CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

ANTHONY MARTINEZ ET AL. *v.* CITY OF NEW HAVEN ET AL.
(SC 19850)

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

Syllabus

The plaintiffs sought to recover damages from, among others, the defendant city and the defendant board of education for negligent supervision in connection with injuries sustained by the named plaintiff, M, when he was accidentally cut in the face during an incident in which other students were running with safety scissors in an auditorium prior to the start of school. M had been injured when he attempted to pick up the scissors after they had fallen to the ground. The plaintiffs claimed, pursuant to the statute (§ 52-557n) permitting certain negligence actions against municipalities, that the defendants were negligent in failing to properly supervise the students in the auditorium, to inspect the premises for dangerous objects, and to remove the dangerous object that caused M's injuries. After the defendants filed an answer denying the allegations of negligence, they filed a motion for leave to amend their answer to include, inter alia, the special defense of governmental immunity, but the trial court never explicitly ruled on that motion. The case was tried to the court, which concluded that M had proven the imminent harm to identifiable persons exception to governmental immunity. From the judgment rendered in part for the plaintiffs, the defendants appealed and the plaintiffs cross appealed. *Held*:

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

1. The trial court incorrectly determined that M satisfied the imminent harm to identifiable persons exception to governmental immunity, M having failed to prove the imminent harm prong of that exception because he failed to establish that it was apparent to the defendants that the claimed dangerous condition, namely, students running with safety scissors, was so likely to cause harm that a clear and unequivocal duty to act immediately was created; there was no evidence that possessing safety scissors in the auditorium violated any school policy, there was no prohibition on students having safety scissors at the school, the teacher who was supervising the students in the auditorium at the time of the incident had never experienced any behavioral problems with any of the students involved and did not see the students running or the safety scissors, there had been no previous incidents of a similar nature that would have alerted the defendants that additional safety procedures were needed in the auditorium, and, thus, the defendants had no reasonable way to anticipate that a student would be cut in the course of attempting to pick up safety scissors.

(*One justice dissenting*)

2. The plaintiffs could not prevail on their claim, raised as an alternative ground for affirming the judgment, that the defendants had failed to plead governmental immunity as a special defense in the operative answer: although the trial court never expressly ruled on the defendants' request for leave to amend their answer to include governmental immunity as a special defense, or the plaintiffs' objection to that request, a thorough review of the record demonstrated that the trial court implicitly granted the defendants' request to amend their answer and overruled the plaintiffs' objection, as the trial court's memorandum of decision treated the special defense of governmental immunity as the primary issue to be resolved in the case, nearly the entire decision was devoted to addressing governmental immunity and the imminent harm to identifiable persons exception, and nowhere in that decision did the court treat the matter as a simple negligence case; moreover, because the plaintiffs did not argue that the trial court abused its discretion in implicitly granting the defendants' request to amend their answer, this court would not disturb the trial court's decision to allow the defendants to assert the special defense of governmental immunity.

Argued September 21, 2017—officially released January 30, 2018

Procedural History

Action to recover damages for personal injuries sustained by the named plaintiff as a result of the defendants' negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Agati*, *J.*; verdict and judgment

in part for the plaintiffs, from which the named defendant et al. appealed and the plaintiffs cross appealed. *Reversed in part*; *judgment directed.*

Audrey C. Kramer, assistant corporation counsel, for the appellants-cross appellees (named defendant et al.).

Terrence M. Wynne, for the appellees-cross appellants (plaintiffs).

Opinion

ROBINSON, J. The principal issue in this appeal is whether the trial court properly determined that the named plaintiff, Anthony Martinez,[1] proved the imminent harm to identifiable persons exception to the defense of governmental immunity with respect to facial injuries that he sustained when other students engaged in horseplay by running with a pair of safety scissors in the auditorium of his school. The plaintiff commenced this action against the defendants, the city of New Haven (city), the Board of Education of the City of New Haven (board), and Garth Harries, the Superintendent of New Haven Public Schools,[2] seeking damages for, inter alia, their negligent supervision of

[1] We note that the present action was commenced on behalf of Anthony Martinez by and through his mother, Luz Mercado, as next friend and parent, who was also listed as a plaintiff in her individual capacity. We further note that, during the pendency of the present appeal, the trial court granted a motion substituting Anthony Martinez' father, Jorge Martinez, as next friend. For the sake of simplicity, we hereinafter refer to Anthony Martinez as the plaintiff.

[2] We note that, because the trial court rendered judgment in favor of Harries, he did not join the city and the board in filing the present appeal. See footnote 5 of this opinion. For the sake of simplicity, we hereinafter refer to the city and the board, collectively, as the defendants.

students pursuant to General Statutes § 52-557n (a).[3] On appeal,[4] the defendants claim, inter alia, that the trial court improperly held that the plaintiff satisfied the imminent harm to identifiable persons exception to governmental immunity, which this court recently clarified in *Haynes* v. *Middletown*, 314 Conn. 303, 101 A.3d 249 (2014). The plaintiff disagrees, and also claims, as an alternative ground for affirming the judgment of the trial court, that the defendants failed to plead governmental immunity as a special defense in the operative answer. We conclude that the plaintiff has failed to prove that the defendants' conduct had subjected an identifiable person to imminent harm. We also conclude that the trial court implicitly granted the defendants' request to amend their answer to plead governmental immunity as a special defense. Accordingly, we reverse in part the judgment of the trial court.

The record reveals the following facts, as found by the trial court, and procedural history relevant to our resolution of this appeal. On March 19, 2013, the plaintiff, who was eleven years old, attended the Engineering Science University Magnet School (school) in New Haven. Upon his arrival at the school that day, the

[3] General Statutes § 52-557n (a) provides in relevant part: "(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 . . . . (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. . . ."

[4] The defendants 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.

plaintiff went to the auditorium to eat breakfast and wait for classes to start. At that time, a teacher, David Scott Stewart, was present in the auditorium because the principal had assigned him to supervise student behavior. There were between seventy and seventy-five students in the auditorium that morning. While there, the plaintiff observed two female students running around the auditorium chasing after one of the plaintiff's friends. Stewart did not see the students running because he was talking to other students at the time. One of the female students had safety scissors in her hand as she ran. As that female student approached the plaintiff, the scissors fell to the ground. The plaintiff and the other female student bent down to retrieve the scissors and, as that female student lifted the open scissors from the ground, she accidentally cut the plaintiff on the left side of his face.

The plaintiff's laceration began to bleed, so he went to the bathroom with his friend to tend to the injury. Other students advised another teacher, Karissa Stolzman, of the incident. Stolzman went to the bathroom and gave the plaintiff paper towels to care for the cut and then took him to the main office. Stolzman then reported the incident to the principal and filed an incident report. The school informed the plaintiff's parents of the incident and called an ambulance to transport him to a hospital emergency room for treatment.

The plaintiff subsequently commenced this action against the defendants, seeking monetary damages for his injuries. In the operative complaint, the plaintiff alleged that the defendants had failed to supervise the students in the auditorium properly. The plaintiff further alleged that the defendants failed to inspect the premises properly to ascertain the presence of dangerous objects, and, as such, they failed to remove the dangerous object that caused his injuries. The plaintiff also alleged that the defendants and their agents, ser-

vants or employees were negligent, and that the action was being brought pursuant to § 52-557n. The defendants filed their first answer on July 29, 2015, which denied the plaintiff's allegations of negligence. On September 11, 2015, the defendants filed a request for leave to amend their answer to include, inter alia, the special defense of governmental immunity. The trial court never explicitly ruled on that motion for leave to amend the answer.

