DIANE BOISVERT ET AL. *v.* JAMES GAVIS
(SC 20049)
(SC 20053)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.*

Syllabus

The plaintiffs, the maternal grandparents of the defendant father's minor child, B, filed, in the trial court, a petition for visitation with B pursuant to statute (§ 46b-59). The defendant had been granted custody of B following the death of B's mother, before which the plaintiffs enjoyed a significant relationship with B and contributed meaningfully to his care. The defendant unilaterally terminated visitation shortly after the mother's death, contending that the plaintiffs did not abide by his wishes with respect to B's care during B's time with them, and also because he believed that the plaintiffs were seeking to have him incarcerated so that they could be awarded custody of B. Following an evidentiary hearing, the trial court granted the plaintiffs' petition, finding that the plaintiffs had a parent-like relationship with B and that the denial of visitation would cause B real and significant harm, and the defendant appealed. Thereafter, the defendant filed a motion seeking a no contact order between B and his maternal aunt, R, who was living with B's maternal grandmother at the time. The court denied the motion, and the defendant, upon certification by the Chief Justice pursuant to statute (§ 52-265a) that a matter of substantial public interest was involved, filed an appeal from the denial of the motion, which was consolidated with his direct appeal. While the defendant's consolidated appeals were pending, the defendant offered the plaintiffs visitation with B in an amount that was substantially less than what the trial court had previously ordered in conjunction with the plaintiffs' petition. In conjunction with his offer, the defendant filed a motion to open and to terminate visitation, contending that the trial court was divested of subject matter jurisdiction in light of his offer, which the trial court denied. Meanwhile, the defendant discontinued B's visitation with the plaintiffs, and the plaintiffs moved for contempt.. The court found the defendant in wilful contempt for failure to comply with its visitation order. Subsequently, the plaintiffs filed a second motion for contempt on the basis of the

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

defendant's continued refusal to comply with the trial court's orders, which the trial court granted, and the defendant filed an amended appeal. On appeal, the defendant claimed, inter alia, that the trial court's order of visitation violated the implicit requirements of § 46b-59 and the due process clause of the fourteenth amendment to the United States constitution because it did not include a provision directing the plaintiffs to abide by the defendant's decisions regarding B's care while B was visiting with the plaintiffs and that the court's order violated the defendant's fundamental parental rights because the amount of visitation ordered was more than was necessary to further the state's compelling interest in sustaining B's relationship with the plaintiffs. *Held*:

1. The trial court correctly determined that it was not deprived of subject matter jurisdiction by virtue of the defendant's postjudgment offer of visitation to the plaintiffs and, therefore, properly denied the defendant's motion to dismiss the plaintiffs' action: the defendant's postjudgment offer of visitation did not render the action moot because, even if a controversy involving an existing order of third-party visitation could be rendered moot due to a custodial parent's voluntary offer of meaningful visitation with the third party, the defendant failed to establish that his particular offer of visitation was made in good faith and with the intention of allowing visitation rather than of avoiding or undermining the existing visitation order, particularly given that the defendant had consistently and vehemently opposed the plaintiffs' visitation and twice had been held in contempt for his refusal to comply with the court-ordered visitation; moreover, this court concluded that, in light of its determination that the trial court was not divested of jurisdiction by virtue of the defendant's postjudgment offer of visitation, that court also properly rejected the defendant's claim that the trial court's contempt order was void for lack of subject matter jurisdiction.

2. There was no merit to the defendant's claim that the trial court's visitation order violated the implicit requirements of § 46b-59 and the due process clause of the fourteenth amendment insofar as it failed to include a provision directing the plaintiffs to abide by his decisions, as a fit parent, regarding fundamental aspects of B's care during B's visitation with the plaintiffs:

   a. There was no implicit requirement in § 46b-59 that the trial court include a provision directing a third party to abide by a fit parent's decisions regarding the child's care during visitation with the third party, as subsection (e) of that statute simply authorizes the trial court to craft the terms and conditions of third-party visitation and provides that those terms and conditions are to be guided by the best interest of the child.

   b. The defendant could not prevail on his claim that the due process clause compels a trial court ordering third-party visitation to include a provision requiring the third party to abide by all of a fit parent's decisions regarding the child's care during visitation and that § 46b-59 was unconstitutional as applied to the facts of the present case insofar as

the order of visitation allowed the plaintiffs to override the defendant's exercise of his fundamental parental right to make decisions regarding B's care: constitutional and statutory principles governing third-party visitation do not confer on a parent the absolute right to dictate the terms and conditions governing third-party visitation, and the fundamental purpose of the statute, to sustain the deep, emotional bond between the child and the third party, would be thwarted if a parent opposing third-party visitation were given unfettered authority to micromanage the visitation and to supplant the third party's caregiving choices during the period of visitation with his or her own; nevertheless, a court, in assessing what terms may be in the best interest of the minor child, must accord special weight to a fit parent's preferences when those preferences pertain to the most fundamental aspects of a child's life, such as the child's education, health, religion, and association, but the court should satisfy itself that the parental request concerning such preferences is made in good faith before according those preferences special weight; moreover, a custodial parent seeking to impose terms and conditions on a court's visitation order must make a specific and timely request that includes an explanation as to how the requested terms and conditions further the best interest of the child, and, if the parent believes that the requested terms and conditions are necessary to protect his or her fundamental parental rights, he or she must specify the alleged constitutional nature of the request and the right asserted; furthermore, in the present case, the defendant's request was neither timely, as it was filed after the close of evidence, after the issuance of the visitation order, and despite the defendant's knowledge that R was living with D at the time of the evidentiary hearing, nor specific, as it was unaccompanied by any explanation as to why his requested no contact order between B and R was desired or necessary.

3. This court declined to review, under *State* v. *Golding* (213 Conn. 233), the defendant's unpreserved constitutional claim that the amount of visitation ordered by the trial court violated his fundamental parental rights under the due process clause of the fourteenth amendment, the record having been inadequate for such review: although the defendant filed various postjudgment motions in the trial court challenging its visitation order, he did not ask that court to reconsider the amount of visitation or to articulate the basis for that amount, or otherwise bring before the court the due process claim he raised on appeal, and, because the trial court never had the opportunity to rule on that issue, it was not preserved for review; moreover, given the inherently fact bound nature of how the trial court's visitation order should be implemented, the defendant's failure to request that the trial court make particularized findings as to the amount of visitation necessary to sustain the plaintiffs' relationship with B would render any decision by this court concerning the defendant's claim entirely speculative.

Argued September 10, 2018—officially released July 2, 2019

Procedural History

Petition for visitation with the defendant's minor child, brought to the Superior Court in the judicial district of Windham and tried to the court, *Graziani*, *J.*; judgment granting the petition, from which the defendant appealed; thereafter, the court, *Graziani*, *J.*, denied the defendant's motion for an order precluding contact between the minor child and a third party; subsequently, the defendant, upon certification by the Chief Justice pursuant to General Statutes § 52-265a that a matter of substantial public interest was involved, filed a separate appeal with this court, which consolidated the appeals; thereafter, the court, *Graziani*, *J.*, denied the defendant's motion to open and to terminate visitation, and the defendant's motion to dismiss, and the defendant, upon certification by the Chief Justice pursuant to § 52-265a that a matter of substantial public interest was involved, filed an amended appeal. *Affirmed.*

Mathew Olkin, for the appellant (defendant).

Douglas T. Stearns, for the appellees (plaintiffs).

Justine Rakich-Kelly and *Pamela Magnano* filed a brief for the Children's Law Center of Connecticut as amicus curiae.

Leslie I. Jennings-Lax and *Louise T. Truax* filed a brief for the Connecticut Chapter of the American Academy of Matrimonial Lawyers as amicus curiae.

George Jepsen, former attorney general, and *Carolyn A. Signorelli*, *Benjamin Zivyon* and *John E. Tucker*, assistant attorneys general, filed a brief for the Department of Children and Families as amicus curiae.

Mark S. Randall filed a brief for the Connecticut Bar Association as amicus curiae.

Opinion

ECKER, J. The principal issue in this appeal is whether an order granting a third party's petition for visitation pursuant to General Statutes § 46b-59[1] over

[1] General Statutes § 46b-59 provides: "(a) As used in this section: (1) 'Grandparent' means a grandparent or great-grandparent related to a minor child by (A) blood, (B) marriage, or (C) adoption of the minor child by a child of the grandparent; and (2) 'Real and significant harm' means that the minor child is neglected, as defined in section 46b-120, or uncared for, as defined in said section.

"(b) Any person may submit a verified petition to the Superior Court for the right of visitation with any minor child. Such petition shall include specific and good-faith allegations that (1) a parent-like relationship exists between the person and the minor child, and (2) denial of visitation would cause real and significant harm. Subject to subsection (e) of this section, the court shall grant the right of visitation with any minor child to any person if the court finds after hearing and by clear and convincing evidence that a parent-like relationship exists between the person and the minor child and denial of visitation would cause real and significant harm.

"(c) In determining whether a parent-like relationship exists between the person and the minor child, the Superior Court may consider, but shall not be limited to, the following factors: (1) The existence and length of a relationship between the person and the minor child prior to the submission of a petition pursuant to this section; (2) The length of time that the relationship between the person and the minor child has been disrupted; (3) The specific parent-like activities of the person seeking visitation toward the minor child; (4) Any evidence that the person seeking visitation has unreasonably undermined the authority and discretion of the custodial parent; (5) The significant absence of a parent from the life of a minor child; (6) The death of one of the minor child's parents; (7) The physical separation of the parents of the minor child; (8) The fitness of the person seeking visitation; and (9) The fitness of the custodial parent.

"(d) In determining whether a parent-like relationship exists between a grandparent seeking visitation pursuant to this section and a minor child, the Superior Court may consider, in addition to the factors enumerated in subsection (c) of this section, the history of regular contact and proof of a close and substantial relationship between the grandparent and the minor child.

"(e) If the Superior Court grants the right of visitation pursuant to subsection (b) of this section, the court shall set forth the terms and conditions of visitation including, but not limited to, the schedule of visitation, including the dates or days, time and place or places in which the visitation can occur, whether overnight visitation will be allowed and any other terms and conditions that the court determines are in the best interest of the minor child, provided such conditions shall not be contingent upon any order of

the objection of a fit custodial parent must include a provision requiring the third party to abide by all of the parent's decisions regarding the care of the child during the visitation. We conclude that neither § 46b-59 nor the due process clause of the fourteenth amendment to the United States constitution requires the trial court to impose such a broad term and condition on an order of third-party visitation. With respect to the more limited claim of the custodial parent, the defendant James Gavis, that the denial of his postjudgment motion for a no contact order between the minor child and the child's maternal aunt violated the defendant's fundamental parental right to make decisions regarding his child's associations, we conclude that the defendant failed to meet his burden of demonstrating any such constitutional violation because he failed, as a threshold matter, to articulate a reason in support of the requested term and condition. We reject the defendant's remaining claims and affirm the judgment of the trial court.

I

The following facts and procedural history are relevant to this appeal. On November 3, 2016, the plaintiffs,

financial support by the court. In determining the best interest of the minor child, the court shall consider the wishes of the minor child if such minor child is of sufficient age and capable of forming an intelligent opinion. In determining the terms and conditions of visitation, the court may consider (1) the effect that such visitation will have on the relationship between the parents or guardians of the minor child and the minor child, and (2) the effect on the minor child of any domestic violence that has occurred between or among parents, grandparents, persons seeking visitation and the minor child.

"(f) Visitation rights granted in accordance with this section shall not be deemed to have created parental rights in the person or persons to whom such visitation rights are granted, nor shall such visitation rights be a ground for preventing the relocation of the custodial parent. The grant of such visitation rights shall not prevent any court of competent jurisdiction from thereafter acting upon the custody of such child, the parental rights with respect to such child or the adoption of such child and any such court may include in its decree an order terminating such visitation rights.

"(g) Upon motion, the court may order the payment of fees for another party, the attorney for the minor child, the guardian ad litem, or any expert by any party in accordance with such party's financial ability."

Diane Boisvert and Thomas Boisvert,[2] filed a verified petition for visitation with their grandson, B,[3] pursuant to § 46b-59. The defendant, who is B's father, opposed the petition. The trial court, *Graziani*, *J.*, conducted an evidentiary hearing on the plaintiffs' petition, after which it issued a written memorandum of decision making the following findings of fact.

The defendant and Nicole M. Gavis (Nicole) were married in October, 2011, and divorced in July, 2013. They had one child, B, who was born in June, 2012. The defendant was "the primary cause of the breakdown of the marriage" because he subjected Nicole "to a course of domestic violence, threats and humiliation." (Internal quotation marks omitted.) As a consequence, "[t]he defendant has been in prison on seven different occasions with multiple incarcerations based [on] domestic violence . . . ." During his incarcerations, the defendant failed to provide any financial support for his family. After their divorce in 2013, Nicole was awarded sole custody of B, and the defendant had no visitation until April, 2015, at which time he was given supervised access to B. Nicole died on March 8, 2016.

The plaintiffs are B's maternal grandparents and, although they are divorced, they both have had a significant relationship with B since his birth. Prior to Nicole's death, her mother, Diane Boisvert, "provided [B with] care, including feeding, doctor appointments, taking [B] to day care, school appointments, taking day trips with [B] as well as taking [B] on vacation." Thomas Boisvert's "role in taking care of [B] was less than that of" Diane Boisvert, but he still had a "significant relationship"

[2] The plaintiffs will be referred to collectively as "the plaintiffs," except when it is necessary to identify them individually by name.

[3] In view of this court's policy of protecting the privacy interests of juveniles, we refer to the child involved in this matter as B. See, e.g., *Frank* v. *Dept. of Children & Families*, 312 Conn. 393, 396 n.1, 94 A.3d 588 (2014).

with B, which "involved . . . babysitting, feeding and changing [B's] diapers."

The defendant was granted custody of B after Nicole's death in March, 2016. The plaintiffs continued to be involved in B's life until June 26, 2016,[4] when the defendant terminated the plaintiffs' contact with B because he believed that they were "seeking custody of [B] and [were] also seeking to get [the defendant] sent back to jail." The defendant claimed that the plaintiffs "did not follow his directions as to how they were to treat" B during their visits. For example, the defendant did not want B to use a pacifier, but the plaintiffs did not comply with his request. On another occasion, the defendant apparently did not want Diane Boisvert to assist B with his shoe, but she did so anyway.

At the evidentiary hearing on the plaintiffs' petition for visitation, Steven H. Humphrey, a licensed clinical psychologist, testified as an expert witness. Humphrey testified that the plaintiffs had been very involved as B's primary caretakers for twenty-two months of his young life while the defendant was incarcerated. In Humphrey's expert opinion, the plaintiffs both have a " 'warm and healthy bond' " with B, who has maintained a sense of their importance in his life. Humphrey explained that the sudden death of B's mother was "very traumatic . . . and severely disruptive and long lasting" for B and that the unexplained disappearance of the plaintiffs from B's life has compounded his sense

[4] The memorandum of decision states that the plaintiffs' contact with B was terminated on June 26, 2017, but the 2017 date appears to be a scrivener's error. It is undisputed that there had been a complete denial of visitation at the time the plaintiffs' petition for visitation was filed on November 3, 2016. Additionally, the trial court stated in its decision, which was issued on August 11, 2017, that the plaintiffs' visitation with B had been "terminated by the defendant father approximately a year ago . . . ." From this we conclude that the correct date on which the defendant terminated the plaintiffs' contact with B was June 26, 2016, less than four months after Nicole's death.

of loss. Humphrey opined that the lack of contact between B and the plaintiffs "is very detrimental to [B] and would cause real and significant harm to [B]" if allowed to continue. Humphrey further testified that depriving B of "individuals who have been in a caretaker capacity, who have helped bridge the difficulties caused by maternal death and paternal incarceration, and who are capable and eager to provide [B] with such support, would not be in his best interest, and there are reasons for concern that there would be significant psychological harm to cessation of these relationship[s]." The trial court found Humphrey's in-court testimony, expert report, and expert opinions to be credible, "well thought out, appropriate, and reasonable."

Tracie Molinaro, the guardian ad litem appointed on behalf of B, also testified at the evidentiary hearing. In Molinaro's opinion, B has a "healthy relationship" with the plaintiffs, whom he "adores and loves . . . ." Molinaro testified that the plaintiffs had a regular and consistent relationship with B and that they had been actively involved in his day-to-day care, especially during the defendant's incarceration. Molinaro believed that B had a parent-like relationship with Diane Boisvert and that the denial of visitation would cause B real and significant harm. As for Thomas Boisvert, Molinaro testified that the relationship was healthy, loving and positive, but she did not believe that the relationship rose to the level of a parent-like relationship. In Molinaro's opinion, neither of the plaintiffs would undermine the defendant's role as a parent if visitation was ordered. The trial court found Molinaro's testimony to be "credible and consistent with the testimony of . . . Humphrey, with the exception of the maternal grandfather not having a parent-like relationship" with B, which the trial court did not find to be correct.

The trial court issued its written memorandum of decision on August 11, 2017. On the basis of the evi-

dence adduced at the evidentiary hearing, the trial court found, by clear and convincing evidence, that the plaintiffs had a parent-like relationship with B and that a denial of visitation would cause B real and significant harm. The trial court explained: "This child is five years old. During his life, he has suffered the loss of his father as a result of his incarceration for approximately two years, being 40 percent of the child's life. [After] [t]he death of his mother on March 8, 2016, the cessation of any meaningful contact with his maternal grandparents for the last year as a result of the unilateral actions of the father is clearly harmful to the child. As . . . Humphrey articulated in his testimony and report, the death of the child's mother, compounded with the unexplained disappearance of the maternal grandparents, is very detrimental to the child and would cause real and significant harm to the child. . . . Humphrey also opined that disruptive relationships in the life of a child can have deleterious effects for the child, including mood problems, insecurity and problems with socialization and self-confidence. The death of the mother cannot be changed. The cessation of the child's contact with the maternal grandparents can be changed by the court. The father, in terminating a support for the child in the form of . . . consistent and loving figures in the life of the child, the maternal grandparents, is not acting in the best interest of the child. Contact with the child's mother's family provides a source of information to the child as to the mother that he no longer gets to see by virtue of her death. The emotional development of the child in dealing with the loss of his mother and the cessation of contact with the maternal grandparents clearly is harmful to the child and not in the best interest of the child. The court thereby, having found the existence of a parent-like relationship between the child and the maternal grandparents, also finds that the termination of that relationship does cause a real and significant harm to the child."

