ROBERT J. MCKAY v. STUART L. LONGMAN ET AL. (SC 20013) (SC 20014)

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

Syllabus

Pursuant to the Connecticut Uniform Fraudulent Transfer Act (CUFTA) (§ 52-552e [a] [1] and [2]), a transfer made by a debtor is fraudulent as to a creditor if the creditor's claim arose before the transfer was made and if the debtor made the transfer with intent to hinder, delay or defraud any creditor of the debtor or without receiving a reasonably equivalent value in exchange for the transfer.

Pursuant further to CUFTA (§ 52-552f [a]), a transfer made by a debtor is fraudulent as to a creditor if the creditor's claim arose before the transfer was made, the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer, and the debtor was insolvent at that time or became insolvent as a result of the transfer.

The plaintiff, who had obtained a judgment in New York against his former business partner, the defendant L, sought to enforce that judgment in

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

Connecticut through the imposition of constructive trusts on certain real property in Ridgefield and on the proceeds from the sale of real property in Greenwich, and by having the trial court apply the doctrine of reverse corporate veil piercing to eight defendant companies affiliated with L, namely, S Co., X Co., R Co., G Co., W Co. and three other companies collectively referred to as the S entities. After the plaintiff obtained the New York judgment, S Co., a real estate development business, whose only asset was the Ridgefield property, obtained a loan from the defendant bank, M Co., secured by a mortgage on the Ridgefield property. L, a member of S Co., executed the mortgage documents on behalf of S Co., and S Co. then transferred title to the property to L. L then obtained a loan, secured by a mortgage against the Ridgefield property, and transferred title to that property back to S Co. L and his family occupied a residence on the Ridgefield property but never executed a lease with S Co. or made any rental payments. Subsequently, L acquired title to the Greenwich property in his name but, shortly thereafter, quitclaimed title to that property to X Co., a company owned by L's wife and controlled by L, for no more than nominal consideration and without payment of a conveyance tax. X Co. sold that property to a bona fide purchaser, and L, through X Co., distributed portions of the sale proceeds to L's personal bank account and among the bank accounts of various entities with which L was associated. The plaintiff alleged that, pursuant to the provision ([Rev. to 2017] § 34-130) of the Connecticut Limited Liability Company Act governing the authority of members and managers of limited liability companies to execute legal instruments on behalf of such companies, L did not have the authority to bind S Co. to the mortgage agreement with M Co., and sought to have that mortgage declared void so that it would not be an encumbrance on the Ridgefield property for purposes of enforcing the New York judgment. The plaintiff also alleged that L, through his control of various entities, fraudulently transferred the Ridgefield property to S Co. and the Greenwich property to X Co., in violation of §§ 52-552e (a) (1) and (2) and 52-552f (a), in an attempt to avoid creditors such as the plaintiff. The plaintiff further claimed that the trial court should apply the doctrine of reverse corporate veil piercing, an equitable remedy by which a court imposes liability on a corporation for the acts of a corporate insider, allowing a creditor to reach the assets of the corporation, to the eight defendant companies, to the extent necessary to satisfy the New York judgment. The trial court concluded that the plaintiff lacked standing to challenge the mortgage between M Co. and S Co. and to have it declared void. The trial court also set aside as fraudulent L's transfer of the Ridgefield property to S Co. and the Greenwich property to X Co. The court imposed a constructive trust on the Ridgefield property in favor of the plaintiff, subjecting it to all applicable postjudgment remedies, and imposed a constructive trust on all moneys received from or other items of value acquired through the transfer of the Greenwich property, and awarded damages

to the plaintiff. The trial court finally determined that S Co., X Co., R Co. and G Co. were alter egos of L, and that their separate corporate existence was to be disregarded for purposes of satisfying L's debt to the plaintiff, enjoining those companies from disposing of any assets prior to the satisfaction of the plaintiff's New York judgment but that the S entities were not alter egos of L. From the trial court's judgment, L, S Co., X Co., R Co. and G Co. appealed, and the plaintiff filed a separate appeal. *Held*:

1. The trial court correctly determined that the plaintiff lacked standing to challenge the enforceability of M Co.'s mortgage to S Co.: the plaintiff, who was not a party to the mortgage, a third-party beneficiary of it, or either a member or manager of S Co., did not fall within the zone of interests that § 34-130 was intended to protect, and, when M Co. and S Co. entered into the mortgage agreement, the plaintiff had not yet recorded a lis pendens on the land records and, therefore, had no recorded title interest in the property; moreover, there was no merit to the plaintiff's claim that, because the text of § 34-130 is silent as to who may bring an action under that statute, it confers standing on creditors of parties that enter into contracts with or on behalf of a limited liability company, as the effect of such a rule would expose future lenders to any and all such claims by any creditors of any party that enters into a contract with a limited liability company, thereby contradicting the apparent intent of the legislature in enacting the Connecticut Limited Liability Company Act, which was to give maximum effect to the enforceability of limited liability company agreements.
2. The trial court's findings that L's transfers of the Ridgefield property to S Co. and the Greenwich property to X Co. were fraudulent under §§ 52-552e and 52-552f were not clearly erroneous: multiple factors set forth in § 52-552e (b) supported the trial court's finding with respect to the Ridgefield property, including that L was an insider with respect to S Co., as S Co. was owned directly and indirectly by L and his wife and L made all of the decisions for S Co., that, through this insider relationship, L used the Ridgefield property as security for multiple loans, some of which were obtained by L in an individual capacity and paid off by loans acquired in a representative capacity, that there was a recording delay with respect to L's transfer of the Ridgefield property back to S Co., which allowed L to obtain a second mortgage without ever holding the transfer proceeds in his name, that there was no more than nominal consideration for the transfer, and that there was no indication of any benefit to S Co. for allowing L, through this and related transfers, to extract equity from S Co.'s sole asset; moreover, with respect to the Greenwich property, this court determined that the property constituted L's asset for purposes of CUFTA, as the record supported the trial court's finding that L acquired that property with purchase money provided through a series of transfers originating from L's personal bank account, there was evidence that X Co., an entity owned solely by L's wife, paid

nothing more than nominal consideration for the property and that neither party paid a conveyance tax on the transfer, it appeared from the record that L's debts exceeded his identified assets, based on the amount of the New York judgment, which had increased significantly by the time of the transfer, and there was no apparent reason for the transfer to X Co., other than the avoidance of creditors such as the plaintiff.

3. This court recognized the doctrine of outsider reverse corporate veil piercing, and the trial court's application of the doctrine in the present case was not clearly erroneous:

a. This court, having recognized the doctrine of outsider reverse corporate veil piercing, set forth a three part test for its proper application, pursuant to which, first, the outsider must prove that, under the instrumentality or identity rule, as set forth in traditional veil piercing cases, the corporate entity has been so controlled and dominated that justice requires liability to be imposed or that there was such a unity of interest and ownership that the independence of the corporation had in effect ceased to exist, second, the trial court must consider the impact of reverse piercing on innocent shareholders and creditors, and, third, the trial court must consider whether adequate remedies at law are available.

b. The trial court's determination to apply the doctrine of reverse corporate veil piercing to S Co., X Co., R Co. and G Co. was not clearly erroneous: testimonial and documentary evidence admitted at trial demonstrated that L exercised control and dominance over S Co., X Co., R Co. and G Co. to perpetuate a fraud or wrong and that such wrong proximately caused the plaintiff's loss, as that evidence revealed, inter alia, that L fraudulently transferred the Ridgefield and Greenwich properties to S Co. and X Co., respectively, for the purpose of avoiding creditors, the property transfers rendered the plaintiff unable to attach L's assets in order to satisfy the debt owed to him, none of the four entities had any cognizable capital or sources of income other that from the transfers or from L's personal accounts, any inter-entity transactions made in conjunction with the transfers had no identified or identifiable business purpose and were subject to L's discretion, S Co. allowed L to maintain the family residence on its property without a lease, X Co. and R Co. were used to provide funds to L and his family members, there existed consistent ownership of the four entities by L's family members, L served as the decision maker for those entities, and most of the entities used the address of the Ridgefield property, where L and his family resided, as their business addresses; moreover, there was no impact to innocent investors or creditors, as none of the nonculpable creditors or equity holders would have been prejudiced by the application of reverse piercing, and there were no adequate remedies at law, as the constant movement of money and the multiplicity of entities left the court unable to calculate monetary damages.

c. The trial court's decision not to apply the doctrine of reverse corporate veil piercing to the S entities was not clearly erroneous, because, although the S entities received from X Co. proceeds from the sale of the Greenwich property, they were not alter egos of L, as they were engaged in a legitimate business, and the granting of such relief would affect nonculpable investors, who would be prejudiced if the plaintiff were permitted to attach assets in which they have an interest; moreover, the trial court correctly determined that the plaintiff had abandoned his claim of reverse piercing with respect to W Co.

(*One justice concurring separately*)

Argued November 15, 2018—officially released July 23, 2019

Procedural History

Action seeking, inter alia, to enforce a foreign judgment, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the case was withdrawn as to the defendant The Savings Bank of Danbury et al.; thereafter, Manufacturers and Traders Trust Company was substituted as a defendant; subsequently, the case was transferred to the Complex Litigation Docket and tried to the court, *Povodator*, *J.*; judgment for the defendant Manufacturers and Traders Trust Company et al., and judgment in part for the plaintiff as against the named defendant et al., from which the plaintiff and the named defendant et al. filed separate appeals with the Appellate Court; subsequently, the appeals were consolidated and transferred to this court. *Affirmed.*

James R. Fogarty, for the appellant in Docket No. SC 20013 and appellee in Docket No. SC 20014 (plaintiff).

Gary S. Klein, with whom was *Todd R. Michaelis*, for the appellees in Docket No. SC 20013 and appellants in Docket No. SC 20014 (named defendant et al.).

David K. Fiveson, pro hac vice, with whom was *Gerald L. Garlick*, for the appellee in Docket Nos. SC 20013 and SC 20014 (defendant Manufacturers and Traders Trust Company).

Opinion

KAHN, J. These consolidated appeals require us to consider three main issues: (1) whether a plaintiff who is neither a party to a mortgage nor an intended beneficiary thereof has standing to challenge the enforceability of that mortgage under the Connecticut Limited Liability Company Act, General Statutes (Rev. to 2017) § 34-130;[1] (2) whether specified transfers between an owner of property and the limited liability companies of which he is either an officer or equity holder constitute fraudulent transfers under the Connecticut Uniform Fraudulent Transfer Act (CUFTA), General Statutes §§ 52-552e (a) (1) and (2) and 52-552f; and (3) whether this court recognizes the doctrine of reverse piercing of the corporate veil and, if so, whether the trial court properly applied the doctrine to the facts in the present case. The plaintiff, Robert J. McKay, and the defendants Stuart L. Longman and various entities related to him—Sapphire Development, LLC (Sapphire); Lurie Investments, LLC (Lurie); R.I.P.P. Corp. (R.I.P.P.); 2 Great Pasture Road Associates, LLC (Great Pasture); W.W. Land Company, LLC (W.W. Land); Solaire Development, LLC; Solaire Management, LLC; and Solaire Funding, Inc. (collectively, corporate defendants)—filed separate appeals,[2] following a bench trial, from the trial court's judgment.

[1] All references herein to § 34-130 are to the 2017 revision. The legislature has since repealed the Connecticut Limited Liability Company Act, effective July 1, 2017, and replaced it with the Connecticut Uniform Limited Liability Company Act, General Statutes § 34-243 et seq.

[2] Longman and the corporate defendants, and the plaintiff, filed separate appeals from the judgment of the trial court to the Appellate Court, which consolidated the appeals, and we transferred the consolidated appeals to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. The plaintiff named the following additional defendants in its substituted complaint, none of which is a party to this appeal: Emerald Investments, L.L.C.; 55 Post Road West Management Company, Inc.; Chatham Haste, LLC; Stuart L. Longman, Trustee of Stuart Longman Family Trust; 60 SRA Management, LLC; Shelter Rock Enterprises I, LLC; 60 Shelter Rock Associates, LLC; Shelter Rock Development Associates, LLC; Parcelle Develop-

The present case arises from the plaintiff's efforts to enforce a foreign judgment. The trial court found the following facts. In July, 1996, after a falling out between the plaintiff and Longman, who were once business partners, the plaintiff obtained a judgment in New York against Longman in the amount of $3,964,046.86 on the basis of the New York trial court's finding that Longman's actions constituted affirmative fraud against the plaintiff and that Longman's conduct was gross, wanton and wilful (New York judgment).[3] The plaintiff promptly filed a certified copy of the New York judgment in Connecticut. The plaintiff's efforts over the years to collect on the New York judgment have been unsuccessful, including his attempts to attach Longman's assets, which, over time, were in the form of two Connecticut properties: real property located in Ridgefield, which was the location of Longman's family residence (Ridgefield Property), and real property located in Greenwich (Greenwich Property).

Throughout the relevant time period, Longman transferred ownership of the Ridgefield and Greenwich Properties between himself and his various entities. Included among these land transfers are three contested transactions that "[set] the stage for . . . the predominant issues [on appeal]." Those three transactions, the additional details of which we set forth as necessary, occurred on the following dates and between the following parties. First, in October, 2007, Sapphire, a real estate development business owned partly by Longman that held record title to the Ridgefield Property during that time, obtained a loan from the defendant Man-

ment, LLC; Solaire Tenant, LLC; 31 Pecks Lane Associates, LLC; and Dreamfields, LLC. The Savings Bank of Danbury was also named as a defendant, but the action was later withdrawn against it.

[3] The record reveals that Longman secretly obtained a mortgage against his and the plaintiff's joint business and converted $625,000 of the proceeds to his own use. Longman then took steps to conceal the mortgage from the plaintiff, including renegotiating in bad faith the terms of a shareholder's agreement between them, resulting in further damages.

ufacturers and Traders Trust Company (M&T Bank)[4] secured by a mortgage against the Ridgefield Property. Second, in November, 2007, after Sapphire obtained the M&T mortgage and transferred title to the Ridgefield Property to Longman, Longman obtained a loan from J.P. Morgan Chase Bank, N.A. (Chase Bank), also secured by a mortgage against the Ridgefield Property (Chase Bank mortgage), and transferred title to that property back to Sapphire. Finally, in February, 2010, Longman individually acquired the Greenwich Property and transferred title of that property to Lurie, another real estate development business owned partly by him, allowing Lurie to sell the property to a bona fide purchaser several weeks later. Each of these contested transactions occurred and was recorded "prior to any filing of a lis pendens or judgment lien by the plaintiff . . . ."

After learning of these and other transactions entered into by either Longman or the entities he purportedly controlled, in October, 2010, the plaintiff filed an eight count complaint against Longman and twenty entities affiliated with him, M&T Bank, and The Savings Bank of Danbury. See footnote 2 of this opinion. The action by the plaintiff included, inter alia,[5] three main claims

[4] In April, 2016, the trial court granted the plaintiff's motion to substitute Manufacturers and Traders Trust Company, a wholly owned subsidiary of M&T Bank Corporation, in lieu of Hudson City Savings Bank (HCSB) as a defendant after a merger between the two entities. We refer to Manufacturers and Traders Trust Company as M&T Bank throughout this opinion for convenience. Consequently, although we observe that the trial court referred to the mortgage agreement entered into by HCSB and Sapphire as the HCSB mortgage, we will refer to it as the M&T mortgage.