The matter was tried to the court, which found in favor of the plaintiff on counts one and two of the complaint. Specifically, the trial court concluded that the plaintiff satisfied the imminent harm to identifiable persons exception to governmental immunity under the standard articulated in *Haynes* v. *Middletown*, supra, 314 Conn. 303. The trial court rendered judgment on counts one and two of the complaint awarding the plaintiff past economic damages of $2814.19, future economic damages of $3000, and noneconomic damages of $35,000. The trial court rendered judgment against the plaintiff on the remaining three counts of the complaint. See footnote 5 of this opinion. This appeal followed. See footnote 6 of this opinion.

On appeal, the defendants claim, inter alia, that the trial court improperly concluded that the plaintiff was an identifiable person subject to imminent harm. The plaintiff disagrees and also posits, as an alternative ground for affirmance, that the defendants failed to plead the special defense of governmental immunity in the operative answer.[5] We address these issues in turn.

[5] The plaintiff also filed a cross appeal, claiming that the trial court improperly (1) awarded him only $35,000 in noneconomic damages, which was inadequate to compensate him for his permanent scarring and pain and suffering, and (2) rendered judgment in favor of the defendants on counts three, four, and five of the complaint, which he contends asserted an official capacity claim against Harries and derivative claims against the city and the board pursuant to General Statutes §§ 7-465 (a) and 10-235 (a). Because we conclude that the plaintiff has failed to satisfy the imminent harm to identifiable persons exception to governmental immunity, we need not

I

We first address the question of whether the trial court properly determined that the plaintiff met his burden of proving the imminent harm to identifiable persons exception to governmental immunity. Specifically, the defendants contend that, because the trial court did not identify how the harm was imminent, the plaintiff could not be found to be an identifiable person. Additionally, the defendants argue that the trial court did not identify the dangerous condition or explain how that dangerous condition was apparent to Stewart. Finally, the defendants contend that the trial court's reliance on whether the harm was foreseeable is improper because this court rejected that standard in *Haynes* v. *Middletown*, supra, 314 Conn. 303.[6]

In response, the plaintiff contends that the trial court properly concluded that he was a member of an identifiable class of victims as a student at school during school hours. Moreover, the plaintiff further contends that the dangerous condition was students running with scissors and that it was, or should have been, apparent to Stewart that the plaintiff was in danger of imminent harm. To this end, the plaintiff argues that *Haynes* did not reject the foreseeability standard; rather, it rejected the notion that foreseeability was limited only to temporal and geographical considerations.

address these claims. See *Grady* v. *Somers*, 294 Conn. 324, 338, 984 A.2d 684 (2009) ("[a] tort claimant seeking to establish the liability of a municipal employee or official arising out of the negligent performance of a discretionary act necessary for indemnification by the municipality under § 7-465 [a] must . . . overcome the qualified immunity afforded to those employees or officials").

[6] We note that the defendants also claim that the trial court's finding of fact that the students were still running when the plaintiff's injury occurred was clearly erroneous. Because we ultimately conclude that the plaintiff failed to satisfy the imminent harm to identifiable persons exception to governmental immunity, even under the facts as the trial court found them, we need not address this claim.

Our analysis begins with a review of the law concerning governmental immunity, including the imminent harm to identifiable persons exception. "[Section] 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." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Edgerton* v. *Clinton*, 311 Conn. 217, 229, 86 A.3d 437 (2014).

"This court has recognized an exception to discretionary act immunity that allows for liability when 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 . . . . This identifiable person-imminent harm exception has three requirements: (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. . . . All three must be proven in order for the exception to apply." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 230–31. "[T]he ultimate determination of whether [governmental] immunity applies is ordinarily a question of law for the court . . . [unless] there are unresolved factual issues . . . properly left to the jury." (Internal quotation marks omitted.) *Strycharz* v. *Cady*, 323 Conn. 548, 574, 148 A.3d 1011 (2016).

We note at the outset that this court has held that public schoolchildren are "an identifiable class of bene-

ficiaries" of a school system's duty of care for purposes of the imminent harm to identifiable persons exception. *Burns* v. *Board of Education*, 228 Conn. 640, 649, 638 A.2d 1 (1994), overruled on other grounds by *Haynes* v. *Middletown*, supra, 314 Conn. 303. Indeed, "[t]he only identifiable class of foreseeable victims that we have recognized . . . is that of schoolchildren attending public schools during school hours . . . ." (Internal quotation marks omitted.) *Grady* v. *Somers*, 294 Conn. 324, 352, 984 A.2d 684 (2009). Thus, given that the plaintiff was a public school student at school during school hours, he was an identifiable person for purposes of the imminent harm to identifiable persons exception.[7] Accordingly, our focus in this appeal is on whether the trial court properly concluded that the defendants' acts or omissions subjected the plaintiff to imminent harm.

Recently, in *Haynes* v. *Middletown*, supra, 314 Conn. 322–23, we clarified the imminent harm prong of the exception, holding that "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."[8] Applying that stan-

[7] We note that, to the extent that the defendants argue that the plaintiff was not, in fact, a member of an identifiable class of foreseeable victims, we need not reach this claim given our ultimate conclusion that the plaintiff has failed to establish that the defendants' acts or omissions subjected him to imminent harm.

[8] In clarifying the imminent harm standard, we concluded in *Haynes* that *Burns* v. *Board of Education*, supra, 228 Conn. 640, "incorrectly held that a foreseeable harm may be deemed imminent if the condition that created the risk of harm was only temporary and the risk was significant and foreseeable. Our statement in *Evon* v. *Andrews*, [211 Conn. 501, 508, 559 A.2d 1131 (1989)], that a harm is not imminent if it 'could have occurred at any future time or not at all' was not focused on the *duration* of the alleged dangerous condition, but on the *magnitude of the risk* that the condition created." (Emphasis in original.) *Haynes* v. *Middletown*, supra, 314 Conn. 322; see id., 323 ("[w]e therefore overrule *Burns* and [*Purzycki* v. *Fairfield*, 244 Conn. 101, 708 A.2d 937 (1998)] to the extent that they adopted a different standard").

dard to the facts in *Haynes*, we held that, because a jury reasonably could infer that school officials knew both that a locker had been broken for seven months and that horseplay was an ongoing problem in the locker room, a jury reasonably could have inferred "that the dangerous condition was apparent to school officials." Id., 325.

Our next occasion to apply the imminence standard clarified in *Haynes* was in *Strycharz* v. *Cady*, supra, 323 Conn. 548. In *Strycharz*, this court held that a high school student, who was struck by a vehicle at the intersection of the school's driveway, failed to satisfy the imminent harm prong of the exception. Id., 550–51, 588. This court explained that the plaintiff did not prove it was apparent to the municipal defendants that this type of harm was imminent because there was no evidence from which a jury could conclude that the school was aware that students were crossing the intersection in violation of school policy. Id. Moreover, the question of whether the defendants *could* have prevented the plaintiff from leaving school property, while relevant to whether the defendants had breached a ministerial duty, was "irrelevant to the issue of whether it was *apparent* to them that students were, in fact, leaving school property, which is what the plaintiff must demonstrate to establish . . . the identifiable person-imminent harm exception to governmental immunity." (Emphasis in original.) Id., 590. Significantly, this court explained that, even if the exact number of students who were crossing the street was known, "there [was] nothing in the record to indicate that the defendants would have seen them doing it." Id., 589. Thus, this court concluded that a reasonable juror could not find that the defendants would have been aware of the problem. Id., 589–90.[9]

[9] We note that the question of whether an imminent harm was apparent to a municipal defendant is an evolving area of the law. For example, we recently granted a petition for certification in *Northrup* v. *Witkowski*, 175

Turning to the record in the present case, we conclude that the plaintiff failed to satisfy the imminent harm prong of the exception because he failed to prove that it was apparent to the defendants that the claimed dangerous condition, namely, students running with safety scissors,[10] was so likely to cause harm that a clear and unequivocal duty to act immediately was created. First, there is no evidence that possessing safety scissors in the auditorium violated any school policy. On the contrary, Stolzman testified that there was no prohibition on students having these safety scissors at school. Additionally, Stewart testified that he had never experienced any behavioral problems with any of the students involved. There is also no evidence that any

Conn. App. 223, 167 A.3d 443, cert. granted, 327 Conn. 971, 173 A.3d 392 (2017). In that case, the Appellate Court held that the plaintiffs had failed to prove the imminent harm prong of the exception because the risk of flooding, due to the allegedly improper maintenance of a storm water drainage system, was not so great that there was a "clear and urgent need for action on the part of the [municipal] defendants." Id., 244–45. Similarly, in *Washburne* v. *Madison*, 175 Conn. App. 613, 630, 167 A.3d 1029 (2017), petition for cert. filed (Conn. September 5, 2017) (No. 170201), the Appellate Court concluded that the plaintiff "presented no evidence that . . . the defendants were aware that an injury similar to the one suffered by [the plaintiff, namely, a broken leg while playing soccer,] was so likely to happen that they should have acted to prevent it . . . ."

