Hon. Howard T. Owens, Jr.*,

** February 2, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

judge trial referee, who, exercising the powers of the Superior Court, rendered judgment sustaining the plaintiffs' administrative appeal as to count one and granting summary judgment in favor of the defendant as to count two, from which the plaintiffs appealed and the defendant cross appealed. *Affirmed in part; reversed in part; judgment directed.*

*Michael J. Walsh*, for the appellants-appellees (plaintiffs).

*Michael J. Rose*, with whom was *Cindy M. Cieslak*, for the appellee-appellant (defendant).

*Opinion*

McDONALD, J. In *Longley* v. *State Employees Retirement Commission*, 284 Conn. 149, 177–78, 931 A.2d 890 (2007), this court held that the defendant, the State Employees Retirement Commission, had improperly interpreted statutes governing retirement benefits by failing to directly add a retiree's final, prorated longevity payment to the salary earned in the retiree's final year of state employment for the purpose of calculating the retiree's base salary. Although the commission contended in *Longley* that it had calculated retirement benefits in accordance with its interpretation since the 1960s; id., 166; this court afforded relief to the two plaintiffs in that case without expressing a view on whether the decision applied retroactively. Id., 178. The commission subsequently ordered the recalculation and award of increased retirement benefits, in accordance with *Longley*, of any person who had retired, or whose benefits were not finalized, on or after October 2, 2001, the six year period preceding the date of the *Longley* decision. The present case raises the question of whether all state employees, irrespective of when they retired, are entitled to have their benefits recalculated in accordance with *Longley*.

This question comes to us by way of an unusual procedural posture—a two count complaint bringing (1) an administrative appeal from the commission's decision denying a petition for a declaratory ruling filed by the plaintiffs, retirees Roger J. Bouchard, James J. Malone and James E. Fox, and (2) a declaratory judgment action on behalf of a class, represented by the plaintiffs, of all state employees who retired and began collecting pensions before October 2, 2001. The trial court granted relief to the plaintiffs in the administrative appeal, but denied relief to the class on the ground that the declaratory judgment count was time barred. The plaintiffs appealed from the trial court's judgment insofar as it denied relief for the class. The commission cross appealed from the judgment insofar as it granted relief to the plaintiffs and raised numerous alternative procedural and substantive grounds for affirming the judgment denying relief to the class. We conclude that the plaintiffs' claims for recalculation of benefits were time barred, and, for the reasons supporting that conclusion, neither they nor the class is entitled to relief. Accordingly, we affirm in part and reverse in part the trial court's judgment.

The record reveals the following undisputed facts and procedural history. The three plaintiffs retired after decades of state service—in 1990, 1997, and 2000, respectively. The commission audited and finalized their retirement benefits in April, 1994, May, 1998, and April, 2001, respectively.

On October 2, 2007, this court issued its decision in *Longley*. At a meeting held a few weeks after that date, the commission discussed the effect of that decision. It voted that, with the exception of the two *Longley* plaintiffs, calculations including the prorated longevity payments would be made only on a prospective basis for persons retiring on or after the date of that decision.

In December, 2007, Bouchard sent a letter to the commission requesting recalculation of his benefits in accordance with *Longley*. The commission denied the request, citing its October, 2007 decision. Bouchard delayed further action while a federal class action was pending in which state retirees challenged the application of *Longley* on a prospective only basis and the commission's multitiered review procedures.

In the interim, the Superior Court issued a decision rejecting the commission's position that *Longley* applied prospectively only. See *Malerba* v. *State Employees Retirement Commission*, Superior Court, judicial district of New Britain, Docket No. HHB-CV-06-4011383 (July 15, 2008) (45 Conn. L. Rptr. 853). The court in *Malerba* also rejected the commission's argument that the claims in the consolidated administrative appeals before the court were time barred, noting that this defense had not been raised in the administrative proceedings. Id., 854. The court specifically limited its holding to administrative appeals pending before the court when *Longley* was decided, expressing no opinion as to its retroactive application to other cases. Id., 855 n.5.

Thereafter, in April, 2009, the commission adopted a second resolution in order to "fully conform with" the October 2, 2007 *Longley* decision. It directed the retirement services division of the Office of the State Comptroller to calculate and award increased retirement benefits in accordance with *Longley* to any person who had retired on or after October 2, 2001, or who had retired before that date but whose retirement was not finalized as of that date.

In August, 2009, after the federal class action was dismissed; see *Belanger* v. *Blum*, 628 F. Supp. 2d 260, 267 (D. Conn. 2009); the plaintiffs followed a series of administrative steps before the commission in an

unsuccessful effort to challenge its limited retroactive application of *Longley* that excluded them and other retirees similarly situated.[1] They filed a petition for a declaratory ruling, which the commission treated as a "claim" for benefits; General Statutes § 5-155a (j); an appeal from the final decision denying that claim; see General Statutes § 5-155a (k); a request for reconsideration of the denial of the appeal; see General Statutes § 5-155a (k); and a second petition for a declaratory ruling as to each plaintiff, which was treated as a separate petition for each plaintiff by the commission. See General Statutes § 4-176.

The commission issued a final decision denying the plaintiffs' petitions, citing four broad conclusions as support. First, it concluded that its decision to adopt a six year limitation on recalculation was reasonable, and thus was not arbitrary or capricious. It explained that, like the approach taken for claims under federal pension law, which also contains no statute of limitations, it had looked to the most suitable time limit to apply in light of the nature of the action and the rights at issue. It found the six year limitation for actions sounding in contract to be the most suitable. See General Statutes § 52-576.

Second, relying on the six year limitation period to establish the scope of "pending" cases, the commission concluded that its decision to limit retroactive relief to pending cases was not arbitrary or capricious. It reasoned that *Longley* was a new interpretation of the law and that, in the absence of impermissible discrimination, it was reasonable to limit retroactive relief to pending cases.

[1] The plaintiffs characterized their adherence to these procedures as being taken under protest, as it was their view that the commission had stated its formal position in its April, 2009 resolution and should not require them to follow a multistep review process, which had not been formally enacted. The propriety of those procedures is not at issue in this appeal.