[5] The first and second counts sought constructive trusts based upon common-law fraud as to the Ridgefield Property and the Greenwich Property, respectively. The third and fourth counts alleged fraudulent transfers of the Ridgefield Property under §§ 52-552e (a) (1) and (2) and 52-552f. The fifth and sixth counts alleged fraudulent transfers of the Greenwich Property under §§ 52-552e (a) (1) and (2) and 52-552f. The seventh and eighth counts requested that the trial court apply reverse veil piercing to the various corporate defendants based on the instrumentality rule and identity rule, respectively.

that are before us on appeal. First, the plaintiff alleged that various land transfers from Longman to entities he controlled—including his November, 2007 transfer of the Ridgefield Property to Sapphire and his February, 2010 transfer of the Greenwich Property to Lurie —violated §§ 52-552e (a) (1) and (2) and 52-552f of CUFTA, and requested that the trial court impose constructive trusts on the Ridgefield Property and the proceeds from the sale of the Greenwich Property. Second, the plaintiff alleged that the M&T mortgage was unenforceable under § 34-130 and requested that the trial court declare it void in order to render the Ridgefield Property "unencumbered" by that mortgage when the plaintiff enforced the New York judgment against Longman and the corporate defendants. Third, the plaintiff alleged that the corporate defendants constituted alter egos of Longman and requested that the trial court apply reverse veil piercing to the corporate defendants "to the extent necessary to satisfy the [New York] judgment."

After an eight day bench trial, the trial court rendered judgment relevant to the issues on appeal in the following manner. The trial court rendered judgment as to counts one, three, and four in favor of M&T Bank, holding, inter alia, that the plaintiff lacked standing to challenge the M&T mortgage. The trial court rendered judgment as to counts three through eight in favor of the plaintiff as against Longman, Sapphire, Lurie, R.I.P.P., and Great Pasture. As against W.W. Land and Solaire Development, LLC, Solaire Management, LLC, and Solaire Funding, Inc. (Solaire entities), however, the trial court rendered judgment as to counts seven and eight in their favor. These consolidated appeals followed.

In order to place the parties' arguments on appeal in the proper context, we begin by outlining the trial court's decision. First, the trial court rendered judgment

in favor of the plaintiff as to counts three and four of his substituted complaint in the form of a declaratory judgment avoiding and setting aside the fraudulent transfer of the Ridgefield Property by Longman to Sapphire. Second, the court imposed a constructive trust on the Ridgefield Property, subjecting it to all postjudgment remedies that may be applicable. Third, the trial court rendered judgment in favor of the plaintiff as to counts five and six of his substituted complaint in the form of a declaratory judgment avoiding and setting aside the fraudulent transfer of the Greenwich Property by Longman to Lurie. Fourth, the trial court imposed a constructive trust on all moneys received from or other items of value acquired through the transfer of the Greenwich Property. Fifth, in addition to this constructive trust, the trial court entered an award of $250,000 in damages in favor of the plaintiff and against Lurie. Sixth, the trial court rendered judgment in favor of the plaintiff as to counts seven and eight of his substituted complaint in the form of a judgment declaring that Sapphire, Lurie, R.I.P.P., and Great Pasture are alter egos of Longman, and, as such, "their separate corporate existence shall be disregarded for purposes of satisfying the debt of . . . Longman to the plaintiff," and enjoined those defendants from disposing of any assets prior to the satisfaction of the plaintiff's foreign judgment. Seventh, the trial court rendered judgment in favor of M&T Bank as to all the claims asserted against it, including the plaintiff's claim under counts one, three, and four that a mortgage on the Ridgefield Property between M&T Bank and Sapphire (M&T mortgage) should be declared void. Eighth, the trial court rendered judgment in favor of the Solaire entities and W.W. Land as to all counts asserted against them.[6]

[6] In addition, the trial court rendered judgment in favor of the defendants Shelter Rock Enterprises I, LLC, 60 Shelter Rock Associates, LLC, and Shelter Rock Development Associates, LLC, which have not appealed, and the plaintiff either abandoned or withdrew his claims against the remaining entities. Additionally, the trial court rendered judgment in favor of Sapphire as to

The plaintiff appeals from the trial court's judgment in favor of M&T Bank as to its claim under counts one, three, and four that the M&T mortgage should be declared void. The plaintiff claims that the trial court incorrectly determined that he lacked standing to challenge the enforceability of that mortgage under § 34-130 (b), (c) and (d), because those subsections are silent as to who may bring a claim under them. M&T Bank responds that the trial court properly held that, as neither a party to nor an intended beneficiary of the mortgage between it and Sapphire, the plaintiff lacked standing to challenge it.[7]

M&T Bank's cross complaint against it. Finally, although the trial court imposed constructive trusts under the CUFTA counts, it rendered judgment in favor of all of the remaining defendants as to the plaintiff's first and second counts, which sought constructive trusts based on common-law fraud as to the Ridgefield Property and the Greenwich Property, respectively, noting that "a constructive trust is a permissible remedy under [some of the other] count[s]" and that it had "not found an independent 'fraud' as seemingly [was] alleged" in counts one and two.

Similarly, because, as the plaintiff conceded in his posttrial brief, the record established that W.W. Land had no assets at the time of the trial court's judgment, we reject the plaintiff's claim that the trial court intended to create a constructive trust to recover funds transferred from Lurie to W.W. Land after the sale of the Greenwich Property. With respect to Sapphire, R.I.P.P., and W.W. Land, the trial court noted that, "[*t*]*o the extent that any* or all *of these entities have any assets*, a constructive trust is an appropriate vehicle for attempting to recover part or all of their share of the proceeds of this sale." (Emphasis added.) On the basis of the fact that the trial court found that W.W. Land did not have any available assets at that time, we observe that it was not clear error for the trial court to refrain from rendering judgment against W.W. Land for the imposition of a constructive trust, as such a remedy was not available. This observation is supported by the fact that the trial court chose to create a constructive trust for Sapphire.

[7] M&T Bank appears to make additional claims in its brief that the trial court properly dismissed the plaintiff's claims against it under counts one, three, four, seven, and eight and also properly dismissed the plaintiff's claim that the M&T mortgage should be declared void. Because neither the plaintiff nor Longman and the corporate defendants brief these claims as against M&T Bank in their argument sections, as these claims do not respond to the issues framed by that bank or the other parties, we decline to address these issues. For similar reasons, and because we affirm the trial court's judgment that the plaintiff lacks standing to challenge the M&T mortgage,

Longman and the corporate defendants appeal from the trial court's judgment as to counts three through six whereby that court rendered two declaratory judgments avoiding and setting aside two specified transfers—one between Longman and Sapphire and the other between Longman and Lurie—under §§ 52-552e (a) (1) and (2) and 52-552f of CUFTA, and imposed constructive trusts on the Ridgefield Property and the proceeds from or other items acquired through the sale of the Greenwich Property. Those defendants claim that, with respect to both transfers at issue, Longman did not transfer an "asset," which is required in order to find that a transfer is fraudulent under CUFTA. In response, the plaintiff claims that Longman and the corporate defendants misconstrue the facts and case law applicable to the question of whether the transfers were fraudulent and asks this court to uphold the trial court's determination.

Additionally, Longman and the corporate defendants appeal from the trial court's judgment as to counts seven and eight whereby that court rendered a judgment declaring that Sapphire, Lurie, R.I.P.P., and Great Pasture constitute alter egos of Longman and, as such, applied the doctrine of reverse piercing of the corporate veil to reach their assets to satisfy the plaintiff's foreign judgment. Those defendants claim that the reverse piercing doctrine conflicts with Connecticut law and that, in the alternative, the evidence in the present case does not support the application of reverse piercing. The plaintiff responds that this court should recognize reverse veil piercing as a viable remedy and conclude that the trial court properly applied the doctrine in the present case with respect to Sapphire, Lurie, R.I.P.P., and Great Pasture.

we neither reach the defenses claimed by M&T Bank under the doctrine of laches nor the issue of whether it "would be entitled to a declaration that it is equitably subrogated to the September 24, 2007 satisfied [Washington Mutual] mortgage . . . ."

The plaintiff appeals separately, however, from the trial court's judgment as to counts seven and eight rendered in favor of the Solaire entities and W.W. Land with respect to that court's refusal to declare those entities alter egos of Longman. The plaintiff claims that the trial court's findings supported reverse piercing as to those entities. Longman and the corporate defendants respond that, if this court were to adopt reverse veil piercing, the trial court properly declined to apply it with respect to these four entities, because these entities are engaged in legitimate businesses and the application of reverse piercing would affect nonculpable parties who have an interest in those companies. We affirm the judgment of the trial court.

I

STANDING

Because the question of standing implicates subject matter jurisdiction, we first consider the plaintiff's claim that the trial court improperly held that he lacked standing to bring an action under § 34-130,[8] challenging

[8] General Statutes (Rev. to 2017) § 34-130 provides: "(a) Except as provided in subsection (b) of this section, every member is an agent of the limited liability company for the purpose of its business or affairs, and the act of any member, including, but not limited to, the execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business or affairs of the limited liability company of which he is a member binds the limited liability company, unless the member so acting has, in fact, no authority to act for the limited liability company in the particular matter and the person with whom he is dealing has knowledge of the fact that the member has no such authority.

"(b) If the articles of organization provide that management of the limited liability company is vested in a manager or managers: (1) No member, solely by reason of being a member, is an agent of the limited liability company; and (2) every manager is an agent of the limited liability company for the purpose of its business or affairs, and the act of any manager, including, but not limited to, the execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business or affairs of the limited liability company of which he is a manager binds the limited liability company, unless the manager so acting has, in fact, no authority to act for the limited liability company in the particular matter and the person with whom he is dealing has knowledge of the fact that the manager has no such authority.

the sufficiency of Longman's authority, as a member of Sapphire, to bind the company to the mortgage agreement between it and M&T Bank. The plaintiff challenges the trial court's determination that he lacked standing to challenge the M&T mortgage, because, although he was a stranger to the transaction, he claims that the trial court did not analyze whether he lacked standing specifically under § 34-130, a statute that he claims was intended by the legislature to authorize third parties like him to bring claims. The threshold issue we must address, therefore, is whether the plaintiff is an individual who can challenge an alleged failure by Longman to comply with the requirements of § 34-130 when entering into a contract, when the plaintiff is neither a party to nor an intended beneficiary of that contract. We conclude that the trial court correctly determined that the plaintiff lacked standing to challenge the M&T mortgage.[9]

The record reveals the following additional facts that are relevant to our resolution of this claim. In October, 2007, Sapphire entered into a loan agreement with M&T Bank, secured by the $2.5 million M&T mortgage on the Ridgefield Property. Longman, acting as one of Sapphire's members,[10] executed the mortgage docu-

"(c) An act of a manager or member which is not apparently for the carrying on in the usual way the business or affairs of the limited liability company does not bind the limited liability company, unless authorized in accordance with the operating agreement, at the time of the transaction or at any other time.

"(d) An act of a manager or member in contravention of a restriction on authority shall not bind the limited liability company to persons having knowledge of the restriction."

[9] Because we conclude that the plaintiff lacks standing, we do not reach the plaintiff's substantive claim that, under the circumstances of this case, Longman lacked sufficient authority to enter into the M&T mortgage on behalf of Sapphire.

[10] When asked at trial whether he signed the mortgage as a member or the operating manager of Sapphire, Longman testified: I believe [I signed] it as an operating manager of Sapphire Development; but [the mortgage] does say member, so I'm a little confused."

ments. At the time he executed those documents, however, Longman owned only a 5 percent interest in Sapphire, with the remaining 95 percent interest owned almost exclusively by his wife, Gayla Longman (Gayla). Longman did not request Gayla's approval before executing the M&T mortgage.

Among its provisions, Sapphire's operating agreement vested in the operating manager the authority to manage the company, "[e]xcept for actions requiring the approval of the [m]embers pursuant to the provisions of the [Connecticut Limited Liability Company] Act, the [a]rticles [of organization], or this [operating] [a]greement . . . ." Under the same section, the operating agreement noted that the operating manager "shall not have the authority" to mortgage any property of Sapphire without the approval of a supermajority of Sapphire's members, which was defined as "[m]embers holding an aggregate of . . . 100 [percent] or more of the [p]ercentage [i]nterests held by all [m]embers."[11]

At trial, M&T Bank introduced into evidence Sapphire's 2008 statement of annual resolutions, which was signed by Gayla on January 27, 2008, a few months after Sapphire entered into the M&T mortgage, and contained a provision resolving "that all prior acts of the officers . . . including but not limited to entering into agreement[s] and executing documents prior to the adoption of said resolutions . . . are hereby ratified." Gayla testified at trial that, upon signing the document, she intended to ratify all the acts taken by Longman on behalf of Sapphire prior to January, 2008.

The plaintiff asked the trial court to declare the M&T mortgage unenforceable under § 34-130, because Sapphire's operating agreement did not authorize Longman, a 5 percent shareholder, to obtain a mortgage from M&T Bank without approval from Gayla, and because

[11] Longman testified at trial that these provisions were never amended.

M&T Bank had failed to confirm whether the mortgage to Sapphire had been approved according to the terms of that operating agreement. Although, ultimately, M&T Bank argued that Gayla ratified Longman's actions, it first claimed that the trial court lacked subject matter jurisdiction over the plaintiff's claim, because the plaintiff, who was neither a party to nor a third party beneficiary of the mortgage, lacked standing to challenge its enforceability.

The trial court determined that, "[a]bsent a viable claim that the mortgage transaction was a fraudulent transfer . . . the plaintiff [lacked standing] to challenge the sufficiency of the ratification process." The court reasoned that "the plaintiff . . . provided no authority that a third-party stranger to a transaction has the right to challenge the ratification of the transaction . . . when the actual parties have done everything possible to show consent and have engaged in substantial performance."

On appeal, we begin with the general principles governing standing to assert a claim. "If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . A determination regarding a trial court's subject matter jurisdiction is a question of law. 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. . . .

"Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions [that] may affect the rights of others are forged in hot controversy, with each view fairly and

vigorously represented. . . . These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy. . . . The requirement of directness between the injuries claimed by the plaintiff and the conduct of the defendant also is expressed, in our standing jurisprudence, by the focus on whether the plaintiff is the proper party to assert the claim at issue. . . .

"Two broad yet distinct categories of aggrievement exist, classical and statutory. . . . Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the [controversy], as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the [alleged conduct] has specially and injuriously affected that specific personal or legal interest. . . . Statutory aggrievement [however] exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) *PNC Bank, N.A.* v. *Kelepecz*, 289 Conn. 692, 704–705, 960 A.2d 563 (2008).

"In order to determine whether a party has standing to make a claim under a statute, a court must determine the interests and the parties that the statute was designed to protect. . . . Essentially the standing question in such cases is whether the . . . statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. . . . [Stated differently, the] plaintiff must be within the zone of interests protected by the statute." (Citation omitted; internal quotation

marks omitted.) *McWeeny* v. *Hartford*, 287 Conn. 56, 65, 946 A.2d 862 (2008).

The issue of whether an individual who was neither a party to nor an intended third-party beneficiary of a mortgage between a limited liability company and a bank falls within the zones of interests protected by § 34-130 so as to afford him standing to challenge whether a member of the limited liability company that executed the mortgage agreement as the company's agent possessed sufficient authority to bind the company through his actions presents a question of statutory interpretation, over which we exercise plenary review, guided by well established principles regarding legislative intent. See, e.g., *Kasica* v. *Columbia*, 309 Conn. 85, 93, 70 A.3d 1 (2013) (explaining plain meaning rule under General Statutes § 1-2z and setting forth process for ascertaining legislative intent).