[10] We note that the parties disagree about what constituted the dangerous condition in this case. The plaintiff asserts that the dangerous condition was students running with scissors. The defendants, on the other hand, contend that the trial court did not "identify the dangerous condition that caused the plaintiff's harm . . . ." Specifically, the defendants seem to argue that the students had stopped running before the scissors fell, and, therefore, "the running and the scissors had no connection with the plaintiff's injury . . . ." For its part, the trial court's memorandum of decision provides little insight into what it considered the dangerous condition. It noted: "[One of the female students] had safety scissors in her hand as she chased after [the plaintiff's friend]. As they approached the area where [the plaintiff] was in the auditorium, the scissors fell to the ground. . . . In picking up the scissors, [the other female student] cut the plaintiff . . . ." Regardless of whether the dangerous condition was students running with safety scissors or simply the presence of the safety scissors, however, the plaintiff has not identified any facts in the record that would have made it apparent to the defendants that this type of harm was imminent in the present case.

similar incident had occurred in the past that would have alerted the defendants that additional safety procedures were needed in the auditorium. In fact, Stewart never previously had experienced problems caused by any dangerous student behavior in the auditorium, students running with scissors or otherwise. Moreover, Stewart saw neither the students running nor the safety scissors. Unlike the broken locker and student horseplay in the locker room in *Haynes*, which the school had been aware was a problem since the beginning of the school year; *Haynes* v. Middletown, supra, 314 Conn. 325; the defendants had not experienced any problems with student behavior in the auditorium. Thus, the defendants had no reasonable way to anticipate that a student would be cut in the course of attempting to pick up safety scissors in the auditorium at the same time as another student. Similar to the defendants in *Strycharz* v. *Cady*, supra, 323 Conn. 548, it was not apparent to the defendants that any harm was imminent.[11] Accordingly, we conclude that the trial court improperly determined that the plaintiff satisfied the imminent harm to identifiable persons exception to governmental immunity.

II

We now turn to the plaintiff's alternative ground for affirmance, namely, that the defendants failed to plead governmental immunity as a special defense in their operative answer and, as such, this is simply a negli-

[11] We emphasize that the plaintiff was not required to prove actual knowledge on the part of the defendants. "[T]he applicable test for the apparentness prong of the identifiable person-imminent harm exception is an objective one, pursuant to which we consider the information available to the [school official] at the time of [his or] her discretionary act or omission. . . . Under that standard, [w]e do not ask whether the [school official] actually knew that harm was imminent but, rather, whether the circumstances would have made it apparent to a reasonable [school official] that harm was imminent." (Citation omitted; internal quotation marks omitted.) *Strycharz* v. *Cady*, supra, 323 Conn. 589.

gence case. In response, the defendants contend that the plaintiff failed to raise this issue distinctly before the trial court, and, thus, the trial court was "under no obligation to decide the question." Practice Book § 5-2. Additionally, the defendants argue that the plaintiff did not adequately brief this issue on appeal because he failed to cite to any legal authority in support of his position. We conclude that the trial court implicitly granted the defendants' request for permission to amend their answer to plead governmental immunity as a defense, and that the plaintiff failed to show that the trial court abused its discretion by allowing that amendment to the pleadings.

The record reveals the following additional relevant facts and procedural history. In response to the plaintiff's complaint, the defendants filed their first answer on July 29, 2015. That answer denied the plaintiff's allegations of negligence but failed to raise any special defenses. Thereafter, on September 11, 2015, the defendants filed a request for leave to amend their answer to include certain special defenses. In the attached amended answer, the defendants asserted four special defenses, specifically, that (1) the plaintiff's claims were barred by the doctrine of governmental immunity pursuant to § 52-557n, (2) the plaintiff's claims for damages were barred by § 52-557n (b) (6),[12] (3) the plaintiff's complaint failed to state a claim upon which relief may be granted, and (4) the intervening and superseding acts and omissions of the other students caused the plaintiff's injuries. On September 25, 2015, the plaintiff filed an objection to that motion.

[12] General Statutes § 52-557n (b) provides in relevant part: "Notwithstanding the provisions of subsection (a) of this section, a political subdivision of the state or any employee, officer or agent acting within the scope of his employment or official duties shall not be liable for damages to person or property resulting from . . . (6) the act or omission of someone other than an employee, officer or agent of the political subdivision . . . ."

At the conclusion of the trial, the defendants reminded the court that "there was an amended answer to the plaintiff's complaint, [dated] September 11, 2015, which the plaintiff objected to, but it was never resolved. And there [is] the [defense] of governmental immunity in our amended answer." The plaintiff responded that the motion was never decided by the court, so the original July 29, 2015 answer was the operative pleading. At that time, the trial court did not resolve the issue, but instead responded, "[a]ll right," and then proceeded to explain that it was reserving decision on an unrelated motion to dismiss filed by the defendants. Subsequently, the trial court issued a memorandum of decision concluding that the plaintiff had satisfied the imminent harm to identifiable persons exception to governmental immunity. That memorandum of decision does not, however, expressly address the defendants' motion for permission to amend their answer to assert governmental immunity as a special defense, or the plaintiff's objection to that motion.

Although the trial court never expressly exercised its discretion in ruling on the defendants' request to amend their answer or the plaintiff's objection to that motion, based on a thorough review of the record and the memorandum of decision, we conclude that it implicitly granted the defendants' request to amend their answer and overruled the plaintiff's objection. See *Community Collaborative of Bridgeport, Inc.* v. *Ganim*, 241 Conn. 546, 560, 698 A.2d 245 (1997) (although trial court did not make explicit finding that plaintiff's board failed to ratify unilateral action of one of its members, that finding was implicit in trial court's dismissal of action for lack of standing); cf. *Gonzales* v. *Langdon*, 161 Conn. App. 497, 509, 128 A.3d 562 (2015) ("we should infer from the [trial] court's silence that it implicitly denied the plaintiff's request for leave to amend"); *Spencer* v. *Star Steel Structures, Inc.*, 96 Conn. App. 142, 155, 900

A.2d 42 ("[w]e may construe the [trial] court's decision to grant the application [for a prejudgment remedy] as an implicit finding that the defendants were not prejudiced by the short delay in their receipt of notice of the hearing on the application"), cert. denied, 280 Conn. 914, 908 A.2d 539 (2006). The trial court's memorandum of decision treats the special defense of governmental immunity as the primary issue to be resolved in the present case. Nearly the entire decision is devoted to addressing governmental immunity and the exception for imminent harm to an identifiable person. Nowhere in the memorandum of decision does the trial court treat the matter as "simply a negligence case," as the plaintiff now attempts to characterize it. Accordingly, we disagree with the plaintiff's claim that the defendants never pleaded the special defense of governmental immunity, because the record demonstrates that the trial court granted—albeit implicitly—the defendants' motion for permission to amend their answer. Moreover, because the plaintiff does not argue that the trial court abused its discretion by granting the defendants' motion for permission to amend their answer,[13] we do