The trial court granted the plaintiffs' petition for visitation, awarding Diane Boisvert visitation "every other weekend from Friday at 5 p.m. until Sunday at 5 p.m.," and Thomas Boisvert visitation "every Wednesday from the end of school each Wednesday, or noon if there is no school, until 8 p.m." The trial court also imposed the following terms and conditions on visitation: (1) "[t]he parties shall not disparage the other parties in the presence of the minor child"; (2) "[a]ll communication between the parties regarding visitation and/or the minor child shall be via text message or other written communication"; and (3) "[n]othing herein shall prohibit the parties [from] expanding the visitation for any specific visit as agreed by [the] parties in writing by the parties."

The defendant filed an appeal from the trial court's judgment. Shortly thereafter, the defendant also filed a postjudgment motion for order, pursuant to Practice Book § 25-24 (a), asking the trial court to enter an order requiring the plaintiffs to "allow no contact between [the] minor child [B] and a certain third party, Regina Riddell . . . ."[5] The defendant represented in his motion that he had "asked the plaintiffs to allow no contact between the minor child and . . . Riddell but that the plaintiffs ha[d] refused to give assurance that they [would] honor such request." The defendant argued that the plaintiffs' refusal to honor his request constituted a denial of his fundamental parental right to make decisions regarding B's care, control and associations. The trial court conducted a hearing on the defendant's motion at which the plaintiffs' counsel explained that the defendant's motion "stems from . . . Diane Boisvert, having her daughter living in her house, her daughter [Riddell] . . . is an adult, and it stems from the request that [Riddell] not be present for any

[5] Riddell, also known as Regina Boisvert, is B's maternal aunt, i.e., Nicole's sister and the plaintiffs' daughter.

of the visitation." The plaintiffs' counsel continued: "[T]here have been no documented concerns of any harm that would come to the child from [Riddell]. This was never brought up during the trial about [Riddell's] presence being a concern. And so this seems like an unreasonable request . . . ." The defendant did not testify at the hearing and presented no evidence in support of his motion. The trial court denied the defendant's postjudgment motion on the ground that there was "not one scintilla of evidence to show that [B's contact with Riddell] is inappropriate, puts the child in any danger, or reduces the level of care." The trial court noted that "visitation is always an open issue, it's never cast in stone," and, if an order of visitation puts a child at risk or is not in a child's best interest, "then the court can always modify or terminate the visitation . . . ." The trial court explained, however, that it was not otherwise "going to micromanage" the visitation because "[there are] literally millions and millions of circumstances that may ultimately follow . . . ."

The defendant subsequently filed a motion to reargue, contending that "it was irrelevant that the defendant failed to produce evidence to show the child could be harmed if the defendant's decisions were not complied with" because the defendant is a fit parent whose decisions must be presumed to be in the best interest of his child. The defendant argued that "[t]he constitutional limitations [that] constrain the *granting* of third-party visitation orders necessarily apply with equal force to the terms and conditions of the visitation order itself," and, as such, the trial court is obligated to "craft orders [that] preserve, to the extent possible, a parent's fundamental right to make parenting decisions." (Emphasis in original.) The trial court denied the defendant's motion to reargue.

The defendant then filed an application for an expedited public interest appeal from the trial court's denial

of his postjudgment motions pursuant to General Statutes § 52-265a and Practice Book § 83-1. He contended that the trial court's failure to direct the plaintiffs to abide by his parental decisions regarding the care, control and custody of B violates § 46b-59 and the due process clause of the fourteenth amendment to the United States constitution. The application was granted by then Chief Justice Rogers. Thereafter, the defendant's direct appeal was transferred from the Appellate Court to this court pursuant to Practice Book § 65-1, and his direct appeal and his certified public interest appeal were consolidated for this court's review.

While these appeals were pending, on January 9, 2018, the defendant filed in the trial court a postjudgment motion to open and terminate visitation, claiming that a change in circumstances had divested the trial court of subject matter jurisdiction. The defendant informed the trial court that he had offered each of the plaintiffs what he considered to be meaningful visitation in the amount of a four hour visit each month plus a four hour visit on or near a major holiday, and argued that, in light of this offer, the trial court was divested of jurisdiction because there no longer was a denial of visitation that would cause real and significant harm to B under § 46b-59 (b). Two months later, on March 22, 2018, the plaintiffs filed a motion for contempt in the trial court, alleging that the defendant had refused to comply with the third-party visitation order on the basis of his offer of visitation, which "is very limited and outside of any court orders." The defendant moved to dismiss the motion for contempt for lack of subject matter jurisdiction. The trial court denied the defendant's postjudgment motion to open and terminate visitation, determining that the defendant's unilateral offer of visitation did not divest the trial court of "subject matter jurisdiction over the action at the time it rendered the underlying judgment and issued its memorandum of decision."

The trial court held a hearing on the plaintiffs' motion for contempt on July 18, 2018. On the morning of the hearing, the defendant filed a postjudgment motion to dismiss for lack of subject matter jurisdiction, again contending that his January 9, 2018 offer of visitation had divested the trial court of subject matter jurisdiction. At the hearing, the defendant argued that "nothing can be adjudicated today because of the motion I filed this morning seeking dismissal for a lack of subject matter jurisdiction." The trial court denied the defendant's motion to dismiss for lack of subject matter jurisdiction and also denied his motion to dismiss the plaintiffs' motion for contempt. On the merits of the contempt motion, the trial court heard testimony that court-ordered visitation had been refused for four months, which is "sixteen days of weekends, plus every single Wednesday . . . ." On the basis of the evidence adduced at the hearing, the trial court found the defendant to be "in wilful contempt by clear and convincing evidence of the August 11, 2017 court orders and enter[ed] the following remedial orders: (1) The defendant shall pay the plaintiffs' [attorney's] fees in the amount of $1400. This amount shall be paid within thirty days. (2) The visitation which was previously ordered on August 11, 2017, shall resume immediately. The maternal grandmother's weekend visitation shall commence on July 20, 2018, and the maternal grandfather's Wednesday visitation shall commence on July 25, 2018. (3) In addition to the previously ordered visitation, the maternal grandmother shall have five days of continuous visitation with the minor child this summer. The dates shall be selected upon agreement of the parties. If the parties are unable to come to an agreement, the maternal grandmother shall have visitation with the minor child from August 13, 2018, through August 17, 2018."

On July 23, 2018, the plaintiffs filed a second motion for contempt, alleging that the defendant had "again

refused visitation," even after being "ordered to resume visitation after being found in contempt . . . ." The trial court conducted a hearing at which the plaintiffs testified that the defendant continued to refuse to permit them any visitation with B, despite the trial court's prior orders. Following the hearing, the trial court found, by clear and convincing evidence, that "the defendant had notice of the valid court orders both on August 11, 2017, and the subsequent court order of July 19, 2018," and had "wilfully failed to comply with the orders of the court, which are clear and unambiguous, by not providing the visitation in accordance with the court orders with the plaintiff Diane Boisvert [from] July 20 through [July] 22 of 2018, and the plaintiff Thomas Boisvert on July 25, 2018." The court found the defendant to be in wilful contempt and committed him to the custody of the Department of Correction. The trial court stayed its order of incarceration, however, pending compliance with the court's order of visitation.[6]

The defendant filed an amended appeal in this court seeking review of the trial court's July 19, 2018 contempt order and the denial of his postjudgment motion to dismiss for lack of subject matter jurisdiction. The defendant's amended appeal was treated as an application for certification to file a public interest appeal pursuant to § 52-265a and Practice Book § 83-1, which was granted by Chief Justice Robinson. Thereafter, the parties filed supplemental briefs addressing the trial court's subject matter jurisdiction and the validity of the contempt order.

[6] The order provided: "The defendant is . . . ordered to provide visitation of the minor child with the plaintiff Diane Boisvert on Friday, August 31, 2018, at 5 p.m. until Sunday, September 2, at 5 p.m., and every other weekend thereafter, and provide visitation with the plaintiff Thomas Boisvert, on Wednesday, August 29, [2018] from the end of school, and each Wednesday, [from] noon if there is no school, until 8 p.m." The court further ordered the defendant to "pay the plaintiffs' attorney's fees in the amount of $1500 within thirty days of this order."

The defendant raises the following claims in these consolidated appeals: (1) the trial court improperly denied the defendant's postjudgment motion to dismiss for lack of subject matter jurisdiction because it failed to make the requisite factual findings under *Roth* v. *Weston*, 259 Conn. 202, 789 A.2d 431 (2002); (2) the trial court's July 19, 2018 order of contempt is void for lack of subject matter jurisdiction; (3) the order of visitation violates the implicit requirements of § 46b-59 and the due process clause of the fourteenth amendment because it does not include, as a term and condition governing the visitation, a provision affirmatively directing the plaintiffs to abide by the defendant's decisions regarding B's care; (4) the order of visitation violates the defendant's fundamental parental rights under the due process clause because the amount of visitation is more than is necessary to further the state's compelling interest in sustaining B's relationship with the plaintiffs; and (5) the "magnitude as well as the duration of the constitutional deprivations" warrant vacatur of the order of visitation and dismissal of the plaintiffs' petition for visitation.[7]

[7] After oral argument in these consolidated appeals, this court, sua sponte, invited the filing of amicus curiae briefs from the Family Law Section of the Connecticut Bar Association, the Children's Law Center of Connecticut, the Office of the Public Defender, the Center for Children's Advocacy, and the Child Protection Unit of the Office of the Attorney General. We asked the proposed amici curiae to address the following questions in their briefs: (1) "Once a trial judge has decided to issue an order granting third-party visitation under . . . § 46b-59, do the custodial parent's substantive due process rights require the judge to order the [third party] to abide by all of the custodial parent's specific directives regarding care of the minor child during the visitation?" (2) "More generally, what legal standard must the trial judge apply when crafting the terms and conditions of visitation relating to any specific aspect(s) of the environment or care provided by the [third party] as to which the custodial parent objects? (Is it the 'best interests of the child' standard under . . . § 46b-59 [e], or is a different legal standard constitutionally required?)" And (3) "Does a different legal standard and burden of proof apply when a party moves for modification of the terms and conditions of a third-party visitation order under . . . § 46b-59?" The Connecticut Bar Association, the Children's Law Center of Connecticut, the Department of Children and Families, and the Connecticut Chapter of the

II

It will be useful at the outset to review the fundamental constitutional principles and relevant statutory provisions governing third-party visitation. A parent's right to control his or her child's upbringing was first accorded constitutional protection in two United States Supreme Court cases decided almost one century ago. See *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534–35, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (referring to "the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer* v. *Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (referring to parent's right to "bring up children"). Seventy-five years later, in *Troxel* v. *Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), the United States Supreme Court had occasion to consider whether this parental right was violated by Washington's third-party visitation statute, which permitted " '[a]ny person' to petition a superior court for visitation rights 'at any time,' and authorize[d] that court to grant such visitation rights whenever 'visitation may serve the best interest of the child.' " Id., 60 (plurality opinion), quoting Wash. Rev. Code § 26.10.160 (3) (2000). Pursuant to the Washington statute, Jenifer and Gary Troxel were granted visitation with their granddaughters over the objection of their mother, Tommie Granville. Id., 60–61. The United States Supreme Court held that the order of visitation infringed on Granville's fundamental right under the due process clause of the fourteenth amendment of the United States constitution to "make decisions concerning the care, custody, and control of her two daughters." Id., 72. The court noted that "[t]he Washington nonparental visitation statute [was] breathtakingly broad"; id., 67; and "directly contravened the traditional presumption that a fit parent will act in the

American Academy of Matrimonial Lawyers accepted our invitation and submitted amicus briefs.

best interest of his or her child." Id., 69. Because the due process clause "does not permit a [s]tate to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made," the court held that Washington's third-party visitation statute was unconstitutional. Id., 72–73. In arriving at its conclusion, the court noted that it did not need to "define . . . the precise scope of the parental due process right in the visitation context" because "the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied . . . ." Id., 73. In short, "the constitutional protections in this area are best 'elaborated with care.' " Id.[8]

In *Roth* v. *Weston*, supra, 259 Conn. 205, this court considered whether Connecticut's then existing third-party visitation statute, General Statutes (Rev. to 2001) § 46b-59, was unconstitutional in light of *Troxel*. We acknowledged in *Roth* that parents have a fundamental constitutional right "to raise their children as they see fit," and "*Troxel* teaches that courts must presume that fit parents act in the best interests of their children . . . ." (Internal quotation marks omitted.) Id., 216, quoting *Troxel* v. *Granville*, supra, 530 U.S. 68 (plurality opinion). "*Troxel* confirms that among those interests lying at the core of a parent's right to care for his or her own children is the right to control their associations. . . . The essence of parenthood is the compan-

[8] *Troxel* produced six different opinions. The plurality decision has been widely criticized for its failure to provide adequate direction to courts and legislatures attempting to abide by its holding. See, e.g., D. Lannetti, "A Nonparent's Ability To Infringe on the Fundamental Right of Parenting: Reconciling Virginia's Nonparental Child Custody and Visitation Standards," 30 Regent U. L. Rev. 203, 210 (2018) ("[t]he *Troxel* decision is known today more for what it failed to address than what it actually decided, and its six opinions—with the noticeable absence of a majority opinion—unsurprisingly caused confusion for both courts and practitioners as they attempted to discern the [c]ourt's guidance, or lack thereof").

ionship of the child and the right to make decisions regarding his or her care, control, education, health, religion and association[s]." (Citation omitted.) *Roth* v. *Weston*, supra, 216–17.

Roth also recognized, however, that there are "limitations on these parental rights." Id., 224. One such limitation occurs when an otherwise fit parent denies his or her child access to an individual who has a parent-like relationship with the child and "the parent's decision regarding visitation will cause the child to suffer real and substantial emotional harm . . . ."[9] Id., 226. Under such circumstances, the state has a compelling interest in protecting "the child's own complementary interest in preserving [parent-like] relationships that serve [the child's] welfare" by avoiding the "serious and immediate harm to [the] child" that would result from the parent's decision to terminate or impair the child's relationship with the third party. Id., 225; see also id. ("[The] issue of grandparent visitation is not simply 'a bipolar struggle between the parents and the [s]tate over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child.' "), quoting *Troxel* v. *Granville*, supra, 530 U.S. 86 (Stevens, J., dissenting). *Roth* holds that a third party seeking visitation over a fit parent's objection must surmount a "high hurdle"; *Roth* v. *Weston*, supra, 229; and requires the petitioning party to establish, by clear and convincing evidence, that (1) a parent-like relationship exists, and (2) denial of visitation would cause the child to suffer real and significant harm. Id., 225–29. These two factors, commonly referred to as the *Roth* factors, "must be satisfied

[9] In *Troxel* v. *Granville*, supra, 530 U.S. 73 (plurality opinion), the United States Supreme Court did not consider "whether the [d]ue [p]rocess [c]lause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation."

in order for a court: (1) to have jurisdiction over a petition for visitation contrary to the wishes of a fit parent; and (2) to grant such a petition." Id., 234. Once this high burden is met, visitation "is appropriate and should be ordered." *DiGiovanna* v. *St. George*, 300 Conn. 59, 73, 12 A.3d 900 (2011).

In 2012, our legislature amended § 46b-59 in accordance with the constitutional standards set forth in *Roth*. See Public Acts 2012, No. 12-137, § 1 (P.A. 12-137). The amended statute provides that "[a]ny person may submit a verified petition to the Superior Court for the right of visitation with any minor child. Such petition shall include specific and good-faith allegations that (1) a parent-like relationship exists between the person and the minor child, and (2) denial of visitation would cause real and significant harm. Subject to subsection (e) of this section, the court shall grant the right of visitation with any minor child to any person if the court finds after hearing and by clear and convincing evidence that a parent-like relationship exists between the person and the minor child and denial of visitation would cause real and significant harm."[10] General Statutes § 46b-59 (b). "In determining whether a parent-like relationship exists . . . the Superior Court may consider, but shall not be limited to, the following factors: (1) The existence and length of a relationship between the person and the minor child prior to the submission of a petition pursuant to this section; (2) The length of time that the relationship between the person and the minor child has been disrupted; (3) The specific parent-like activities of the person seeking visitation toward the minor child; (4) Any evidence that the person seeking visitation has unreasonably undermined the authority and discretion of the custodial parent; (5) The

[10] "'Real and significant harm' means that the minor child is neglected, as defined in section 46b-120, or uncared for, as defined in said section." General Statutes § 46b-59 (a) (2).

significant absence of a parent from the life of a minor child; (6) The death of one of the minor child's parents; (7) The physical separation of the parents of the minor child; (8) The fitness of the person seeking visitation; and (9) The fitness of the custodial parent." General Statutes § 46b-59 (c). Additionally, if the third party seeking visitation is a grandparent, the trial court may consider "the history of regular contact and proof of a close and substantial relationship between the grandparent and the minor child." General Statutes § 46b-59 (d).

Section 46b-59 (e) provides in relevant part that a trial court granting visitation "shall set forth the terms and conditions of visitation including, but not limited to, the schedule of visitation, including the dates or days, time and place or places in which the visitation can occur, whether overnight visitation will be allowed and any other terms and conditions that the court determines are in the best interest of the minor child, provided such conditions shall not be contingent upon any order of financial support by the court. In determining the best interest of the minor child, the court shall consider the wishes of the minor child if such minor child is of sufficient age and capable of forming an intelligent opinion. In determining the terms and conditions of visitation, the court may consider . . . the effect that such visitation will have on the relationship between the parents or guardians of the minor child and the minor child . . . ." The statute also makes clear that a grant of visitation does not create any "parental rights in the person or persons to whom such visitation rights are granted . . . ." General Statutes § 46b-59 (f).

In *DiGiovanna* v. *St. George*, supra, 300 Conn. 73, we specifically addressed the trial court's authority to fashion terms and conditions governing third-party visitation. In that case, the plaintiff sought visitation with the child over the mother's intense objection. Id., 61–62,

65. The mother's opposition to third-party visitation was so vehement and unrestrained that, even though the trial court found by clear and convincing evidence that both of the *Roth* factors had been satisfied, the trial court nonetheless denied the plaintiff's petition for visitation because it believed that the mother would take her anger out on the child and, on that basis, concluded that visitation ultimately was not in the child's best interest. Id., 67. This court reversed the judgment of the trial court, explaining that the best interest of the child standard cannot "overcome the *Roth* standard for ordering visitation." Id., 69. We clarified that the best interest of the child standard "determines *how* [an] order of visitation should be implemented"; (emphasis in original) id., 73; and the trial court has many "tools in its arsenal to effectuate visitation." Id., 75. For example, the trial court has authority under General Statutes § 46b-56 (i) to order both parents and third parties to undergo counseling; id., 74–75; and can "[prescribe] specific conditions under which visitation would take place to address legitimate concerns of either party." Id., 75. With specific reference to the mother's concern that "the plaintiff had attempted to buy the [child's] affections by excessively spending money on [him] and buying [him] toys and gifts," we observed that the trial court "could have limited the circumstances under which the plaintiff could buy things for" the child. Id., 75 n.8. We noted, finally, that the trial court can always use "its contempt powers to coerce . . . compliance" with visitation orders and may even "consider whether to order intervention by the [D]epartment [of Children and Families]." Id., 76. *DiGiovanna* clarifies that the best interest of the child standard "guides the court in determining how best to foster" the relationship between the third party and the child once visitation is ordered under the *Roth* factors, as codified in § 46b-59, and the trial court may, in implementing the visita-

tion order, consider "counseling, as well as restrictions on the time, place, manner, and extent of visitation." Id., 78.