On the basis of the plain language of this statute, only members and managers—who represent either their own interests as agents or those derivative of the limited liability company—and the parties with whom those members or managers contract fall within the zone of interests protected by § 34-130. We begin by noting that the statutory language found in § 34-130 (b), (c) and (d) governs the agency powers of members and managers to execute legal instruments in different contexts, including ordinary business transactions, extraordinary business transactions, transactions entered into under a member-managed limited liability company, and transactions entered into under a manager-managed limited liability company. A limited liability company may be "member-managed" or "manager-managed." See General Statutes (Rev. to 2017) § 34-140 (a) and (b). By default, the members of a limited liability company manage the company's affairs. The members, however, may, in the articles of organization, vest management of the business in a manager or managers. See General Statutes (Rev. to 2017) § 34-140 (a) and (b).

General Statutes (Rev. to 2017) § 34-130 (b), which addresses situations in which the limited liability company is manager-managed, provides in relevant part that a "manager . . . execut[ing] . . . any instrument, for apparently carrying on in the usual way the business or affairs of the . . . company . . . binds the limited liability company, unless the manager so acting has, in fact, no authority to act for the . . . company in the particular matter *and* the person with whom he is dealing has knowledge of [that] fact . . . ." On its face, this subsection deals with protecting the interests of the party with whom the agent of a limited liability company contracts when that party is unaware that the agent lacks authority and seeks to enforce an agreement made between it and the agent. See 2 Restatement (Third), Agency § 6.01, comment (b), p. 4 (2006) ("[a]n agent has power to make contracts on behalf of the agent's principal when the agent acts with actual or apparent authority").

Section 34-130 (c), by contrast, addresses situations in which a member or manager acts as an agent and that member or manager "is not apparently . . . carrying on in the usual way the business or affairs of the . . . company," in which case his actions "[do] not bind the . . . company, unless authorized in accordance with the operating agreement . . . ." Subsection (c) appears to create a protection for the limited liability company itself, by restricting agents of the limited liability company from binding the limited liability company to extraordinary dealings, unless previously agreed on in the operating agreement.

Finally, § 34-130 (d), which also governs actions by the managers and members as agents of the limited liability company, provides that "[a]n act of a manager or member in contravention of a restriction on authority *shall not bind the limited liability company* to persons having knowledge of that restriction." (Emphasis

added.) Unlike subsections (b) and (c), which protect the contracting parties when the agent does not have actual authority to act on behalf of the limited liability company, § 34-130 (d) addresses situations in which the agent has apparent authority to act on behalf of the limited liability company. On the one hand, this subsection protects the unknowing party with whom the agent contracts, as it prevents the limited liability company from subsequently avoiding liability by alleging that the agent lacked authority to enter into the agreement. On the other hand, it also protects the limited liability company from being bound to transactions in which the party with whom the agent is contracting knows of a restriction on the agent's authority to enter into an agreement on behalf of its principal. See 3 Am. Jur. 2d 516, Agency § 74 (2013) ("[t]he doctrine . . . may not be invoked by one who knows or has good reason to know the limits and extent of an agent's authority").

We conclude that the plaintiff in the present case, who was neither a party to the M&T mortgage nor a third-party beneficiary of it, does not fall within the zone of interests that § 34-130 was meant to protect.[12] The plaintiff does not claim that he was either a member or manager of Sapphire; nor does he claim that he was a party to the mortgage agreement. Additionally, the plaintiff failed to establish that he was an intended third-party beneficiary of the mortgage. At the time Sap-

[12] Because we find that the plaintiff lacks standing under the plain language of § 34-130 (b), (c) and (d), we do not reach the plaintiff's argument that "the legislature . . . is presumed to have been aware of [General Statutes] §§ 33-649 and 33-1038 . . . [and its] omission [to limit the parties who may assert claims under § 34-130] must be construed as intentional." See *State* v. *Wright*, 320 Conn. 781, 801, 135 A.3d 1 (2016) ("[i]f the legislature's intent is clear from the statute's language, our inquiry ends . . . [and we do not] consider extratextual evidence of its meaning, such as . . . the circumstances surrounding its enactment . . . and the statute's relationship with existing legislation" [citation omitted]).

phire and M&T Bank entered into the mortgage agreement, the plaintiff had not yet recorded a lis pendens on the land records and, therefore, had no recorded title interest in the property.[13]

The plaintiff asks this court, however, to interpret the statute's silence as to who may bring an action under § 34-130 as an indication of the legislature's affirmative intent to allow persons other than members or managers of the limited liability company or the party with whom its agent contracts to bring a claim challenging the enforceability of an agreement between those two parties. That interpretation is inconsistent with the general contract principle, articulated by this court, that "one who [is] neither a party to a contract nor a contemplated beneficiary thereof cannot sue to enforce the promises of the contract . . . ."[14] (Internal quotation marks omitted.) *Tomlinson* v. *Board of Education*, 226 Conn. 704, 718, 629 A.2d 333 (1993). We observe that other courts have applied this proposition in the context of mortgages. See, e.g., *In re Espanol*, 509 B.R. 422, 429

[13] To the extent that the plaintiff would benefit from a determination rendering the M&T mortgage void, as it would advance the priority of his security interest in the Ridgefield Property, we observe that an interest in the outcome does not equate to a beneficial interest in the mortgage itself. For similar reasons, we agree with the trial court that, in asking for a declaration that the M&T mortgage is void, "the plaintiff effectively seeks a windfall." The plaintiff argues, on the one hand, that Longman had such control and domination of Sapphire as to allow this court to uphold the trial court's determination that Sapphire was Longman's alter ego, while asking this court, on the other hand, to find that—with regard to the M&T mortgage—Longman did not have the authority to obtain a mortgage on Sapphire's behalf.

[14] Additionally, because the trial court did not find that any of the transfers surrounding the M&T mortgage constituted fraudulent transfers, we also reject the plaintiff's claim that the M&T mortgage is unenforceable because Sapphire was declared an "artifice" and "fraudulent transferee." As the trial court correctly noted, "absent a viable claim that the [M&T] mortgage transaction was a fraudulent transfer . . . the plaintiff [does not have] the right to challenge the sufficiency of the ratification process [of that mortgage]."

(Bankr. D. Conn. 2014) (citing *Tomlinson* and holding that "[o]nly a party to the contract or intended [third-party] beneficiary has standing to challenge or seek to enforce the terms of [a] mortgage"); *Crimmino* v. *Household Realty Corp.*, 104 Conn. App. 392, 393, 395–96, 933 A.2d 1226 (2007) (citing *Tomlinson* and holding that plaintiff lacked standing to request that judgment of strict foreclosure on residence in which he lived be set aside because he was not party to mortgage on which bank foreclosed and he had no recorded interest in subject property after transferring it to his children to "insulate the property from [his] creditors"), cert. denied, 285 Conn. 912, 943 A.2d 470 (2008).

Additionally, to the extent that the plaintiff claims that, because the statute is silent, it confers standing on creditors of parties that enter into contracts with or on behalf of a limited liability company, his claim lacks merit because such a reading of § 34-130 would expose future lenders to any and all claims by any creditors of any party that enters into a contract with or on behalf of a limited liability company. The effect of such a rule would contradict the apparent intent of the legislature in enacting the Connecticut Limited Liability Company Act, General Statutes (Rev. to 2017) § 34-100 et seq., which was to "give maximum effect to the principle of freedom of contract and to [the] enforceability of limited liability company agreements." General Statutes (Rev. to 2017) § 34-242 (a). Because we conclude that the trial court correctly determined that the plaintiff lacked standing to challenge the M&T mortgage, we do not reach the issue of whether the circumstances of this case would render the mortgage void or voidable.

II

FRAUDULENT TRANSFERS UNDER CUFTA

We next address whether the trial court incorrectly determined that, under §§ 52-552e and 52-552f, Long-

man fraudulently transferred title to the Ridgefield Property to Sapphire in December, 2007, and title to the Greenwich Property to Lurie in February, 2010. Longman and the corporate defendants claim that, with respect to both transactions, Longman did not transfer an "asset" under CUFTA. The plaintiff responds that Longman and the corporate defendants misconstrue the facts and case law applicable to his CUFTA claims. We conclude that the trial court's findings that these two transfers by Longman were fraudulent under §§ 52-552e[15] and 52-552f[16] were not clearly erroneous.

[15] General Statutes § 52-552e provides: "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made or the obligation was incurred and if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder, delay or defraud any creditor of the debtor; or (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction, or (B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

"(b) In determining actual intent under subdivision (1) of subsection (a) . . . consideration may be given, among other factors to whether: (1) The transfer or obligation was to an insider, (2) the debtor retained possession or control of the property transferred after the transfer, (3) the transfer or obligation was disclosed or concealed, (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit, (5) the transfer was of substantially all the debtor's assets, (6) the debtor absconded, (7) the debtor removed or concealed assets, (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred, (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred, (10) the transfer occurred shortly before or shortly after a substantial debt was incurred, and (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor."

[16] General Statutes § 52-552f provides: "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

We begin with the legal principles guiding our review of these claims. "A party alleging a fraudulent transfer or conveyance under the common law bears the burden of proving either: (1) that the conveyance was made without substantial consideration and rendered the transferor unable to meet his obligations or (2) that the conveyance was made with a fraudulent intent in which the grantee participated. . . . The party seeking to set aside a fraudulent conveyance need not satisfy both of these tests. . . . These are also elements of an action brought pursuant to §§ 52-552e (a) and 52-552f (a). Indeed, although the statute provides a broader range of remedies than the common law . . . [CUFTA] is largely an adoption and clarification of the standards of the common law of [fraudulent conveyances] . . . .

"The determination of whether a fraudulent transfer took place is a question of fact and it is axiomatic that [t]he trial court's [factual] findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . 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. The elements of fraudulent conveyance, including whether the defendants acted with fraudulent intent, must be proven by clear, precise and unequivocal evidence." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Certain Underwriters at Lloyd's, London* v. *Cooperman*, 289 Conn. 383, 394–95, 957 A.2d 836 (2008). With these principles in mind, we turn to the plaintiff's claims.

"(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time and the insider had reasonable cause to believe that the debtor was insolvent."

A

We first address the contention by Longman and the corporate defendants that the trial court improperly held that Longman's December 4, 2007 transfer of the Ridgefield Property back to Sapphire for nominal consideration constituted a fraudulent transfer under §§ 52-552e (a) (1) and (2) and 52-552f. With respect to this transfer, Longman and the corporate defendants specifically claim that the transfers were intended only to satisfy Chase Bank's lending requirements, that Longman was merely "the facilitator for Sapphire that allowed Sapphire to effectuate [obtainment of the loan]," and, therefore, that Longman's temporary title to the property for this purpose did not render it his asset. The plaintiff responds that the timing of the transfers surrounding the Chase Bank mortgage indicates the fraudulent intent behind this transaction and that the timing of this particular transfer shielded the mortgage from the plaintiff. We conclude that the trial court's determination that the December 4, 2007 transfer was fraudulent is not clearly erroneous.

Because we agree with the trial court that reviewing the history of the transactions involving the Ridgefield Property is helpful in a context such as this one, in which "[t]he number of days that title to the property was in . . . Longman's name [since 1995] could be . . . measured in days out of a multiyear period of time," we observe that the following additional facts found in the record are relevant to our resolution of the plaintiff's fraudulent transfer claims with respect to the Ridgefield Property. In 1985, Longman purchased the Ridgefield Property, and, since 1987, he and his family lived in the residence located there. In 1995, while the New York action was pending against Longman, Longman executed a quitclaim deed conveying the Ridgefield Property to Gayla. Gayla provided no consideration for this transfer.

At approximately the same time as the New York judgment was rendered, the Ridgefield Property went into strict foreclosure, and a deficiency judgment was rendered in favor of Webster Bank, which entered into a settlement agreement in 1997 with Longman while the case was on appeal. Thereafter, the Ridgefield Property was transferred by Webster Bank in two portions: one portion to Longman's friend, David A. Thomas, and the second portion to R.I.P.P., a corporation created by Longman, of which Gayla was its sole shareholder and Longman its only director. Thomas transferred title to his portion of the property to R.I.P.P. in return for a mortgage. In 2001, Thomas filed an action to foreclose his mortgage from R.I.P.P., before assigning his interest in the mortgage to Highland Connecticut Investment, LLC (Highland), of which Longman had a 5 percent ownership stake and of which Emerald Investments, L.L.C. (Emerald) had a 95 percent ownership stake. At that time, The Stuart Longman Family Trust had a 90 percent ownership stake in Emerald, and Longman and Gayla each had a 5 percent ownership stake in Emerald. After this transfer, a judgment of strict foreclosure was rendered on behalf of Highland.

In January, 2002, Highland, acting through Longman, transferred title to the Ridgefield Property[17] to Longman individually. "[O]n the same day" that Longman executed the deed that transferred the Ridgefield Property from Highland to him, he individually executed an "open-end mortgage from . . . Washington Mutual Bank, FA . . . ." He recorded both the mortgage and the deed six days later. Longman admitted at trial that "the reason for the quitclaim deed . . . [was] obviously to effect this financing." The original principal amount of this mortgage was $1,920,000. On February 7, 2002,

[17] The record indicates that, at this time, the real property that was transferred was "a larger portion of what was resubdivided subsequently into the parcel that" we refer to as the Ridgefield Property.

Longman recorded a quitclaim deed conveying the Ridgefield Property back to Highland.

On July 27, 2007, Longman recorded a merger, executed on November 21, 2006, of Highland into Sapphire, then owned 95 percent by Emerald and 5 percent by Longman. Thereafter, on August 28, 2007,[18] Sapphire —the remaining entity postmerger—quitclaimed the Ridgefield Property to Longman, as trustee of The Stuart Longman Family Trust. This conveyance was made "in connection with" a second Washington Mutual mortgage on the Ridgefield Property that Longman executed as trustee of The Stuart Longman Family Trust.[19] The second mortgage, which was obtained on August 27, 2007,[20] in the amount of $2,800,000, was used in part to pay off the first Washington Mutual mortgage made to Longman individually.

On August 28, 2007, the day after he obtained the second Washington Mutual mortgage, Longman applied for the M&T mortgage loan.[21] On August 31, 2007, Long-

[18] The record is unclear as to when Sapphire quitclaimed the Ridgefield Property to Longman as trustee, because the deed entered into evidence at trial was dated August 8, 2005, but notarized on August 28, 2007, one day after Longman purportedly obtained the second Washington Mutual mortgage as trustee. At trial, Longman testified that he would guess it was executed in 2007.

[19] The record reflects that, when asked if he obtained permission from Gayla before signing the deed from Sapphire to Longman as trustee, Longman stated that he was authorized "by [him]self." When asked about his deposition testimony in which he stated that it was his practice to try to get authorization from Gayla and that he understood that to be reasonably competent management, Longman stated: "To the extent that they're family members, I would say that the rules are slightly different . . . . I don't believe that the same procedure holds true when you're talking about family members for whom I operate these various family businesses. But if you were talking about outside partners where it is truly an arm's-length situation, then, yes, you need to get their permission prior to signing documents on their behalf."

[20] The mortgage proceeds were disbursed on September 14, 2007.