Third, it concluded that its decision to limit retroactive relief to pending cases also was proper in light of the significant adverse financial effect that unlimited retroactive application would have on the state retirement plan. The commission noted that it had construed and applied the retirement statutes; see General Statutes §§ 5-154 and 5-162; so as not to include the final, prorated longevity payment since 1967. The commission estimated that unlimited retroactive application of *Longley* would cost the retirement fund between approximately $48 million and $157 million, if statutory interest of 5 percent was applied.

Fourth, the commission concluded that the plaintiffs could not avoid the six year time bar in § 52-576 under theories of either a continuing violation of §§ 5-154 and 5-162 or a deliberate concealment of that violation. The commission deemed the continuing violation theory inapplicable as a matter of law because the retirement plan was neutral (i.e., nondiscriminatory) in operation. It rejected the allegation of wrongful concealment as unsupported by any proof and contradicted by the Appellate Court's view in *Longley* that the construction of § 5-162 raised a question on which there was little precedent to provide guidance. See *Longley* v. *State Employees Retirement Commission*, 92 Conn. App. 712, 717, 887 A.2d 904 (2005), rev'd in part, 284 Conn. 149, 931 A.2d 890 (2007).

Finally, the commission made clear that its ruling applied only to the three plaintiffs. It noted that the petitions had sought the recalculation of not only the plaintiffs' benefits but also the pensions of "all retirees." The commission asserted that, to the extent that the plaintiffs were attempting to bootstrap a class action onto their petitions for a declaratory ruling, the Uniform Administrative Procedure Act, General Statutes § 4-166

et seq., does not permit class certification in an administrative proceeding.[2]

Following the commission's decision, the plaintiffs filed a two count "Administrative Appeal and Class Action Complaint" in the Superior Court. Count one, captioned "Administrative Appeal," alleged that the plaintiffs had been deprived of benefits owed to them by virtue of the commission's arbitrary and capricious application of its 2009 resolution imposing the six year time limitation. Count two, captioned "Declaratory Judgment for Class," incorporated the allegations in count one and alleged that, in addition to bringing their individual administrative appeal, the plaintiffs brought this action as a class action under Practice Book § 9-8. The plaintiffs subsequently filed a motion seeking to certify a mandatory class in the declaratory action (i.e., certification covering all members of the class without a procedure for members to "opt in" or "opt out" of the class).

The commission filed a motion to dismiss and/or strike the second count of the complaint, as well as an objection to class certification. The court, *Hon. Howard T. Owens, Jr.*, judge trial referee, concurrently issued decisions granting the plaintiffs' motion for class certification, but not as a mandatory class, and denying the commission's motion to dismiss or strike count two.

Discovery and disclosure of expert witnesses ensued, largely directed at the question of the actual financial

[2] Although we do not reach the commission's procedural and substantive challenges relating to the class, we note that the commission's position at oral argument before this court contradicted the position in its decision. At oral argument, it contended that one of its regulations provides a "mechanism for a class action," specifically, § 5-155a-1 (b) (6) of the Regulations of Connecticut State Agencies, and faulted the plaintiffs for failing to request information from the commission under the Freedom of Information Act, General Statutes § 1-200 et seq., to identify and provide notice to the putative class members in accordance with that regulation.

impact of a decision requiring retroactive relief for the entire class. Thereafter, the plaintiffs moved for judgment on the merits as to count one, the administrative appeal, and for summary judgment as to count two, the declaratory judgment action. The defendant filed a brief in opposition to the motion for judgment on count one, and filed its own motion for summary judgment on count two.

The court sustained the plaintiffs' administrative appeal. The court determined that the commission's decision to award increased benefits for only those persons who had retired on or after October 2, 2001, based on application of an analogous six year statute of limitations for contract claims, was arbitrary and capricious. It reasoned that the six year contract statute of limitations applied by the commission, if properly applied, would have commenced when the right of action accrued, such right accruing when *Longley* was decided in 2007, not six years prior to that date.[3] Having rejected the time limitation set forth in the commission's resolution, the court pointed to the absence of a statute or regulation in effect when *Longley* was decided that prescribed a time limit for filing a petition for a declaratory ruling with the commission. It declined to consider the commission's alternative arguments that the statute of limitations for tort actions; see General Statutes § 52-577; or the time limitation under a regulation the commission recently adopted[4] would apply,

[3] The court also concluded that the commission could not properly choose an arbitrary cutoff date due to concerns about the financial impact of full retroactive application of *Longley*, the extent of which the plaintiffs had called into question, when the law regarding retroactivity did not support such a limitation.

[4] Section 5-155a-2 of the Regulations of Connecticut State Agencies took effect on April 27, 2012, the same day that the plaintiffs filed their administrative appeal and class action complaint. That regulation provides in relevant part: "(a) No action at law or in equity may be brought to recover under the State Employee Retirement System (SERS) or any of the retirement systems administered, supervised or managed by the State Employees Retirement Commission ('Commission') any benefit, Tier transfer, service credit

concluding that the commission had to defend its decision on the grounds on which it was based. Nonetheless, the court concluded that, insofar as the commission relied on case law permitting the borrowing of an analogous statute of limitations to fill such a gap, that precedent did not apply to an administrative proceeding and should not apply, given the commission's authority to promulgate a regulation prescribing time limits.

In the absence of any governing time limitation, the court determined that (1) the plaintiffs' benefit awards were "pending" and not final when *Longley* was decided, (2) *Longley* presumptively applied retroactively to those pending awards; see *Marone* v. *Waterbury*, 244 Conn. 1, 10–11, 707 A.2d 725 (1998) (judgment that is not limited to prospective application is presumed to apply retroactively to pending cases); and (3) the commission had not satisfied one of the criteria necessary to overcome that presumption, namely, that "[given its prior history, purpose and effect] 'retrospective application of the rule would retard its operation . . . .' " See *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106–107, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971) (prescribing three part test); see also *State* v. *Harrell*, 199 Conn. 255, 267–68, 506 A.2d 1041 (1986) (applying *Chevron Oil* test). But see *Neyland* v. *Board of Education*, 195 Conn. 174, 182, 487 A.2d 181 (1985) (test inapplicable

or any other related retirement benefit or payment (including but not limited to over or under payments) or claim challenging the alleged failure of the Commission to abide by a statutory dictate after the expiration of six (6) years after the member first knew or should have known with reasonable diligence of his or her entitlement to such a benefit, Tier transfer, service credit or other related retirement benefit or payment (including but not limited to over or under payments) or any claim challenging an alleged failure of the Commission to abide by a statutory dictate. Claims not brought within this time frame shall be denied as untimely.