III

With this legal framework in mind, we turn to the defendant's claims on appeal. A threshold issue involves the defendant's challenge to the trial court's subject matter jurisdiction. The jurisdictional attack is predicated on the defendant's postjudgment offer of visitation to the plaintiffs, which was conveyed to the plaintiffs by letter dated January 9, 2018. The defendant argued in the trial court that this postjudgment offer of visitation deprived the court of subject matter jurisdiction over the action because there no longer was a "denial of visitation" that "would cause real and significant harm." General Statutes § 46b-59 (b); see also *Roth* v. *Weston*, supra, 259 Conn. 234 (holding that both *Roth* factors "must be satisfied in order for a court . . . to have jurisdiction over a petition for visitation contrary to the wishes of a fit parent"). The defendant acknowledged that the trial court may have "*previously* . . . possessed subject matter jurisdiction over this action" because there was a complete denial of visitation when the trial court granted the plaintiffs' petition for visitation, but contended that his subsequent "offer of meaningful visitation serves to deprive [the] court of jurisdiction over this action *presently*." (Emphasis in original.) He renews this claim on appeal.

The defendant's argument is predicated on *Denardo* v. *Bergamo*, 272 Conn. 500, 509, 863 A.2d 686 (2005), which he contends requires application of the *Roth* factors to a postjudgment motion to dismiss filed by a fit parent.[11] The defendant's reliance on *Denardo* is

[11] The defendant also filed a motion to open and terminate visitation on the basis of his January 9, 2018 offer of visitation. The motion to open was denied by the trial court. Because the defendant did not appeal from the trial court's denial of this motion, we do not consider or decide the merits of that ruling.

misplaced, however, because *Denardo* involved an award of third-party visitation that was not supported by the *Roth* factors in the first instance. See id., 503. In *Denardo*, the trial court's initial order granting visitation to the paternal grandparents, over the mother's objection, was made prior to this court's decision in *Roth*. Id., 505–506. The trial court therefore based its initial ruling on the "best interest of the child standard [which at the time] was in accord with the judicial gloss that this court had applied to [the pre-*Roth* version of] § 46b-59 . . . ." Id., 506. After our decision in *Roth* was issued, the defendant in *Denardo* moved to modify and terminate the third-party visitation order on the ground that the standard articulated in *Roth* applied retrospectively. Id., 507. The trial court agreed, and this court affirmed, stating: "The plaintiffs failed to allege or attempt to prove that their relationship with the child was similar to a parent-child relationship and that denial of visitation would cause real and significant harm to the child. Without those specific, good faith allegations or such proof, either at the time of the filing of their petition or at the time of the hearing on the defendant's motion, the trial court's prior order of visitation was rendered without subject matter jurisdiction." Id., 514. Although *Denardo* held that the *Roth* factors apply retroactively to third-party visitation orders issued under the pre-*Roth* best interest of the child standard, that case says nothing about the jurisdiction of a trial court to adjudicate a postjudgment motion to dismiss on the basis of events that occur after an award of third-party visitation is made by a court duly applying the *Roth* factors under § 46b-59, as amended by P.A. 12-137. *Denardo*, therefore, lends no support to the defendant's jurisdictional claim.

The defendant's jurisdictional argument is not cast in terms of mootness, but he appears to argue that his postjudgment offer of visitation rendered the action

moot because he voluntarily remedied any legally cognizable harm. "Mootness implicates [the] court's subject matter jurisdiction" and, therefore, "presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 502, 506–507, 970 A.2d 578 (2009). "Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because a change in the condition of affairs between the parties. . . . A case becomes moot when due to intervening circumstances a controversy between the parties no longer exists" and "the court can no longer grant any practical relief." (Internal quotation marks omitted.) *Taylor* v. *Zoning Board of Appeals*, 71 Conn. App. 43, 46, 800 A.2d 641 (2002).

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a . . . court of its power to determine the legality of the practice," because, "[i]f it did, the courts would be compelled to leave [t]he defendant . . . free to return to his old ways." (Internal quotation marks omitted.) *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). The voluntary cessation exception to the mootness doctrine is founded on "the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc.* v. *Waukesha*, 531 U.S. 278, 284 n.1, 121 S. Ct. 743, 148 L. Ed. 2d 757 (2001). Thus, the standard "for determining whether a case has been mooted by the defendant's voluntary conduct is stringent," and a case becomes moot only "if subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (Internal quotation marks omitted.) *Friends of the Earth, Inc.* v. *Laidlaw*

Environmental Services (TOC), *Inc.*, supra, 189. "The heavy burden of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." (Internal quotation marks omitted.) Id.; see also *Windels* v. *Environmental Protection Commission*, 284 Conn. 268, 281, 933 A.2d 256 (2007) (holding that defendant's voluntary cessation of challenged activity did not render case moot because defendant had "not alleged, much less established, that it does not intend to resume" challenged activity).

Even if we were to assume, for the sake of argument, that a controversy involving an existing order of third-party visitation could be rendered moot under some circumstances due to the custodial parent's voluntary offer to allow meaningful visitation, the defendant has failed to satisfy his heavy burden of establishing that his January 9, 2018 offer of visitation was made in good faith and with the intention to permit the plaintiffs to visit with B, rather than to avoid or undermine the purpose of the third-party visitation order. The record reflects that the defendant consistently and vehemently has opposed the plaintiffs' visitation with B. Indeed, the defendant's opposition to the plaintiffs' visitation is so intense that he has refused to comply with court-ordered visitation for months at a time and twice has been found to be in contempt of court, resulting in an order of commitment to the Department of Correction. The defendant's voluntary offer of visitation, on these facts, plainly did not divest the trial court of subject matter jurisdiction.

Our conclusion on this point also disposes of the defendant's claim that the trial court's July 19, 2018 order of contempt was void for lack of subject matter jurisdiction. Having determined that the trial court had subject matter jurisdiction over this matter, we hold that the defendant's challenge to the contempt order

must fail. See *Eldridge* v. *Eldridge*, 244 Conn. 523, 530, 710 A.2d 757 (1998) ("[a]n order of the court must be obeyed until it has been modified or successfully challenged" [internal quotation marks omitted]). Therefore, the trial court's July 19, 2018 order of contempt is affirmed.

IV

The defendant claims that the trial court's order of visitation violated the implicit requirements of § 46b-59 and the due process clause of the fourteenth amendment to the United States constitution because it failed to include a provision affirmatively directing the plaintiffs to abide by his decisions regarding B's care during the duration of their visit with B. It is important to understand at the outset that the defendant does not challenge the trial court's *Roth* findings or the award of visitation in favor of the plaintiffs. He contends, instead, that the third-party visitation order is unlawful because both § 46b-59 and the due process clause require a trial court granting third-party visitation to "affirmatively [direct] the third party not to override the parent's decisions concerning the minor child's care, control, education, health, religion, and associations." (Emphasis omitted.) We disagree.

A

We first address defendant's claim regarding the implicit requirements of § 46b-59. "[I]ssues of statutory construction raise questions of law, over which we exercise plenary review. . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner,

the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Ugrin* v. *Cheshire*, 307 Conn. 364, 379–80, 54 A.3d 532 (2012).

Section 46b-59 (e) expressly addresses the terms and conditions governing a third-party visitation order. It provides: "If the Superior Court grants the right of visitation pursuant to subsection (b) of this section, the court shall set forth the terms and conditions of visitation including, but not limited to, the schedule of visitation, including the dates or days, time and place or places in which the visitation can occur, whether overnight visitation will be allowed and any other terms and conditions that the court determines are in the best interest of the minor child . . . . In determining the best interest of the minor child, the court shall consider the wishes of the minor child if such minor child is of sufficient age and capable of forming an intelligent opinion. In determining the terms and conditions of visitation, the court may consider (1) the effect that such visitation will have on the relationship between the parents or guardians of the minor child and the minor child, and (2) the effect on the minor child of any domestic violence that has occurred between or among parents, grandparents, persons seeking visitation and the minor child." General Statutes § 46b-59 (e).

Nothing in § 46b-59 requires the trial court to include, as a term and condition governing the order of third-party visitation, a provision affirmatively directing the

third party not to override a fit parent's decisions regarding the child's care. To the contrary, the statute plainly provides the trial court with the authority to craft "terms and conditions that the court determines are in the best interest of the minor child . . . ." General Statutes § 46b-59 (e); see also *DiGiovanna* v. *St. George*, supra, 300 Conn. 73 (clarifying "that the best interest of the child determines *how* th[e] order of visitation should be implemented" [emphasis in original]). We therefore reject the defendant's statutory argument.

B

The defendant next argues that the due process clause of the fourteenth amendment compels a trial court ordering third-party visitation to include a provision requiring the third party to abide by all of a fit parent's decisions regarding the child's care during the visitation. This claim is based on the "traditional presumption that a fit parent will act in the best interest of his or her child." *Troxel* v. *Granville*, supra, 530 U.S. 69 (plurality opinion); see also *Roth* v. *Weston*, supra, 259 Conn. 221. In light of this traditional presumption, the defendant contends that § 46b-59 is unconstitutional as applied to the facts of this case because the trial court's visitation order permits the plaintiffs to override the defendant's exercise of his fundamental parental right to make decisions regarding B's care.

"Determining the constitutionality of a statute presents a question of law over which our review is plenary. . . . It [also] is well established that a validly enacted statute carries with it a strong presumption of constitutionality, [and that] those who challenge its constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt. . . . The court will indulge in every presumption in favor of the statute's constitutionality . . . . Therefore, [w]hen a question of constitutionality is raised, courts must

approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear." (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 405, 119 A.3d 462 (2015). In evaluating the constitutionality of a statute, moreover, we will construe the statute in such a manner as "to save its constitutionality," rather than "to destroy it." *State* v. *Indrisano*, 228 Conn. 795, 805, 640 A.2d 986 (1994). In doing so, "we may also add interpretative gloss to a challenged statute in order to render it constitutional. In construing a statute, the court must search for an effective and constitutional construction that reasonably accords with the legislature's underlying intent." (Internal quotation marks omitted). Id., 805–806.

The due process clause of the fourteenth amendment requires a court to apply the "traditional presumption that a fit parent will act in the best interest of his or her child"; *Troxel* v. *Granville*, supra, 530 U.S. 69 (plurality opinion); see also *Roth* v. *Weston*, supra, 259 Conn. 221; and to accord "special weight" to a fit parent's determination of his or her child's best interest. *Troxel* v. *Granville*, supra, 69. Indeed, it is because of this constitutional deference to a fit parent's decision-making authority that § 46b-59 contains an implicit but "rebuttable presumption that visitation that is opposed by a fit parent is not in a child's best interest." *Roth* v. *Weston*, supra, 234. In order to obtain an order of visitation over a fit parent's objection, a third party must surmount a "high hurdle" and demonstrate, by clear and convincing evidence, both that a parent-like relationship exists and that disruption of the third-party relationship would cause the child to suffer real and significant harm. Id., 229. Once this high hurdle has been surmounted, however, and the trial court orders third-party visitation over a fit parent's objection, the "traditional presumption" relied on by the defendant

has been rebutted with respect to whether visitation is in the child's best interest. Stated another way, once there has been a judicial determination that a parent's denial of visitation would cause the child to suffer real and significant harm, then it no longer can be presumed that a fit parent is acting in his or her child's best interest in connection with the third-party visitation. The *Roth* standard itself is built on the premise that judicial intervention is warranted precisely because the interactions between an otherwise fit parent and a third party seeking visitation can be so fraught with hostility, tension, and resentment—often for reasons unrelated to the child—that the parent is unable or unwilling to act in the child's best interest, resulting in real and significant harm to the child.[12]

None of this means that a fit parent who is subject to a third-party visitation order has forfeited his or her parental rights or that the third party has obtained parental rights by virtue of the order of visitation. A fit parent retains the "quintessential rights of parenthood," which "include the right to make medical, educational, religious and other decisions that affect the most fundamental aspects of the child's life . . . ." (Internal quotation marks omitted.) *Fish* v. *Fish*, 285 Conn. 24, 58, 939 A.2d 1040 (2008). Likewise, § 46b-59 (f) explicitly provides that "[v]isitation rights granted in accordance with this section shall not be deemed to have created parental rights in the person or persons to whom such

[12] It should be recalled that a fit parent's decision-making authority also is protected at the threshold stage by § 46b-59 (c) (4), which directs the trial court to consider, in determining whether a parent-like relationship exists in the first instance, "[a]ny evidence that the person seeking visitation has unreasonably undermined the authority and discretion of the custodial parent . . . ." This provision does not guarantee that visitation will be permitted only to a third party whose views on child rearing are entirely harmonious with the parent's views, but it does provide a strong incentive for the third party to make sure that his or her decisionmaking does not unreasonably undermine the parent's authority.

visitation rights are granted . . . .'' These precepts remain fixed and unchanged, but they do not confer on the parent an absolute right to dictate the terms and conditions governing the visitation. The animating purpose of the statute is to sustain and nurture the deep, emotional bond between the child and the third party, and the third party's caregiving choices for the child while acting in a ''parent-like'' capacity necessarily are integral to the formation and sustenance of that bond—a bond that the trial court has determined must be preserved to prevent real and significant harm to the child. The fundamental purpose of the statute would be thwarted if the parent opposing third-party visitation were given unfettered authority to micromanage the visitation and to replace the third party's caregiving choices during the period of visitation with his or her own.

We recognize that, during the course of the child's visitation with the third party, the third party may make decisions for the child that potentially implicate a parent's fundamental parental rights to direct his or her child's upbringing, and the longer the period of visitation, the more decisions that the third party must make. See *Roth* v. *Weston*, supra, 259 Conn. 229 n.13 (recognizing that ''[v]isitation is a limited form of custody during the time the visitation rights are being exercised'' [internal quotation marks omitted]). Most of the third party's decisions during visitation will be of the mundane variety, and, less frequently, the third party may need to make weighty, discretionary, and sometimes instantaneous decisions pertaining to the child's health, safety, and well-being. The question we must resolve in the present appeal is, when a conflict arises between a fit parent and a third party regarding the third party's caregiving decisions that implicate the parent's constitutional rights, how should that conflict be resolved so

as to preserve the parent's rights, while at the same time sustaining the child's relationship with the third party?

To answer this question, we turn to § 46b-59 (e), which provides the trial court with the authority to devise terms and conditions governing third-party visitation. Section 46b-59 (e) provides in relevant part that if visitation is granted, "the court shall set forth the terms and conditions of visitation including, but not limited to, the schedule of visitation, including the dates or days, time and place or places in which the visitation can occur, whether overnight visitation will be allowed and any other terms and conditions that the court determines are in the best interest of the minor child . . . . In determining the best interest of the minor child, the court shall consider the wishes of the minor child if such minor child is of sufficient age and capable of forming an intelligent opinion. In determining the terms and conditions of visitation, the court may consider . . . *the effect that such visitation will have on the relationship between the parents or guardians of the minor child and the minor child* . . . ." (Emphasis added.) General Statutes § 46b-59 (e) (1). Thus, in setting forth terms and conditions governing the order of third-party visitation, the trial court can and should consider the effect that the visitation order will have on the parent-child relationship, which include any good faith concerns that the parent might have regarding the third party's caregiving choices and how those choices may infringe on the parent's fundamental rights relating to the child's upbringing. The statute therefore provides the trial court with the ability to craft particularized terms and conditions to protect the parental prerogatives at the heart of the parent-child relationship while simultaneously preserving the constitutive elements of a meaningful third-party visitation.

In assessing what terms and conditions may be in the "best interest of the minor child" under § 46b-59

(e), the trial court must accord "special weight" to a fit parent's preferences; *Troxel* v. *Granville*, supra, 530 U.S. 69 (plurality opinion); when those preferences pertain to the most fundamental aspects of the child's life, such as the child's "education, health, religion, and association." *Roth* v. *Weston*, supra, 259 Conn. 217; see also *Fish* v. *Fish*, supra, 285 Conn. 58 (describing parent's "right to make medical, educational, religious and other decisions that affect the most fundamental aspects of the child's life during the custodial period"). When it comes to these particular matters, properly tailored parental requests made in good faith should not be rejected by the trial court solely on the basis of the third party's conflicting views or the "judge's [own] personal or lifestyle preferences." *Fish* v. *Fish*, supra, 47. For example, if a parent requests as a term and condition of visitation an order prohibiting the third party from taking the child to religious services in the third party's faith because the child is being raised in a different faith (or no faith at all), the trial court should not deny this parental request because he or she (or the third party) believes that the child would benefit from exposure to the other religion. If made in good faith, these types of parental requests, which affect "the most fundamental aspects of the child's life"; id., 58; are not subject to judicial override under color of an order of third-party visitation. See General Statutes § 46b-59 (f).

Two caveats are necessary. First, many decisions do not fall within the scope of this category of fundamental parental prerogative, and, with respect to those matters, the trial court has discretion under the statute to formulate terms and conditions that serve the best interest of the child. In doing so, the trial court always should take into account the fit parent's good faith preferences, but those preferences are not entitled to "special weight" under the due process clause of the fourteenth

amendment. See *Troxel* v. *Granville*, supra, 530 U.S. 69 (plurality opinion); *Roth* v. *Weston*, supra, 259 Conn. 217. Second, even in the realm of decisionmaking involving those matters that affect the most fundamental aspects of a child's upbringing, the trial court should satisfy itself that the parental request is made in good faith before according it the special weight the constitution requires. A good faith inquiry is necessary because the relationship between the parent and the third party may be so toxic, and the parent's opposition to the visitation may be so vehement, that the parent may try to undermine the third-party visitation by imposing unreasonable and unfounded terms and conditions. See *DiGiovanna* v. *St. George*, supra, 300 Conn. 78 (declining to create loophole by which recalcitrant parent may thwart intent of third-party visitation statute). By way of example, perhaps the third party and the child always have shared a special interest in baseball, and the parent requests an order preventing the third party from taking the child to baseball games or playing baseball with the child out of an alleged concern for the child's health and safety due to the risk of harm. The third party objects and questions the good faith nature of the parental request, in light of the undisputed fact that the parent allows the child to play baseball at all other times. After considering the facts and the parties' explanations, the trial court may deny the requested term and condition, even though it allegedly implicates a fundamental parental right, if the trial court finds that the parental request represents a bad faith attempt to undermine the third-party relationship.