[21] The borrower on the first page of the application is indicated as Longman.

man, as trustee for The Stuart Longman Family Trust, quitclaimed the property back to Sapphire. The M&T mortgage was closed on October 26, 2007, and the proceeds were disbursed to Sapphire on October 31, 2007. Certain proceeds from the M&T mortgage, in the amount of $2,294,596.24, were paid to Washington Mutual for the satisfaction of the second mortgage, given to The Stuart Longman Family Trust. There was a net balance of $199,921.55 remaining from the M&T mortgage proceeds, which was disbursed to Longman, and Longman testified that he does not know where that money went or how he spent it.

On the same dates that the M&T mortgage was closed and the proceeds were disbursed, Sapphire executed and recorded a quitclaim deed to the Ridgefield Property back to Longman, subject to the M&T mortgage, in order "to facilitate the closing of a financing with Chase Bank for [an additional] mortgage loan [secured by the Ridgefield Property] in the amount of . . . $500,000" to Longman individually. Longman executed the Chase Bank mortgage on November 20, 2007. Four days before the execution of that mortgage loan, however, Longman transferred his title to the Ridgefield Property to Sapphire for $1 "and other valuable consideration." The record indicates that no other consideration was provided.[22] Longman did not record the quitclaim deed for that transfer until December 4, 2007. Similarly, the Chase Bank mortgage was not recorded until December 26, 2007, which was more than one month after Longman executed the loan agreement and

[22] At trial, Longman testified that the additional consideration "would have been the attendant financing that paid off the prior debt"; however, the plaintiff impeached Longman with prior inconsistent testimony from his deposition, at which Longman testified that he had no reason to believe there was any other consideration paid. The record also indicated that no conveyance tax was received because there was no change in beneficial ownership.

twenty-two days after he quitclaimed the Ridgefield Property back to Sapphire.

With this background in mind, we turn to the governing law. As we have indicated, the plaintiff's claims of fraudulent transfer fall under §§ 52-552e and 52-552f of CUFTA. See footnotes 15 and 16 of this opinion. Consequently, the trial court considered the plaintiff's claims under each of these statutes and concluded that Longman's December 4, 2007 transfer of the Ridgefield Property back to Sapphire before recording the $500,000 Chase Bank mortgage that he obtained through a previous transfer of the property to him for that purpose "facially and substantively satisf[ies]" § 52-552e (a) (1) and (2), as "the prompt transfer back to Sapphire likely . . . was intended to shield the property from any creditors . . . ."

The trial court first considered the plaintiff's fraudulent transfer claims regarding the Ridgefield Property under § 52-552e (a) (1). With respect to finding "actual intent" as set forth in § 52-552e (a) (1), we have stated that, because fraudulent intent is "almost always . . . proven by circumstantial evidence," courts may consider numerous factors in determining whether a transfer was made with "actual intent" to defraud. *Canty* v. *Otto*, 304 Conn. 546, 564, 41 A.3d 280 (2012). In its memorandum of decision, the trial court relied on various factors set forth in § 52-552e (b) to support its finding of fraudulent intent: "Longman appears to have been an 'insider' with respect to Sapphire; he retained control of the property in a functional sense . . . there is a history of substantial delays in recording transactions; a multimillion dollar judgment had entered against [Longman] a decade earlier; at the time of the transfer back to Sapphire, the property was or appeared to be the overwhelming majority of assets (by value) then identifiable as owned by Longman; there was no consideration stated or paid for the transaction; [and]

he appears to have been rendered insolvent by the transfer, to the extent that the outstanding judgments appear to have exceeded all of his identified assets."[23] (Footnotes omitted.) In its analysis of § 52-552 (a) (2), the trial court noted both "the absence of any consideration for the transfer[s]" and the fact that the transfer of the Ridgefield Property back to Sapphire "rendered [Longman] insolvent," with "no indication as to an even theoretical ability . . . to pay debts" he then owed.

We conclude that these findings are not clearly erroneous. The record revealed, among other facts detailed by the trial court, that Longman was an insider, as Sapphire was owned directly and indirectly by him and Gayla, and he made all of the decisions for the company. See, e.g., *Zapolsky* v. *Sacks*, 191 Conn. 194, 200–201, 464 A.2d 30 (1983) (close relationship between defendants supported finding of fraudulent intent). The record revealed that, through this close relationship, various transfers enabled Longman to use the Ridgefield Property as security for multiple loans, some of which were obtained by Longman in an individual capacity and paid off by loans acquired in a representative role; a recording delay with respect to both Longman's transfer of the Ridgefield Property back to Sapphire and the Chase Bank mortgage allowed Longman to obtain that mortgage without ever holding the proceeds under his name; there was a lack of consideration; and there was no indication of any benefit to Sapphire for allowing Longman, through these transfers, to extract equity from its sole asset.

[23] The trial court noted, in part, the fact that "the only substantial assets that ever were identified by [Longman] as possibly indicative of his ability to pay debts was Florida property, which he conceded was tied up in litigation. There was no indication as to an even theoretical ability to liquidate those assets in order to pay debts, and an inability to pay debts as they become due necessarily implicates questions of ability to liquidate assets to pay such bills. . . . [In addition] there was at least one additional debt of [Longman] that was long overdue in being paid."

We also reject Longman's argument that the trial court incorrectly determined that Longman's transfer of the Ridgefield Property to Sapphire in October, 2007, constituted a fraudulent transfer because he was merely the facilitator of the loan for Sapphire. As we have explained, there is no evidence in the record that Sapphire, a purportedly independent real estate entity whose only asset was the Ridgefield Property, did or would benefit from Longman's obtaining an individual home equity loan secured by the property less than one month after Sapphire itself obtained the proceeds from the M&T mortgage.[24] We observe that, from the circumstances surrounding Longman's application for and recording of the Chase Bank mortgage, coupled with the history of multiple transfers, the trial court correctly found fraudulent intent. See, e.g., *National Council on Compensation Ins., Inc.* v. *Caro & Graifman, P.C.*, 259 F. Supp. 2d 172, 179 (D. Conn. 2003) (under Connecticut law, "[a]ctual fraudulent intent may be inferred from the circumstances surrounding the transaction").

The trial court next considered the plaintiff's fraudulent transfer claims under § 52-552f. See footnote 16 of

[24] Moreover, Longman and the corporate defendants' reliance on *Dentz Amusements, Inc.* v. *Aronson*, Docket No. CV-99-368009-S, 2002 WL 1335933 (Conn. Super. May 21, 2002), a case that is not binding on this court, is misplaced. In that case, the defendant, Yuly Aronson, and his wife took title to their newly purchased residence in their individual names in order to obtain a mortgage to finance it. Id., *1. The bank required that they apply for the mortgage as individuals, not as trustees of the trust in which they were going to hold title to the property. Id. Thereafter, the defendant and his wife executed a quitclaim deed to the trust. The trial court noted that "[t]here [was] no proof of intentional fraud, since the meeting of the technical requirements of the mortgagee does not rise to a suggestion of intentional fraud." Id., *2. In the present case, in addition to the series of transactions that preceded the transfers surrounding the Chase Bank mortgage, Longman did not give a reason for obtaining the Chase Bank mortgage and testified that he does not know where the net balance of $199,921.55 from the M&T mortgage proceeds, obtained less than one month before, went or how he spent it. In fact, Longman could not point to more than two home improvements on which he spent the M&T loan money.

this opinion. The trial court held that "the transactions whereby Sapphire transferred the property to [Longman], [Longman] then obtained a loan secured by the Ridgefield Property, and then transferred the property back to Sapphire subject to that mortgage, facially and substantively satisfy this statute." The court reasoned that "there was no consideration whatsoever for the transfer back to Sapphire, much less 'reasonably equivalent value' and [that] the existence of the multimillion dollar judgment [that had] essentially doubled by the time of this transaction . . . rendered . . . [Longman] insolvent . . . ." We conclude that the trial court's finding that the transfer at issue was fraudulent under § 52-552f was not clearly erroneous, as the record indicates that nothing more than nominal consideration was provided.

B

We next address the claim by Longman and the corporate defendants that the trial court improperly found that the February 12, 2010 transfer of the Greenwich Property to Lurie constituted a fraudulent transfer under §§ 52-552e (a) (1) and (2) and 52-552f of CUFTA. See footnotes 15 and 16 of this opinion. Longman and the corporate defendants argue that the trial court improperly found that Longman had provided the purchase money for the equity piece of the property, when the record indicates—through Longman's deposition testimony—that "Lurie and/or Emerald" provided it. They further argue, therefore, that, because Longman purportedly purchased the Greenwich Property with equity received from Lurie—thus, purchasing the property on Lurie's behalf—he never owned the "asset," and its transfer to Lurie did not constitute a fraudulent transfer under Connecticut law. The plaintiff responds that the trial court properly found that the equity to purchase the Greenwich Property came from Longman, as the sequence of transfers indicates that, although

the purchase money transferred through Lurie, it originated in Longman's personal bank account and was funneled through the other corporate defendants. We conclude that the trial court's determination was not clearly erroneous.

The record reveals the following additional facts that are relevant to our resolution of this claim. On February 9, 2010, Longman acquired the Greenwich Property for $1,049,000 from Thomas, the same friend who, at one time, acquired an interest in the Ridgefield Property. Longman financed the purchase with a $600,000 commercial mortgage loan and paid the equity remainder. The closing statement for this transaction lists the balance of funds paid by Longman as $515,000.

At trial, the plaintiff introduced records from Longman's personal bank account and the bank accounts of Solaire Funding, Inc., Lurie, and R.I.P.P. to chronicle the following series of transactions, which occurred during the days leading up to the purchase of the Greenwich Property. On February 3, 2010, Longman transferred $500,000 from his personal bank account to the bank account of Solaire Funding, Inc., a corporation whose operating agreement lists Lurie as its sole member and Longman as its sole director. Solaire Funding, Inc., received the transfer on February 5, 2010, and three days later, transferred $500,000 to Lurie's bank account. Lurie received this transfer on February 8, 2010, and, on the same day, Lurie transferred amounts that totaled $514,000 to R.I.P.P.'s bank account. R.I.P.P.'s bank account, in turn, shows receipt of the Lurie transfers on February 8, 2010, and a check drawn from its account on that same day in the amount of $515,000.

On February 9, 2010, Longman executed a commercial mortgage loan to finance the remaining $600,000 of the purchase price of the Greenwich Property, and

Thomas executed the deed to the property that same day. Three days later, on February 12, 2010, Longman quitclaimed the property to Lurie, which was 100 percent owned by Gayla, for the stated consideration of $10. Longman testified that there was no conveyance tax paid with respect to this transfer. On April 30, 2010, Lurie sold the Greenwich Property to a bona fide purchaser for $1,850,000. On May 3, 2010, Lurie distributed the portions of the sale's proceeds to Longman's personal bank account and among the bank accounts of Solaire Funding, Inc., the Solaire entities, Sapphire, R.I.P.P., and W.W. Land. Longman testified that he did not "have any specific knowledge" as to why he made these transfers on behalf of Lurie.

Longman was asked at trial: "Who actually paid the equity piece of [the Greenwich Property]?" Longman responded that he "[did not] recall the source of the funds at [that] point, although it appear[ed] that the funds were drawn from a . . . Vanguard account . . . [a]nd were deposited into the R.I.P.P. account that [he] controlled and used for these purposes and was then in some way transferred to the attorney that closed on the property." When asked, in a follow-up question, whether he remembered testifying in his deposition that the money came from "Lurie and/or Emerald," and whether "that [would] be true," Longman responded, "if that's what I said at the time . . . I'm not arguing."

The trial court determined that "the Lurie transaction . . . falls within the range of statutory and common-law fraudulent transactions," noting that "[t]he fact that the property was sold to the bona fide purchaser less than three months after the initial acquisition of the property by Longman, with the actual title of ownership by [him] of perhaps a week, fits the pattern of . . . avoiding ownership in the name of Longman except to the minimal extent necessary for purposes of obtaining financing." The trial court reasoned that the New York

judgment debt that Longman owed to the plaintiff had increased by approximately $1 million dollars by 2010, Lurie provided "no consideration" for the transfer of the title to the Greenwich Property, and Longman, through Lurie, distributed a significant amount of the proceeds from the sale to entities controlled by Longman and to Longman's personal bank account.

We conclude that the trial court's determination that the February 12, 2010 transfer from Longman to Lurie constituted a fraudulent transfer under §§ 52-552e (a) (1) and (2) and 52-552f was not clearly erroneous, as the record supports that determination. First, contrary to the claim by Longman and the corporate defendants that the Greenwich Property did not constitute an asset of Longman, the trial court did not clearly err in finding that Longman "acquir[ed] the property through payment of funds from [an] . . . account maintained by the Longmans, coupled with commercial financing." The record reveals, at the very least, that the purchase money was provided through a series of transfers originating from Longman's personal bank account. Specifically, the amount of the check drawn on R.I.P.P.'s account—which occurred on the same day that R.I.P.P. received a large sum of money compared to the normal contributions listed in that account—correlated with the $515,000 listed on the closing statement from the sale and occurred at the end of a series of transfers within a short time frame.

Second, because the record supports the trial court's finding that Longman purchased the Greenwich Property with money from his personal bank account, the fact that Lurie, an entity owned solely by Longman's wife, paid nothing more than nominal consideration and neither party paid a conveyance tax, further supports the trial court's conclusion that the transfer to Lurie was fraudulent. See, e.g., *In re Galaz*, 850 F.3d 800, 804–805 (5th Cir. 2017) (lack of " 'reasonably equiv-

alent' " consideration presented badge of fraud indicating actual intent); *In re Bifani*, 580 Fed. Appx. 740, 746 (11th Cir. 2014) (same); *Cadle Co.* v. *Newhouse*, 74 Fed. Appx. 152, 153 (2d Cir. 2003) (same). Additionally, based on the amount of the New York judgment alone, it appears from the record that Longman's debts exceeded his identified assets. Longman also controlled the proceeds from the sale of the Greenwich Property when he paid off his credit card balance, and distributed various amounts to other corporate defendants and his personal bank account. See *In re Kaiser*, 722 F.2d 1574, 1583 (2d Cir. 1983) ("[t]he shifting of assets by the debtor to a corporation wholly controlled by him is [a] badge of fraud"). Moreover, looming large over this transaction, as noted by the trial court, was the fact that, "[w]hile it certainly is understandable that [Longman] would have wanted to replenish . . . [the] account from which some of the purchase funds had been obtained," there was no apparent reason—other than the avoidance of creditors like the plaintiff—for why Longman would have first transferred the property to Lurie, sold it and distributed the proceeds from that entity.

III

REVERSE PIERCING OF THE CORPORATE VEIL

The final issue we address is whether this court recognizes the doctrine of reverse piercing of the corporate veil and, if so, whether the trial court properly applied the doctrine under the facts of the present case. The principle known as reverse veil piercing is an equitable remedy by which a court imposes liability on a corporation for the acts of a corporate insider. Courts have generally recognized two forms of reverse veil piercing: insider and outsider. 1 Fletcher Cyclopedia of the Law of Corporations (Rev. 2018) § 41.70. Insider reverse veil piercing is applicable to cases in which the plaintiff is

a corporate insider seeking to disregard the corporate form for his own benefit. See 18 Am. Jur. 2d 699–700, Corporations § 51 (2004). Outsider reverse veil piercing, otherwise known as "third-party reverse piercing" and the type of reverse piercing at issue in the present case, "extends the traditional [veil piercing] doctrine to permit a third-party creditor to pierce the corporate veil to satisfy the debts of an individual shareholder out of the corporation's assets." 1 Fletcher Cyclopedia of the Law of Corporations, supra, § 41.70.