"(b) Before pursuing legal action, a person claiming retirement benefits or seeking redress related to the retirement system(s) shall first exhaust the Commission's claim, review and appeal procedures. . . ." Regs., Conn. State Agencies § 5-155a-2.

to jurisdictional determination). Accordingly, the trial court ordered the commission to apply *Longley* to the plaintiffs' retirement income calculation from the date of their retirement, as well as to pay postjudgment interest.

The court, however, rendered summary judgment in favor of the commission on the declaratory judgment count, concluding that the class' claim was time barred. In reaching this conclusion, the court acknowledged that it had applied a different analytical approach than in its resolution of the administrative appeal, which it justified on the basis of the different procedural postures of the two counts. Specifically, the court noted that case law dictates that the timeliness of a declaratory judgment action is assessed by the time limitation applicable to the underlying right being enforced in such an action. Although the statutes governing the calculation of retirement benefits contained no time limitation, the court cited case law from this court sanctioning the borrowing of an analogous statute of limitations. The court reasoned that a claim for pension benefits is more akin to a claim asserting a breach of a statutory duty, to which the tort statute of limitations applied, than to a breach of contract claim. As such, the court held that the class' claim was untimely because the three year tort statute of limitations would commence when the class members first sustained injury, i.e., when they received their finalized pension calculation, not when they discovered the wrongful act. Because the class was defined as persons collecting benefits prior to October 2, 2001, the statute of limitations would have expired long before the declaratory judgment action was commenced in 2012. The court rejected the plaintiffs' argument that the statute of limitations was tolled under a continuing violation/continuing course of conduct theory.

The plaintiffs filed a motion for reargument and reconsideration of the court's ruling on the second count and its failure to award prejudgment interest, which the court denied.

The court rendered judgment in accordance with its decision. The plaintiffs appealed and the commission cross appealed from that judgment to the Appellate Court, and we thereafter transferred the case to this court. See General Statutes § 51-199 (c); Practice Book § 65-1.

In their appeal, the plaintiffs challenge the trial court's judgment denying the declaratory judgment count as to the class, as well as the trial court's failure to award prejudgment interest. On the merits, the plaintiffs claim that the trial court improperly failed to treat the class plaintiffs in the same manner as the individual plaintiffs. They contend that the class stands in the shoes of the class representatives and is entitled to all the rights and benefits afforded to those plaintiffs, including their exhaustion of administrative remedies and their timely initiated claims. Alternatively, the plaintiffs contend that the class' claim similarly did not accrue until the *Longley* decision was issued, but that the continuing violation theory would toll any applicable time limitation.

In its cross appeal, the commission claims that the trial court improperly concluded that the plaintiffs were entitled to prevail on their administrative appeal. The commission contends that the plaintiffs' claim for recalculation of their benefits was untimely under the analogous statute of limitations, that *Longley* does not apply retroactively, and that the commission's application of *Longley* to six years prior to the decision was not arbitrary or capricious. In addition, the commission asserts numerous alternative grounds, both procedural and

substantive, for affirming the trial court's judgment denying the class relief.

We conclude that the proper starting point of our analysis is the commission's cross appeal, as its resolution could be dispositive of the plaintiffs' appeal as well. If the commission is correct that the individual plaintiffs are not entitled to relief, then the class, too, would not be entitled to relief under the plaintiffs' argument for like treatment. Ultimately, we conclude that the plaintiffs' request to the commission for recalculation of their benefits was time barred. Accordingly, although this case raises important questions about the ability to maintain a class action in connection with administrative proceedings, we leave those questions for another day.

The sole issue on which we focus—the timeliness of the underlying administrative proceedings—potentially requires us to answer three questions. The first is whether the trial court properly determined that no time limitation applied for the plaintiffs to initiate their claims for recalculation of benefits under *Longley*. The second is whether the trial court properly determined that the plaintiffs' claim accrued when *Longley* was decided. The third is whether the trial court properly concluded that the tolling mechanism of the continuing violation theory is not applicable to the claim at issue. Although substantial deference is given to factual and discretionary determinations of administrative agencies, each of these questions is a purely legal matter over which we exercise plenary review.[5] See, e.g., *Maturo*

[5] The plaintiffs and the defendant have raised many arguments that we have not specifically addressed, as the three broader questions we have posed subsume the central, and dispositive, matters. To the extent that the plaintiffs raised certain arguments solely in conjunction with the class, such as tolling under the continuing violation theory, we have assumed that this argument likewise applies to the defendant's challenge to the timeliness of the individual plaintiffs' claims.

v. *State Employees Retirement Commission*, 326 Conn. 160, 171, 162 A.3d 706 (2017); *Bridgeport Hospital* v. *Commission on Human Rights & Opportunities*, 232 Conn. 91, 109, 653 A.2d 782 (1995).

I

At the time the plaintiffs commenced the underlying administrative proceedings, neither the State Employees Retirement Act (act), General Statutes § 5-152 et seq., nor regulations promulgated thereunder prescribed a time limitation for filing a claim for retirement benefits or a petition for a declaratory ruling. The commission contends that it was proper for it to apply an analogous statute of limitations in those proceedings to determine whether the plaintiffs' claims were timely.[6] We agree with the commission.

In *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 199, 931 A.2d 916 (2007), this court considered an action seeking to enforce a duty created by a statute that provided no limitation period for commencing such an action. In addressing the effect of that omission, the court set forth the following relevant principles: "Public policy generally supports the limitation of a cause of action in order to grant some degree of certainty to litigants. . . . The purpose of [a] statute of limitation[s] . . . is . . . to (1) prevent the unexpected enforcement of stale and fraudulent claims by allowing persons after the lapse of a reasonable time, to plan their affairs with a reasonable degree of certainty, free from the disruptive burden of protracted and unknown potential liability, and (2) to aid in the search for truth that may be impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disap-

[6] The plaintiffs have not responded directly to this argument. Instead, they make an argument that, if a statute of limitations applies, the claim in the present case is more like a contract action and is distinguishable from the claim at issue in the case on which the defendant relies.

pearance of documents or otherwise. . . . *Therefore, when a statute includes no express statute of limitations, we should not simply assume that there is no limitation period. Instead, we borrow the most suitable statute of limitations on the basis of the nature of the cause of action or of the right sued upon.*" (Citations omitted; emphasis added; internal quotation marks omitted.) Id.