We can hypothesize an infinite variety of factual scenarios and a limitless number of parental and third-party motivations that may require judicial resolution, depending on the facts and circumstances of each individual case.[13] Given the depth and complexity of the

[13] The situation becomes still more challenging because (1) the third party, like the parent, may allow animosity toward the opposing party to influence

issues involved, we believe that the trial court is in the best position to "[prescribe] specific conditions under which visitation [should] take place to address legitimate concerns of either party." *DiGiovanna* v. *St. George*, supra, 300 Conn. 75.

The present case illustrates the need for the parties to follow certain commonsense procedures to provide an optimal framework for the trial court to determine what terms and conditions may be necessary under § 46b-59 (e). A party seeking to impose terms and conditions on the order of visitation must make a *specific* and *timely* request. A request is specific if it is tailored to identify and ameliorate the party's concern and is accompanied by an explanation of how the requested terms and conditions further the best interest of the child. See General Statutes § 46b-59 (e) ("terms and conditions that the court determines are in the best interest of the minor child"). If the requesting party is a parent who believes that the requested terms and conditions are necessary to protect his or her fundamental parental rights, the parent must alert the trial court to the alleged constitutional nature of the request and the right asserted. See General Statutes § 46b-59 (f) ("[t]he grant of such visitation rights shall not prevent any court of competent jurisdiction from thereafter acting upon . . . the parental rights with respect to such child"). The explanation provided to the trial court need not be exhaustive, but it should be sufficient to alert the trial court to the content and contours of the requesting party's claim.[14] The required explana-

his or her views about the child's best interest, and (2) neither party may be fully aware of their underlying motivations in this context. The difficult task of sorting out these dynamic uncertainties is left to the discretion of the trial court based on a careful consideration of all of the evidence.

[14] As we previously indicated, if the requesting party is a parent who claims that the proposed terms and conditions are necessary to protect his or her fundamental parental rights to make decisions regarding the child's education, health, religion, or association, then the parent's determination of his or her child's best interest should be accorded special weight. See

tion, and the reasons for any opposition, ordinarily will be based on the evidence elicited during the hearing on the contested petition for visitation. If additional evidence is needed, an evidentiary hearing will be necessary to enable the trial court to make the factual determinations and credibility assessments required for a decision. The evidence not only will enable the trial court to decide whether the requested terms and conditions are made in good faith, but also will allow the trial court to weigh the competing considerations and determine whether it is possible to fashion terms and conditions that may accommodate competing interests, wishes, and needs.

A request is timely if it is made without unreasonable delay once the requesting party knows or reasonably should know of the factual circumstances that prompt the requested terms and conditions. The requesting party is not barred from belatedly requesting such terms and conditions in a postjudgment motion, as was done in this case, but the belated nature of the request may support an inference that it is not made in good faith, if the inference reasonably is justified under the surrounding circumstances. The requirements of specificity and timeliness are not intended to preclude good faith requests for reasonable terms and conditions that may arise as circumstances develop over time, but to provide an optimal and efficient procedure by which the trial court can evaluate the requested terms and conditions and fashion appropriate relief responsive to the parties' concerns and the child's needs.

Troxel v. *Granville*, supra, 530 U.S. 69 (plurality opinion). Nonetheless, an explanation is necessary in order for the trial court to ascertain whether the proposed terms and conditions actually implicate the parent's fundamental parental rights, reflect sincerely held parental beliefs, and involve disputed questions of fact necessitating an evidentiary hearing. The requesting party's explanation and the opposing party's responses not only will provide the trial court with the information necessary to address the parties' concerns and fashion appropriate relief, but also will provide an appellate court with an adequate record to review the trial court's order, if necessary.

Ultimately it is up to the trial court, as the finder of fact and the arbiter of credibility, to determine the issues relating to the terms and conditions of visitation, including, without limitation, whether the requested terms and conditions reflect a parent's sincerely held belief regarding a fundamental aspect of the child's upbringing or whether they are a pretext to undermine the third-party relationship or the order of visitation. The trial court has many "tools in its arsenal" to protect a fit parent's fundamental rights while simultaneously fostering the third-party relationship by effectuating the order of visitation. *DiGiovanna* v. *St. George*, supra, 300 Conn. 75, 78; see General Statutes § 46b-56.

Applying these principles to the facts of this case, we conclude that the trial court properly denied the defendant's request for a broad order requiring the plaintiffs to abide by all of his parental decisions regarding B's care during the course of the plaintiffs' visitation. The defendant's motion was untimely because it was filed after the close of evidence and the issuance of the trial court's order of third-party visitation. Moreover, for the reasons previously explained, the due process clause of the fourteenth amendment does not require the trial court to issue a broad order requiring a third party to abide by *all* of a parent's decisions regarding the child's care, regardless of the nature of the parent's decisions, the reasons for the request, whether the decisions further the child's best interest, and whether they implicate the parent's constitutional right to guide his or her child's upbringing. As the United States Supreme Court has cautioned, "the constitutional protections in this area are best 'elaborated with care,' " because "[state court] adjudication in this context occurs on a case-by-case basis . . . ." *Troxel* v. *Granville*, supra, 530 U.S. 73 (plurality opinion). The assessment of what terms and conditions are necessary in the third-party visitation context is highly fact dependent; see *DiGio-*

vanna v. *St. George*, supra, 300 Conn. 78; and cannot be undertaken "in a factual vacuum." *Lehrer* v. *Davis*, 214 Conn. 232, 234, 571 A.2d 691 (1990); see id., 235–36 (holding that record was inadequate to undertake "a constitutional review of § 46b-59").

Turning to the defendant's specific request for a no contact order between B and Riddell, we note that this request was untimely[15] and unaccompanied by an explanation regarding its origin or basis. The request, rather, was formulated as a naked demand resting on the classic invocation of absolute parental authority used to preempt discussion: "Because I'm the parent and I said so." This resort to fiat reflects a perfectly adequate parenting position in many day-to-day parent-child interactions, but it will not suffice when a judicial authority has determined that state interference in the parent-child relationship "is justified" because the third party has "demonstrated a compelling need [for third-party visitation] to protect the child from harm." *Roth* v. *Weston*, supra, 259 Conn. 229. Although the right to control a child's associations is a fundamental parental right; see id., 216–17; in the absence of an explanation, the trial court cannot evaluate the good faith nature of the parental request, assess the need for evidence to resolve disputed questions of fact, or fashion appropriate relief. See footnote 14 of this opinion. Because the defendant failed to give any reason in support of the requested term and condition regarding B's contact with Riddell, we conclude that the trial court properly denied the defendant's postjudgment motion.

[15] It appears from the record that the defendant was aware that Riddell was living in Diane Boisvert's home at the time of the evidentiary hearing, but did not raise the issue as a concern or request any particular terms and conditions limiting B's contact with Riddell prior to the issuance of the trial court's visitation order. Furthermore, although the defendant filed several postjudgment motions, he never filed a motion to modify the order of visitation to include a no contact order between B and Riddell.

We emphasize that our holding confers no parental rights on the plaintiffs; nor does it bestow any visitation rights on Riddell. As the trial court aptly observed, the order of visitation simply gave "visitation to the plaintiffs" and "[i]n no way, shape, or form did the court grant any visitation to [Riddell]" or create any parental rights on behalf of the plaintiffs. The trial court simply found that in the absence of any reason or any evidence to justify the defendant's requested restriction on the order of third-party visitation, there was no basis to find that the requested restriction was in the child's best interest. We agree and, therefore, affirm the judgment of the trial court.

V

Lastly, the defendant claims that the amount of visitation awarded to the plaintiffs violates his fundamental parental rights under the fourteenth amendment to the United States constitution. The defendant points out that § 46b-59 is subject to strict scrutiny; *Roth* v. *Weston*, supra, 259 Conn. 218; and argues that the amount of visitation awarded under the statute must be narrowly tailored to further the state's compelling interest in sustaining the child's relationship with the third party. Under this theory, the defendant contends that any visitation in excess of the amount minimally necessary to sustain the child's relationship with the third party "constitutes a significant interference" with his parental rights.

Although the defendant filed various postjudgment motions challenging the order of visitation, he never asked the trial court to reconsider the amount of visitation or to articulate the basis for the amount of visitation awarded to the plaintiffs.[16] Because the trial court never

[16] At the hearing on the plaintiffs' first motion for contempt, the defendant testified that he believed the order of visitation "was way too much because the only time that I have to spend with my son is a couple hours after work and every weekend." Additionally, as explained in parts I and III of this opinion, the defendant filed a postjudgment motion to open and terminate

had an opportunity to rule on this issue, we conclude that it is not preserved for our review. See, e.g., *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 142, 84 A.3d 840 (2014) ("[i]t is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial" [internal quotation marks omitted]). Nonetheless, because the defendant's claim implicates his fundamental parental rights under the United States constitution, we consider whether review is appropriate under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[17]

Under *Golding*, "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. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) Id.; see also *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*). The burden is on the party

visitation and a postjudgment motion to dismiss for lack of subject matter jurisdiction on the basis of his January 9, 2018 offer of visitation, which would have provided substantially less visitation than the amount ordered by the trial court. At no point, however, did the defendant argue that the amount of visitation ordered by the court violated his fundamental parental rights under the United States constitution.

[17] The defendant's failure affirmatively to request and brief his entitlement to *Golding* review does not preclude our consideration of his constitutional claim. See *State* v. *Elson*, 311 Conn. 726, 730, 91 A.3d 862 (2014) (holding that there is no requirement "that a party must 'affirmatively request' *Golding* review in its main brief in order to receive appellate review of unpreserved constitutional claims").

seeking review of unpreserved constitutional claims under *Golding* to demonstrate both that the record is adequate for review and that the claim "is indeed a violation of a fundamental constitutional right." *State* v. *Golding*, supra, 213 Conn. 240. "If the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the defendant's claim." Id.

The trial court is in the best position to determine how the order of visitation should be implemented; *DiGiovanna* v. *St. George*, supra, 300 Conn. 73; and must set forth the "terms and conditions of visitation including, but not limited to, the schedule of visitation, including the dates or days, time and place or places in which the visitation can occur, [and] whether overnight visitation will be allowed . . . ." General Statutes § 46b-59 (e). "[T]he best interest of the child [standard] guides the court" in crafting these terms and conditions and "in determining how best to foster [the third-party] relationship." *DiGiovanna* v. *St. George*, supra, 78. The trial court must weigh "all the facts and circumstances of the family situation. Each case is unique. The task is sensitive and delicate, and involves the most difficult and agonizing decision that a trial judge must make." (Internal quotation marks omitted.) *Gallo* v. *Gallo*, 184 Conn. 36, 44, 440 A.2d 782 (1981). The trial court's factual findings may be reversed on appeal only if they are clearly erroneous. See *DiGiovanna* v. *St. George*, supra, 69 ("[t]o the extent that the defendant claims that the trial court should have credited certain evidence over other evidence that the court did credit, it is well settled that such matters are exclusively within the province of the trial court"); see also *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 377, 999 A.2d 721 (2010) ("To the extent that the trial court has made findings of fact, our review is limited to deciding whether such

findings were clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." [Internal quotation marks omitted.]).

In light of the inherently fact bound nature of the trial court's schedule of visitation, we conclude that the record is inadequate to review the defendant's constitutional challenge to the amount of visitation awarded to the plaintiffs under § 46b-59 (e). See *Lehrer* v. *Davis*, supra, 214 Conn. 234, 236 (recognizing "[t]he [fact bound] nature of . . . constitutional challenge[s] to § 46b-59" and counseling "against the adjudication of constitutional questions in a factual vacuum"). The defendant did not request, and therefore the trial court did not provide, particularized factual findings regarding the amount of visitation necessary to sustain the plaintiffs' relationship with B. "Without the necessary factual and legal conclusions furnished by the trial court . . . any decision by us respecting [the defendant's claims] would be entirely speculative." (Internal quotation marks omitted.) *State* v. *Brunetti*, 279 Conn. 39, 63, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007). The record is "inadequate to establish whether the alleged constitutional violation did, in fact, occur"; id., 64; and, therefore, we decline to review the defendant's unpreserved constitutional claim.[18]

The judgment is affirmed.

In this opinion the other justices concurred.

[18] Because the defendant has failed to establish the violation of his fundamental parental rights under the United States constitution, we need not reach the defendant's claim that the "magnitude as well as the duration of the constitutional deprivations" warrant vacatur of the order of visitation and dismissal of the plaintiffs' petition for third-party visitation.

GEORGE W. NORTHRUP ET AL. *v.* HENRY J. WITKOWSKI, JR., ET AL.
(SC 20023)

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

Syllabus

Pursuant to statute (§ 52-557n [a] [2] [B]) and the common law of this state, respectively, municipalities and their employees enjoy qualified immunity from liability for their negligent acts or omissions in the performance of duties that require the exercise of judgment or discretion.

The plaintiffs, who reside in the borough of Naugatuck on a particular parcel of property that is prone to flooding, appealed to the Appellate Court from the trial court's judgment in favor of the defendants, the borough and several of its officials, which was rendered on the basis of governmental immunity. The plaintiffs had alleged, inter alia, that the defendants' negligence caused their property to be inundated by water on eight separate occasions. Specifically, the plaintiffs had alleged that a nearby municipally owned catch basin in the area routinely became clogged or otherwise inadequately redirected storm water away from their property. In support of their motion for summary judgment, the defendants claimed that the plaintiffs' negligence claims were barred by governmental immunity because they involved acts or omissions that required the exercise of judgment or discretion. In granting that motion, the trial court concluded that, because the municipal ordinance setting forth the general duties of the relevant municipal department did not contain specific directions or mandates as to how those duties should be discharged, the plaintiffs' claims necessarily pertained to discretionary acts or omissions. The trial court acknowledged this court's decision in *Spitzer* v. *Waterbury* (113 Conn. 84), which held that the repair and maintenance of municipally owned drainage systems are ministerial functions, but concluded that, under more recent case law, the duty to repair and maintain drainage systems is discretionary unless an ordinance prescribes the particular manner in which that duty is to be discharged. The plaintiff subsequently appealed from the trial court's judgment in favor of the defendants to the Appellate Court, which distinguished the facts of *Spitzer* and ultimately agreed that there was no genuine issue of material fact with respect to whether the allegedly negligent omissions in the present case were discretionary in nature. Accordingly, the Appellate Court affirmed the trial court's judgment, and the plaintiffs, on the granting of certification, appealed to this court. *Held* that the Appellate Court properly upheld the trial court's granting of summary judgment in favor of the defendants, this court having concluded that the borough's duty to maintain and repair its drainage

system was discretionary rather than ministerial in nature and, therefore, subject to governmental immunity: neither the question of whether the duty to repair and maintain the drainage system was imposed by statute or voluntarily assumed, nor the distinction between construction and repair, was relevant to consideration of the nature of the defendants' duty, because, under modern principles of governmental immunity, the salient consideration in determining whether that duty was discretionary or ministerial is whether any statute, charter provision, ordinance, regulation, rule, policy, or any other directive required the defendants to act in a prescribed manner, and, accordingly, the defendants could be held liable to the plaintiffs only if there was some legal directive prescribing the specific manner in which the defendants were required to maintain and repair the borough's storm drainage system; moreover, the plaintiffs did not challenge the Appellate Court's conclusion that the language of the relevant municipal ordinance did not, in and of itself, create a ministerial duty to repair and maintain the drainage system, and, even if this court were to assume that a policy or rule from a municipal agency could give rise to a ministerial duty, deposition testimony from the borough's superintendent of streets evincing an annual maintenance schedule and a general policy of attempting to respond to public complaints about clogged storm drains was insufficient to establish the existence of such a policy or rule that could convert the borough's discretionary duty mandated by ordinance into a ministerial duty, as a contrary conclusion would disincentivize municipalities from making virtually any attempt to ensure that their discretionary duties are regularly and properly carried out; furthermore, this court could not conclude that the defendants had breached a ministerial duty by failing to conduct any maintenance on the basin at issue because the plaintiffs cited no evidence that would support such a finding, and, even if they had, a general duty to maintain and repair the drainage system as a whole would not encompass a judicially enforceable duty to maintain and repair each individual component of that system.

Spitzer v. *Waterbury* (113 Conn. 84), to the extent it concluded that municipal duties with respect to the maintenance and repair of drains and sewers are ministerial in nature, overruled.

(*One justice dissenting*)

Argued October 16, 2018—officially released July 2, 2019

Procedural History

Action to recover damages for the alleged negligence of the named defendant et al. in maintaining and repairing certain municipal storm water systems, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Blue*,

J., granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to the Appellate Court, *Alvord*, *Prescott* and *Mullins*, *Js.*, which affirmed the trial court's judgment, and the plaintiffs, on the granting of certification, appealed to this court. *Affirmed.*

Joshua F. Gilman, for the appellants (plaintiffs).

Thomas R. Gerarde, with whom, on the brief, was *Beatrice S. Jordan*, for the appellees (defendants).

Aaron S. Bayer and *Tadhg Dooley* filed a brief for the city of Bridgeport et al. as amici curiae.

Opinion

ROBINSON, C. J. This certified appeal requires us to consider the continued vitality of this court's decision in *Spitzer* v. *Waterbury*, 113 Conn. 84, 88, 154 A. 157 (1931), which held that "[t]he work of constructing drains and sewers, as well as that of keeping them in repair, is ministerial, and the municipality is responsible for negligence in its performance." The plaintiffs, Helen M. Northrup, George W. Northrup, and Timothy Northrup,[1] brought this action against the defendants, the borough of Naugatuck (town) and several town officials,[2] claiming, inter alia, that the defendants' negligence in maintaining and repairing the town's storm drains and drainage pipes had caused the repeated flooding of the plaintiffs' residence. The plaintiffs now appeal, upon our granting of their petition for certifica-

[1] For the sake of simplicity, we refer to the plaintiffs individually by first name when necessary. We also note that the present action was brought on Timothy's behalf by Helen, his mother, as next friend.

[2] The following officials were named as defendants: (1) Robert A. Mezzo, the town's mayor; (2) Henry J. Witkowski, Jr., who served as the town's superintendent of streets; and (3) James Stewart, who served as town engineer until 2009, when he was appointed director of the town's newly formed public works department, which replaced the streets commission.

tion,[3] from the judgment of the Appellate Court affirming the trial court's granting of the defendant's motion for summary judgment on the ground that the negligence claims were barred because, under more recent cases refining and clarifying *Spitzer*, the maintenance of storm drains and drainage systems is a discretionary function subject to governmental immunity, rather than a ministerial function, the negligent performance of which can subject a municipality to liability. *Northrup* v. *Witkowski*, 175 Conn. App. 223, 250, 167 A.3d 443 (2017). We disagree with the plaintiffs' claim that the Appellate Court improperly failed to follow *Spitzer* because we conclude that decision must be overruled in light of modern case law governing the distinction between ministerial and discretionary duties. Accordingly, we affirm the judgment of the Appellate Court.