A number of jurisdictions have recognized outsider reverse piercing claims. E.g., *In re Phillips*, 139 P.3d 639, 646 (Colo. 2006) (en banc) (recognizing outsider reverse piercing and citing to several jurisdictions noting same); *C.F. Trust, Inc.* v. *First Flight L.P.*, 266 Va. 3, 11, 580 S.E.2d 806 (2003) ("Virginia does recognize the concept of outsider reverse piercing and that this concept can be applied to a Virginia limited partnership").[25] Because outsider reverse piercing differs from traditional reverse piercing by allowing the creditor to reach the corporation's assets without regard to the origin of those assets, however, some courts have rejected the doctrine to protect nonculpable shareholders and creditors. See, e.g., *Postal Instant Press, Inc.* v. *Kaswa Corp.*, 162 Cal. App. 4th 1510, 1513, 77 Cal.

[25] See *LFC Marketing Group, Inc.* v. *Loomis*, 116 Nev. 896, 904, 8 P.3d 841 (2000) (reverse piercing is appropriate only in "those limited instances where the particular facts and equities show the existence of an alter ego relationship and require that the corporate fiction be ignored so that justice may be promoted"); *Olen* v. *Phelps*, 200 Wis. 2d 155, 163, 546 N.W.2d 176 (App. 1996) (outsider reverse piercing recognized); see also *Sky Cable, LLC* v. *DIRECTV, Inc.*, 886 F.3d 375, 387 (4th Cir. 2018) (predicting that Delaware would recognize reverse piercing and noting that it is "particularly appropriate when an LLC has a single member"); *United States* v. *Badger*, 818 F.3d 563, 571 (10th Cir. 2016) (predicting that Utah Supreme Court would recognize reverse piercing claim); *Zahra Spiritual Trust* v. *United States*, 910 F.2d 240, 244 (5th Cir. 1990) (presuming that Texas would recognize reverse piercing claim "upon a finding that the individual [debtor] and the corporation should be treated as alter egos").

Rptr. 3d 96 (2008) (outsider reverse piercing "can harm innocent shareholders and corporate creditors"); *Acree* v. *McMahan*, 276 Ga. 880, 881, 585 S.E.2d 873 (2003) ("[w]e reject reverse piercing, at least to the extent that it would allow an 'outsider,' such as a third-party creditor, to pierce the veil in order to reach a corporation's assets to satisfy claims against an individual corporate insider").

The plaintiff and Longman and the corporate defendants separately appeal from the trial court's determination to apply reverse veil piercing to four of the eight corporate defendants. Longman and the corporate defendants ask this court either to reject the doctrine of reverse piercing or, in the alternative, to hold that the trial court improperly applied it to Sapphire, Lurie, R.I.P.P., and Great Pasture. The plaintiff responds that this court should adopt reverse piercing and hold that the trial court's conclusion was improper only insofar as it declined to pierce all of the corporate defendants that are the subject of this appeal. For the reasons set forth in this part of the opinion, we conclude that Connecticut recognizes the doctrine of outsider reverse veil piercing and that the trial court's application of reverse piercing in the present case was not clearly erroneous.

A

We begin by addressing the question of whether this jurisdiction recognizes the doctrine of reverse veil piercing.[26] Longman and the corporate defendants claim

[26] We reject the plaintiff's claim that Longman and the corporate defendants did not preserve the issue of whether reverse veil piercing doctrine is a viable remedy in Connecticut. Our review of the posttrial briefs, submitted to the trial court before it rendered its decision, indicate that this issue was discussed by both Longman and the corporate defendants and the plaintiff. Moreover, the trial court inevitably addressed the parties' arguments in applying the doctrine to the four entities; therefore, our review of this claim would not create a trial by ambuscade. See, e.g., *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 265, 828 A.2d 64 (2003).

that this court should reject the doctrine because it serves no legitimate purpose and contravenes public policy. In response, the plaintiff claims that reverse veil piercing is a viable remedy in other jurisdictions and that it should be adopted in Connecticut, as the facts of this case justify adopting the doctrine. We conclude that Connecticut recognizes the doctrine of outsider reverse piercing of the corporate veil.[27]

Because reverse veil piercing constitutes an expansion of the traditional veil piercing doctrine, a brief history of traditional veil piercing provides an informa-

[27] On June 25, 2019—seven months after we heard oral argument in this appeal and almost nine years after the plaintiff commenced his action—the parties advised us that, on that same day, the legislature had passed No. 19-181 of the 2019 Public Acts (P.A. 19-181), which codifies the instrumentality test for veil piercing and prohibits reverse veil piercing. Specifically, § 3 of P.A. 19-181 provides: "(*Effective from passage and applicable to any civil action filed on or after the effective date of this section*) No domestic entity shall be responsible for a debt, obligation or other liability of an interest holder of such entity based upon a reverse veil piercing doctrine, claim or remedy." (Emphasis in original.) Following passage of P.A. 19-181, this court ordered the parties to file supplemental briefs regarding the import, if any, of that prospective legislation to the present appeal. A review of the legislative history of P.A. 19-181 reveals that it was first referred to the Joint Standing Committee on Judiciary in March, 2019. There was no floor debate directly addressing or even indirectly relating to § 3 of P.A. 19-181, the provision relating to reverse veil piercing. Although we recognize that the legislature arguably expressed an intent in P.A. 19-181 to prevent the courts from applying the doctrine of reverse veil piercing, it is significant that the legislature explicitly stated that it intended § 3 of P.A. 19-181 to apply prospectively, that is, on or after July 9, 2019, the date the governor signed the legislation. See *D'Eramo* v. *Smith*, 273 Conn. 610, 620, 872 A.2d 408 (2005) ("we have uniformly interpreted [General Statutes] § 55-3 as a rule of presumed legislative intent that statutes affecting substantive rights shall apply prospectively only" [internal quotation marks omitted]); *Spector Motor Service, Inc.* v. *Walsh*, 135 Conn. 37, 43, 61 A.2d 89 (1948) (effective on passage means date of governor's signature). Because of the act's prospective nature and the unfairness that would transpire by " 'impos[ing] a substantive amendment that changes the grounds upon which [the plaintiff may maintain this] action' "; id., 621; which was commenced nearly nine years ago to collect on a foreign judgment rendered against Longman in 1996, we conclude that P.A. 19-181 does not affect our decision to uphold the trial court's application of reverse veil piercing.

tive backdrop. Connecticut first recognized traditional veil piercing claims, by which a court may disregard a corporate fiction to hold individual stockholders liable, in *Zaist* v. *Olson*, 154 Conn. 563, 227 A.2d 552 (1967). In *Zaist*, this court held that courts may pierce the corporate veil under one of two theories: either the instrumentality rule or the identity rule. Id., 575. "The veil may be pierced if the elements of either theory are satisfied." *Avant Capital Partners, LLC* v. *Strathmore Development Co. Michigan, LLC*, Docket No. 312-CV-1194 (VLB), 2015 WL 136391, *6 (D. Conn. January 9, 2015). Since *Zaist*, this court has noted that "[t]he concept of piercing the corporate veil is equitable in nature," and "[n]o hard and fast rule . . . [exists to determine] the conditions under which the entity may be disregarded . . . as they vary according to the circumstances of each case." (Citations omitted; internal quotation marks omitted.) *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, 187 Conn. 544, 555–56, 447 A.2d 406 (1982). Consequently, this court has not applied traditional veil piercing lightly but, rather, has pierced the veil "only under exceptional circumstances, for example, where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice." (Internal quotation marks omitted.) Id., 557; see also, e.g., *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 234, 990 A.2d 326 (2010) ("courts decline to pierce the veil of even the closest corporations in the absence of proof that failure to do so will perpetrate a fraud or other injustice").

This court has addressed reverse veil piercing only once, in *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, 304 Conn. 128, 37 A.3d 724 (2012) (*State Five*).[28] Although this court deter-

[28] We observe that, although this court took up this issue in *State Five*, our Appellate Court applied reverse veil piercing in *Litchfield Asset Management Corp.* v. *Howell*, 70 Conn. App. 133, 799 A.2d 298, cert. denied, 261 Conn.

mined that the facts of that case did not warrant reverse

911, 806 A.2d 49 (2002), in which that court concluded, as a matter of first impression, that reverse piercing is a viable remedy in this state. Id., 151. Although we denied certification in *Howell*, we observe that the facts of that case were similar to those in the present case. In *Howell*, the Appellate Court held that the evidence that the defendant Mary Ann Howell created two limited liability companies for the purpose of evading the debts she owed to the plaintiff, Litchfield Asset Management Corporation (Litchfield), was sufficient to reverse pierce the corporate veil of the two companies. Id., 152–58. In that case, the defendant owned and operated an interior design corporation, Mary Ann Howell Interiors, Inc. (Interiors). The defendant entered into an agreement with Litchfield in which she agreed to "perform services." Id., 135. When a dispute arose from that agreement, Litchfield brought an action against the defendant and Interiors in Texas and obtained a judgment against them in the amount of $657,207, plus interest, which was enforced by a Connecticut trial court and upheld by the Appellate Court in 1997. Id., 135.

While these actions were pending, the defendant and her husband, Jon Howell, formed two limited liability companies, Howell Interiors and Architectural Design, LLC (Design) and Antiquities Associates, LLC (Antiquities). Id., 135–36. Design and Antiquities were owned by the Howell family in the following manner: the defendant owned a 97 percent interest in Design, after borrowing against her life insurance policies to contribute $144,679 in exchange for ownership; Jon Howell and their two daughters, Wendi Howell and Marla Howell, each owned 1 percent of the shares after each contributed $10. Design, in turn, owned 99 percent of Antiquities, after it contributed $102,901 in exchange for its interest, and the defendant owned the remaining 1 percent of the shares after contributing $10. Id., 136.

After it was unable to reach the assets owed to it by Interiors and the defendant, Litchfield brought an action against the defendant, Jon Howell, Design and Antiquities, alleging that Design and Antiquities were shell companies created in a conspired effort "to fraudulently divert . . . assets beyond [Litchfield's] reach as a judgment creditor . . . ." Id. In upholding the trial court's application of reverse piercing to those companies and recognizing reverse piercing for the first time, the Appellate Court noted that the defendant "[was] the general manager of both Design and Antiquities. Neither company ha[d] any employees . . . [and] [b]oth companies operate[d] out of a loft space above the garage at . . . [the] [Howells'] personal residence. Neither company [paid] any rent . . . . [The defendant] exercised complete control over the policies, finances, and business practices of Design and Antiquities; there is no indication in the record that Jon Howell, Wendi Howell or Marla Howell participated in their operation in any significant way. [The defendant] has never drawn a salary or received regular distributions from either Design or Antiquities, but consistently has used company funds to pay for many personal expenses and to provide . . . free loans or gifts to family members. . . . [P]ayments for Antiquities'

veil piercing[29] and, therefore, did not reach the issue, it observed that reverse veil piercing depends on the facts of the case and recognized equitable concerns regarding adoption of the doctrine but declined to foreclose its adoption in the future when presented with the "appropriate case." Id., 138 n.13. The appropriate case, this court explained, would be one in which the doctrine could be recognized under circumstances in which "it achieves its equitable purpose without harming third parties."[30] Id. This court went on to note that, if it were to adopt reverse piercing, it would limit its application. See id., 140 ("[a]lthough some courts have adopted reverse veil piercing with little distinction as a logical corollary of traditional veil piercing, because

sales were deposited in Design's account without a corresponding reimbursement . . . [and] tax returns were not filed for either company for the two years preceding trial." Id., 137–38.

[29] In *State Five*, the Commissioner of Environmental Protection brought an action against State Five Industrial Park, Inc., and Jean L. Farricielli to recover the payment of civil penalties from a judgment in a prior action brought against Jean's husband, Joseph J. Farricielli, which he failed to pay. The commissioner alleged that Jean and State Five, a company in which only Jean and two sons of Jean and John had ownership interest, should be held liable—through, inter alia, reverse veil piercing—for the remainder of the earlier judgment against Joseph, because Joseph purportedly had attempted to conceal his assets by, in part, quitclaiming real property he owned to State Five. *State Five*, supra, 304 Conn. 133–34. In concluding that the trial court's application of reverse veil piercing was clearly erroneous, this court noted, in part, that the trial court improperly applied reverse veil piercing because it failed to evaluate whether the sons' interests—who each were passive minority owners of State Five—would be negatively impacted. Id., 143. Additionally, this court noted that the trial court failed to adequately ensure that third-party creditors did not exist or, if they did, that they would not be prejudiced. Id., 145. Further, this court reasoned that the trial court's analysis failed to establish how Joseph's interactions with State Five proximately caused the commissioner's inability to obtain the debts owed under the 2001 judgment, as the predominant asset transfer at issue—in which Joseph transferred a parcel of land to State Five—occurred more than five years before the 2001 judgment. Id., 147–48.

[30] We observe that the trial court's tailored application of the doctrine in the present case, which addressed the concerns outlined in *State Five*, serves as good evidence that trial courts can apply outsider reverse veil piercing in a particularized manner to achieve an equitable purpose.

the two share the same equitable goals, others *wisely* have recognized important differences between them and have either *limited*, or disallowed entirely, reverse veil piercing" [emphasis added]).

The majority in *State Five* outlined, in dicta, three concerns that arise specifically from the application of reverse veil piercing and suggested methods of limiting application of the doctrine. Id., 140–42. First, this court noted the concern that reverse piercing allows creditors to bypass normal judgment collection procedures. Id., 140. Second, this court noted that reverse piercing can harm nonculpable shareholders and creditors. Id. Third, this court noted that, as an equitable remedy, reverse piercing should be imposed only when there is an absence of adequate remedies at law. Id., 141. In a sole concurrence,[31] Justice Zarella echoed these concerns,[32] noting that, in contrast to traditional veil piercing, in which "the corporation itself is not affected by the piercing," in reverse veil piercing "[t]he corporation itself is liable—and thus corporate assets are vulnerable—for the wrongdoing of an individual." Id., 155.

We begin by discussing the first and second concerns articulated by the majority in *State Five*, which we observe are interrelated. On the one hand, the majority

[31] Justice Zarella wrote separately because he believed "compelling considerations militate against allowing reverse veil piercing" and that he "would overrule *Howell* to the extent it holds that reverse veil piercing is a viable legal theory in this state." *State Five*, supra, 304 Conn. 153 (*Zarella, J.*, concurring).

[32] Justice Zarella listed an additional concern as well, which was that "reverse piercing injects uncertainty into the corporate structure in a way that could systemically alter the ability of corporations to obtain loans and investment capital . . . [and] [c]orporate creditors are likely to insist on being compensated for the increased risk . . . which will reduce the effectiveness of the corporate form as a means of raising credit." (Internal quotation marks omitted.) *State Five*, supra, 304 Conn. 160 (*Zarella, J.*, concurring). By ensuring a limited application of reverse piercing and, consequently, the infrequency with which it will be applied, however, this court's test both anticipates and addresses this systemic concern.

noted that "reverse piercing bypasses normal judgment-collection procedures, whereby judgment creditors [of an individual judgment debtor] attach the judgment debtor's shares in the corporation and not the corporation's assets . . . prejudic[ing] [other] rightful creditors of the corporation, who relied on the entity's separate corporate existence when extending it credit . . . ." (Internal quotation marks omitted.) Id., 140.[33] On the other hand, the majority in *State Five* noted that, "if a corporation has other [nonculpable] shareholders, they [too] obviously will be prejudiced if the corporation's assets can be attached directly . . . [because, in] contrast [to] ordinary piercing cases, [in which] only the assets of the particular shareholder [or other insider] who is determined to be the corporation's alter ego are subject to the attachment," in reverse piercing cases, the creditor can reach all of the assets of the corporation, "allowing the outsider to attach assets in which [nonculpable shareholders] have an interest." (Citations omitted; internal quotation marks omitted.) Id., 140–41; see also id., 158 (*Zarella, J.*, concurring).