The rule set forth in *Bellemare* is one that is widely, although not universally, followed in other jurisdictions. See 51 Am. Jur. 2d, Limitation of Actions §§ 105 and 106 (2018) (actions upon statutes lacking limitation provision).

In *Bellemare*, the court applied this rule in the context of a judicial proceeding. We have not had the opportunity to consider whether this rule would extend to administrative proceedings. There are divergent views on this question in other jurisdictions.[7] We agree with

[7] Broadly characterized, the approaches of other jurisdictions to the question of whether this rule applies to administrative proceedings fall into the following categories:

(1) categorical rejection; see, e.g., *Oakland* v. *Public Employees' Retirement System*, 95 Cal. App. 4th 29, 48, 115 Cal. Rptr. 2d 151 (2002); *Autio* v. *Proksch Construction Co.*, 377 Mich. 517, 521–25, 141 N.W.2d 81 (1966); *In re Wage & Hour Violations of Holly Inn, Inc.*, 386 N.W.2d 305, 307–308 (Minn. App. 1986); *Morgan* v. *Dept. of Commerce, Division of Securities*, Docket No. 20160091-CA, 2017 WL 6154336, *2 (Utah App. December 7, 2017);

(2) presumption favoring application; see, e.g., *Sahu* v. *Iowa Board of Medical Examiners*, 537 N.W.2d 674, 676 (Iowa 1995); *State Board of Retirement* v. *Woodward*, 446 Mass. 698, 707, 847 N.E.2d 298 (2006) (citing additional cases); *Marsicovetere* v. *Dept. of Motor Vehicles*, 172 Vt. 562, 563–65, 772 A.2d 540 (2001);

(3) application of the rule when there is a general or "catch-all" type of statute of limitations; see, e.g., *Manning ex rel. Manning* v. *Fairfax County School Board*, 176 F.3d 235, 236–39 (4th Cir. 1999); *Murphy* v. *Timberlane Regional School District*, 22 F.3d 1186, 1192–93 (1st Cir. 1994); *3M Co.* v. *Browner*, 17 F.3d 1453, 1455–57 (D.C. Cir. 1994); *Utah Consolidated Mining Co.* v. *Industrial Commission*, 57 Utah 279, 281, 194 P. 657 (1920), overruled in part on other grounds by *Salt Lake City* v. *Industrial Commission*, 93 Utah 510, 512–13, 74 P.2d 657 (1937); and

(4) application to claims that are a substitute for a common-law predecessor to, or counterpart of, the administrative action. See, e.g., *Hames* v.

those courts that have recognized that this rule may apply to administrative proceedings and hold that it should apply in the present case.

As a general matter, we agree with those courts that have recognized that the same policy reasons for applying a statute of limitations can apply irrespective of whether the proceeding is initiated in a judicial or administrative forum. See, e.g., *3M Co.* v. *Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994) ("Given the reasons why we have statutes of limitations, there is no discernible rationale for applying [a statute of limitations] when the penalty action or proceeding is brought in a court, but not when it is brought in an administrative agency. The concern that after the passage of time evidence has been lost, memories have faded, and witnesses have disappeared pertains equally to [fact-finding] by a court and [fact-finding] by an agency. . . . Statutes of limitations also reflect the judgment that there comes a time

*Miami Firefighters' & Police Officers' Trust*, 980 So. 2d 1112, 1115–16 (Fla. App. 2008); *Scott Tobacco Co.* v. *Cooper*, 258 Ky. 795, 799, 81 S.W.2d 588 (1934); *Natural Resources & Environmental Protection Cabinet* v. *Kentucky Ins. Guaranty Assn.*, 972 S.W.2d 276, 281 (Ky. App. 1997); *Federal Rubber Co.* v. *Industrial Commission*, 185 Wis. 299, 300–301, 201 N.W. 261 (1924).

We observe that there is greater consensus that no statute of limitations will be applied to such proceedings when they are initiated by the government for the public interest, especially professional disciplinary proceedings. See N. Harlow, annot., "Applicability of Statute of Limitations or Doctrine of Laches to Proceeding to Revoke or Suspend License to Practice Medicine," 51 A.L.R.4th 1147, 1151 (1987); 51 Am. Jur. 2d, supra, § 44. We also note that jurisdictions that do not apply a statute of limitations by analogy may nonetheless apply it in considering a laches defense. See, e.g., *Fountain Valley Regional Hospital & Medical Center* v. *Bonta*, 75 Cal. App. 4th 316, 324, 89 Cal. Rptr. 2d 139 (1999) ("[i]n cases in which no statute of limitations directly applies [such as administrative proceedings] but there is a statute of limitations governing an analogous action at law, the period may be borrowed as a measure of the outer limit of reasonable delay in determining laches" [internal quotation marks omitted]); *Farzad* v. *Dept. of Professional Regulation*, 443 So. 2d 373, 375–76 (Fla. App. 1983) ("[h]aving found that the statute of limitations is not applicable, we are persuaded that the parallel concept, the doctrine of laches, usually utilized in equitable proceedings, is similarly inapplicable to this administrative license revocation proceeding").