[13] We note, however, that it appears from the face of the record that the trial court did not abuse its discretion by granting the defendants' motion for permission to amend their answer. Whether to allow a party to amend the pleadings under Practice Book § 10-60 (a) rests within the discretion of the trial court. See, e.g., *Motzer* v. *Haberli*, 300 Conn. 733, 747, 15 A.3d 1084 (2011); *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 184, 73 A.3d 742 (2013); see also *Briere* v. *Greater Hartford Orthopedic Group, P.C.*, 325 Conn. 198, 206 n.8, 157 A.3d 70 (2017) (stating that relation back inquiry presents question of law, but "once the trial court finds that a pleading relates back, its decision whether to allow an amendment is subject to an abuse of discretion standard of review"). "Factors to be considered in passing on a motion to amend are the length of the delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. . . . Whether to allow an amendment is a matter left to the sound discretion of the trial court. This court will not disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion." (Internal quotation marks omitted.) *Rizzuto* v. *Davidson Ladders, Inc.*, 280 Conn. 225, 255, 905 A.2d 1165 (2006). Considering these factors, we observe that the defendants filed their request for permission to amend their answer on September 11, 2015, almost two months prior to the start of trial. Addition-

not disturb the trial court's decision to allow the defendants to assert the special defense of governmental immunity.

The judgment is reversed as to counts one and two of the plaintiff's complaint and the case is remanded with direction to render judgment for the defendants on those counts; the judgment is affirmed in all other respects.

In this opinion ROGERS, C. J., and PALMER, McDONALD, D'AURIA and ESPINOSA, Js., concurred.

EVELEIGH, J., dissenting. I respectfully disagree with the majority opinion. In my view, the trial court properly applied the test from *Haynes* v. *Middletown*, 314 Conn. 303, 101 A.3d 249 (2014), and made findings of fact in accordance with that test in rendering judgment in favor of the named plaintiff, Anthony Martinez,[1] in the preset action, which was commenced against the defendants, the city of New Haven (city), the Board of Education of the City of New Haven (board), and Garth Harries, the Superintendent of New Haven Public Schools. This court should not be disturbing the trial court's findings of fact since they are not, in my view, clearly erroneous. Therefore, I respectfully dissent.

The trial court found the following: "Based upon the [the imminent harm to identifiable persons exception to the defense of governmental immunity] as expressed [in *Haynes*], this court finds that the plaintiff was [an]

ally, throughout the one day trial, both the plaintiff and the defendants focused on the issues of governmental immunity and the exception for imminent harm to an identifiable person. As such, there is no indication that allowing the amendment was unfair to the plaintiff. Accordingly, it appears that the trial court did not abuse its discretion by permitting the defendants to amend their answer.

[1] I note that Luz Mercado is also named as a plaintiff in the present action. See footnote 1 of the majority opinion. For the sake of simplicity, I hereinafter refer to Anthony Martinez as the plaintiff.

identifiable victim. The court further finds that the harm which the plaintiff was exposed to was foreseeable, and [that] a duty was imposed on [David Scott] Stewart to supervise students and to act immediately to prevent the harm. Therefore, liability . . . under General Statutes § 52-557n is found by the court."

Under our case law, the main purpose of charging school officials with a duty of care is to ensure that schoolchildren in their custody are protected from imminent harm. See generally *Haynes* v. *Middletown*, supra, 314 Conn. 303 (schools have a duty to protect students from imminent harm). The imposition of that duty is predicated, in part, on our settled understanding of the need "to safeguard children of tender years from their propensity to disregard dangerous conditions." (Internal quotation marks omitted.) *Strycharz* v. *Cady*, 323 Conn. 548, 578, 148 A.3d 1011 (2016). As this court stated in *Strycharz*, "it is inarguable that the plaintiff became a member of the identifiable class of foreseeable victims when he arrived at school on the school bus . . . [because] his attendance was legally required, and his parents were statutorily mandated to relinquish their protective custody to school officials. Accordingly, we agree with the plaintiff and the trial court that the school officials' duty to protect the plaintiff from imminent harm attached once he arrived at school on the day of the accident." Id., 576. Therefore, I agree with the majority that there can be no question that the trial court was correct when it found that the plaintiff was an identifiable victim in the present case.

Regarding the issue of imminent harm, I respectfully disagree with the majority opinion. In my view, this incident cannot be regarded as an isolated event of two children going to pick up a pair of safety scissors and one accidently getting cut. Rather, I view the case as a failure to supervise the continuum of activity that revolved around two students, one of whom had safety

scissors in her hand, chasing another student. In my opinion, this activity, which the trial court found began after Stewart, the assigned supervisor, arrived at 9:15 a.m. and continued for a period of time thereafter, should have been stopped prior to the scissors being dropped. The plaintiff certainly presented enough evidence to allow a determination of fact by the trial court, which was acting as the finder of fact in the present case. The trial court found facts in favor of the plaintiff, and I do not believe that we should be interfering with those findings because they are not clearly erroneous.

In *Strycharz*, this court held that, "[b]ecause we are unable to conclude, on the basis of the record before us, that a reasonable juror could find that the circumstances were such that the defendants would have been aware of this problem, the defendants are entitled to judgment as a matter of law on this claim." Id., 590. However, in the present case, a teacher specially assigned to an auditorium to supervise students, most of whom are eating breakfast, would have been aware of children running around the auditorium. At the very least, this issue presents a question for the finder of fact—namely, whether it would have been apparent to Stewart that, unless he acted, there was a risk of imminent harm.

Moreover, I disagree, respectfully, with the majority when it downplays the nature of the harm that may be caused by safety scissors. For instance, the majority states that "there is no evidence that possessing safety scissors in the auditorium violated any school policy." While that fact may be true, it belies the real issue, which is whether there was a policy against either horseplay or children running after one another. Even if a specific policy does not exist, in my view, the situation presented an issue of fact that a risk of imminent harm existed. There was certainly a risk of imminent harm created by the horseplay. The child with the scissors

could have fallen on the scissors and injured herself or others in the process of the fall. The fact that a child was injured while attempting to pick up the scissors, after the scissors dropped during the horseplay, while unfortunate, was certainly understandable as a direct result of the horseplay.

Second, the majority states that "[t]here is also no evidence that any similar incident had occurred in the past that would have alerted the defendants that additional safety procedures were needed in the auditorium. In fact, Stewart never previously had experienced problems caused by any dangerous student behavior in the auditorium, students running with scissors or otherwise." This was an incident of horseplay. The question of whether such conduct had occurred previously, while important from a notice standpoint for the defendant, does not change the fact that a fact finder could reasonably find that that conduct created a risk of imminent harm. There may not have been a need for additional safety procedures if the teacher had been attentive to his duties of supervision.

Third, the majority states that "[m]oreover, Stewart saw neither the students running nor the safety scissors." Respectfully, this is the central point of my disagreement with the majority. As we stated in *Strycharz*, the question is whether a reasonable fact finder could find that a teacher "would" have been aware of this problem if he had been executing his duties properly. *Strycharz* v. *Cady*, supra, 323 Conn. 590. Certainly, it cannot be enough to excuse one charged with the duty of supervising young schoolchildren that he did not see the challenged activity in a room that he was in charge of supervising. Indeed, if that were the case, every teacher charged with supervision could escape liability by saying that he or she never saw the incident.