Quoting the Virginia Supreme Court's opinion in *C.F. Trust, Inc.* v. *First Flight L.P.*, supra, 266 Va. 12–13, in which that court recognized reverse piercing, this court stated, "a court considering reverse veil piercing must weigh the impact of such action upon innocent investors . . . [and] innocent secured and unsecured creditors."[34] (Internal quotation marks omitted.) *State Five*,

[33] Justice Zarella likewise explained that, because, in reverse piercing situations, the creditor often must prove that the corporation is an alter ego, the creditor then may take assets from the corporation without regard to where they originated, "greatly expand[ing] the scope of assets that a judgment creditor would normally be able to reach under traditional causes of action." *State Five*, supra, 304 Conn. 157–58 (*Zarella, J.*, concurring).

[34] In fact, this court noted in *State Five* that the trial court's failure to analyze whether innocent creditors or shareholders would be harmed led, in part, to its determination that the facts of that case did not warrant reverse piercing. *State Five*, supra, 304 Conn. 145.

supra, 304 Conn. 142; see also id., 158 (*Zarella, J.*, concurring). Other jurisdictions that have applied outsider reverse piercing have adopted the same considerations. See, e.g., *In re Phillips*, supra, 139 P.3d 646 (recognizing outsider reverse piercing of corporate veil doctrine but placing limitations on circumstances that would permit application, noting that, "[w]hen innocent shareholders or creditors would be prejudiced by outside reverse piercing, an equitable result is not achieved").

With respect to the third concern, that reverse veil piercing should not be applied if adequate remedies at law are available, this court in *State Five* explained that, unlike "the case of a traditional veil pierce . . . [in which] the judgment creditor cannot reach the assets of the individual shareholders due to limitations on liability imposed by corporate law . . . when the judgment debtor is a shareholder or other insider, many legal remedies potentially are available to reach corporate assets that rightfully should be available for collection . . . ." (Citation omitted; internal quotation marks omitted.) *State Five*, supra, 304 Conn. 141. Therefore, this court indicated that, "because corporate veil piercing is an equitable remedy, it should be granted only in the absence of adequate remedies at law . . . including the attachment of the debtor's shares in the corporation . . . garnishment of . . . pay from the corporation . . . or . . . challenging . . . transfers of assets to the corporation as fraudulent conveyances or illegal conversion . . . ."[35] (Citations omitted.) Id.

[35] Referring to the concerns expressed in *State Five*, Longman and the corporate defendants argue against reverse piercing for the following reasons: (1) reverse piercing is not a viable remedy; (2) the trial court did not properly apply the three considerations set forth in *State Five*; and (3) Connecticut statutes both "[specify] the means by which a judgment debt may be collected . . . and the procedures that must be followed to dissolve a business entity," and also provide "adequate remedies at law [through] Connecticut's statutory judgment debt collection scheme . . . ." In part, Longman and the corporate defendants claim that a charging order under General Statutes § 34-259b is the exclusive remedy available to the plaintiff. Other jurisdictions that have addressed this claim under charging order

Other jurisdictions that have adopted reverse veil piercing have articulated the same additional consideration. See, e.g., *In re Phillips*, supra, 139 P.3d 647 ("the availability of alternative, adequate remedies must be considered by the trial court"); *C.F. Trust, Inc.* v. *First Flight L.P.*, supra, 266 Va. 13 ("[t]he court must also consider the availability of other remedies the creditor may pursue").

Declining "to hold that this doctrine is not viable under any circumstance," the majority in *State Five* noted that it was "not convinced . . . that [these three] concerns cannot be addressed adequately, in the appropriate case . . . and [was] reluctant to presume that there is no possible factual scenario in which reverse veil piercing would be appropriate . . . ."[36] *State Five*,

statutes with similar language have held that "piercing the veil of an alter ego is not the type of remedy that the [exclusivity] provision was designed to prohibit." *Sky Cable, LLC* v. *DIRECTV, Inc.*, 886 F.3d 375, 388 (4th Cir. 2018); see also *State Five*, supra, 304 Conn. 159 n.5 (noting that charging order "only transfers to the judgment creditor a right to receive distributions") (*Zarella, J.*, concurring); *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 151 n.14 (noting that "[the defendant] did not receive regular distributions but rather, paid her personal bills directly using limited liability company funds").

[36] On the basis of this and other dicta in *State Five* and case law from other jurisdictions, we reject the additional arguments of Longman and the corporate defendants, including their claim that reverse piercing "is based on a false analogy," because the company itself "perpetrated no [wrongful] conduct," that corporations "are not protected . . . by any 'veil,' " and that the company is not the "real actor." Under this equitable remedy, whether the limited liability company itself "perpetrated" the wrongful conduct is irrelevant, because when the equity holder and the company are held to be alter egos, they are considered one and the same, and, therefore, the company can be held liable for the wrongdoing of its equity holder. See *C.F. Trust, Inc.* v. *First Flight L.P.*, supra, 266 Va. 12 ("[t]he piercing of a veil is justified when the unity of interest and ownership is such that *the separate personalities* of the corporation and/or limited partnership and the individual *no longer exist, and adherence to that separateness would create an injustice*" [emphasis added]). This is especially true under the facts of the present case, in which the trial court properly found that there existed no nonculpable creditors or shareholders of Sapphire, Lurie, R.I.P.P., or Great Pasture. Cf. *State Five*, supra, 304 Conn. 142–43. Additionally, we reject Longman and the corporate defendants' claim that this question is properly

supra, 304 Conn. 138 n.13. Following our dicta in *State Five*, and on the basis of the facts in the present case, we recognize the viability of the doctrine of reverse veil piercing. We adopt the approach taken by the Virginia Supreme Court in *C.F. Trust, Inc.*, in which that court applied the traditional veil piercing rule but additionally required that "a court considering reverse veil piercing . . . weigh the impact of such action upon innocent investors . . . [and] innocent secured and unsecured creditors . . . [and] also consider the availability of other remedies the creditor may pursue." (Internal quotation marks omitted.) *State Five*, supra, 142, quoting *C.F. Trust, Inc.* v. *First Flight L.P.*, supra, 266 Va. 12–13.

In summary, the following is the proper test to apply when an outsider seeks to reverse pierce the corporate veil. We reiterate that the inquiry is a three part process. In part one, the outsider must first prove that, under the instrumentality and/or identity rules, as set forth in traditional veil piercing cases, "the corporate entity has been so controlled and dominated that justice requires liability to be imposed . . . ." (Internal quotation marks omitted.) *Litchfield Asset Management Corp.* v. *Howell*, 70 Conn. App. 133, 147, 799 A.2d 298, cert. denied, 261 Conn. 911, 806 A.2d 49 (2002). If the outsider prevails on part one, then, in part two, trial courts must, consistent with our dicta in *State Five*, consider the impact of reverse piercing on innocent shareholders and creditors. In part three, also consistent with our dicta in *State Five*, trial courts must consider whether adequate remedies at law are available.

In part one of the test, which is similar to traditional veil piercing, trial courts must first apply the instrumen-

for the legislature. In *State Five*, this court recognized that reverse piercing the corporate veil, like traditional veil piercing, is an equitable remedy. Id., 141. For these and other reasons set forth in this opinion, we reject the remainder of the claims of Longman and the corporate defendants as meritless.

tality and/or identity rules and determine if the elements of either are satisfied. See *Avant Capital Partners, LLC* v. *Strathmore Development Co. Michigan, LLC*, supra, 2015 WL 136391, *6. The instrumentality rule involves an examination of the defendant's relationship to the company and requires the court to determine whether there exists proof of three elements: "(1) Control [by the defendant], not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice *in respect to the transaction attacked* so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of [the] plaintiff's legal rights; *and* (3) that the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of." (Emphasis in original; internal quotation marks omitted.) *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, supra, 187 Conn. 553.

In assessing the first prong of the instrumentality rule, that is, whether an entity is dominated or controlled, courts consider a number of factors, including "(1) the absence of corporate formalities; (2) inadequate capitalization; (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes; (4) overlapping ownership, officers, directors, personnel; (5) common office space, address, phones; (6) the amount of business discretion by the allegedly dominated corporation; (7) whether the corporations dealt with each other at arm's length; (8) whether the corporations are treated as independent profit centers; (9) payment or guarantee of debts of the dominated corporation; and (10) whether the corporation in question had property that was used by other

of the corporations as if it were its own." (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, supra, 295 Conn. 233.

With regard to the second and third prongs of the instrumentality test, that is, (2) whether such control was used to commit a fraud or wrong, and (3) whether that fraud or wrong proximately caused the plaintiff's loss, this court has stated that "[i]t is not enough . . . simply to show that a judgment remains unsatisfied . . . . There must be some wrong beyond the creditor's inability to collect, which is contrary to the creditor's rights, and that wrong must have *proximately caused* the inability to collect." (Citations omitted.) *State Five*, supra, 304 Conn. 150.

The identity rule, which this court has observed "complement[s] the instrumentality rule," has one prong, which requires the plaintiff to show "that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, [in which case] an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise." (Internal quotation marks omitted.) *Zaist* v. *Olsen*, supra, 154 Conn. 575, 576; see also *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, supra, 187 Conn. 554.

If the trial court finds that either the instrumentality or identity rule is met, then it must consider the remaining two parts of the proposed test, i.e., the *State Five* considerations. Under part two, the court must "weigh the impact of such action upon innocent investors . . . [and] innocent secured and unsecured creditors," and, under part three, the court must "consider the availability of other remedies the creditor may pur-

sue." (Internal quotation marks omitted.) *State Five*, supra, 304 Conn. 142, quoting *C.F. Trust*, *Inc.* v. *First Flight L.P.*, supra, 266 Va. 12–13.

B

With this test in mind, we now review the trial court's application of reverse veil piercing to the facts of the present case. The same legal principles that govern traditional veil piercing govern reverse veil piercing. "Whether the circumstances of a particular case justify the piercing of the corporate veil presents a question of fact. . . . Accordingly, we defer to the trial court's decision to pierce the corporate veil, as well as any subsidiary factual findings, unless they are clearly erroneous. . . . A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . .

"Generally, a corporation is a distinct legal entity and the stockholders are not personally liable for the acts and obligations of the corporation . . . or vice versa. Courts will, however, disregard the fiction of a separate legal entity to pierce the shield of immunity afforded by the corporate structure in a situation in which the corporate entity has been so controlled and dominated that justice requires liability to be imposed on the real actor. . . . In a traditional veil piercing case, a litigant requests that a court disregard the existence of a corporate entity so that the litigant can reach the assets of a corporate insider, usually a majority shareholder. In a reverse piercing action, however, the claimant seeks to reach the assets of a corporation or some other business entity . . . to satisfy claims or a judgment obtained against a corporate insider. . . . In either circumstance, veil piercing is not lightly imposed. [C]orporate veils exist for a reason and should be pierced only

reluctantly and cautiously. The law permits the incorporation of businesses for the very purpose of isolating liabilities among separate entities. . . . Accordingly, the corporate veil is pierced only under exceptional circumstances, for example, where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice." (Citations omitted; internal quotation marks omitted.) *State Five*, supra, 304 Conn. 138–39.

The plaintiff claims that the trial court properly applied the doctrine in the present case with respect to Sapphire, Lurie, R.I.P.P., and Great Pasture, as that court properly applied the instrumentality rule and considered the concerns this court raised in *State Five*, but asks this court to reverse the trial court's decision not to reverse pierce the Solaire entities and W.W. Land. To support the latter claim, the plaintiff argues, first, that the trial court intended to reverse pierce the veil of W.W. Land and that it confused the Solaire entities named here with a separate entity, Solaire Tenant, LLC (Solaire Tenant), and, second, that the facts of the present case justify reverse piercing as to those entities. Longman and the corporate defendants respond that, if we choose to recognize the doctrine of reverse piercing, this court should find that the trial court improperly applied the doctrine as to Sapphire, Lurie, R.I.P.P., and Great Pasture, because the plaintiff failed to present evidence of ownership by Longman, evidence of control and proximate causation, and evidence alleviating the *State Five* concerns. We conclude that the trial court did not clearly err either in its application of reverse veil piercing to Sapphire, Lurie, R.I.P.P., and Great Pasture or in its decision not to apply reverse piercing to the Solaire entities and W.W. Land.

In addition to the facts already set forth in parts I and II of this opinion, the record reveals the following

facts that are relevant to our resolution of these claims. Testimonial and documentary evidence admitted at trial—which included deeds, corporate documents, bank statements, tax documentation, and bankruptcy records—revealed the following, often interrelated, facts about the history of Sapphire, Lurie, R.I.P.P., and Great Pasture. Longman originally organized Sapphire to purchase and develop a property located at 2 Great Pasture Road in Danbury. As part of a reorganization pursuant to Chapter 11 of the United States Bankruptcy Code, however, Sapphire transferred title to that property in 2006 to a newly created entity, Great Pasture. Sapphire did not have any employees, and its sole asset from that point forward was the Ridgefield Property, which did not produce an income. While holding the Ridgefield Property, Sapphire conducted no business, and the Longman family continued to reside in the residence located there without ever executing a written lease with Sapphire.

After the transfer of 2 Great Pasture Road, Sapphire derived its income from the other related entities. On its 2007 M&T mortgage application, Longman listed Lurie and Great Pasture under "bank accounts" as assets of Sapphire. In 2007, Longman also filed, on behalf of Sapphire, a final tax return for the company, which he claimed he did not carefully review, if he reviewed it at all. According to Sapphire's bank statements and the monthly operating reports it filed during bankruptcy,[37] Lurie contributed most, if not all, of the income that Sapphire received from 2009 to 2012.[38]

[37] Three days before trial in this case, Sapphire filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code, which stayed the state court action for approximately two and one-half years. The United States District Court for the District of Connecticut upheld the bankruptcy court's dismissal of Sapphire's Chapter 11 petition, reasoning that it was filed in bad faith. See *Sapphire Development, LLC* v. *McKay*, Docket Nos. 3:15-cv-1570 (MPS) and 3:15-cv-1097 (MPS) (D. Conn. February 1, 2016).

[38] Between October, 2010 and January, 2011, each deposit of funds into Sapphire's bank account came from Lurie. Likewise, from February, 2011

Although Sapphire did not itself generate any income, Longman continued to use its assets and equity for his personal use. In 2006 and 2007, Longman and Gayla took itemized deductions on their joint federal tax returns for taxes and mortgage interest associated with the Ridgefield Property. Additionally, Sapphire's 2006 federal tax return indicated that Emerald, which held a 95 percent interest in Sapphire according to Sapphire's operating agreement, was allocated 5 percent of the profits and losses of Sapphire, and Longman, who held a 5 percent interest, was allocated a 95 percent share of Sapphire's profit and losses. At trial, Longman testified that this tax return was never amended.