when the potential defendant ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations . . . . Here again it is of no moment whether the proceeding leading to the imposition of a penalty is a proceeding started in a court or in an agency. From the potential defendant's point of view, lengthy delays upset settled expectations to the same extent in either case." [Citations omitted; internal quotations omitted.]); *Utah Consolidated Mining Co.* v. *Industrial Commission*, 57 Utah 279, 282, 194 P. 657 (1920) ("[e]very possible reason that calls for a limitation of time in the one case applies with equal force to the other"), overruled in part on other grounds by *Salt Lake City* v. *Industrial Commission*, 93 Utah 510, 512–13, 74 P.2d 657 (1937); see also *Manning ex rel. Manning* v. *Fairfax County School Board*, 176 F.3d 235, 239 (4th Cir. 1999) ("[t]here is nothing to persuade us that disputes in administrative [Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq.] proceedings are so different in nature from those in judicial IDEA actions as to justify application of disparate limitations periods"). Granted, in the present case, some of the evidentiary considerations have less force, but the detrimental impact on the commission's fiduciary duties is certainly consistent with other policy considerations. Cf. *Anderson* v. *Bridgeport*, 134 Conn. 260, 266–67, 56 A.2d 650 (1947) ("[O]ne great object of statutes of limitation[s] is to prevent the unexpected enforcement of stale claims, concerning which persons interested have been thrown off their guard by want of prosecution. . . . According to a more specific statement filed by the plaintiff, the total amount of all salaries claimed by those who have joined in the action to have been withheld is about $370,000. If they can now, after the lapse of so many years since the last time salaries were not paid in full, successfully assert their claims, the unfortunate results upon the financial situation of

the defendant city are obvious. There could rarely be an instance where the statement quoted above would so clearly apply." [Citation omitted; internal quotation marks omitted.]).[8]

When the right being enforced is created by statute, as was the case in *Bellemare*, and not by regulation, there is good reason to apply the same rule irrespective of the forum in which the claim is initiated. If the plaintiffs were not required to exhaust administrative remedies and instead could seek judicial relief in the first instance, such a declaratory judgment action undoubtedly would be subject to the statute of limitations applicable, or analogous, to the underlying right sought to be vindicated. See *Wilson* v. *Kelley*, 224 Conn. 110, 116, 617 A.2d 433 (1992) (courts apply statute of limitations applicable to underlying right in declaratory judgment action). There is no reason why the exhaustion requirement should operate to eliminate that time limitation. See *Marsicovetere* v. *Dept. of Motor Vehicles*, 172 Vt. 562, 563–65, 772 A.2d 540 (2001) (reasoning that,

[8] *Anderson* v. *Bridgeport*, supra, 134 Conn. 260, includes an early view of this court regarding the borrowing of a statute of limitations that is contrary to the one set forth in *Bellemare*. See id., 262–63 (stating, when considering whether statute of limitations raised as defense applied to action at issue, that "we must seek the true meaning of the specific language it contains and we may not extend it to include situations merely because we think they are analogous to those designated in it"). *Bellemare* did not address *Anderson*. Since the latter decision was issued in 1947, however, this court has cited to that aspect of *Anderson* only for the broader rule of statutory construction that "[i]t is not the role of this court to extend the language of a statute to apply to situations analogous to those specified in the statute." *Doe* v. *Manson*, 183 Conn. 183, 187–88, 438 A.2d 859 (1981); see id., 184, 188 (applying proposition in considering whether "court records" in General Statutes [Rev. to 1981] § 54-142a [d], which provides for erasure of police, court, and state's or prosecuting attorney records pertaining to individual who had been pardoned, includes all records in custody of Department of Correction pertaining to plaintiff's imprisonment). Accordingly, although the general proposition articulated in *Anderson* is good law, its application to statutes of limitations has been implicitly overruled by *Bellemare*.

because taxpayer's exhaustion of remedies is condition precedent to judicial review of department's decision, statute of limitations should apply to administrative hearing that provides first opportunity for plaintiff to initiate action); see also *Natural Resources & Environmental Protection Cabinet* v. *Kentucky Ins. Guaranty Assn.*, 972 S.W.2d 276, 280 (Ky. App. 1997) ("[i]t would be an absurd result if, for example, the [c]abinet could commence a proceeding before a hearing officer of the [c]abinet on a cause of action which arose ten years earlier, even though the action would be barred by the statute of limitations in every other tribunal of the [c]ommonwealth" [internal quotation marks omitted]).

This conclusion is bolstered by other evidence. After administrative remedies are exhausted, the legislature has prescribed a short period of time to appeal from an adverse administrative decision to the Superior Court. See General Statutes § 4-183 (c) (1) (prescribing forty-five days to appeal final decision). It is difficult to square this expression of legislative intent with one intending an unlimited period to commence the administrative proceedings giving rise to such an appeal. Cf. *Skrundz* v. *Review Board of Indiana Employment Security Division*, 444 N.E.2d 1217, 1221, 1223 (Ind. App. 1983) (regulation providing that specified individuals " 'may apply at any time' " to state agency for trade readjustment allowance evidenced clear intention not to apply any time limitation). We also observe that, although not dispositive, the regulation adopted by the commission in 2012 prescribing time limits for challenging retirement benefits; see footnote 4 of this opinion; that is consistent with the period of limitation applied in the present case, has been sanctioned by the legislature. See General Statutes § 4-170 (review, approval, and disapproval without prejudice by bipartisan Legislative Regulation Review Committee); General Statutes § 4-

171 (review by General Assembly of regulations disapproved by Legislative Regulation Review Committee).

We recognize that courts in some jurisdictions have not applied analogous statutes of limitations to administrative proceedings when such statutes refer to a "civil action" or an "action," as do ours, because the common meaning ascribed to those terms refers to judicial proceedings. See, e.g., *Oakland* v. *Public Employees' Retirement System*, 95 Cal. App. 4th 29, 48, 115 Cal. Rptr. 2d 151 (2002); *In re Wage & Hour Violations of Holly Inn, Inc.*, 386 N.W.2d 305, 307–308 (Minn. App. 1986); *Guthmiller* v. *North Dakota Dept. of Human Services*, 421 N.W.2d 469, 471 (N.D. 1988); *Morgan* v. *Dept. of Commerce, Division of Securities*, Docket No. 20160091-CA, 2017 WL 6154336, *3 (Utah App. December 7, 2017). We agree with those courts that do not consider that term dispositive. See, e.g., *Manning ex rel. Manning* v. *Fairfax County School Board*, supra, 176 F.3d 236–39; *Anawan Ins. Agency, Inc.* v. *Division of Ins.*, 459 Mass. 592, 597, 946 N.E.2d 688 (2011); *Marsicovetere* v. *Dept. of Motor Vehicles*, supra, 172 Vt. 563–65. Neither our statutes nor our case law provides a definition of "action" that would preclude application of our statutes of limitations in this manner.[9] See *Carbone* v. *Zoning Board of Appeals*, 126 Conn. 602, 604–605, 13 A.2d 462 (1940) ("In a general sense the word action means the lawful demand of one's right in a court of justice; and in this sense it may be said to include any proceeding in such a court for the purpose of obtaining such redress as the law provides. . . . However, the word action has no precise meaning and the scope of proceedings which will be included within the term as used in the statutes depends upon the nature and purpose of the particular statute in question." [Cita-