In my view, the present case is very similar to *Haynes*, in which this court held that "[t]he jury reasonably could

have inferred from this evidence that the dangerous condition was apparent to school officials. Although this evidence is far from compelling, we are unable to conclude that no reasonable juror could find that it was apparent to school officials that, in combination, the ongoing problem of horseplay in the locker room and the presence of the broken locker were so likely to cause an injury to a student that the officials had a clear and unequivocal duty to act immediately to prevent the harm either by supervising the students . . . to prevent horseplay or by fixing the broken locker." (Footnote omitted.) *Haynes* v. *Middletown*, supra, 314 Conn. 325. In my view, this case is even stronger than *Haynes* because, in that case, a teacher was not present in the locker room. In the present case, a teacher was physically present in the auditorium. Thus, in my view, a reasonable fact finder could find that it would have been apparent to Stewart that students were engaging in horseplay with a pair of scissors, and that Stewart had a clear and unequivocal duty to act immediately to prevent the horseplay and potential injury. It is axiomatic that the purpose of assigning a teacher to the auditorium was to maintain order, answer questions, and promote student safety.

I note that the majority has criticized the clarity of the trial court's decision. However, "an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding." *Fisher* v. *Big Y Foods, Inc.*, 298 Conn. 414, 424–25, 3 A.3d 919 (2010). Furthermore, "[w]e read an ambiguous trial court record so as to support, rather than contradict, its judgment." (Internal quotation marks omitted.) *Matza* v. *Matza*, 226 Conn. 166, 187, 627 A.2d 414 (1993). In the present case, the trial court applied the proper law to the facts. On the basis of the trial court's findings, I would affirm the judgment of the trial court.

Therefore, I respectfully dissent.

STATE OF CONNECTICUT *v.* DELANO JOSEPHS (SC 19900)

Rogers, C. J., and Palmer, McDonald, Robinson and D'Auria, Js.

Syllabus

Pursuant to statute (§ 53-247 [a]), a person is guilty of cruelty to animals when he, inter alia, "unjustifiably injures any animal . . . ."

The defendant, who was convicted of one count of cruelty to animals in connection with an incident in which he shot a cat with a BB gun, appealed, claiming that, under § 53-247 (a), the state was required to prove that he had the specific intent to injure the cat, that § 53-247 (a) is unconstitutionally vague as applied to his conduct, and that the evidence was insufficient to support his conviction. The defendant's neighbor, L, testified that, about ten days after another witness had seen the defendant on his property stalking something with a BB gun, she noticed that one of her cats was injured. A veterinarian later confirmed that the cat had a metal object, consistent with a BB, lodged adjacent to one of the cat's vertebrae. L complained about the injury to an animal control officer, who testified that he interviewed the defendant and that the defendant had admitted to having a BB gun and to shooting at L's cats to scare them so as to prevent them from coming on his property but claimed that he did not mean to hurt the cats. The trial court found the defendant guilty of unjustifiably injuring L's cat after concluding that § 53-247 (a) required only a general intent to engage in the conduct in question. *Held*:

1. The trial court properly concluded that the state was not required to prove that the defendant possessed the specific intent to injure L's cat in order to find him guilty under the unjustifiably injuring an animal clause of § 53-247 (a): the plain and unambiguous language of that clause required proof of only a general intent to engage in the conduct at issue, as the legislature did not include any specific intent language in the unjustifiably injuring an animal clause but clearly did require proof of specific intent in certain other clauses and other subsections of § 52-247; moreover, there was no merit to the defendant's claim that requiring proof of only a general intent would lead to the absurd result of a person who accidentally hits an animal while driving a car being subject to conviction for cruelty to animals, as the general intent to do the act of striking the animal would be lacking in such a case, and the state still would need to prove that the injury was unjustifiable in order to secure a conviction.

2. The defendant could not prevail on his unpreserved claim that § 53-247 (a) was unconstitutionally vague when applied to his conduct, as his conduct clearly came within the unmistakable core of the conduct prohibited under § 53-247 (a); the defendant's conduct clearly constituted

an unjustifiable injury to L's cat, as there were other statutes also prohibiting the defendant's conduct of discharging a firearm in a manner likely to cause injury to a domestic animal and of unlawfully injuring any companion animal, and the defined circumstances that allow someone to kill or injure an animal do not include mere trespassing.

3. The evidence presented was sufficient for the trial court to find the defendant guilty of cruelty to animals pursuant to § 53-247 (a): the trial court reasonably could have concluded that the defendant intentionally shot L's cat with a BB gun thereby causing the cat's injury, as the evidence established that the defendant was seen with a BB gun on his property close to the time when L's cat was injured, he admitted to owing a BB gun and to shooting at L's cats, and one of those cats was injured by a BB gun, which, according to the veterinarian who testified at trial, was a rare occurrence; furthermore, the trial court was free to discredit the defendant's testimony that he did not purchase the BB gun until a later date, and this court deferred to the trial court's credibility determination of testimony that the defendant was seen with a BB gun more than one week before L's cat was shot.

Argued October 17, 2017—officially released January 30, 2018

Procedural History

Substitute information charging the defendant with two counts of the crime of cruelty to animals, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, and tried to the court, *Nastri*, *J.*; verdict and judgment of guilty of one count of cruelty to animals, from which the defendant appealed. *Affirmed.*

Katherine C. Essington, for the appellant (defendant).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Elizabeth M. Moseley*, assistant state's attorney, for the appellee (state).

Opinion

ROGERS, C. J. This case requires us to examine the meaning of language used in General Statutes § 53-247

(a),[1] a provision that criminalizes a broad range of acts of cruelty to animals. The defendant, Delano Josephs, appeals[2] from the judgment of conviction of a single violation of § 53-247 (a), stemming from his shooting of his neighbor's cat with a BB gun.[3] The defendant claims that (1) the trial court improperly concluded that the clause of § 53-247 (a) applicable to his conviction, which bars a person from "unjustifiably injur[ing]" an animal, requires only a general intent to engage in the behavior causing the injury, (2) the phrase "unjustifiably injures" in § 53-247 (a) is unconstitutionally vague both facially and as applied to the facts of this case and (3) the evidence was insufficient to support the defendant's conviction pursuant to § 53-247 (a). We dis-

[1] General Statutes § 53-247 (a) provides in relevant part: "*Any person who* overdrives, drives when overloaded, overworks, tortures, deprives of necessary sustenance, mutilates or cruelly beats or kills or *unjustifiably injures any animal*, or who, having impounded or confined any animal, fails to give such animal proper care or neglects to cage or restrain any such animal from doing injury to itself or to another animal or fails to supply any such animal with wholesome air, food and water, or unjustifiably administers any poisonous or noxious drug or substance to any domestic animal or unjustifiably exposes any such drug or substance, with intent that the same shall be taken by an animal, or causes it to be done, or, having charge or custody of any animal, inflicts cruelty upon it or fails to provide it with proper food, drink or protection from the weather or abandons it or carries it or causes it to be carried in a cruel manner, or fights with or baits, harasses or worries any animal for the purpose of making it perform for amusement, diversion or exhibition, *shall*, *for a first offense*, *be fined not more than one thousand dollars or imprisoned not more than one year or both* . . . ." (Emphasis added.) Since the events underlying this appeal, General Statutes § 53-247 (a) was the subject of several amendments that have no bearing on the issues presented herein. See, e.g., Public Acts 2012, No. 12-86 (amending statute to add penalty for subsequent offense). In the interest of simplicity, we refer to the current revision of the statute.

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

[3] The defendant was charged by way of a long form information with two counts of cruelty to animals pursuant to § 53-247 (a). He was found not guilty of the first count, which alleged that he had injured another cat with a BB gun, but guilty of the second count.

agree with each of these claims and, accordingly, affirm the judgment of conviction.

The defendant was convicted after a trial to the court. The record reveals the following facts that the trial court reasonably could have found. At the time of the events in question, the defendant lived next door to Lorraine Leiner, who kept a number of cats as pets and allowed them to roam outdoors. On June 3, 2012, Peter Bombard, who was visiting one of Leiner's tenants,[4] was parked by Leiner's house when he heard three distinct noises that he identified as a BB gun being discharged. Bombard exited his car and saw a man he recognized as the defendant walking with a BB gun in his hands. Bombard testified that the man acted "like he was stalking something" and moved "the way a hunter would walk." Upon noticing Bombard, the defendant cocked the gun and made "direct eye contact" before "slowly back[ing] up out of [his] view . . . ."