During the relevant time period, Gayla owned a majority interest in Sapphire, but Longman made decisions on behalf of the company. Prior to 2008, Gayla held a majority interest in Sapphire through her majority interest in Emerald. In 2008, Longman assigned his 5 percent interest and Emerald's 95 percent interest in Sapphire to Gayla for no consideration. Longman remained Sapphire's operating manager throughout the relevant time period, and Sapphire's operating agreement required a supermajority vote to remove him. The record revealed that, during the time periods before and after the 2008 assignment that gave Gayla 100 percent ownership interest in Sapphire, Longman made decisions on behalf of the company in his capacity as Sapphire's operating manager.

The history of Lurie, another real estate development company controlled by Longman, reveals that Lurie was also used to hold Longman's property and provide funds to the Longman family. As we have explained, in 2010, Lurie held title to the Greenwich Property, purchased

through July, 2012, almost all of the funds deposited into Sapphire's bank account came from Lurie. Longman also testified that, "for the years 2009, 2010, [and] 2011 . . . Sapphire received many contributions from Lurie."

by Longman, for two months, until Lurie sold it to a bona fide purchaser and distributed most of the proceeds of that sale to the other corporate defendants three days later. Longman testified that he did not believe that Lurie had filed tax returns for the five years preceding Longman's 2011 deposition. Longman also admitted that, over a period of "five [or] six years," he would "regularly" allocate, from Lurie, $250 per week to the children "while they were in school" and $500 per week to Gayla.

Like Sapphire and Lurie, R.I.P.P. was owned by Gayla, and it distributed funds from its account to the Longman family members.[39] At trial, Longman testified that R.I.P.P., which was owned 100 percent by Gayla, with Longman and Gayla as its only directors, was "[o]riginally . . . conceived to be a family owned company that would handle investments on behalf of the family." Longman testified, however, that R.I.P.P. "never actually did much. It was superseded [by other companies] shortly after being formed . . . ." Longman testified at trial that, as was the case with Lurie, Gayla and their children were able "to write personal checks" from their individualized R.I.P.P. accounts, in order to extract allowances from the company.

The fourth entity pierced by the trial court, Great Pasture, held real property located at the address from which it received its name, after Sapphire transferred that property to it during Sapphire's 2006 reorganization. Lurie was the company's sole equity member after 2007, and Longman and his son, Matthew Longman, were the managers of Great Pasture. Longman was also the signatory on the account for the company. Lurie and Great Pasture provided income to each other inter-

[39] To the extent that Gayla held a majority share in any of these entities, the record revealed that she either gave Longman full "authority to make decisions as to all the identified entities" or ratified his conduct after the fact.

changeably. On the M&T loan application, Longman listed among Sapphire's assets the bank account for Great Pasture. After Longman's sale of the Greenwich Property, Lurie distributed $2000 to Great Pasture. Like Sapphire, Lurie, and R.I.P.P., the business address for Great Pasture was the address of the Ridgefield Property.

Unlike the former four entities, to which the trial court applied reverse veil piercing, Solaire Development, Solaire Management, and Solaire Funding were commercial businesses that provided services on an ongoing basis. They developed "commercial solar projects [such as] large [ground and rooftop] solar farms," which, at the time of their inception, "were the largest commercial solar installations in New England . . . ." As described by Longman, "Solaire Development owns the projects. Solaire Tenant leases the projects from Solaire Development as part of a sale of tax credits that funded the development of these projects. Solaire Management manages the sale of the electricity from those projects." Longman testified that this structure was organized to allow an investor, in this circumstance, Bank of America, "to obtain [a particular] tax benefit . . . and . . . [also] to effect the investment of the equity . . . required to build these projects." Specifically, Longman testified that "Solaire Tenant . . . [sold] the investment tax credit . . . to . . . Bank of America . . . through a broker called Cityscape Capital. . . . Cityscape Capital, as the managing broker of that transaction, actually owns 99 percent of Solaire Tenant and leases the arrays from Solaire Development. That structure allows for Bank of America, as the purchaser of the credits, to . . . receive the tax credit."

At the time of trial, the Solaire entities employed approximately ten people, who handled the field, regulatory, administrative, human resources, payroll, and

accounting tasks associated with these solar projects. The Solaire entities also employed an individual to maintain the corporate books "on a regular basis." The Solaire entities also had outside investors and creditors, including Bank of America, which, Longman testified, was "the ultimate purchaser and beneficiary of the [investment] tax credit and the depreciation [on these projects], which they [obtained] via the ownership structure that was set up among these entities." Solaire Funding, one of these entities, also received a treasury grant from the federal government in 2009.

The last of the corporate defendants, W.W. Land, "was formed to purchase, subdivide, and build out . . . a fifty unit . . . subdivision in Palatka, Florida . . . ." At the time of trial, W.W. Land was "still owning and dealing with the Florida subdivision that was built out in . . . 2006 [or 2007]." Following Longman's deposition in 2011, the plaintiff requested a temporary injunction, enjoining W.W. Land from "distributing, transferring or voluntarily encumbering the proceeds of . . . any sale of real property owned by [it]," and the trial court granted his request. At trial, Longman testified that, at that time, "the lots [were] fully done [and] [m]any of them [were] sold." Nevertheless, none of the lots on which the plaintiff had placed liens had been sold in the intervening period.

1

Reverse Veil Piecing as to Sapphire, Lurie, R.I.P.P., and Great Pasture

In light of this evidentiary record, we address the claim of Longman and the corporate defendants that the trial court improperly applied reverse piercing to Sapphire, Lurie, R.I.P.P., and Great Pasture. In his post-trial brief, the plaintiff claimed, inter alia, that the trial court should reverse pierce these four entities because Longman's control over them—evidenced by their own-

ership structure and the movement of funds between them—rendered them artifices. Longman and the corporate defendants responded that reverse piercing the corporate veil is not viable law in Connecticut and, in the alternative, it would be improper for the trial court to apply the doctrine to the present case because the evidence did not support that these entities were alter egos and the *State Five* considerations precluded relief.

The trial court first examined the facts presented under the instrumentality rule. The trial court found that " 'the element of domination and control' " was present. The trial court reasoned that "Sapphire's only asset of note was the Ridgefield Property, but its questionable ability to pay taxes was a measure of the uncertainty of [the] adequacy of its capitalization, and all of the subject entities that the court has included had no cognizable capital or sources of income other than the inter-entity transfers (or funds from such private sources as the Vanguard account). Factors three through ten all point in the direction of piercing—pervasive payment of personal expenses of Longman family members (and payments to family members); consistent ownership by Longman family members (chiefly Gayla—or a family trust) with Longman as the actual decision maker by title and function; the Ridgefield Property (home) as the business address for most entities; no indicia of independent business decisions/discretion; while there was evidence of a paper trail for inter-entity transactions, the transactions had no identified or identifiable business purpose, i.e., all [were] subject to the never explained and often unexplainable " 'discretion' " of [Longman]; the entities were not profit centers much less independent profit centers, as the principal transaction of Lurie was isolated and took place only after a consideration free transfer from brief ownership by [Longman], whereas the others had no identified material profit generation in any relevant time

period; Sapphire was essentially a guarantor of the personal debt of [Longman] via the Chase [Bank] mortgage, and there was, at best, ambiguity as to whether the taxes on the property were being paid by Longman as opposed to the nominal owner (when taxes were paid); and Longman was able to tap the equity of Sapphire, and draw down assets of other entities without regard to business (or any able to be articulated) purpose."

Our review of the trial court decision reveals that the court made all the requisite findings to establish instrumentality, fraud, and proximate cause.[40] Specifically, regarding whether Longman used his control and dominance to perpetrate a fraud or wrong, the trial court found that the evidence revealed that Longman fraudulently transferred the Ridgefield Property and the Greenwich Property to Sapphire and Lurie, respectively, "for purposes of avoiding creditors." But cf. *State Five*, supra, 304 Conn. 148 (reverse piercing was denied when plaintiff could not prove proximate cause because debtor's transfer of large parcel of real property to State Five occurred "more than five years prior to the 2001 judgment that imposed the fines at issue"). Additionally, the trial court found that the lack of any "semblance of a separate existence" of Great Pasture and the fact that R.I.P.P.'s "only identified source of funds in the relevant time frame [came] from Lurie, and Lurie already has been identified as not truly an independent entity," rendered these entities as additional "vehicles created for financial 'hide the pea' exercises . . . ." With respect to whether the wrong perpetrated proximately caused the plaintiff's loss, the trial court found that these transfers rendered the plaintiff unable to attach Longman's assets.

[40] We observe that the trial court made the requisite findings consistent to warrant reverse piercing under the test established herein.

After applying the instrumentality rule, the trial court considered whether innocent equity holders[41] or creditors would be prejudiced by the piercing and whether adequate remedies at law were available to the plaintiff. Regarding the question of whether innocent equity holders or creditors would be prejudiced by the piercing, the trial court found that "there [was] no basis for concern about other creditors . . . [as] there [has] been no evidence of possible other creditors of . . . entities . . . subject to this analysis," with the exception of "Sapphire, [whose] creditors all appear to be secured creditors . . . and, in any event . . . the reverse piercing is in the nature of a 'backup' to the fraudulent transfer claim . . . ." The court also considered the existence of nonculpable equity holders, principally Gayla, and noted that she received ownership of the entities for "no consideration," gave "Longman full and effectively sole authority to make decisions as to all identified entities . . . [and] more than acquiesced in the conduct of [Longman as] she expressed no direct interest . . . [and gave] affirmative authorization . . . ."[42]

The trial court next turned to the consideration of whether adequate remedies at law were available. The court found, with regard to the transfers of the Ridgefield Property, that, although it "already . . . applied a statutory and common-law framework for fraudulent transfers to the Ridgefield Property as nominally owned by Sapphire . . . the 'hook' in this case [was] the brief

[41] We observe that the majority in *State Five* used the term "shareholders," because the defendant entity in that case, State Five Industrial Park, Inc., was a corporation. Because all of the corporate defendants in this case, except for R.I.P.P., are limited liability companies, we use the term "equity holder."

[42] In a separate part of its decision, the trial court also "reject[ed] the notion that [Longman's son, Matthew] . . . identified as a 5 percent owner, without any apparent 'basis' in that investment," would be unfairly affected by the application of reverse piercing.

period of time that the property actually was owned by [Longman] within the relevant time frame." Likewise, with regard to the transfers of the Greenwich Property, that court found that "the multiplicity of entities, the constant movement of money between entities and to the family members, and the need for a painstaking analysis of actual bank records to track such movement of money, makes the tracing of specific sums of money difficult, if not impossible, absent a fraudulent transfer without liquidation."

After our review of the trial court's application of the facts with respect to Sapphire, Lurie, R.I.P.P., and Great Pasture under our three part test for reverse piercing, we conclude that the trial court's determination to apply the doctrine of reverse piercing as to those entities was not clearly erroneous. First, we agree with the trial court's analysis under the instrumentality rule. The trial court's conclusion that none "of the subject entities . . . included [by that court] had [any] cognizable capital or sources of income other than the inter-entity transfers"[43] or contributions from Longman's personal Vanguard account is supported by the record, which reveals the following. Sapphire was originally organized "to purchase and develop 2 Great Pasture Road in Danbury . . . [and] it transferred title to that property [in 2006] to . . . Great Pasture . . . ." After the transfer, Sapphire's only asset was the Ridgefield Property, and Longman testified that he did not know of any income Sapphire derived from that property since 2006, and that, by 2007, Sapphire engaged in no management activities because "the market was completely dead."[44]

[43] The trial court does note that, although Lurie did sell the Greenwich Property, "th[at] principal transaction . . . was isolated and took place only after a consideration free transfer from brief ownership by Longman, whereas the others had no identified material profit generation in any relevant time period . . . ."

[44] On the basis of the evidence presented at trial regarding tax returns filed with respect to the Ridgefield Property—such as Sapphire's 2007 tax return and the Longmans' joint tax returns for 2006 and 2007—we agree

Lurie's only asset was the Greenwich Property, which was transferred via a warranty deed to a bona fide purchaser in April, 2010. After the sale, "Lurie dispersed more than [one] half of the proceeds almost immediately [to the other entities] and there [was] no indication that Lurie retain[ed] any appreciable funds . . . ." The record also revealed that Sapphire and Lurie stopped filing tax returns around 2006. See *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 138 (reverse piercing applied where companies at issue failed to file tax returns during years preceding trial). Finally, it appears from the record that the only asset ever held by R.I.P.P. was the Ridgefield Property, of which it held only a portion and only from August, 1997 through August, 2001.[45]

Additionally, the trial court's findings that the "inter-entity transactions . . . had no identified or identifiable business purpose . . . [and were] subject to the never explained and often unexplainable 'discretion' of [Longman]," that "the entities were not profit centers much less independent profit centers," and that there existed "pervasive payment of personal expenses of Longman family members" are also supported by the record, which revealed through bank statements and monthly operating reports that, during various time periods, Lurie contributed most, if not all, of the income received by the other entities, especially Sapphire and R.I.P.P. Further evidencing these contributions, Sapphire's M&T mortgage application listed Lurie and Great

with the trial court that, "there was at best ambiguity as to whether the taxes on the property were paid by . . . the nominal owner (when . . . paid) . . . ."

[45] As we explained in part II of this opinion, in 2001, Thomas, the owner of the other portion of the Ridgefield Property and a friend of Longman, instituted a foreclosure action and assigned his interest in the R.I.P.P. mortgage to Highland Connecticut Investment, LLC, another Longman entity, of which Emerald, yet another Longman entity, owned 95 percent and of which Longman owned 5 percent.

Pasture under "bank accounts." In addition, Great Pasture and Lurie transferred funds to each other without any stated purpose. As to personal expenses, the plaintiff revealed, through his impeachment of Longman, that Longman would "regularly allocate" corporate funds from Lurie to Gayla and their children for spending money, and that the "family members had separate R.I.P.P. based accounts with the ability to write personal checks . . . ."

Further, the trial court's findings that there existed "consistent ownership by Longman family members . . . with Longman as the actual decision maker by title and function . . . [and] the Ridgefield Property (home) as the business address for most entities" are likewise supported by the evidence. The record reveals that most of the businesses used the address of the Ridgefield Property, the location of the Longman family's home, as their business addresses. Additionally, Sapphire managed the Ridgefield Property as its sole business but had no employees and did not receive any rental payments from the Longman family, who lived in the residence. See *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 137 (reverse piercing applied where companies were located at debtor's personal residence, had no employees, and did not pay rent). The record further revealed that, from the time that Sapphire merged with one of Longman's former limited liability companies, Highland Connecticut Investment, LLC, in 2007, ownership of Sapphire transferred between Longman, Gayla, and Emerald.[46] At the time of M&T Bank's loan to Sapphire in exchange for a mortgage of the Ridgefield Property, Longman had a

[46] Although Emerald was removed as a party due to bankruptcy proceedings, Emerald constituted another entity that received most of its income from Lurie. Monthly bank statements showing the Emerald account held with Bank of America were introduced at trial and revealed that, from February, 2011 through July, 2012, substantially all of the deposits into this account came through transfers from other entities, most from Lurie.