[9] Practice Book § 14-6 makes clear that administrative *appeals* are civil actions, but is silent as to underlying administrative *petitions*, presumably because our rules of practice do not govern such underlying petitions.

tions omitted; internal quotation marks omitted.]); see also *Metcalfe* v. *Sandford*, 271 Conn. 531, 538, 858 A.2d 757 (2004) (same); *Gipson* v. *Commissioner of Correction*, 257 Conn. 632, 641, 778 A.2d 121 (2001) ("[b]ecause the word action may have different meanings in different contexts . . . we [take] a functional approach in our construction of the [word], eschewing the application of inflexible rules in favor of a contextual analysis" [internal quotation marks omitted]).

We also are not persuaded by the trial court's view that the commission's failure to exercise authority delegated to it to promulgate a regulation prescribing a time limitation—prior to the proceedings at issue—precludes resort to the statutory analogue. That logic could apply equally to the statutory context; nonetheless, we borrow analogous statutes of limitations when the legislature could have, but failed to, adopt an express limitation in the statute creating the action. Our research has not revealed any other jurisdiction that has relied on that consideration to decide this issue.

This is not to say that a time limitation will be borrowed in every instance in which one is not expressly provided. The courts should consider the nature of the proceeding and all relevant textual evidence to determine whether the legislature did not intend for any time limitation to apply. Moreover, a time limitation will apply by analogy only when that analogy is apt and its application is consistent with the policies underlying the administrative scheme. When there is ambiguity as to which statute of limitations is apt, courts should apply the longer of the two. See 51 Am. Jur. 2d, supra, § 76 (rule favoring longest limitation period).

Applying these principles to the present case, there is no reason to conclude that our legislature intended to allow retirees to challenge the commission's method of calculating their retirement benefits decades after

they started to receive benefits. Indeed, an unlimited period to advance such claims could cause financial and administrative hardship. Notably, the plaintiffs conceded in the administrative proceedings that a statute of limitations would apply to the administrative proceeding, disputing only when the cause of action would accrue and whether tolling applied.[10]

As to whether there is an analogous statute of limitations, in the proceedings before the commission, both parties agreed that the six year statute of limitations for contract actions under § 52-576 applied to the right at issue. Although the commission advocated for application of the shorter limitation period for tort actions before the trial court, we conclude that the longer period should apply, given the commission's position throughout the administrative proceedings, the rule requiring any ambiguity to favor the longer period, and the weight of authority applying the contract period. Compare *Harrison* v. *Digital Health Plan*, 183 F.3d 1235, 1240 (11th Cir. 1999) ("[a] survey of decisions from other circuits shows that almost without exception, federal courts have held that a suit for [Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq.]) benefits pursuant to [the civil enforcement section of ERISA] should be characterized

[10] The plaintiffs made this concession several times. For example, in a 2009 letter stating the grounds for their appeal from the commission's final decision, the plaintiffs stated: "The [retirement services] division correctly assumes that the [six] year limitations period for written contracts . . . in § 52-576 . . . applies to the obligation to pay pension benefits. But the division wrongly assumes that the six year period runs from the date [the] claimants retired." In the 2011 hearing on their request for reconsideration by the commission, the plaintiffs reiterated that position, stating at the outset: "We agree that the correct assumption for the commission, and prior to that, the division, is that the six year statute of limitations under [§] 52-576 does apply to the obligation to pay pension benefits." For reasons that are not clear, the commission did not argue before the trial court or this court that the plaintiffs had waived a claim that § 52-576 did not apply to their administrative claims.

as a contract action for statute of limitations purposes"), and *Johnson* v. *State Mutual Life Assurance Co. of America*, 942 F.2d 1260, 1261–62 (8th Cir. 1991) (action for ERISA benefits should be characterized as contract action for statute of limitations purposes unless breach of ERISA trustee's fiduciary duties is alleged), with *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 284 Conn. 200 ("courts have held that, when a plaintiff seeks to recover damages for the breach of a statutory duty, such an action sounds in tort").

II

Having concluded that the six year time limitation for contract actions applies to the plaintiffs' *Longley* claims, we next must consider when the plaintiffs' right of action accrued so as to commence the running of that period. We conclude that this right accrued when the plaintiffs' claims for retirement benefits were approved and finalized.[11]

Our law construing accrual under § 52-576 is well settled. "[I]n an action for breach of contract . . . the cause of action is complete at the time the breach of contract occurs, that is, when the injury has been inflicted. . . . Although the application of this rule may result in occasional hardship, [i]t is well established that ignorance of the fact that damage has been done does not prevent the running of the statute, except where there is something tantamount to a fraudulent concealment of a cause of action." (Internal quotation

[11] In their reply brief to this court, the plaintiffs contend that "[t]he commission said it used the date the Supreme Court decided *Longley* as the date any claims against it accrued." This assertion is not supported by the commission meeting minutes cited by the plaintiffs. Rather, those minutes reflect that the commission assumed that the six year statute of limitations applied to a claim for benefits under *Longley* and subtracted six years from the date of that decision to determine the earliest point in time that an accrued claim would be timely.

marks omitted.) *Amoco Oil Co.* v. *Liberty Auto & Electric Co.*, 262 Conn. 142, 153, 810 A.2d 259 (2002).