On the night of June 14, 2012, Leiner's cat, Wiggles, came inside, and, the next morning, Leiner noticed blood on Wiggles' shoulder. She brought the cat to the Animal Hospital of Berlin for treatment where Veterinarian David Hester took a radiograph of Wiggles and determined that the cat had a "metal opacity" of about "three or four millimeters," consistent with a BB, located "[a]djacent to about the tenth vertebra" of its spine. Hester treated Wiggles but did not remove the BB. At the defendant's trial, Hester testified that BB gun injuries to cats are uncommon and rarely seen.

After Hester treated Wiggles, Leiner complained to the police that "a neighbor was shooting her cats." In investigating the complaint, Animal Control Officer James Russo spoke with the defendant in his driveway in late July or early August, 2012. Russo testified that

[4] Leiner testified that she lived on the first floor of a multifamily home and that her tenants lived on the second and third floors.

the defendant "openly admitted that he does have a BB gun" and that "he was shooting at the cats to scare them away" from coming onto his property, although he also stated that "he had no means of hurting any cats."

The defendant alleged during his oral motion for a judgment of acquittal that the "unjustifiably injures" clause of § 53-247 (a) required specific intent to "harm the animal, to shoot the animal." In its final ruling, the trial court rejected this argument, determining that "[t]he state [was] not required to prove the defendant intended to injure the animal" because the crime only required a general intent to engage in the conduct in question.

The trial court found that "the credible evidence establishes the state prove[d] the elements of the offense [of] cruelty to animals pursuant to § 53-247 (a) beyond a reasonable doubt and, therefore, [found] the defendant guilty [of one count of cruelty to animals]." See footnote 3 of this opinion. The defendant was sentenced to thirty days incarceration, execution suspended, and six months of probation. This appeal followed.

I

MENS REA

The defendant, who was convicted pursuant to the portion of § 53-247 (a) that bars a person from "unjustifiably injur[ing]" an animal, claims first that the trial court committed reversible error by applying the wrong mens rea for the crime. Although acknowledging that the "unjustifiably injures" clause of § 53-247 (a) is unaccompanied by any mens rea qualifier, the defendant contends that the state must prove that he had the specific intent to injure Wiggles, rather than the general intent to do the act that led to the injury. In response, the state argues that "[t]he plain language of § 53-247 (a),

its relationship to the other statutes and its legislative history all demonstrate that the legislature intended for the prohibition against unjustifiably injuring an animal to require only the general intent to engage in the action that ultimately results in injury to the animal." We agree with the state.

The issue of the requisite mens rea applicable to the "unjustifiably injures" clause of § 53-247 (a) "is a question of statutory interpretation, over which our review is plenary." *State ex rel. Gregan* v. *Koczur*, 287 Conn. 145, 152, 947 A.2d 282 (2008). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply." (Internal quotation marks omitted.) Id. Pursuant to General Statutes § 1-2z, the "meaning of a statute, shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If . . . 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." A statute is ambiguous if, "when read in context, [it] is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *State* v. *Pond*, 315 Conn. 451, 467, 108 A.3d 1083 (2015).

Connecticut's case law distinguishes between general and specific intent. "In determining [whether a crime] requires proof of a general intent [or] of a specific intent, the language chosen by the legislature in enacting a particular statute is significant. When the elements of a crime consist of a description of a particular act and a mental element not specific in nature, the only issue is whether the defendant intended to do the proscribed act. If he did so intend, he has the requisite general

intent for culpability. When the elements of a crime include a defendant's intent to achieve some result additional to the act, the additional language distinguishes the crime from those of general intent and makes it one requiring a specific intent." (Internal quotation marks omitted.) *State* v. *Roy*, 173 Conn. 35, 45, 376 A.2d 391 (1977); see also General Statutes § 53a-5 ("[w]hen the commission of an offense . . . or some element of an offense, requires a particular mental state, such mental state is ordinarily designated in the statute defining the offense by use of the terms 'intentionally,' 'knowingly,' 'recklessly' or 'criminal negligence' "). Moreover, "[w]e are not permitted to supply statutory language that the legislature may have chosen to omit." *Vaillancourt* v. *New Britain Machine/Litton*, 224 Conn. 382, 396, 618 A.2d 1340 (1993).

Section 53-247 is comprised of subsections (a) through (e). Subsections (b) through (e) each include explicit specific intent terms, specifically, "maliciously and intentionally," "knowingly," and "intentionally," that apply to all of the acts proscribed by the particular subsection. General Statutes § 53-247 (b) through (e).[5]

[5] General Statutes § 53-247 (b) provides in relevant part: "Any person who *maliciously and intentionally* maims, mutilates, tortures, wounds or kills an animal [shall be guilty of a class C or D felony]. . . ." (Emphasis added.)

General Statutes § 53-247 (c) provides: "Any person who *knowingly* (1) owns, possesses, keeps or trains an animal engaged in an exhibition of fighting for amusement or gain, (2) possesses, keeps or trains an animal with the intent that it be engaged in an exhibition of fighting for amusement or gain, (3) permits an act described in subdivision (1) or (2) of this subsection to take place on premises under his control, (4) acts as judge or spectator at an exhibition of animal fighting for amusement or gain, or (5) bets or wagers on the outcome of an exhibition of animal fighting for amusement or gain, shall be guilty of a class D felony." (Emphasis added.)

General Statutes § 53-247 (d) provides in relevant part: "Any person who *intentionally* injures any animal while such animal is in the performance of its duties under the supervision of a peace officer . . . or *intentionally* injures a dog that is a member of a volunteer canine search and rescue team . . . while such dog is in the performance of its duties under the supervision of the active individual member of such team, shall be guilty of a class D felony." (Emphasis added.)

In contrast, § 53-247 (a) lacks a mens rea term that applies to every proscribed act listed therein and, instead, contains some clauses that include a specific intent term and others that do not. See footnote 1 of this opinion. This differing structure strongly supports a conclusion that the legislature did not intend for all of the acts proscribed by § 53-247 (a) to be accompanied by the same mens rea.

Additionally, unlike the clause at issue, in other clauses of § 53-247 (a), the adverb "unjustifiably" appears in conjunction with additional language that clearly requires specific intent. Specifically, the clause under which the defendant was convicted refers to any person who "unjustifiably injures any animal," but other portions of subsection (a) later refer to any person who "unjustifiably administers any poisonous or noxious drug or substance to any domestic animal or unjustifiably exposes any such drug or substance, *with intent* that the same shall be taken by an animal . . . ." (Emphasis added.) General Statutes § 53-247 (a). This plainly indicates that, in § 53-247 (a), "unjustifiably" means something different from "intentionally" and that the legislature will include specific intent language along with the word "unjustifiably" when it intends for a specific intent to apply. See *State* v. *Roy*, supra, 173 Conn. 45. The legislature's differing treatment of these two clauses within the same subsection convinces us that the "unjustifiably injures any animal" clause, under which the defendant was charged, requires only a general intent. General Statutes § 53-247 (a).

General Statutes § 53-247 (e) provides in relevant part: "Any person who *intentionally* kills any animal while such animal is in the performance of its duties under the supervision of a peace officer . . . or *intentionally* kills a dog that is a member of a volunteer canine search and rescue team . . . while such dog is in the performance of its duties under the supervision of the active individual member of such team, shall be fined not more than ten thousand dollars or imprisoned not more than ten years, or both." (Emphasis added.)