The opinion of the Appellate Court aptly sets forth the following facts and procedural history. "The plaintiffs reside on property located in the town at 61 Nettleton Avenue. On eight different occasions between 2009 and 2012, the plaintiff's property was damaged when surface rainwater and/or 'black water'[4] inundated the property because the single catch basins in the area routinely became clogged or inadequately redirected water away from the property.

"After the first occurrence in July, 2009, Helen . . . contacted [James] Stewart, who, at that time, was

[3] We granted the plaintiffs' petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly conclude that the maintenance and repair of storm water systems is a discretionary duty, in light of this state's precedents, including *Spitzer* v. *Waterbury*, [supra, 113 Conn. 84], and *Silberstein* v. *54 Hillcrest Park Associates, LLC*, 135 Conn. App. 262, 41 A.3d 1147 (2012)?" *Northrup* v. *Witkowski*, 327 Conn. 971, 173 A.3d 392 (2017).

[4] "In their complaint, the plaintiffs define 'black water' as surface rainwater that overwhelms and causes a [backup] in the sanitary sewer system, resulting in flood waters that contain sewage and other contaminants." *Northrup* v. *Witkowski*, supra, 175 Conn. App. 226 n.4.

the [town] engineer. He told her that the flooding was the result of a rare storm and that it would not happen again. Despite his assurance, however, flooding occurred again in October and December of that year. The plaintiffs continued to contact Stewart, to no avail. The plaintiffs made several requests to the town for sandbags; one such request was granted, but others were denied or simply ignored.

"The town received a report in October, 2009, from an engineering firm about the Nettleton Avenue neighborhood. The report indicated that, over the past forty years, many residences in the neighborhood had experienced periodic flooding of their properties following periods of heavy rainfall. It further indicated that the drainage system in the area was likely to experience flooding after rainfalls of two inches or more, which could occur several times a year. The report attributed the flooding to the fact that runoff was required to flow through relatively narrow drainpipes that were in poor to fair condition and that the majority of catch basins in the area were old and had small openings that often became overgrown with vegetation or obstructed by trash. The report recommended that the town construct new, larger storm drains to handle the storm runoff in the area, but the town failed to adopt that proposal. The plaintiffs' property flooded again in July of 2010, March and August of 2011, and June and September of 2012." (Footnote in original.) Id., 226–27.

On June 4, 2013, the plaintiffs filed the operative second amended complaint alleging negligence against Henry J. Witkowski, Stewart, and the town, and recklessness against the individual defendants. See footnote 2 of this opinion. In addition, the plaintiffs alleged negligent infliction of emotional distress against Witkowski, Stewart, and the town.

"On October 30, 2015, the defendants filed [a] motion for summary judgment . . . . The defendants submit-

ted a supporting memorandum of law, attached to which were partial transcripts from the depositions of Helen . . . and the individual defendants, as well as an affidavit by Stewart. The defendants argued that the negligence counts, including those alleging negligent infliction of emotional distress, were barred by governmental immunity because they involved acts or omissions that required the exercise of judgment or discretion, and no other recognized exception to governmental immunity applied. The defendants further argued that the recklessness counts brought against the individual defendants also failed as a matter of law because, on the basis of the allegations and evidence presented, no reasonable fact finder could determine that the individual defendants had engaged in demonstrably reckless conduct.

"The plaintiffs filed an objection to the motion for summary judgment on November 18, 2015, arguing with respect to the negligence counts that there remained genuine issues of material fact as to whether the defendants were exercising ministerial or discretionary duties and, if discretionary, whether the identifiable person-imminent harm exception to governmental immunity applied." *Northrup* v. *Witkowski*, supra, 175 Conn. App. 228–29.

"On January 20, 2016, the court issued a memorandum of decision granting summary judgment in favor of the defendants on all counts. With respect to the negligence counts, including those counts alleging negligent infliction of emotional distress, the court concluded that the plaintiffs' specifications of negligence amounted to a 'litany of discretionary omissions' and that their 'allegations boiled down to a claim that the defendants failed to perform their municipal duties in an appropriate manner.' The court determined that the city ordinance on which the plaintiffs relied in opposing summary judgment only set forth the general duties of

the [streets commission] without any specific directions or mandates as to how those duties should be discharged." Id., 230.

The trial court acknowledged this court's decision in *Spitzer* v. *Waterbury*, supra, 113 Conn. 88, holding that the repair and maintenance of drainage systems is a ministerial function, but concluded that more recent cases had "refined [the] analysis of the relationship and differences between ministerial and discretionary acts . . . ." *Silberstein* v. *54 Hillcrest Park Associates, LLC*, 135 Conn. App. 262, 272, 41 A.3d 1147 (2012). The trial court concluded that, under those more recent cases, the repair and maintenance of drainage systems are discretionary unless an ordinance "prescribe[s] the *manner* in which the drainage systems are to be maintained . . . ." (Emphasis in original.)

"Accordingly, the court concluded that the defendants' acts or omissions in maintaining the town's drainage system were discretionary in nature. Furthermore, the court concluded that the identifiable person-imminent harm exception to discretionary act immunity was inapplicable as a matter of law because the risk of the property flooding at any given time was indefinite and, thus, did not constitute an imminent harm. The court also granted summary judgment with respect to the recklessness counts, concluding that they also were barred by governmental immunity.

"The plaintiffs filed a motion to reargue and for reconsideration, which the defendants opposed. The court denied the plaintiffs' motion, and [the plaintiffs' appeal to the Appellate Court] followed."[5] *Northrup* v. *Witkowski*, supra, 175 Conn. App. 230.

[5] On appeal to the Appellate Court, the plaintiffs contended that the trial court improperly (1) determined that the governmental acts complained of were discretionary in nature rather than ministerial, (2) concluded that the identifiable person-imminent harm exception to governmental immunity did not apply, and (3) raised sua sponte the issue of whether the plaintiffs' allegations of recklessness directed against the individual defendants could

The Appellate Court held that "to demonstrate the existence of a ministerial duty on the part of a municipality and its agents, a plaintiff ordinarily must point to some statute, city charter provision, ordinance, regulation, rule, policy, or other directive that, by its clear language, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion. See *Violano* v. *Fernandez*, 280 Conn. 310, 323, 907 A.2d 1188 (2006); *Evon* v. *Andrews*, 211 Conn. 501, 506–507, 559 A.2d 1131 (1989); *DiMiceli* v. *Cheshire*, [162 Conn. App. 216, 224–25, 131 A.3d 771 (2016)]; *Grignano* v. *Milford*, 106 Conn. App. 648, 659–60, 943 A.2d 507 (2008)." *Northrup* v. *Witkowski*, supra, 175 Conn. App. 235. The court ultimately concluded that, "although there is language in § 16-32 of the [Naugatuck Code of Ordinances] that requires the streets commission to maintain and repair the town's storm water sewer system, the ordinance contains no provisions that mandate the time or manner in which those responsibilities are to be executed, leaving such details to the discretion and judgment of the municipal employees." Id., 238.

The Appellate Court then acknowledged this court's statement in *Spitzer* v. *Waterbury*, supra, 113 Conn. 88, that the repair and maintenance of drains and sewers are ministerial functions, but it concluded that *Spitzer* was distinguishable on its facts because it involved only the question of whether a drainage system "as it was planned could handle even ordinary amounts of rain," not whether the city had properly maintained and cleaned the system. *Northrup* v. *Witkowski*, supra, 175 Conn. App. 239. In addition, the Appellate Court con-

be maintained against them and ultimately concluded that the claims were barred by government immunity. *Northrup* v. *Witkowski*, supra, 175 Conn. App. 225–26, 245–46. The Appellate Court rejected all of these claims. Id., 250. The Appellate Court's rulings on the second and third claims are not at issue in this certified appeal. See footnote 3 of this opinion.

cluded that the statement in *Spitzer* was dictum. Id., 241. The Appellate Court concluded that, "[c]onsidered in light of our modern case law analyzing qualified governmental immunity, we are convinced that the [trial] court correctly determined that there was no genuine issue of material fact to be resolved with respect to whether the alleged[ly] negligent acts or omissions of the defendants were discretionary in nature and, thus, subject to immunity." Id., 242. Accordingly, the Appellate Court affirmed the judgment of the trial court. Id., 250. This certified appeal followed.[6] See footnote 3 of this opinion.

On appeal to this court, the plaintiffs contend that the Appellate Court incorrectly determined both that *Spitzer* is distinguishable on its facts and that this court's statement in *Spitzer* that the repair and maintenance of drains and sewers are ministerial functions was dictum. Rather, they argue that *Spitzer* is directly on point and is binding authority for the proposition that the duty of a municipality to maintain and repair its drainage system is ministerial and, therefore, that the negligent performance of that duty will subject the municipality to liability. We conclude that we need not determine whether the language in *Spitzer* was dictum because, even if it was not, *Spitzer* must be overruled in light of more modern case law and statutes governing the distinction between ministerial and discretionary duties. We further conclude that the Appellate Court correctly determined that, under those more modern cases, the town's duty to maintain and repair its drainage system was discretionary and, therefore, subject to governmental immunity.

[6] After the plaintiffs filed this certified appeal, we granted permission to the cities of Bridgeport, Danbury, Hartford, New Haven, Stamford and Waterbury to file a joint brief as amicus curiae in support of the defendants' position.

As a preliminary matter, we set forth the standard of review. "Summary judgment shall be rendered forthwith if the pleadings, affidavits and other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. . . . When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, 311 Conn. 282, 289–90, 87 A.3d 534 (2014).

We next review the law governing governmental immunity. "The [common-law] doctrines that determine the tort liability of municipal employees are well established. . . . Generally, a municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of governmental acts. . . . Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature. . . . The hallmark of a discretionary act is that it requires the exercise of judgment. . . . In contrast, [m]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion." (Internal quotation marks omitted.) *Violano* v. *Fernandez*, supra, 280 Conn. 318.

"The tort liability of a municipality has been codified in [General Statutes] § 52-557n. Section 52-557n (a) (1) provides that '[e]xcept 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 . . . .' Section 52-557n (a) (2) (B) extends, however, the same discretionary act immunity that applies to municipal officials to the municipalities themselves by providing that they will not be liable for damages caused by '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.' " Id., 320.

"Municipal officials are immunized 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 ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion. . . . This is because society has no analogous interest in permitting municipal officers to exercise judgment in the performance of ministerial acts." (Internal quotation marks omitted.) Id., 318–19.

"This court has identified two other policy rationales for immunizing municipalities and their officials from tort liability. The first rationale is grounded in the principle that for courts to second-guess municipal policy making by imposing tort liability would be to take the administration of municipal affairs out of the hands to which it has been entrusted by law. . . . Second, we have recognized that a civil trial may be an inappropri-

ate forum for testing the wisdom of legislative actions. This is particularly true if there is no readily ascertainable standard by which the action of the government servant may be measured . . . . Thus, [t]he policy behind the exception is to avoid allowing tort actions to be used as a monkey wrench in the machinery of government decision making." (Citation omitted; internal quotation marks omitted.) Id., 319 n.7.

For purposes of determining whether a duty is discretionary or ministerial, this court has recognized that "[t]here is a difference between laws that impose general duties on officials and those that mandate a particular response to specific conditions." *Bonington* v. *Westport*, 297 Conn. 297, 308, 999 A.2d 700 (2010). "A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment [or discretion] upon the propriety of the act being done."[7] (Internal quotation marks omitted.) *Blake* v. *Mason*, 82 Conn. 324, 327, 73 A. 782 (1909); see also *Benedict* v. *Norfolk*, 296 Conn. 518, 520 n.4, 997 A.2d 449 (2010) (municipal acts are "deemed ministerial if a policy or rule limiting discretion in the completion of such acts exists"); *Pluhowsky* v. *New Haven*, 151 Conn. 337, 347, 197 A.2d 645 (1964) (describing ministerial acts in similar terms). In contrast, when an official has a general duty to perform

[7] See, e.g., *Grignano* v. *Milford*, supra, 106 Conn. App. 657–60 (municipal ordinance requiring owner of structure within harbor or marine facility that has been found to be dangerous to post proper notice, to construct barricade, and to adequately illuminate area until repairs are made created ministerial duty); see also *Wright* v. *Brown*, 167 Conn. 464, 471–72, 356 A.2d 176 (1975) (statute requiring town dog warden to quarantine dog for fourteen days after dog bit person created ministerial duty); *Pluhowsky* v. *New Haven*, 151 Conn. 337, 347, 197 A.2d 645 (1964) (town clerk has ministerial duty to record instrument that has been accepted for recordation in land records); *Leger* v. *Kelley*, 142 Conn. 585, 589, 116 A.2d 429 (1955) (statute prohibiting commissioner of motor vehicles from registering any motor vehicle that was not equipped with safety glass created ministerial duty).

a certain act, but there is no "city charter provision, ordinance, regulation, rule, policy, or any other directive [requiring the government official to act in a] prescribed manner," the duty is deemed discretionary. *Violano* v. *Fernandez*, supra, 280 Conn. 323.

"In general, the exercise of duties involving inspection, maintenance and repair of hazards are considered discretionary acts entitled to governmental immunity." *Grignano* v. *Milford*, supra, 106 Conn. App. 656. This is so because there ordinarily is no legal directive mandating the specific manner in which officials must perform these tasks. Rather, "[a] municipality necessarily makes discretionary policy decisions with respect to the timing, frequency, method and extent of inspections, maintenance and repairs." Id.; see also *Bonington* v. *Westport*, supra, 297 Conn. 308–309 (when plaintiff claimed that defendants had improperly or inadequately inspected neighboring property for zoning violations, alleged acts of negligence constituted discretionary acts because no legal authority mandated inspection to be performed in prescribed manner); *Martel* v. *Metropolitan District Commission*, 275 Conn. 38, 50–51, 881 A.2d 194 (2005) (in absence of any policy or directive requiring defendants to design, supervise, inspect and maintain trail on defendant's property, defendants "were engaged in duties that inherently required the exercise of judgment," and, therefore, those duties were discretionary in nature); *Evon* v. *Andrews*, supra, 211 Conn. 506–507 (defendants' acts were discretionary in nature because what constitutes reasonable, proper or adequate fire safety inspection to ensure that multifamily residence was in compliance with state and local building codes involves exercise of judgment); *Pluhowsky* v. *New Haven*, supra, 151 Conn. 347–48 (in absence of any legal directive requiring defendants to repair malfunctioning catch basin under specific conditions or in particular manner, duty was discretionary); *Grig-*

nano v. *Milford*, supra, 656–57 (ordinance requiring owner of maritime facility to maintain physical improvements in safe condition imposed discretionary duty because ordinance did not "[prescribe] the manner in which the defendant is to perform reasonable and proper inspection and maintenance activities"); *Segreto* v. *Bristol*, 71 Conn. App. 844, 857–58, 804 A.2d 928 (city's allegedly negligent design and maintenance of stairwell located on premises of senior center that was owned and operated by city was discretionary because determinations of what is reasonable or proper under particular set of circumstances necessarily involve exercise of judgment), cert. denied, 261 Conn. 941, 808 A.2d 1132 (2002).

Consistent with these principles, the Appellate Court concluded in *Silberstein* v. *54 Hillcrest Park Associates, LLC*, supra, 135 Conn. App. 273, that the maintenance of storm drains is discretionary in nature. See also *Brusby* v. *Metropolitan District*, 160 Conn. App. 638, 656, 127 A.3d 257 (2015) (in absence of legal directive prescribing manner in which sanitary sewer system was to be maintained or repaired, duty was discretionary). In *Silberstein*, the plaintiffs owned property in the Hillcrest Park neighborhood of Old Greenwich. *Silberstein* v. *54 Hillcrest Park Associates, LLC*, supra, 264. The plaintiffs alleged that the defendants, the Hillcrest Park Tax District (tax district) and Hillcrest Park Association, Inc., which were responsible for maintaining and constructing roads and storm sewers in the Hillcrest neighborhood, had negligently failed to do so, resulting in the periodic flooding of the plaintiffs' property. Id., 264–65. The trial court granted the defendant's motion for summary judgment on the ground of governmental immunity. Id., 267. On appeal, the Appellate Court noted that, although the tax district's bylaws stated clearly that one of the functions of that organization was "to construct and maintain roads . . . drains,

[and] storm sewers"; (internal quotation marks omitted) id., 273; the bylaws did not "prescribe the *manner* in which the roads and drainage systems [were] to be maintained, and there [was] no evidence in the record of any procedure or directive governing the manner of their maintenance." (Emphasis in original.) Id. Accordingly, the court concluded that "the manner in which the defendants discharge their duty to maintain the roads and drainage systems plainly involves the exercise of judgment and discretion," and the duty was, therefore, discretionary. Id.

Like the plaintiffs in the present case, the plaintiffs in *Silberstein* had relied on this court's statement in *Spitzer* v. *Waterbury*, supra, 113 Conn. 88, that "[t]he work of constructing drains and sewers, as well as that of keeping them in repair, is ministerial, and the municipality is responsible for negligence in its performance" to support their contention to the contrary. *Silberstein* v. *54 Hillcrest Park Associates, LLC*, supra, 135 Conn. App. 272. In *Silberstein*, the Appellate Court concluded that *Spitzer* was distinguishable on the ground that this court had concluded in *Spitzer* that "a municipality's construction and repair of storm water sewers and drains [were] ministerial because [they were] 'incidental to' the municipality's statutorily imposed duty to maintain its streets and highways. . . . The court [in *Spitzer*] reasoned: 'The duty imposed by statute upon the municipality to maintain the highways within its limits makes it necessary for the municipality to dispose of all surface water falling upon them.' . . . Thus, the municipality was legally obligated to maintain and repair the drains. In contrast to the municipality in *Spitzer*, the defendants in [*Silberstein* were] not charged with having failed to fulfill a duty that was *imposed* upon them by statute. Rather, the plaintiffs claim[ed] that the defendants negligently failed to carry out a duty that they assumed pursuant to the tax district

bylaws. The tax district bylaws, however, [did] not prescribe the specific manner in which the duty to maintain and repair the roads, drains and storm sewers is to be performed." (Citations omitted; emphasis in original.) Id., 272, quoting *Spitzer* v. *Waterbury*, supra, 87–88.

The plaintiffs in the present case contend that *Spitzer* is controlling because, as in that case—unlike *Silberstein*—the duty of the defendants to repair and maintain the drainage system "originate[s] from the General Statutes, which require Connecticut municipalities to maintain the highways within their limits."[8] The plaintiffs further contend that *Silberstein* is distinguishable because the plaintiffs in that case alleged that the defendants had negligently failed to install a properly functioning drainage system, and "the decision to *build or construct* storm water systems is almost universally held to be a governmental discretionary act." (Emphasis added.) In contrast, the plaintiffs in the present case allege that the defendants failed to adequately *maintain and repair* the storm drainage system, which, they argue are ministerial duties. We disagree with both of these claims.