"Applied to a cause of action, the term to accrue means to arrive; to commence; to come into existence; to become a present enforceable demand. . . . Cf. *Vaughn* v. *State Farm Mutual Automobile Ins. Co.*, 445 So. 2d 224, 226 (Miss. 1984) ([A] cause of action accrues when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested. . . . [A] cause of action must be complete before it can be said to have accrued. . . . ). While the statute of limitations normally begins to run immediately upon the accrual of the cause of action, some difficulty may arise in determining when the cause or right of action is considered as having accrued. The true test is to establish the time when the plaintiff first could have successfully maintained an action." (Citations omitted; internal quotation marks omitted.) *Polizos* v. *Nationwide Mutual Ins. Co.*, 255 Conn. 601, 608–609, 767 A.2d 1202 (2001); see also *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, U.S. , 134 S. Ct. 604, 610, 187 L. Ed. 2d 529 (2013) ("[a]s a general matter, a statute of limitations begins to run when the cause of action accrues—that is, when the plaintiff can file suit and obtain relief" [internal quotation marks omitted]).

Under this law, the plaintiffs' claims accrued when their applications for retirement benefits were approved and finalized. The statutory scheme in its then existing form afforded them the right to have their final longevity payment directly included in the calculation of their base salary. See General Statutes § 5-152 et seq. Thus, the breach occurred when the calculation was made without including that payment.

Contrary to the view of the trial court and the plaintiffs, our decision in *Longley* did not establish the earliest date on which the plaintiff first could have

successfully maintained an action. That view assumes that the plaintiffs could not have prevailed before the commission in light of its long-standing, but improper, interpretation of the act, which they equate with an inability to successfully maintain an action for recalculation of their benefits. This syllogism is wrong as a matter of fact and law. The commission's interpretation of the act had not been challenged, administratively or judicially, as of the time the plaintiffs retired. In any event, the court, not the commission, is the final arbiter of what the law is. This court's interpretation of the act evidenced what the law always meant; the law did not change as a consequence of that interpretation. See *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 749–50 n.11, 12 A.3d 817 (2011) (distinguishing decision that changes law from one that provides clarification of what law always has meant); see also *Longley* v. *State Employees Retirement Commission*, supra, 284 Conn. 177 n.23 ("because the commission's interpretation lacks statutory support, we would not endorse that interpretation even if it were entitled to deference").[12] The phrase "successfully maintain an action" refers to the time at which the facts exist (or allegedly exist) to establish the legal elements of the cause of action. See *Polizos* v. *Nationwide Mutual Ins. Co.*, supra, 255 Conn. 608–13. At the time the plaintiffs received their final audit and began receiving retirement benefits, all of the operative facts to successfully assert a claim under the act existed—they had met the conditions for retirement, they had received a final longevity payment, and that payment was not included in their benefit calculation.

[12] We need not decide in the present case whether our decision in *Longley* would meet the first of the three criteria for deeming a judicial decision to apply prospectively only. See *Neyland* v. *Board of Education*, supra, 195 Conn. 179 ("the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed" [citation omitted; internal quotation marks omitted]).

Under the foregoing principles, the plaintiffs' claims accrued when their retirement benefits were approved and finalized.[13] As we previously indicated, the commission finalized the plaintiffs' retirement benefits in April, 1994, May, 1998, and April, 2001, respectively. Barring any basis to toll the statute of limitations or to change the accrual date, the statute of limitations on their claims would have expired in April, 2000, May, 2004, and April, 2007, respectively. Bouchard filed the first request for recalculation in December, 2007. The first claim filed on behalf of the other two plaintiffs was filed in August, 2009.

## III

All that is left to decide is whether the trial court properly determined that the continuing violation theory invoked by the plaintiffs did not apply to render their claims timely. The plaintiffs claim that there was a continuing violation that tolled the statute of limitations because they continued to receive payments that did not comply with the act. They contend that their position is supported by *State* v. *Commission on Human Rights &*

[13] Although we are mindful that some jurisdictions have effectively applied some form of discovery rule in pension cases; see *Novella* v. *Westchester County*, 661 F.3d 128, 144–48 (2d Cir. 2011) (discussing various approaches to accrual issue in context of pension miscalculation); we need not consider in the present case whether to adopt such an approach. The plaintiffs have not advanced that argument on appeal. Moreover, they presented no evidence to establish that the information made available to them when they applied for and received their retirement benefits was insufficient to alert them that their final longevity payment was not included in their benefit calculation. Furthermore, we take judicial notice of the fact that the record in *Longley* reflects that those plaintiffs had gleaned this fact from the retirement application form itself. See *Karp* v. *Urban Redevelopment Commission*, 162 Conn. 525, 527, 294 A.2d 633 (1972) (court may take judicial notice of files in other cases). The ready availability of this information also is evidenced by the fact that, at the time *Longley* was pending before this court, four other cases raising similar challenges were pending before the Superior Court. See *Malerba* v. *State Employees Retirement Commission*, supra, 45 Conn. L. Rptr. 853.

*Opportunities*, 211 Conn. 464, 559 A.2d 1120 (1989) (*CHRO*), and *Watts* v. *Chittenden*, 301 Conn. 575, 22 A.3d 1214 (2011). We disagree.

"The critical distinction in the continuing violation analysis . . . is whether the plaintiffs complain of the present consequence of a one time violation, which does not extend the limitations period, [or] the continuation of that violation into the present, which does." (Internal quotation marks omitted.) *Knight* v. *Columbus*, 19 F.3d 579, 580–81 (11th Cir.), cert. denied, 513 U.S. 929, 115 S. Ct. 318, 130 L. Ed. 2d 280 (1994). In *CHRO*, this court applied the continuing violation theory in the context of a claim that the plaintiff state employer had engaged in a discriminatory practice by paying smaller pension benefits to male teachers than female teachers as a result of using gender-based actuarial tables for calculating benefits. *CHRO*, supra, 211 Conn. 466–67, 472–77. The court concluded that each payment of retirement benefits constituted a separate discriminatory act in violation of the state's antidiscrimination statute. Id., 476. In so concluding, the court deemed case law controlling in which it had recognized that "discrete incidents occurring during a *continuum of discriminatory employment practices* may constitute fresh violations of [the applicable antidiscrimination statute]." (Emphasis added.) Id., 473. It contrasted this type of ongoing discrimination with cases in which a past act of discrimination impacted an otherwise neutral pension or benefits scheme, the latter not constituting a continuing violation. Id., 473–74. This court has never relied on this case outside of the context of employment discrimination, and we do not view a misinterpretation of pension law as giving rise to a similar continuing expression of unlawful policy. Therefore, *CHRO* does not support application of the continuing violation theory to the present case.