The defendant argues that we should read a specific intent requirement into the prohibition in § 53-247 (a) against "unjustifiably injur[ing]" an animal because subsection (b) of § 53-247 punishes "maliciously and intentionally" maiming, mutilating, torturing, wounding or killing an animal, and, in the defendant's view, there is "no discernable reason to have two different standards of proof for conduct that . . . could be charged under either subsection of the statute." We are not persuaded by this argument because there is a clear reason for an additional mens rea element in subsection (b), namely, the punishment imposed by subsection (b) is more severe than that imposed by subsection (a).[6] General Statutes § 53-247 (a) and (b).

The defendant further contends that the trial court should have required proof of specific intent to injure an animal because requiring only general intent would lead to absurd results. In the defendant's view, a person who accidentally hit a dog while driving a car would be liable under a general intent interpretation of the statute. We disagree because, even in such circumstances, a general intent to do the act of striking the animal still would be lacking. Moreover, in such situations, the state would still need to prove that the injury was unjustifiable in order to obtain a conviction.

As demonstrated by the foregoing analysis, the plain and unambiguous language of the clause in § 53-247 (a) that the defendant was charged with violating required

[6] We also reject the defendant's claim that the "legislators may have been unaware that the language of [§ 53-247 (b), enacted in 1996 separately from subsection (a)] was somewhat duplicative of a portion of subsection (a), or they may have been uncertain themselves as to what constitutes a 'justifiable' injury to an animal." When the meaning of a statute is plain, we do not consider legislative intent. See *State* v. *Pond*, supra, 315 Conn. 467 (pursuant to § 1-2z, "[i]f . . . the meaning of [the statute's] text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered" [internal quotation marks omitted]).

only a general intent when read in the context of the entirety of subsection (a) and within § 53-247 as a whole. Accordingly, the trial court properly concluded that the state was not required to prove that the defendant possessed the specific intent to injure Wiggles.

II

VOID FOR VAGUENESS

The defendant claims next that § 53-247 (a), when applied to his conduct, is unconstitutionally vague. Because this claim is unpreserved, he seeks review of it pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[7] We conclude that, although the record is adequate for review and the defendant has raised a claim of constitutional magnitude, he has not shown the existence of a constitutional violation that deprived him of a fair trial.

Section 53-247 (a) provides in relevant part: "Any person who . . . unjustifiably injures any animal . . . shall, for a first offense, be fined not more than one thousand dollars or imprisoned not more than one year or both . . . ." The defendant contends that the phrase " 'unjustifiably injures' " is unconstitutionally vague on its face and as applied to him "because it does not indicate when an injury to an animal is unjustifiable" and judicial gloss has not cured this infirmity. The state responds that any person of ordinary intelligence would understand that shooting a cat with a BB gun so as to

[7] In *State* v. *Golding*, supra, 213 Conn. 239–40, this court held that "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis omitted; footnote omitted.) Id.; see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*).

cause an injury is not a justifiable act when that cat is simply trespassing on his property. Thus, the state contends, the defendant's claim fails under the third prong of *Golding*. We agree with the state.

The following principles govern our consideration of the defendant's claim. "A statute . . . [that] forbids or requires conduct in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process. . . . Laws must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. . . . A statute is not void for vagueness unless it clearly and unequivocally is unconstitutional, making every presumption in favor of its validity. . . . To demonstrate that [a statute] is unconstitutionally vague as applied to [him], the [defendant] therefore must . . . demonstrate beyond a reasonable doubt that [he] had inadequate notice of what was prohibited or that [he was] the victim of arbitrary and discriminatory enforcement. . . . [T]he void for vagueness doctrine embodies two central precepts: the right to fair warning of the effect of a governing statute . . . and the guarantee against standardless law enforcement. . . . If the meaning of a statute can be fairly ascertained a statute will not be void for vagueness since [m]any statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties." (Internal quotation marks omitted.) *State ex rel. Gregan* v. *Koczur*, supra, 287 Conn. 156. In particular, pursuant to General Statutes § 1-1 (a), "[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly." "References to judicial opinions involving the statute,

the common law, legal dictionaries, or treatises may be necessary to ascertain a statute's meaning to determine if it gives fair warning." (Internal quotation marks omitted.) *State* v. *Winot*, 294 Conn. 753, 759, 988 A.2d 188 (2010). "Unless a vagueness claim implicates the first amendment right to free speech, '[a] defendant whose conduct clearly comes within a statute's unmistakable core of prohibited conduct may not challenge the statute because it is vague as applied to some hypothetical situation . . . .' " *State ex rel. Gregan* v. *Koczur*, supra, 156–57. In contrast, "[i]n a facial vagueness challenge, we . . . examine the challenged statute to see if it is impermissibly vague in all of its applications. A statute that is impermissibly vague in all its applications is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. . . . Such a provision simply has *no* core. . . . A defendant whose conduct clearly comes within a statute's unmistakable core of prohibited conduct may not raise a facial vagueness challenge to the statute." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Indrisano*, 228 Conn. 795, 804, 640 A.2d 986 (1994).

We agree with the defendant that the phrase "unjustifiably injures" in § 53-247 (a) is susceptible to differing interpretations and, therefore, could be vague when applied to some situations. See, e.g., *People* v. *Arroyo*, 3 Misc. 3d 668, 669, 679, 777 N.Y.S.2d 836 (2004) (holding that New York statute, worded similarly to § 53-247 (a), that prohibits "unjustifiably injur[ing]" animals was unconstitutionally vague as applied to defendant who chose not to provide veterinary care to terminally ill dog). Nevertheless, our careful review of the record in this case, as well as other relevant law, satisfies us that the defendant's conduct came within the unmistakable

core of prohibited conduct under § 53-247 (a). First, General Statutes § 53-203[8] makes it abundantly clear that injuring a neighbor's pet cat by shooting it with a BB gun is not permissible, and, further, General Statutes § 22-351[9] disallows the injuring or killing of a companion animal by any means when such act is not authorized by law. Second, although the statutes governing companion animals, as well as our historical common law, allow for the killing, and by extension injuring, of such animals under certain defined circumstances; see, e.g., General Statutes § 22-358 (a) (permitting killing of dog observed to be "pursuing or worrying any . . . domestic animal or poultry"); General Statutes § 22-358 (b) (permitting person bitten by dog or cat, when not present on owner's premises, to kill such dog or cat during attack); General Statutes § 22-359 (b) (permitting "humane euthaniz[ation]" of rabid dog or cat without prior notice to owner); see also *Woolf* v. *Chalker*, 31 Conn. 121, 128–31 (1862) (enumerating similar concepts as to dogs); but see *Vendrella* v. *Astriab Family Ltd. Partnership*, 311 Conn. 301, 315, 87 A.3d 546 (2014) (recognizing certain principles described in *Woolf* inconsistent with subsequent case law); those circumstances clearly do not encompass a mere trespass by an animal. See *Soucy* v. *Wysocki*, 139 Conn. 622, 628, 96 A.2d 225 (1953) (defendant was not justified in shooting dog that had trespassed and was retreating from pens where defendant kept his pheasants); *Johnson* v.

[8] General Statutes § 53-203 provides in relevant part: "Any person who intentionally, negligently or carelessly discharges any firearm in such a manner as to be likely to cause bodily injury or death to persons *or domestic animals* . . . shall be guilty of a class C misdemeanor." (Emphasis added.) Relatedly, the Penal Code defines " 'firearm' " broadly to include any weapon from which a shot may be discharged. General Statutes § 53a-3 (19).

[9] General Statutes § 22-351 (a) provides in relevant part: "Any person . . . who unlawfully kills or injures any companion animal, shall be fined not more than one thousand dollars or imprisoned not more than six months, or both. For a second offense, or for an offense involving more than one companion animal, any such person shall be guilty of a class E felony."