We first address the plaintiffs' contention that the defendants' duty to maintain and repair the sewer system is ministerial because it derives from statute rather from the town's own ordinances or rules. As we have indicated, the Appellate Court also made this distinction in *Silberstein* v. *54 Hillcrest Park Associates, LLC*, supra, 135 Conn. App. 272. In support of the proposition

[8] The plaintiffs do not identify the specific statutes that, according to them, impose this ministerial duty. We note, however, that General Statutes § 13a-99 provides: "Towns shall, within their respective limits, build and repair all necessary highways and bridges, and all highways to ferries as far as the low water mark of the waters over which the ferries pass, except when such duty belongs to some particular person. Any town, at its annual meeting, may provide for the repair of its highways for periods not exceeding five years and, if any town fails to so provide at such meeting, the selectmen may provide for such repairs for a period not exceeding one year."

that a duty imposed on a municipality by statute is necessarily ministerial, whereas a duty voluntarily assumed by the municipality is discretionary, the Appellate Court cited only this court's statement in *Spitzer* v. *Waterbury*, supra, 113 Conn. 87, that "[t]he duty imposed by statute upon the municipality to maintain the highways within its limits makes it necessary for the municipality to dispose of all surface water falling upon them." (Internal quotation marks omitted.) *Silberstein* v. *54 Hillcrest Park Associates, LLC*, supra, 272. In turn, *Spitzer* v. *Waterbury*, supra, 87, supported that proposition with a citation to *Bronson* v. *Wallingford*, 54 Conn. 513, 519–20, 9 A. 393 (1887), in which this court suggested, in dictum and without citation to any authority, that a municipality may be held liable for damages caused while carrying out its statutory duty to dispose of surface waters falling on its highways, whereas it would be immune from liability for acts performed pursuant to a duty imposed by the city charter in the absence of any charter provision providing a remedy.[9]

[9] *Bronson* also states that municipalities may be held liable for damage caused by rainwater runoff from roadbeds "only in special cases, where wanton or unnecessary damage is done, or where [the] damage results from negligence . . . ." *Bronson* v. *Wallingford*, supra, 54 Conn. 520. The cases cited in *Bronson*, however, may be characterized as sounding in nuisance. See id. As we discuss more fully subsequently in this opinion, a municipality may be held liable for the creation of a nuisance even when the act that created the nuisance was, in the language of the older cases, governmental or, in the language of more recent cases, discretionary. Thus, *Bronson* may have conflated the notion that a municipality may be held liable for creating a nuisance while carrying out a statutory duty with the notion that a municipality may be held liable for the performance of nongovernmental acts. Suffice it to say that there are a myriad of cases in Connecticut and other jurisdictions addressing the issue of municipal liability for damages caused by the failure to maintain roads and sewers, and it is likely possible to find an isolated case to support any position. See 4 J. Dillon, Commentaries on the Law of Municipal Corporations (5th Ed. 1911) § 1740, p. 3051 ("[i]t is, perhaps, impossible to reconcile all of the cases" on subject of municipal liability for damage caused by municipal drains and sewers).

Other cases predating *Spitzer* present a mirror image of this proposition, however, and hold that municipalities may *not* be held liable when they violate public duties that have been imposed on them by the state, whereas municipalities *can* be held liable for the violation of duties that they voluntarily take upon themselves. In *Jones* v. *New Haven*, 34 Conn. 1, 13 (1867), this court stated that "[w]henever a public duty is *imposed* upon a town . . . without its consent, express or implied, such town . . . is not liable to an action for negligence in respect to such duty, unless a right of action is given by statute." (Emphasis added.) In contrast, "when a grant is made to a [municipality] of some special power or privilege *at its request*, out of which public duties grow; and when some special duty is imposed upon a [municipality] not belonging to it under the general law *with its consent*; in these and like cases, if the corporation is guilty of negligence in the discharge of such duty, thereby causing injury to another, it is liable to an action in favor of the party injured." (Emphasis added.) Id., 14; see also *Dyer* v. *Danbury*, 85 Conn. 128, 131, 81 A. 958 (1911) (same). There are also cases predating *Spitzer* holding that acts performed pursuant to voluntarily assumed duties may be governmental and, therefore, immune from liability, *as well as* acts performed pursuant to duties imposed by statute. See *Hannon* v. *Waterbury*, 106 Conn. 13, 17, 126 A. 876 (1927) ("Whether the duty is directly imposed upon the city or permissive, that is, one which it voluntarily assumed . . . does not change the character of the act or function. The duty in either case will be governmental if the nature and character of [the] act or function be such."); *Pope* v. *New Haven*, 91 Conn. 79, 82, 99 A. 51 (1916) (function may be governmental regardless of whether "the legislature determines the necessity and expediency of the act to be performed" or "the necessity and expediency are left to be deter-

mined by the municipality"). We are aware of no authority other than the court's unsupported dictum in *Bronson* v. *Wallingford*, supra, 54 Conn. 519–20, however, that would support *Spitzer*'s suggestion that a duty imposed by statute, as distinct from a duty that is voluntarily assumed by the municipality, is by virtue of that fact ministerial.

In any event, the distinction applied by the court in *Jones* and *Dyer* has been superseded by more recent developments in municipal law and the law governing governmental immunity. As the Appellate Court recognized in *Roman* v. *Stamford*, 16 Conn. App. 213, 219, 547 A.2d 97 (1988), aff'd, 211 Conn. 396, 559 A.2d 710 (1989), "[u]nlike the *Dyer* and *Jones* doctrine of assumption of municipal liability based upon a charter provision, the modern construct of municipal liability rests upon distinctly different considerations." See also id., 218–19 ("construct [set forth in *Jones* and *Dyer*], wherein special powers are granted to or imposed upon the municipality, harkens back to the days before the advent of the principle of home rule" and, therefore, is no longer "a valid conceptualization of the doctrine of actionable private duties of a municipality").[10] Specifi-

[10] Remnants of the construct set forth in *Dyer* and *Jones* survive in the principle that a municipality may be held liable for negligent acts that are proprietary in nature, as opposed to governmental. See *Considine* v. *Waterbury*, 279 Conn. 830, 844, 905 A.2d 70 (2006) ("municipalities are liable for their negligent acts committed in their proprietary capacity"); see also General Statutes § 52-557n (a) (1) ("a political subdivision of the state shall be liable for damages to person or property caused by . . . [B] negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit"). Although "the distinction between a municipality's governmental and proprietary functions has been criticized as being illusory, elusive, arbitrary, unworkable and a quagmire"; *Considine* v. *Waterbury*, supra, 845; it is relatively clear that, under the more modern rule, not *all* duties that a municipality voluntarily assumes for the benefit of its inhabitants, as distinct from those that it performs for the benefit of the general public as the agent of the state, are proprietary or, in the language of the older cases, corporate, and, therefore, subject to liability. See id., 846 ("functions that appear to be for the sole benefit of a municipality's inhabitants, but nevertheless provide indirect benefits to the

cally, under modern principles of governmental immunity, the salient consideration in determining whether a municipal duty is discretionary or ministerial is not whether the duty was imposed on the municipality by statute or voluntarily assumed pursuant to its own ordinances or regulations, but whether there is any statute, "city charter provision, ordinance, regulation, rule, policy, or any other directive [requiring the government official to act *in a*] *prescribed manner*." (Emphasis added.) *Violano* v. *Fernandez*, supra, 280 Conn. 323; see also *Roman* v. *Stamford*, supra, 221 (under modern principles of governmental immunity, "[a] ministerial act, as opposed to a discretionary act, refers to [one] which is to be performed in a prescribed manner without the exercise of judgment or discretion" [internal quotation marks omitted]). Accordingly, we disagree with the plaintiffs' argument that *Silberstein* v. *54 Hillcrest Park Associates, LLC*, supra, 135 Conn. App. 272, is not controlling because, unlike in *Silberstein*, the defendants' duty in the present case was imposed by statute.

We next address the plaintiffs' argument that, in contrast to the design of storm water drainage systems, the duty to repair and maintain such systems is ministe-

general public because the activities were meant to improve the general health, welfare or education of the municipality's inhabitants" are governmental); id., 848 ("a municipality is engaged in a proprietary function when it acts very much like private enterprise" [internal quotation marks omitted]). The plaintiffs in the present case make no claim that the maintenance and repair of a storm sewer system is proprietary in nature. Cf. *Platt Bros. & Co.* v. *Waterbury*, 72 Conn. 531, 549, 45 A. 154 (1900) ("[w]hile sewers or drains for the disposition of surface waters collecting in highways may be considered as mere adjuncts of a highway, partaking of its nature as a governmental use . . . it is different with *sewers for the disposition of refuse and filth accumulated on private property*" [citation omitted; emphasis added]); *Brusby* v. *Metropolitan District*, supra, 160 Conn. App. 653 (concluding that there was genuine issue of material fact as to whether maintenance of sanitary sewer system, of which plaintiff was paying customer, was proprietary function).

rial. In support of this claim, the plaintiffs rely on several cases from other jurisdictions. The holdings of those cases, however, can be traced to the outmoded distinction between duties that are imposed on municipalities and those that they voluntarily assume. See *Johnston* v. *District of Columbia*, 118 U.S. 19, 21, 6 S. Ct. 923, 30 L. Ed. 75 (1886) (repair of sanitary sewer is ministerial duty), citing *Child* v. *Boston*, 86 Mass. 41, 52 (1862) (municipality is not liable for defective sanitary sewer plan because creation of plan involved duty of quasi-judicial nature, but could be held liable for negligent care and maintenance of sanitary sewers because those duties were not imposed by legislative authority for public purposes but were voluntarily assumed by municipality); *Barton* v. *Syracuse*, 36 N.Y. 54, 54 (1867) (municipality was liable for negligent failure to repair sanitary sewers because it voluntarily accepted duty and assessed costs on beneficiaries);[11] *Portsmouth* v. *Mitchell Mfg. Co.*, 113 Ohio St. 250, 255–56, 148 N.E. 846 (1925) (citing *Barton* and concluding that municipality cannot be held liable for failure to construct storm sewer but can be held liable for failure to keep storm sewer in repair). In addition, all of these cases either involved or relied on cases involving the maintenance and repair of *sanitary* sewers, which, unlike the maintenance and repair of storm sewers, arguably may be a proprietary function under certain circumstances, even under more modern case law.[12] See footnote 10 of this opinion.

[11] New York state courts continue to accept this distinction between duties that are imposed on municipalities and those that they voluntarily assume. See *Fireman's Fund Ins. Co.* v. *Nassau*, 66 App. Div. 3d 823, 824, 887 N.Y.S.2d 242 (2009) (municipality is immune from liability for negligent design of sanitary sewer, but maintenance of sewer is ministerial function); *Biernacki* v. *Ravena*, 245 App. Div. 2d 656, 657, 664 N.Y.S.2d 682 (1997) (following *Johnston* and concluding that, while municipality is not liable for defective sanitary sewer plan, construction and repair of sewer are ministerial functions).

[12] The plaintiffs have not cited any Connecticut cases to support their position that the construction of sewers is discretionary but that their mainte-

We recognize that, for purposes of imposing liability on a municipality, some Connecticut cases predating *Spitzer* made the distinction between a municipality's duty to construct roads and sidewalks, and, by extension, the storm drains and sewers that are required to ensure that the roads are functional, as opposed to a duty of maintenance and repair. In *Hoyt* v. *Danbury*, 69 Conn. 341, 351, 37 A. 1051 (1897), for example, this court observed that a municipality's statutory obligation to provide highways "carried with it the correlative right of determining the mode of their construction," and "[a]s to which, out of any appropriate modes of building the particular sidewalk in question, was to be chosen, it was for the borough to decide; and so long as the mode selected was an appropriate and lawful one, its decision was not subject to collateral review in a suit of this nature." In other words, *Hoyt* recognized that the *construction* of highways is a discretionary function. As to highway *repairs*, this court noted that municipal liability for the failure to keep roads in good repair had been imposed by statute, now codified at General Statutes § 13a-149,[13] "since early colonial times." Id. The highway defect statute, however, *waives* governmental immunity from claims by travelers on the

nance and repair are ministerial. We note that *Spitzer* itself made no such distinction, but indicated that "[t]he work of constructing drains and sewers, as well as that of keeping them in repair, is ministerial . . . ." *Spitzer* v. *Waterbury*, supra, 113 Conn. 88. *Spitzer* also stated, however, that "the duty to provide . . . drains, authorized by the defendant's charter, is governmental in its nature." Id. Because, at that time, acts in furtherance of governmental or public duties were deemed to be immune from liability, i.e., *not* ministerial; see *Gauvin* v. *New Haven*, 187 Conn. 180, 184, 445 A.2d 1 (1982) (citing *Spitzer* for proposition that "[a] municipality is immune from liability for the performance of governmental acts, as distinguished from ministerial acts"); there would appear to be an inconsistency within *Spitzer*. This apparent inconsistency may reflect the somewhat confusing state of the law governing governmental immunity at the time.

[13] General Statutes § 13a-149 provides in relevant part: "Any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair. . . ."

highway arising from highway defects. See *McIntosh* v. *Sullivan*, 274 Conn. 262, 282, 875 A.2d 459 (2005) (highway defect statute at issue in *Hoyt* "abrogated governmental immunity"). Put differently, the highway defect statute does not *impose a ministerial duty* to repair highways, so that a municipality may be held liable to abutting landowners for breach of that duty. See *Aerotec Corp.* v. *Greenwich*, 138 Conn. 116, 119, 82 A.2d 356 (1951) (highway defect statute "provides no right of recovery to an abutting landowner for damage from a defective highway"). Thus, the distinction made in *Hoyt* between the construction of highways and their repair, which was premised on the highway defect statute, is consistent with the modern rule distinguishing "laws that impose general duties on officials," which impose discretionary duties, "and those that mandate a particular response to specific conditions," which impose ministerial duties. *Bonington* v. *Westport*, supra, 297 Conn. 308.

The authority that *Spitzer* itself cited in support of its statement that the duty to construct and repair drainage systems is ministerial also can be at least partially reconciled with the modern rule. In *Spitzer*, this court relied on a treatise on Municipal Corporations authored by John F. Dillon. See *Spitzer* v. *Waterbury*, supra, 113 Conn. 88, citing 4 J. Dillon, Commentaries on the Law of Municipal Corporations (5th Ed. 1911) §§ 1742 and 1743, pp. 3054–57. That treatise states the following: "[A] municipal corporation *is liable for negligence in the ministerial duty to keep its sewers . . . in repair* . . . ." (Emphasis in original.) 4 J. Dillon, supra, § 1742, p. 3055. A careful review of the treatise, however, reveals that this statement was at least partially premised on the principle that municipalities are "bound to preserve and keep in repair erections [they have] constructed, so that they shall not become a source

of *nuisance* to others."[14] (Emphasis altered; internal quotation marks omitted.) Id. Consistent with this principle, it is well established in this state that "towns will not be justified in doing an act lawful in itself in such a manner as to create a nuisance, any more than individuals. And if a nuisance is thus created, whereby another suffer[s] damage, towns like individuals are responsible." (Internal quotation marks omitted.) *Hoffman* v. *Bristol*, 113 Conn. 386, 390, 155 A. 499 (1931); accord *Keeney* v. *Old Saybrook*, 237 Conn. 135, 165, 676 A.2d 795 (1996) ("a municipality may be liable for a nuisance it creates through its negligent misfeasance or nonfeasance"); *Wright* v. *Brown*, 167 Conn. 464, 470, 356 A.2d 176 (1975) ("[l]iability in nuisance can be imposed on a municipality only if the condition constituting the nuisance was created by the positive act of the municipality"); *Prifty* v. *Waterbury*, 133 Conn. 654, 657, 54 A.2d 260 (1947) ("the rule which exempts municipalities from liability when their employees are acting in discharge of a public duty does not relieve them from liability for the consequences of particular acts which the municipality has directed to be performed and which, from their character or the manner in which they are so ordered to be executed, will naturally work a direct injury to others or create a nuisance"); *Colwell* v. *Waterbury*, 74 Conn. 568, 572–73, 51 A. 530 (1902) (same); *Judd* v. *Hartford*, 72 Conn. 350, 354, 44 A. 510 (1899) (although duty to construct sewer was governmental, municipality could be held liable for negligent failure to remove temporary obstructions after construction because failure to do so turned "city property into a nuisance"); *Mootry* v. *Danbury*, 45 Conn. 550, 556 (1878) (when town constructed bridge over stream that blocked water flow, causing plaintiff's upstream

[14] Dillon's treatise also relied on the now outmoded distinction between public duties, which are imposed on municipalities, and corporate duties, which municipalities voluntarily assume. See 4 J. Dillon, supra, § 1742, p. 3057 n.1.

property to flood, it may be held liable because "towns will not be justified in doing an act lawful in itself in such a manner as to create a nuisance, any more than individuals").[15]

The fact that a municipality may be liable for creating a nuisance, however, does not necessarily mean—at least not under our more recent cases—that the act that created the nuisance was ministerial in nature. Indeed, this court has held that "a municipality may be liable for a nuisance . . . even if [its] misfeasance or nonfeasance also constitutes negligence from which the municipality would be immune" because the municipality was engaged in a discretionary function.[16] *Keeney*

[15] We note that *Spitzer* cited *Judd* and *Mootry* in support of its conclusion that a municipality is "bound to exercise due care in the construction of its storm water sewers, and would be liable for its failure to do so . . . ." *Spitzer* v. *Waterbury*, supra, 113 Conn. 88.

[16] This court stated in *Elliott* v. *Waterbury*, 245 Conn. 385, 421, 715 A.2d 27 (1998), that, "in order to overcome the governmental immunity of municipal defendants where it applies, the plaintiff must prove that the defendants, by some positive act, *intentionally* created the conditions alleged to constitute a nuisance." (Emphasis added.) In support of this statement, this court cited, among other cases, *Keeney* v. *Old Saybrook*, supra, 237 Conn. 165–66, and *Hoffman* v. *Bristol*, supra, 113 Conn. 390–92. See *Elliott* v. *Waterbury*, supra, 421. In both *Keeney* and *Hoffman*, however, this court expressly recognized that a municipality may be held liable for *negligently* creating a nuisance. See *Keeney* v. *Old Saybrook*, supra, 165 (municipality may be held liable for nuisance even if its conduct "constitutes negligence from which the municipality would be immune"); *Hoffman* v. *Bristol*, supra, 389 (municipality may be held liable for nuisance "irrespective of whether the misfeasance or nonfeasance causing the nuisance also constituted negligence"); see also *Judd* v. *Hartford*, supra, 72 Conn. 353 (municipality was liable when, "after planning and constructing an adequate sewer, [the municipality] left obstructions in it, placed there for temporary purposes, which its agents *carelessly* omitted to remove after those purposes had been accomplished" [emphasis added]). It is clear, therefore, that, by using the word "intentionally," *Elliott* merely intended to emphasize that, for a municipality to be held liable for creating a nuisance, the nuisance must be the result of some positive act of the municipality, and that this court did not intend to suggest that only the intentional act of a municipality can create a nuisance. In other words, there is a difference between a *positive* act, which may be negligent, as was the act of the municipality in *Judd*, and an *intentional* act.

v. *Old Saybrook*, supra, 237 Conn. 165; but see *Judd* v. *Hartford*, supra, 72 Conn. 353–54 (duty to remove temporary obstructions from sewer so as to prevent creation of nuisance was ministerial).