We acknowledge that some courts in other jurisdictions, although not cited by the plaintiffs, have treated cases of this ilk as a continuing violation under the view that pension benefits are similar to instalment contracts, rendering each "instalment" for less than owed its own breach. See, e.g., *Green* v. *Obledo*, 29 Cal. 3d 126, 141, 624 P.2d 256, 172 Cal. Rptr. 206 (1981); *Bishop* v. *State, Division of Retirement*, 413 So. 2d 776, 777–78 (Fla. App. 1982); *Harris* v. *Allen Park*, 193 Mich. App. 103, 107, 483 N.W.2d 434 (1992). Many other courts, however, have rejected this view. See, e.g., *Novella* v. *Westchester County*, 661 F.3d 128, 146 (2d Cir. 2011); *Miller* v. *Fortis Benefits Ins. Co.*, 475 F.3d 516, 522 (3d Cir. 2007); *Edes* v. *Verizon Communications, Inc.*, 417 F.3d 133, 139–40 (1st Cir. 2005); *Lang* v. *Aetna Life Ins. Co.*, 196 F.3d 1102, 1105 (10th Cir. 1999); *Pisciotta* v. *Teledyne Industries, Inc.*, 91 F.3d 1326, 1332 (9th Cir. 1996); *Beggs* v. *Portales*, 305 P.3d 75, 81–83 (N.M. App. 2013). One reason cited is that it undermines the purposes of a statute of limitations. See *Miller* v. *Fortis Benefits Ins. Co.*, supra, 522 (rejecting continuing violation theory on ground that it would give rise to indefinite limitation period); *Lang* v. *Aetna Life Ins. Co.*, supra, 1105 ("Under [the] plaintiff's characterization [of her disability policy as an instalment contract], her claim would have an indefinite lifespan. Such a result would undermine the overriding purpose of a statute of limitation[s]."). Another reason cited is that it runs counter to the well settled proposition that a single decision that results in lasting negative effects is not a continuing violation. See *Novella* v. *Westchester County*, supra, 146; *Beggs* v. *Portales*, supra, 81–83. We agree with those courts that would not view a nondiscriminatory miscalculation of a pension benefit as a continuing violation.

The plaintiffs' reliance on *Watts* v. *Chittenden*, supra, 301 Conn. 575, does not persuade us otherwise. As best

we can understand their argument, it is that a continuing violation can be found when there are repeated wrongs arising from a "special relationship" between a plaintiff and a defendant, which, in the present case, the plaintiffs characterize as a fiduciary relationship between retirees and the commission. A fair and complete reading of *Watts*, however, does not support this view of the continuing violation theory; *Watts* is a case that is more accurately characterized as involving the "continuous course of conduct" theory of tolling.[14] Id., 577.

The continuous course of conduct doctrine generally requires proof that "the defendant: (1) committed an initial wrong upon the plaintiff; (2) owed a continuing duty to the plaintiff that was related to the alleged original wrong; and (3) continually breached that duty." (Internal quotation marks omitted.) *Martinelli* v. *Fusi*, 290 Conn. 347, 357, 963 A.2d 640 (2009). "Where we

[14] Although this court has on occasion used both terms in a manner that would imply that they are interchangeable; see, e.g., *Watts* v. *Chittenden*, supra, 301 Conn. 587; the difference between these theories is not simply the circumstances in which they apply, but also the scope of recovery they afford. When there is a continuing violation, each breach gives rise to a new statute of limitations, and the plaintiff is entitled to recover for only those breaches that occurred within the statute of limitations. See *Knight* v. *Columbus*, supra, 19 F.3d 581 ("[w]here a continuing violation is found, the plaintiffs can recover for any violations for which the statute of limitations has not expired"); see also *State* v. *Commission on Human Rights & Opportunities*, supra, 211 Conn. 472–73. Thus, if that theory had applied in the present case, the plaintiffs would be entitled to increased awards only for the six year period preceding the filing of their claim, as well as prospective relief. Conversely, when there is a continuing course of conduct, the accrual of the cause of action is delayed, and the plaintiff is entitled to recover the full extent of his or her injuries, irrespective of when they commenced. See *Handler* v. *Remington Arms Co.*, 144 Conn. 316, 321, 130 A.2d 793 (1957) ("[w]hen the wrong sued upon consists of a continuing course of conduct, the statute does not begin to run until that course of conduct is completed"); see also *Watts* v. *Chittenden*, supra, 596; see generally *Aryeh* v. *Canon Business Solutions, Inc.*, 55 Cal. 4th 1185, 1197–1200, 292 P.3d 871, 151 Cal. Rptr. 3d 827 (2013) (explaining difference between continuing violation and continuing course of conduct theories, and that latter is referred to as "continuous accrual" theory).

have upheld a finding that a duty continued to exist after the cessation of the act or omission relied upon, there has been evidence of either a special relationship between the parties giving rise to such a continuing duty or some later wrongful conduct of a defendant related to the prior act." (Internal quotation marks omitted.) *Watts* v. *Chittenden*, supra, 301 Conn. 584. The plaintiffs have not identified a single case in which any court has deemed pension administration to create such a special relationship or more generally applied the continuous course of conduct doctrine to such cases, despite the many hundreds of pension cases involving application of statutes of limitations and tolling. We also observe that neither of the policy reasons cited by this court in support of this theory of tolling applies to the present case. See id., 591 ([1] "it would be inequitable for the limitations period to begin to run when a plaintiff is incapable of bringing an action because he or she is under the control of the defendant and is thus unable to bring an action," and [2] "it may serve the interest of judicial economy to toll the statute of limitations in cases involving . . . close personal relationships [such as attorney-client] in order to allow the involved parties the opportunity to work out their dispute rather than requiring a plaintiff to commence an action immediately"). Therefore, the plaintiffs also have not made a case for applying the continuous course of conduct doctrine to toll accrual of their causes of action in the present case.

In sum, we conclude that a six year time limitation applicable to the plaintiffs' claims expired before they commenced the present administrative proceedings. Because there is no independent basis on which the class' claim can proceed, its claims fail for the same reason that the individual plaintiffs' claims fail.

The judgment is reversed in part and the case is remanded with direction to render judgment for the commission on the administrative appeal; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.