Patterson, 14 Conn. 1, 5, 11 (1840) (defendant was not justified in poisoning plaintiff's fowls, which had trespassed on defendant's land). Additionally, decisions from other jurisdictions lend further support to our conclusion that the defendant's actions here clearly constituted unjustifiable injury and, therefore, unlawful cruelty to Wiggles. See *Commonwealth* v. *Szewczyk*, 89 Mass. App. 711, 713, 717, 53 N.E.3d 1286 (2016) (defendant's shooting of dog with pellet gun to discourage her from returning to, and defecating on, defendant's property was unjustifiable infliction of pain pursuant to anticruelty to animals statute); *Bartlett* v. *State*, 929 So. 2d 1125, 1126 (Fla. App. 2006) (defendant's repeated shooting of opossum with BB gun after driving it from his garage was infliction of unnecessary pain pursuant to anticruelty to animals statute); see also 4 Am. Jur. 2d 486, Trespassing Animals § 110 (2007) ("[o]rdinarily, the intentional killing or maiming of trespassing animals merely because they are trespassing is considered to be wrongful and to render the person killing or maiming the animal liable in damages").

For all the foregoing reasons, the defendant's vagueness claim fails because his conduct clearly came within the core of the activity prohibited by § 53-247 (a).[10]

III

SUFFICIENCY OF THE EVIDENCE

The defendant finally claims that the evidence was insufficient to prove beyond a reasonable doubt that

[10] Because we conclude that the statutory language was not vague as applied to the defendant's conduct, we need not review the defendant's facial challenge to the statute. See *State* v. *Wilchinski*, 242 Conn. 211, 218, 700 A.2d 1 (1997) ("[o]ur analysis terminates once we determine that the statute, strictly construed, is not vague as applied to the defendant's conduct").

he violated § 53-247 (a) and, therefore, that his conviction was improper.[11] We disagree.

In evaluating a claim of evidentiary insufficiency, we "review the evidence and construe it as favorably as possible with a view toward sustaining the conviction, and then . . . determine whether, in light of the evidence, the trier of fact could reasonably have reached the conclusion it did reach." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Jordan*, 314 Conn. 354, 385, 102 A.3d 1 (2014). A trier of fact is permitted to make reasonable conclusions by "draw[ing] whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . [These inferences, however] cannot be based on possibilities, surmise or conjecture." (Internal quotation marks omitted.) Id.

"We note that the [trier of fact] must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but]

[11] The defendant makes no claim that, because the trial court reserved ruling on his motion for a judgment of acquittal at the close of the state's evidence, it would be improper for this court to consider the evidence that he presented as part of determining whether the evidence was sufficient to support his conviction. See *State* v. *Seeley*, 326 Conn. 65, 67 n.3, 161 A.3d 1278 (2017) ("[W]hen a motion for [a judgment of acquittal] at the close of the state's evidence is denied, a defendant may not secure appellate review of the trial court's ruling without [forgoing] the right to put on evidence in his or her own behalf. The defendant's sole remedy is to remain silent and, if convicted, to seek reversal of the conviction because of insufficiency of the state's evidence. If the defendant elects to introduce evidence, the appellate review encompasses the evidence in toto." [Internal quotation marks omitted.]); see also Practice Book § 42-41. Although the defendant did not renew his motion for a judgment of acquittal, regardless of whether his claim is unpreserved, "any defendant found guilty on the basis of insufficient evidence has been deprived of a constitutional right, and would therefore necessarily meet the four prongs of *Golding* . . . . [Thus] we review an unpreserved sufficiency of the evidence claim as though it had been preserved." (Citation omitted; internal quotation marks omitted.) *State* v. *Revels*, 313 Conn. 762, 777, 99 A.3d 1130 (2014), cert. denied, U.S. , 135 S. Ct. 1451, 199 L. Ed. 2d 404 (2015).

each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Perkins*, 271 Conn. 218, 246, 856 A.2d 917 (2004). "Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence." (Internal quotation marks omitted.) Id.

In the present case, the defendant challenges his conviction of cruelty to animals on the basis that there was insufficient evidence to prove beyond a reasonable doubt that he shot Wiggles with a BB gun. In order to sustain a conviction of cruelty to animals, the state must have presented evidence from which the trier of fact reasonably could have found, beyond a reasonable doubt, that the defendant "unjustifiably injur[ed] [an] animal" with the requisite general intent. General Statutes § 53-247 (a); see part I of this opinion. We conclude that the state satisfied that burden.

In particular, the defendant contends that none of the state's witnesses actually saw him shoot Wiggles, that the state failed to connect the BB that was found inside Wiggles with the BB gun owned by the defendant and that there was no proof that he owned that gun at the time Wiggles was injured.[12] The defendant's argument, however, fails to follow the test applicable to a sufficiency of the evidence claim. See *State* v. *Jordan*, supra, 314 Conn. 385.

We begin our review with the evidence cited by the trial court in its bench ruling: "[T]he state introduced

[12] The defendant also contends that the evidence did not prove that he "possessed the necessary [specific intent] required for the offense." Because we already have concluded that the defendant's conviction required only a general intent, we need not address this argument. See part I of this opinion.

evidence from [Hester] and [Leiner] that on June 15, 2012, [Leiner] brought her cat, Wiggles, to the animal hospital [where] [u]sing a radiograph [Hester] determined the cat had a metal object consistent with a BB lodged in the muscle. [Hester] treated the animal but did not remove the metal object. On cross-examination, [Hester] testified [that] he rarely sees animals shot by a BB gun."

The state also presented evidence that the defendant was observed with a BB gun about ten days before Wiggles was found injured. In this regard, the trial court found that "[Bombard] testified credibly that when he stepped from his car [after hearing three distinct sounds that he associated with the discharge of a BB gun], he saw an individual he recognized as the defendant with a BB [gun] in his hands walking like a hunter stalking prey. The defendant cocked the [gun] and then made eye contact with [Bombard]. When they made eye contact, the defendant slowly stepped backward until he was out [of] [Bombard's] sight." The animal control officer who investigated Leiner's complaint testified that "[t]he defendant admitted to [him] that he owned a BB gun and shot at the cats to scare them away, although he [claimed he] didn't mean to hurt them." On the basis of a "thorough examination of all of the evidence, both documentary and testimonial, the [trial court found] the credible evidence establishes [that] the state prove[d] the elements of the offense [of] cruelty to animals [pursuant to] § 53-247 (a) beyond a reasonable doubt . . . ."

This evidence, viewed as favorably as possible to sustaining the verdict, establishes that the defendant was seen with a BB gun in a shooting stance in his yard close to the time when Wiggles was injured, he admitted that he owned a BB gun and that he had used it to shoot at Leiner's cats, and one of those cats was injured by a BB gun, which, according to Hester, is a rare

occurrence. On the basis of this circumstantial evidence and the reasonable inferences drawn therefrom, the trial court reasonably could have concluded that the defendant intentionally shot Wiggles with his BB gun, resulting in the cat's injury.[13] Although the defendant points to his own testimony that he did not purchase the BB gun until a later date, the trial court, as the finder of fact, was free to discredit this assertion. Moreover, we defer to the trial court's credibility determination of Bombard's testimony that he saw the defendant with a BB gun more than one week before Wiggles was shot. Thus, we conclude that the evidence presented was sufficient for the trial court to find the defendant guilty of cruelty to animals pursuant to § 53-247 (a).

The judgment is affirmed.

In this opinion the other justices concurred.

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[13] The defendant contends that it was "likely that there were other individuals in the vicinity who were unhappy with the presence of the cats." Regardless of whether this is true, the defendant, in essence, requests that this court make impermissible inferences "based on possibilities, surmise or conjecture" about unsupported and barely articulated alternative theories of Wiggles' injury. (Internal quotation marks omitted.) *State* v. *Jordan*, supra, 314 Conn. 385. We decline to do so.