In other words, unlike Dillon's treatise, which seems to suggest that ministerial acts are the only acts for which a municipality may be held liable and, therefore, that if a municipality can be held liable for creating a nuisance, the municipal function that resulted in the creation of the nuisance must be a ministerial one, our more recent cases have treated nuisance and the violation of a ministerial duty as entirely distinct theories of municipal liability.[17] See *Grady* v. *Somers*, 294 Conn. 324, 335 n.10, 984 A.2d 684 (2009) (governmental immunity does not apply to claims alleging "[1] liability in nuisance, which [may] be imposed . . . only if the condition constituting the nuisance was created by the positive act of the municipality; and [2] the negligent performance of ministerial acts" [internal quotation

[17] The plaintiffs in the present case have made no claim that the defendants may be held liable for their failure to properly maintain and repair the storm sewer system under a nuisance theory because a positive act by the town caused damage to their property. Indeed, at oral argument before this court, counsel for the plaintiffs conceded that he did not believe that the facts of this case would support a nuisance claim. See *Aerotec Corp.* v. *Greenwich*, supra, 138 Conn. 120 (noting that municipal liability for nuisance "exists . . . only for those nuisances which have been created by positive act" and that "[t]here is no liability where the condition of the highway which is dangerous has come into being simply because of the failure of the town to take remedial steps"); *Karnasiewicz* v. *New Britain*, 131 Conn. 691, 694, 42 A.2d 32 (1945) (when dangerous highway condition does not constitute defect under highway defect statute and does not constitute nuisance, "a municipality is not liable where its sole fault is a failure to take remedial steps"); see also footnote 18 of this opinion.

These decisions lend support to our conclusion that the maintenance and repair of a storm drainage system are not ministerial functions. It would be odd to conclude that a city is not liable for harms caused by a dangerous condition on a highway unless the condition was created by a positive act of the municipality or constituted a defect under the highway defect statute, but the city may be held liable for harms caused by the failure to take steps to remedy a dangerous condition in a storm drainage system.

marks omitted]); see also *Keeney* v. *Old Saybrook*, supra, 237 Conn. 165. Accordingly, although we agree with Dillon's treatise to the extent that it recognizes that there are situations in which a municipality may be held liable for damage caused by a storm sewer system that the municipality was responsible for maintaining and repairing—namely, when the municipality's positive act has created a nuisance—we do not agree with its suggested inference from that proposition, namely, that the duty to maintain and repair storm sewers is necessarily ministerial.[18] Indeed, if that were the case, municipalities could be held liable for *any* damage caused by their failure to maintain and repair storm sewer systems, even if the "positive act" element of nuisance were not satisfied. See *Wright* v. *Brown*, supra, 167 Conn. 470 ("[l]iability in nuisance can be imposed on a municipality only if the condition constituting the nuisance was created by the positive act of the municipality").

[18] We recognize that this court has held that, by enacting § 52-557n, the legislature eliminated common-law actions against municipalities arising from injuries for which § 13a-149, the highway defect statute, provides a remedy, including nuisance actions. See *Sanzone* v. *Board of Police Commissioners*, 219 Conn. 179, 192, 592 A.2d 912 (1991) (§ 52-557n provides that § 31a-149 "is a plaintiff's exclusive remedy against a municipality or other political subdivision 'for damages resulting from injury to any person or property by means of a defective road or bridge' "); see also General Statutes § 52-557n (a) (1) (providing that municipality may be held liable for its negligent acts and negligent acts of its employees acting within scope of official duties, for acts from which political subdivision derives corporate profit, and for creation of 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"). As we have indicated herein, however, § 13a-149 does not provide a right of recovery to an abutting landowner for damage to the land caused by a defective highway. See *Aerotec Corp.* v. *Greenwich*, supra, 138 Conn. 119. Moreover, a highway need not be *defective* to constitute a nuisance to abutting landowners. See *Wright* v. *Brown*, supra, 167 Conn. 470 ("[l]iability in nuisance can be imposed on a municipality only if the condition constituting the nuisance was created by the positive act of the municipality").

We therefore disagree with the plaintiffs' argument that, in determining whether a municipality's duty with respect to its storm drains and sewers is ministerial or discretionary, the relevant considerations are (1) whether the duty was imposed by statute or, instead, was voluntarily assumed by the town, and (2) whether the municipality was constructing the sewers or, instead, was maintaining or repairing them. Rather, the relevant consideration under well established modern principles of governmental immunity remains whether the duty was a general one or, instead, whether there was a "city charter provision, ordinance, regulation, rule, policy, or any other directive [requiring the government official to act in a] prescribed manner." *Violano* v. *Fernandez*, supra, 280 Conn. 323; see also *Bonington* v. *Westport*, supra, 297 Conn. 308 ("[t]here is a difference between laws that impose general duties on officials and those that mandate a particular response to specific conditions"). To the extent that *Spitzer* v. *Waterbury*, supra, 113 Conn. 84, held otherwise, it is hereby overruled.

We conclude, therefore, that the defendants in the present case may be held liable to the plaintiffs only if there was some legal directive prescribing the specific manner in which they were required to maintain and repair the town's storm sewer system. As we have indicated, the Appellate Court concluded that, "although there is language in § 16-32 of the [Naugatuck Code of Ordinances] that requires the streets commission to maintain and repair the town's storm water sewer system, the ordinance contains no provisions that mandate the time or manner in which those responsibilities are to be executed, leaving such details to the discretion and judgment of the municipal employees."[19] *Northrup*

[19] Section 16-32 of the Naugatuck Code of Ordinances provides: "Except as otherwise provided in this article, the streets commission shall be responsible for the care and management of all streets, avenues, highways, alleys and bridges, and the opening, [grading, improving], repairing and cleaning of the same; of the construction, protection, repair, furnishing, cleaning,

v. *Witkowski*, supra, 175 Conn. App. 238. The plaintiffs do not challenge the Appellate Court's conclusion that the language of that ordinance does not, in and of itself, create a ministerial duty.

Instead, the plaintiffs claim that Witkowski's deposition testimony that the streets commission had developed a schedule to ensure that every catch basin was maintained at least once a year and that, "if there were calls from the public about a basin being blocked or a bad situation that needed to be addressed, we would attempt to do that," established the existence of a rule or policy that limited the streets commission's discretionary authority under § 16-32 of the Naugatuck Code of Ordinances and thereby created a ministerial duty.[20] In support of this claim, the plaintiffs argue that, in *Mills* v. *Solution, LLC*, 138 Conn. App. 40, 51–52, 50

heating, lighting and general care of all public streets and appurtenances, except such as are by the express terms of the Charter under the control of some other officer or department; of the construction, repair, cleaning and general care of all drains, culverts, sluiceways and catch basins, and the collection and disposing of ashes, garbage and refuse. The streets commission shall make all suitable rules and regulations in regard to the department and the conduct of its business."

[20] The plaintiffs raised this claim for the first time in their reply brief. They contend that they did not raise this claim in their main brief because "the question certified by this [court] was not specific to the [town's] directives, but to storm water systems in general . . . ." They point out that the defendants nevertheless addressed "the question more narrowly as it relates only to the [town]." The plaintiffs fail to recognize, however, that this court is required to reach the question of whether the defendants' own acts had created a ministerial duty only if it *rejects* their claim that a ministerial duty was created by statute and that our review of the former issue can only be to their benefit. By failing to address the issue in their main brief, the plaintiffs effectively abandoned it. See, e.g., *State* v. *Jose G.*, 290 Conn. 331, 341 n.8, 963 A.2d 42 (2009) ("[i]t is a well established principle that arguments cannot be raised for the first time in a reply brief" [internal quotation marks omitted]). Nevertheless, because the plaintiffs cannot prevail on this claim, and because the defendants have briefed it, we review it. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 157–58, 84 A.3d 840 (2014) (review of unpreserved claim may be appropriate when party who raised it cannot prevail).

A.3d 381, cert. denied, 307 Conn. 928, 55 A.3d 570 (2012), the Appellate Court held that, although the use of the mandatory language "shall" in a statute does not necessarily create a ministerial duty, if the municipality has a policy or rule limiting the discretion of public officials in the performance of a mandatory duty that would otherwise be discretionary, the duty is ministerial.[21] We are not persuaded that this is a correct interpretation of *Mills*. Rather, *Mills* is more reasonably interpreted as holding that mandatory statutory language is not sufficient to create a ministerial duty unless the *statute itself* limits discretion in the performance of the mandatory act. See id., 52 ("[w]here the text of the statute explicitly vests the chief of police with the discretion to determine when and how to furnish police protection, we decline to hold that the same statute imposes a ministerial duty on the chief of police to furnish the protection he deems, in his discretion, to be necessary").

We need not decide, however, whether the existence of a municipal agency's "policy or rule" that limits the agency's discretion in performing a duty imposed by ordinance or statute can ever convert a duty that otherwise would be discretionary into a ministerial duty because, even if we were to assume, without deciding, that there are circumstances under which it can, we

[21] See also *Wisniewski* v. *Darien*, 135 Conn. App. 364, 374–75, 42 A.3d 436 (2012) (although no legal directive prescribed specific manner in which tree warden was required to perform duties, evidence that town's assistant director of public works had repeatedly provided same general direction to tree warden upon receiving complaints of unsafe trees and tree warden's testimony that he had nondiscretionary duty to perform inspection upon receipt of complaint were sufficient to establish ministerial duty); *Kolaniak* v. *Board of Education*, 28 Conn. App. 277, 281, 610 A.2d 193 (1992) (in case in which board of education had issued bulletin to all maintenance personnel directing that walkways were to be inspected and kept clean on daily basis, maintenance workers had no discretion to determine whether there was sufficient accumulation of snow before clearing walkways but had ministerial duty to clear walkways of snow and ice).

conclude that Witkowski's testimony would not be sufficient to establish the existence of such a policy or rule in the present case. This court previously has held that a municipality may be held liable for the negligent performance of a duty only if the "the official's duty is *clearly* ministerial." (Emphasis added; internal quotation marks omitted.) *Bonington* v. *Westport*, supra, 297 Conn. 308. We conclude that neither the creation of a schedule for cleaning all catch basins at least once per year, nor the practice of attempting to respond to every complaint about malfunctioning storm drains, constitutes a "policy or rule" converting the discretionary duty to carry out the functions mandated by § 16-32 of the Naugatuck Code of Ordinances into a clear ministerial duty. If we were to conclude otherwise, virtually *any* attempt by a municipal agency to ensure that its discretionary duties are regularly and properly carried out would convert its discretionary duty into a ministerial duty, thereby creating a disincentive for municipal agencies to make such attempts and undermining the very policy considerations that the doctrine governmental immunity was intended to advance. See *Violano* v. *Fernandez*, supra, 280 Conn. 319 ("[d]iscretionary 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" [internal quotation marks omitted]).

For similar reasons, we reject the plaintiffs' claim that the defendants violated a ministerial duty when they completely failed to perform *any* maintenance or repair of some storm drains and catch basins. In support of this claim, the plaintiffs rely on this court's decision in *Evon* v. *Andrews*, supra, 211 Conn. 506, in which

we noted that the plaintiffs had not alleged that "the defendants failed to inspect the dwelling" but that they had "failed to make *reasonable and proper inspections* . . . ." (Emphasis in original; internal quotation marks omitted.) The plaintiffs contend that this implies that municipalities have no discretion to completely *fail* to perform a mandatory duty, even if the manner of carrying out the duty is discretionary. We disagree. First, the plaintiffs have cited no evidence that would support a finding that there are town storm drains and catch basins that the defendants have *never* maintained or repaired, and the frequency of maintenance and repair is discretionary. See *Grignano* v. *Milford*, supra, 106 Conn. App. 656 ("[a] municipality necessarily makes discretionary policy decisions with respect to the timing, *frequency*, method and extent of inspections, maintenance and repairs" [emphasis added]). Second, even if we were to assume that the defendants never maintained or repaired certain storm drains and catch basins, we cannot conclude that, in a system as large and complex as a municipal storm drainage system, the duty to maintain and repair the system encompasses a judicially enforceable duty to maintain and repair each individual component of the system, regardless of the needs of the system as a whole. It is not the function of this court to second-guess the administration of such complex municipal affairs, particularly when "there is no readily ascertainable standard by which the action of the government servant may be measured . . . ."[22]

[22] The dissenting justice would conclude that, because "[*o*]*nly* the municipality can construct a storm water drainage system and, once constructed, *only* the municipality can maintain the system and repair it to prevent property damage foreseeably resulting from its malfunction," and "[b]ecause storm water drainage systems are municipal property and subject to exclusive municipal control," a municipality should not be permitted to invoke municipal immunity to "escape liability." (Internal quotation marks omitted.) The very *purpose* of the doctrine of governmental immunity, however, is to bar liability for harmful negligent conduct by a municipality, and it is in the very nature of harmful negligent conduct that the harm was within the power of the tortfeasor to prevent. Thus, to create an exception to the

(Internal quotation marks omitted.) *Violano* v. *Fernandez*, supra, 280 Conn. 319 n.7.

For the foregoing reasons, we conclude that the defendants' duty to maintain and repair the town's storm drains and sewers was discretionary and that the Appellate Court properly upheld the trial court's granting of the defendant's motion for summary judgment on the ground of governmental immunity.

The judgment of the Appellate Court is affirmed.

In this opinion PALMER, McDONALD, D'AURIA and KAHN, Js., concurred.

ECKER, J., dissenting. In *Spitzer* v. *Waterbury*, 113 Conn. 84, 88, 154 A. 157 (1931), this court held, consistent with its prior precedent and the prevailing case law in the majority of our sister states, that the "[t]he work of constructing drains and sewers, as well as that of keeping them in repair, is ministerial, and the municipality is responsible for negligence in its performance." This line of cases imposing liability on municipalities for the negligent maintenance and repair of drains and sewers has been on our books for over a hundred years without any sign of legislative disapproval or criticism from this court. Today we overrule *Spitzer* and the well established case law on which it relied because the majority believes, contrary to *Spitzer*, that the maintenance and repair of a storm water drainage system is not ministerial, but discretion-

doctrine in cases in which the dangerous condition was within the municipality's control and the municipality could have prevented the harm would eviscerate the doctrine, and would entirely disregard the underlying "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." (Internal quotation marks omitted.) *Violano* v. *Fernandez*, supra, 280 Conn. 319.

ary. I cannot understand why we would choose to overturn an established line of cases, which has been codified by the legislature in General Statutes § 52-557n, without any compelling reason to do so. The choice to overrule this long-standing precedent becomes still more mystifying upon the realization that we are doing so in favor of an immunity doctrine that can only serve to encourage municipal carelessness by removing any financial incentive to act with due care. The immunity we confer today imposes the entire burden of a municipality's negligence on the unlucky few who suffer its direct consequences in the form of property damage or personal injury, rather than spreading those costs across the entire community that benefits from the relevant municipal operation. I respectfully dissent.

I begin with a brief review of certain facts that cannot be ignored at the summary judgment stage. The plaintiffs' opposition to summary judgment included a technical report dated October, 2009, entitled "Stormwater Management Report Nettleton Avenue Neighborhood" (drainage study), which was prepared by an engineering firm at the request of the defendant borough of Naugatuck (town). As the majority notes, the drainage study indicates that the flooding in the Nettleton Avenue neighborhood, where the plaintiffs reside, occurs after periods of particularly heavy rainfall and attributes the flooding "to the fact that runoff was required to flow through relatively narrow drainpipes that were in poor to fair condition and that the majority of catch basins in the area were old and had small openings that often became overgrown with vegetation or obstructed by trash." (Internal quotation marks omitted.) The majority's abridged summary, although accurate, fails to acknowledge all of the pertinent facts contained in the drainage study. Additional aspects of the drainage study warrant further elaboration because they illustrate the

nature and extent of the alleged negligent acts and omissions at issue in this case.

The drainage study explains that the cause of the flooding in the Nettleton Avenue neighborhood is not limited to the outdated and dilapidated condition of the drainage pipes and catch basins. Rather, "[t]he street is used as an overflow channel" and "[w]hen the street's capacity is exceeded, water will find and follow the path of least resistance to reach the watershed's natural low point . . . ." The street's ability to act as an overflow channel had been compromised by the town's role in repaving the neighborhood streets and curbs. The repaving had thickened the asphalt and reduced "the height of the curbs above the asphalt . . . decreas[ing] the curb's ability to carry storm water runoff." The excess storm water runoff "adds to the flow already in Trowbridge Place and accumulates at the low point in Trowbridge Place (about [fifty] feet east of Nettleton Avenue) where it overflows the curb and drains through the yards between Trowbridge Place and Moore Avenue." The plaintiffs' home is located at the low point on Nettleton Avenue, near the intersections of Trowbridge Place and Moore Avenue.

According to the drainage study, residents on Nettleton Avenue between Trowbridge Place and Moore Avenue "described being flooded by surface waters that overflow the drainage system in the adjacent streets. The resident at 75 Goodyear Avenue described water backing up into the basement from Trowbridge Place during heavy storms. Residents along the east side of Nettleton Avenue and the north side of Moore Avenue describe water flowing over the curbs on the south side of Trowbridge Place and then through their yards causing water damage during heavy rainfall events. Such flooding was reported to have occurred every one or two years."

The drainage study reflects that the town was aware of the defective condition of the storm water drainage system and the need for maintenance and repairs to prevent flooding in the Nettleton Avenue neighborhood. Additionally, the plaintiffs submitted an affidavit in which Helen M. Northrup averred that she "repeatedly" informed the defendants, James Stewart, the town's director of public works, and Robert A. Mezzo, the town's mayor, that her home continued to flood and asked them to "[take] measures to protect" her home. Her requests were ignored and her home, as well as those in the surrounding neighborhood, continued to flood during periods of heavy rainfall with "rain surface water, black water, and storm water mixed with sewage . . . ."

In my view, the evidence supports a reasonable inference that the defendants were negligent in constructing, maintaining, and repairing all of the components of the storm water drainage system—municipal streets, curbs, catch basins, and drainage pipes—serving the plaintiffs' neighborhood. The evidence further supports a reasonable inference that the plaintiffs' property was damaged by the repeated flooding caused by the defendants' negligent construction, repair, or maintenance of the storm water drainage system. I believe that the defendants' motion for summary judgment should have been denied on this factual record.

The majority affirms the grant of summary judgment in favor of the defendants because, in its view, the construction, maintenance and repair of a storm water drainage system requires the exercise of judgment or discretion under § 52-557n (a) (2) (B).[1] In arriving at

[1] General Statutes § 52-557n (a) (1) (A) provides in relevant part that "[e]xcept as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by . . . [t]he 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 . . . ." The statute further provides, however, that "a political subdivision of the state shall not be liable for damages to person or property caused

this conclusion, the majority overrules this court's holding in *Spitzer* v. *Waterbury*, supra, 113 Conn. 88, that "[t]he work of constructing drains and sewers, as well as that of keeping them in repair, is ministerial, and the municipality is responsible for negligence in its performance." The majority characterizes *Spitzer* as an aberrant case without support elsewhere in Connecticut case law and rooted in an antiquated line of out-of-state cases which relied on "outmoded" distinctions between public and corporate duties, the law of negligence and nuisance, and duties assumed versus duties imposed. I disagree. *Spitzer* was anything but an outlier when decided and its fundamental underlying principles remain vital to this day.

The plaintiffs in *Spitzer* alleged that "after a heavy rainfall, [a] stream overflowed through a catch basin in front of the plaintiffs' house, discharging water into the street which ran into the plaintiffs' cellar, causing damage to their property." Id., 85. This court noted that the defendant city was "bound to exercise due care in the construction of its storm water sewers, and would be liable for its failure to do so though the work was done in the performance of a public and governmental duty. . . . The work of constructing drains and sewers, as well as that of keeping them in repair, is ministerial, and the municipality is responsible for negligence in its performance. . . . If, apart from any defect in the plan, the city's employees had so negligently and improperly constructed the outlet of this storm water sewer that, under conditions reasonably to be anticipated, it would not carry off the water collected by it, the city would be responsible for damage directly resulting to the plaintiffs' property." (Citations omitted.) Id., 88. The plaintiffs' complaint in *Spitzer* foundered only because it

by . . . 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." General Statutes § 52-557n (a) (2) (B).

was not predicated on a claim that the city was negligent in the construction, maintenance, and repair of the storm water drainage system, but rather on a claim of negligent *design*—i.e., that "the failure of the city, in planning a storm water disposal system, to adopt a plan which provided an outlet of sufficient size adequately to dispose of the water discharged by the storm water sewer into the covered stream." Id., 88–89. This court held that "[s]uch a defect in the plan upon which the system was constructed, if one existed, was the result of an error of judgment on the part of the officers of a public corporation on which has been cast the burden of discharging a governmental duty of a quasi-judicial character," and, therefore, "the defendant is not liable." Id., 89.

Spitzer holds that the design of a storm water drainage system is discretionary and, therefore, protected by municipal immunity, whereas the construction, maintenance, and repair of such a system is a ministerial duty for which the municipality may be held liable in negligence. Id. The majority contends that *Spitzer* stands alone in this view, but it has not cited a single decision of this court inconsistent with *Spitzer* regarding the subject at issue, i.e., municipal liability for property damage caused by the negligent construction, maintenance, and/or repair of a storm water drainage system.[2] To the contrary, there is extensive authority demonstrating that *Spitzer* accurately states the law governing this field of municipal operations. See *Phelan* v. *Waterbury*, 97 Conn. 85, 90–91, 115 A. 630 (1921) (reversing judgment in favor of plaintiff because there was no evidence that city negligently failed to clean

[2] The majority's reliance on Appellate Court precedent contrary to *Spitzer*, such as *Silberstein* v. *54 Hillcrest Park Associates, LLC*, 135 Conn. App. 262, 41 A.3d 1147 (2012), is misplaced in light of the well settled rule that "the Appellate Court and Superior Court are bound by our precedent." *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010).

and maintain catch basins; instead, plaintiff's injury was due to alleged inadequate design of storm water drainage system); *Katzenstein* v. *Hartford*, 80 Conn. 663, 666–67, 70 A. 23 (1908) (reversing judgment in favor of plaintiffs because trial court's charge to jury "entirely overlook[ed] the element of negligence" and city was liable for property damage caused by flooded sewer only "upon proof of such negligence"); *Rudnyai* v. *Harwinton*, 79 Conn. 91, 95, 63 A. 948 (1906) ("The statute imposing upon towns the duty of building and repairing necessary highways within their respective limits, does not authorize them, in the discharge of that duty, for the purpose of protecting their highways from surface water, to make use of the adjoining private property by constructing sluices and drains upon it, or by discharging upon it, by means of sluices or ditches or other structures designed for that purpose, the surface water which has accumulated because of the manner in which the road has been constructed, or has been collected by means of gutters or ditches on the sides of the roads. . . . When a municipality directs the performance of such an act, not within the scope of the imposed governmental duty, it becomes liable like any other [wrongdoer] for the resulting injury." [Citations omitted.]); *Judd* v. *Hartford*, 72 Conn. 350, 354, 44 A. 510 (1899) (Holding city was liable for flooding caused by obstructions negligently left in sewer because "its duty . . . to clean up, and remove any temporary appliances which, if left where they were, would render the sewer unserviceable or inadequate, was a new and ministerial one. It was a simple and definite duty arising under fixed conditions, and implied by law."); *Bronson* v. *Wallingford*, 54 Conn. 513, 520–21, 9 A. 393 (1887) (Holding municipal defendant was not liable for property damage caused by storm water runoff because "[t]he defendant is accused of no negligence . . . it is not accused of a faulty construction or repair of the

highway by reason of which the plaintiff has been injured . . . [nor is it] accused of improperly discharging the surface water on the plaintiff's premises in such a manner as to expose her property unnecessarily to special damage . . . . It is only in special cases, where wanton or unnecessary damage is done, or where damage results from negligence, that [towns, cities, and boroughs] can be held responsible." [Citations omitted.]).

Despite its age, the rule announced in *Spitzer* is neither vestigial nor forgotten. Rather, it has continued vitality and routinely is cited by trial courts for the central proposition "that the construction, maintenance, and repair of sewer and drainage systems is ministerial." See *Leone* v. *Portland*, Superior Court, judicial district of Middlesex, Docket No. CV-12-6008054-S (May 9, 2014) (58 Conn. L. Rptr. 201, 203); see also *DeMarco* v. *Middletown*, Superior Court, judicial district of Middlesex, Docket No. CV-11-6006185-S (April 3, 2014) (58 Conn. L. Rptr. 4, 6) ("given that the Supreme Court in *Spitzer* did not limit its holding only to sewer water systems, numerous trial courts have applied [its] holding toward sewage systems, and the plaintiff's complaint clearly alleges that the defendant's conduct has risen out of its construction and repair of sewers, the defendant's actions are deemed ministerial and government[al] immunity does not apply"); *Donahue* v. *Plymouth*, Superior Court, judicial district of New Britain, Docket No. CV-12-6016848, 2013 WL 1943951, *5 (April 22, 2013) (citing *Spitzer* and noting that "[t]he city is not immune from suit stemming from the performance of ministerial acts such as the construction and repair of sewers"); *Voghel* v. *Waterbury*, Superior Court, judicial district of Waterbury, Docket No. CV-96-0134423, 1999 WL 732984, *4 (September 9, 1999) (holding that defendant city was not immune from liability for property damage caused by sanitary sewer backup because, pur-

suant to *Spitzer*, defendant had ministerial duty to maintain and repair sewer system); but see *Pyskaty* v. *Meriden*, Superior Court, judicial district of New Haven, Docket No. CV-12-6005514-S, 2015 WL 5236948, *10 (August 3, 2015) (relying on Appellate Court's decision in *Silberstein* v. *54 Hillcrest Park Associates, LLC*, 135 Conn. App. 262, 41 A.3d 1147 [2012], to hold "that [the] logic and . . . holding [in *Spitzer*] have been limited and should not be expanded to apply" to alleged improper construction, maintenance, and repair of detention basin).

Numerous additional authorities confirm that *Spitzer* correctly states the law of negligence as it relates to municipal storm water drainage systems. Contrary to the majority's account, the doctrinal analysis contained in *Spitzer*—and particularly its assertion that municipal immunity does not extend to "ministerial" negligence in the maintenance and repair of drainage systems—accurately reflects the law as it existed, and still exists, in most jurisdictions. One of the leading tort law treatises at the turn of the twentieth century describes a legal framework that perfectly matches the doctrine as described in *Spitzer*: "[T]he act of constructing a bridge by a county, or of sewers and drains by a municipality, after the plan is formulated, *is regarded as ministerial in its nature*, and if there is any *negligence* in the construction and the keeping of the same in repair, the county (by statute) and the municipality (by common law) is liable for any injury caused by its neglect." (Emphasis added; footnotes omitted.) 1 E. Kinkead, Commentaries on the Law of Torts (1903) § 158, p. 364. "The importance of this distinction [between the discretionary planning stage and the ministerial construction and repair stage] is obvious. 'It may well be the law,' it is said, 'that a municipal corporation is not liable for any error or want of judgment upon which its system of drainage of surface water may be devised,

nor for any defect in the plan which it adopts. The . . . council must, from necessity, exercise its judgment and discretion . . . and should be at liberty to adopt the best plan to accomplish the end.' . . . [F]or injury, occasioned by the plan of improvement, as distinguished from the mode of carrying it out, there is ordinarily no liability. The true distinction in this matter is that the obligation to establish and open sewers is a legislative duty, *while the obligation to construct them with care and not negligently and to keep them in repair is a ministerial act.* Some confusion is found among the cases touching this matter, due to improper distinction in the particular cases." (Emphasis added; footnotes omitted.) Id., pp. 364–65.; see also Recent Cases, "Municipal Corporations—Sewer System—Negligence in Construction—*Hart* v. *City of Neillsville*, 123 N.W. 125 (Wis.)," 19 Yale L.J. 389, 389 (1910); Recent Cases, "Municipal Corporation—Negligence in Maintaining Drains—Injury to Health and Property," 16 Harv. L. Rev. 68, 68–69 (1902).

According to contemporary sources, this liability rule continues to prevail in most jurisdictions. One leading treatise on municipal corporations observes that "municipalities are generally liable for negligence in the construction or failure to repair sewers and drains. Municipal liability for negligence in failure to repair is generally the same, in extent, as for negligence in the construction of sewers, or in the failure to keep sewers free from obstructions." (Footnotes omitted.) 18A E. McQuillin, Municipal Corporations (3d Ed. 2018 Rev.) § 53:154. Although this is not a uniform rule,[3] in general

[3] A minority of jurisdictions consider the maintenance and repair of storm water drainage systems to be discretionary. See 18A E. McQuillin, supra, § 53:154 ("[h]owever, it [also] has been held that the duty of a city to maintain its sewerage and drainage system in a good working and sanitary condition is a governmental function for which no liability against the municipality exists in an action for negligence"); see also annot., 54 A.L.R.6th §§ 7 and 8, pp. 247–60 (2010) (citing cases in § 7 for view that maintenance and operation of drains and sewers is ministerial function negating immunity,

"[a] municipality must exercise ordinary care to maintain in proper manner a system of gutters and drains constructed by it in its streets, and if due to its negligence they become obstructed so as to overflow and flood private premises, the city will be liable." Id.

It is true that this court has held in other contexts that municipal acts or omissions are not ministerial unless there is a "city charter provision, ordinance, regulation, rule, policy, or any other directive" requiring the municipality to act in a "prescribed manner." *Violano* v. *Fernandez*, 280 Conn. 310, 323, 907 A.2d 1188 (2006); see id., 324 (holding municipal official immune from liability for alleged negligence in securing plaintiffs' personal property because there was no "rule, policy, or directive that prescribed the manner in which [defendant] was to secure the property"). Particularly in light of *Spitzer*, however, there is no legal or logical basis to apply this narrow definition in the context of property damage caused by municipal storm water drainage systems. *Only* the municipality can construct a storm water drainage system and, once constructed, *only* the municipality can maintain the system and repair it to prevent property damage foreseeably resulting from its malfunction. Because storm water drainage systems are municipal property and subject to exclusive municipal control, no one else can perform the maintenance and repairs necessary to avoid the risk of harm. See *Judd* v. *Hartford*, supra, 72 Conn. 354 (holding municipality had ministerial duty to remove temporary obstruction because "[n]o one else could perform it" because "[t]he sewer was part of the defendant's property and under its exclusive control"). The plaintiffs in the present case were powerless to avoid the harm to their property, given the immovable nature

and, in § 8, for view that maintenance is discretionary function protected by immunity); id., p. 201 (noting, however, that "[i]n general, a city may be held liable for damage resulting from the obstruction or clogging of a municipal drain or sewer when it has actual or constructive notice of a problem and still fails to take action to remedy it").

of a permanent residential structure and the inevitable occurrence of heavy rainfalls in the area. Under these circumstances, "to permit the city to escape liability under the cloak of the exercise of a governmental function [is] unwarranted and unjust." *Denver* v. *Mason*, 88 Colo. 294, 299, 295 P. 788 (1931).

Contrary to the majority's assertion, I do not urge the creation of "an exception to the doctrine [of municipal immunity] in cases in which the dangerous condition was within the municipality's control and the municipality could have prevented the harm . . . ." The exception, rather, was created long ago by *Spitzer* and scores of other cases from around the country. Liability is imposed in these cases because, until today, Connecticut recognized the commonsense proposition that flood damage to private property caused by negligently maintained municipal storm water drainage systems is categorically different than the usual negligence case against a municipality. The rule announced in *Spitzer* did not "eviscerate" the municipal immunity doctrine; nor did it "disregard" its purpose. Instead, this court in *Spitzer* conducted a thorough analysis of the municipal immunity doctrine and made a "value judgment"; *Violano* v. *Fernandez*, supra, 280 Conn. 319; that the purpose of the doctrine was not served when it came to the negligent construction, maintenance, and repair of storm water drainage systems. See *Spitzer* v. *Waterbury*, supra, 113 Conn. 89.

Indeed, my conclusion finds further support in the legislative codification of the common-law distinction between ministerial and discretionary acts or omissions in § 52-557n (a) (2) (B). See *Violano* v. *Fernandez*, supra, 280 Conn. 327. As this court previously has observed, "we are bound" by the codification of this distinction and, therefore, "[i]rrespective of the merits of [a] competing approach . . . [w]e must resist the temptation . . . to enhance our own constitutional authority by trespassing upon an area clearly reserved

as the prerogative of a coordinate branch of government." (Internal quotation marks omitted.) Id., 328; see also *Durrant* v. *Board of Education*, 284 Conn. 91, 107, 931 A.2d 859 (2007) ("[s]ince the codification of the common law under § 52-557n, this court has recognized that it is not free to expand or alter the scope of governmental immunity therein"). The majority would have us believe that the legislature silently intended to overrule *Spitzer*, despite no textual indication of any such intention and no legislative history to support the contention. The customary rules of statutory construction require the opposite conclusion; we must presume that when the legislature enacted § 52-557n in 1986; see Public Acts 1986, No. 86-338, § 13; it was aware of and intended to codify the well established common-law principle expressed in *Spitzer* that the construction, maintenance, and repair of storm water drainage systems is a ministerial duty for which municipalities may be held liable in negligence.[4] See *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 793 n.21, 865 A.2d 1163 (2005) ("the legislature is presumed to be aware of prior judicial decisions involving common-law rules"); *Elliott* v. *Waterbury*, 245 Conn. 385, 406, 715 A.2d 27 (1998) ("we generally will not interpret a statute as effecting a change in a fundamental common-law principle . . . in the absence of a clear indication of legislative intent to do so" [citation omitted]). In light of the codification of this principle, we are not at liberty to expand the scope of municipal immunity in § 52-557n (a) (2) (B).

[4] In subdivision (2) of § 52-557n (b), the legislature exempted municipalities from liability for "damages to person or property resulting from . . . the condition of a reservoir, dam, canal, conduit, drain or similar structure when used by a person in a manner which is not reasonably foreseeable," but did not do so with respect to damages resulting from the negligent construction, maintenance, or repair of storm water drainage systems. See *Spears* v. *Garcia*, 263 Conn. 22, 33–34, 818 A.2d 37 (2003) (holding that, absent evidence to contrary, exceptions listed in § 52-557n [b] were intended "to be exclusive" [internal quotation marks omitted]).

In my view, this case presents the strongest imaginable rationale for retaining liability for municipal negligence in the absence of a legislative mandate to the contrary.[5] The plaintiffs here did not sustain damage caused by a municipal activity from which they could opt out; nor did they have the ability to engage in self-help to repair the municipality's drainage system. They had no right themselves to repair the cracks, breaks, and misaligned joints in the existing sewers, or to replace the pipes with diameters too small to meet present conditions with larger pipes, or to regrade the neighborhood streets and raise the curbs to protect their home against the flooding. If the plaintiffs cannot come to court for redress under these circumstances, then they have nowhere to turn to obtain compensation for the property damage they sustained as a result of the defendants' alleged negligence. This court's own precedent entitles the plaintiffs to relief if they are able to prove the elements of their claim. Because we are not required to overrule that precedent, we should not do so here. I therefore dissent.

[5] It is important to emphasize that the issue on appeal is whether the plaintiffs' common-law negligence claims are barred by the doctrine of municipal immunity. The plaintiffs' complaint did not contain any claim for common-law nuisance; nor did it raise a statutory claim under General Statutes § 13a-138. For this reason, the majority's discussion of nuisance law; see footnote 17 of the majority opinion; is dicta. See *Cruz* v. *Montanez*, 294 Conn. 357, 376–77, 984 A.2d 705 (2009) ("[d]ictum includes those discussions that are merely passing commentary . . . those that go beyond the facts at issue . . . and those that are unnecessary to the holding in the case" [internal quotation marks omitted]). Unfortunately, the majority's discussion implies that a landowner in the plaintiffs' position would have no ability to recover against a municipality on a theory of nuisance. I find this assertion deeply troubling because that issue was not raised in this case, was not briefed by the parties, and was never litigated or adjudicated. Therefore, we should not be expressing views on it. Nothing in our decision today, by implication or otherwise, should be taken to preclude or limit a plaintiff's ability to recover on any theory other than the theory of negligence as pleaded. See, e.g., *State* v. *DeJesus*, 288 Conn. 418, 454 n.23, 953 A.2d 45 (2008) (noting that dicta is "not binding precedent" and, therefore, does not dictate outcome of future cases).