5 percent ownership interest in Sapphire and the other 95 percent was owned by Emerald, 95 percent of which, in turn, was owned by Gayla and 5 percent of which was owned by Longman. In 2008, Longman transferred 100 percent of the shares in Sapphire to Gayla for no consideration,[47] and, in 2010, Gayla transferred her interest to a family trust of which Longman was the trustee. Similarly, Longman and Gayla were the only directors of R.I.P.P., and Gayla was the sole shareholder. Gayla owned 100 percent of the membership interest in Lurie, until that interest was assigned to the Gayla Longman Family Irrevocable Trust, of which Longman was the trustee. Lurie, in turn, owned Great Pasture, and Longman, as trustee, and his son, Matthew, were the managers of it. Finally, on basis of the mortgages Longman obtained in the name of Sapphire and the "repeated extractions of equity from the property . . . seemingly going to [Longman] personally," we also agree with the trial court that, as to the ninth factor, "Longman was able to tap the equity of Sapphire and draw down assets of other entities without regard to business . . . purpose."[48]

[47] In fact, the trial court found that Gayla made no decisions regarding any of the entities. Moreover, based on the terms of Sapphire's operating agreement, as long as Longman held any interest in Sapphire, he could not be removed as the operating manager, therefore effectively securing his position as decision maker.

[48] The record reveals that each time Longman obtained a mortgage on the Ridgefield Property, the only asset held by Sapphire, Longman personally benefited, whereas it remains unclear from the record whether Sapphire received any benefit. For example, although the principal amount of the first Washington Mutual mortgage, given to Longman individually, was $1,920,000, the closing statement indicates that a check was issued to Longman in the amount of $449,005.15. The second Washington Mutual mortgage, given to Longman as trustee of the family's then defective trust, was used in part to pay off the first Washington Mutual mortgage made to Longman individually. Because the timing between the second Washington Mutual mortgage and the M&T mortgage were so close in time, the second Washington Mutual mortgage, although its proceeds were dispersed on September 14, 2007, was paid off only one month later, on October 31, 2007, with proceeds from the M&T mortgage that was executed on that day. There was a net balance of $199,921.55 from the proceeds of the M&T mortgage,

Having concluded that it was not clearly erroneous for the trial court to find that Longman exercised control and dominance over Sapphire, Lurie, R.I.P.P., and Great Pasture under the second and third prongs of the instrumentality rule, we further conclude that it was not clearly erroneous for the trial court to find that Longman used that control and dominance to perpetrate a fraud or wrong and that such wrong proximately caused the plaintiff's loss. Cf. *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, supra, 187 Conn. 558. The trial court found that the evidence revealed that Longman fraudulently transferred the Ridgefield Property and the Greenwich Property to Sapphire and Lurie, respectively, "for the purposes of avoiding creditors . . . ." Additionally, it was not clearly erroneous for the trial court to determine that Longman's transfers of property between his various entities made it nearly impossible for the plaintiff to attach Longman's assets in order to satisfy the debt owed to him.

Moving to the remaining two parts of the test, which address the three concerns of *State Five*, we conclude that the trial court's findings that there was no impact to either innocent investors or creditors and no adequate remedies at law were not clearly erroneous. The trial court considered the existence of nonculpable creditors and equity holders, including mortgagees of the Ridgefield Property, Gayla, and Matthew Longman, and found that none would be prejudiced by its application of reverse piercing as to the four entities. The record revealed that, after 2006, Matthew Longman had no membership interest in Great Pasture, and Gayla authorized or ratified the decisions made by Longman with respect to those entities, in which she held a major-

and Longman testified that he does not know where that money went or how he spent it. Finally, one month after the M&T mortgage was executed, Longman—through Sapphire—received financing from Chase Bank for a second mortgage loan in the amount of $500,000.

ity of the membership interests. See *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 137 (reverse piercing applied where no family members, other than debtor, participated in companies in any way, but received free loans and gifts from them). But see *State Five*, supra, 304 Conn. 142–43 (reverse piercing rejected where trial court *failed to analyze* whether debtor's sons, who had an interest in State Five, would be negatively affected if court applied reverse piercing as to that company). These findings are strengthened by the fact that the trial court declined to reverse pierce the Solaire entities—although it noted that "[t]he plaintiff . . . marshaled the evidence in favor of their treatment as additional sham entities"—as it determined that reverse piercing of those entities would have harmed "innocent and unrelated parties," because those entities were "actually . . . engaged in ongoing business activities . . . [regarding] solar power installations."

As to whether adequate remedies at law were available, it was not clearly erroneous for the trial court to conclude, under the facts of this case, that there was no adequate remedy. The trial court specifically found that "the brief period of time that the [Ridgefield] Property actually was owned by [Longman] within the relevant time frame" allowed for the reverse piercing of the corporate veil and holding the assets of Sapphire available for the debt of Longman. Further, it was not clearly erroneous for the trial court to find that, with regard to the Greenwich Property, "the multiplicity of entities [and] constant movement of money" made it nearly impossible to calculate a monetary damages award under a fraudulent conveyance claim, which "generally is appropriate only where the transferee subsequently disposes of the transferred property and retains the proceeds of that disposition." *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 145.

2

Reverse Veil Piecing as to the Solaire Entities and W.W. Land

We next turn to the plaintiff's claim that the trial court improperly declined to apply reverse piercing to the Solaire entities.[49] The plaintiff claims that the Solaire entities are alter egos through Longman's ownership and management of them, that no nonculpable shareholders or creditors exist, and that no adequate remedies at law are available to provide the plaintiff with relief. Longman and the corporate defendants first respond that the plaintiff failed to introduce evidence to support his assertion that the Solaire entities are alter egos of Longman, as those entities "are engaged in legitimate [solar power] business . . . ." We con-

[49] With respect to W.W. Land, the plaintiff claims that the trial court "apparently intended to [render] judgment" in his favor with respect to his reverse piercing claims "against W.W. Land," because that court stated that, "[t]o the extent that [Sapphire, R.I.P.P. and W.W. Land] have any assets, a constructive trust is an appropriate vehicle for attempting to recover part or all of their share of the proceeds of [the] sale [of the Greenwich Property]." Longman and the corporate defendants respond that the trial court correctly determined that the plaintiff abandoned this claim in his posttrial brief. The trial court noted that, in the discussion of W.W. Land in the plaintiff's posttrial brief, the plaintiff "essentially abandon[ed] the claim of reverse piercing as to [it] due to considerations such as . . . a likely futile stipulated prejudgment remedy in place . . . ." We conclude that the court's determination was not clearly erroneous. The record revealed that, in the subdivision owned by W.W. Land, all of the lots had been developed, and many of them were sold. Longman testified at trial that, because the Florida real estate market had slowed, however, none of the lots had been sold since 2011. Additionally, in his posttrial brief, after discussing the other entities that he explicitly urged the trial court to reverse pierce, the plaintiff requested a withdrawal of the reverse piercing claims as to a number of entities. Within this section of his brief, as noted by the trial court, the plaintiff stated that, "[a]ccording to Longman's testimony, none of the lots of vacant land in Florida held in his name, as described in the [s]tipulation, [has] been sold . . . . For these reasons W.W. Land remains liable to [the plaintiff], even though, as a practical matter, it is probably judgment proof as the Florida property appears to be unmarketable . . . ."

clude that the trial court's decision with respect to the Solaire entities was not clearly erroneous.

The principal reason that the trial court refused to reverse pierce the Solaire entities is that granting such relief would affect nonculpable investors, such as Cityscape Capital and Bank of America, which would be prejudiced by allowing the plaintiff " 'to attach assets in which they have an interest.' "[50] *State Five*, supra, 304 Conn. 141. The trial court did note that "[t]he Solaire entities present the most difficult situation," as "[t]he plaintiff . . . marshaled the evidence in favor of their treatment as additional sham entities." That court also noted, however, that it "heard testimony . . . that [those entities] are engaged in a legitimate business . . . and [t]he concern about impact on innocent parties and the collateral damage to an ongoing business, militate[s] against applying the doctrine to [them]." We conclude that the trial court did not clearly err, as we observe that, although the record revealed that the Solaire entities received transfers from Lurie containing proceeds of the sale of the Greenwich Property, applying reverse piercing to these entities would implicate the concerns raised in *State Five*.

For the reasons set forth in this opinion, we conclude that the plaintiff, a stranger to the M&T mortgage, lacked standing to challenge the enforceability of that mortgage under § 34-130, the trial court properly held that Longman's transfers of the Ridgefield and Greenwich Properties in December, 2007, and February, 2010, respectively, constituted fraudulent transfers under

[50] Consequently, we reject the plaintiff's argument that the trial court misapplied the factors of Solaire Tenant to the Solaire entities. The record reveals that the structure of these entities is intertwined. For example, the record indicated that Solaire Tenant, which is owned by Cityscape Capital, leases the arrays from Solaire Development. Further, the plaintiff failed to provide evidence that the trial court's conclusion that the innocent investors would be affected was clearly erroneous.

CUFTA, the doctrine of outsider reverse piercing of the corporate veil is a viable remedy in Connecticut, and the trial court properly applied it to the facts of this case.

The judgment is affirmed.

In this opinion the other justices concurred.

ROBINSON, C. J., concurring. I write separately to highlight my understanding of part III A of the majority's comprehensive and well reasoned opinion, which I understand to adopt, in a very limited manner, the doctrine of outside reverse piercing of the corporate veil as a matter of Connecticut law for cases filed before July 9, 2019. See footnote 5 of this concurring opinion. The concerns about reverse piercing stated in Justice Zarella's concurring opinion in *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, 304 Conn. 128, 151, 37 A.3d 724 (2012), originally left me reluctant to join the majority's decision. The majority's narrow approach to reverse piercing, as shown by the distinctions drawn in part III B of its opinion, is, however, responsive to those concerns while preserving that doctrine as an equitable remedy when an individual abuses the "legal fiction" of the corporate form as a "sham or device to accomplish some ulterior purposes"; *Hoffman Wall Paper Co.* v. *Hartford*, 114 Conn. 531, 534–35, 159 A. 346 (1932); such as when a corporate entity does not serve "a legitimate business purpose," and is only "a mere shell . . . used primarily as an intermediary to perpetrate fraud or promote injustice." (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 236, 990 A.2d 326 (2010). Accordingly, I join the majority opinion in its entirety.

By way of background, I observe that, in "traditional veil piercing, the veil shields a shareholder who is abusing the corporate fiction to perpetuate a wrong. In out-

side reverse piercing, however, the corporate form protects the corporation which, through the acts of a dominant shareholder or other corporate insider, uses the legal fiction to perpetuate a fraud or defeat a rightful claim of an outsider. While traditional [piercing] and outside reverse piercing affect diverse corporate interests, the purposes sought to be achieved are similar.

"Both types of piercing strive to achieve an equitable result. . . . In traditional piercing, equity requires [that] the veil be pierced to impose liability on a shareholder who has abused the corporate form for his or her own advantage. . . . Similarly, in outside reverse piercing, an equitable result is achieved by ignoring the corporate fiction to attach liability to the corporation." (Citations omitted.) *In re Phillips*, 139 P.3d 639, 645 (Colo. 2006); see also, e.g., *Naples* v. *Keystone Building & Development Corp.*, supra, 295 Conn. 231–33 (describing purpose of piercing corporate veil under Connecticut law).

As Justice Zarella's concurring opinion explained, the fundamental difference between the two doctrines goes beyond "whether an individual has abused the corporate form" because "[u]nder traditional veil piercing, when an individual is held liable for the actions of the corporation, the corporation itself is not affected by the piercing. In the case of reverse veil piercing, however, the opposite is true. The corporation itself is liable—and thus corporate assets are vulnerable—for the wrongdoing of an individual. In more concrete terms, reverse veil piercing allows courts to alter the legislatively created corporate form by allowing a creditor to reach otherwise protected corporate assets." *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, supra, 304 Conn. 155–56.

In expressing his view that the doctrine of outside reverse piercing "should be disavowed" as a matter of

Connecticut law, which would require us to overrule the Appellate Court's decision in *Litchfield Asset Management Corp.* v. *Howell*, 70 Conn. App. 133, 799 A.2d 298, cert. denied, 261 Conn. 911, 806 A.2d 49 (2002),[1] Justice Zarella's concurrence identified three major "compelling considerations" that he believed to "militate against allowing reverse veil piercing . . . ." *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, supra, 304 Conn. 153. Specifically, Justice Zarella rejected reverse veil piercing on the grounds that it (1) "bypasses normal judgment-collection procedures, whereby judgment creditors attach the judgment debtor's shares in the corporation and not the corporation's assets," (2) "allows a judgment creditor to reach the assets of a corporation to the detriment of other shareholders and existing creditors," and (3) "injects uncertainty into the corporate structure in a way that could systemically alter the ability of corporations to obtain loans and investment capital." (Internal quotation marks omitted.) Id., 155–60. Given these concerns, Justice Zarella would "reject the doctrine of reverse veil piercing until the legislature signals otherwise." Id., 160. I join the majority in the present case because I believe these concerns have been both undermined by subsequent developments in the law, or mitigated by what I understand to be the narrow approach taken in the majority opinion.

Justice Zarella's first concern about reverse veil piercing, which was founded on the decision of the United States Court of Appeals for the Tenth Circuit in *Cascade Energy & Metals Corp.* v. *Banks*, 896 F.2d 1557, 1577 (10th Cir.), cert. denied sub nom. *Weston* v. *Banks*, 498 U.S. 849, 111 S. Ct. 138, 112 L. Ed. 2d 105 (1990), is that the doctrine "bypasses normal judgment-collection procedures, whereby judgment creditors attach the

[1] The majority comprehensively discusses *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 133, in footnote 28 of its opinion.

judgment debtor's shares in the corporation and not the corporation's assets." (Internal quotation marks omitted.) *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, supra, 304 Conn. 156. In *Cascade Energy & Metals Corp.*, the Tenth Circuit declined to apply reverse veil piercing as a matter of Utah law, stating that "traditional theories of conversion, fraudulent conveyance of assets, respondeat superior and agency law are adequate to deal with situations [in which] one seeks to recover from a corporation for the wrongful conduct committed by a controlling stockholder without the [need] to invent a new theory of liability." *Cascade Energy & Metals Corp.* v. *Banks*, supra, 1577; see also *Floyd* v. *Internal Revenue Service*, 151 F.3d 1295, 1299 (10th Cir. 1998) (following *Cascade Energy & Metals Corp.* and declining to apply reverse piercing as matter of Kansas law, given availability of constructive dividend theory to render benefit to shareholder reachable for tax purposes). As the majority points out, this premise of *Cascade Energy & Metals Corp.* simply is not present in this case, because the sheer number of transactions involved and the movement of money between the multiple corporate entities made it "nearly impossible" as a factual matter to calculate a damages award under a fraudulent conveyance theory, rendering reverse piercing appropriate, and other theories inadequate, in the case at hand.

Moreover, the Tenth Circuit's decision in *Cascade Energy & Metals Corp.* has been substantially undercut by that court's much more recent decision in *United States* v. *Badger*, 818 F.3d 563 (10th Cir. 2016), which also considers reverse piercing under Utah law and is closer to the facts of the present case. In *Badger*, an individual who had agreed to a consent judgment on securities fraud claims used various corporate entities, including a trust and a limited liability company, to hide his assets and avoid collection, and the Securities and

Exchange Commission sought to reverse pierce the corporate veil of those entities to hold them liable for the disgorgement portion of the judgment. Id., 565. In agreeing with the commission's arguments, the Tenth Circuit panel deemed itself not bound by the court's previous interpretation of Utah law in *Cascade Energy & Metals Corp.* because *Badger* was distinct both factually and legally. Id., 570–71. With respect to state law, the court first determined that subsequent Utah Supreme Court and intermediate appellate court decisions had "expressed sympathy for reverse piercing, saying that it 'follows logically from the basic premise of the alter ego rule and appears consistent with our case law,' " despite deeming the doctrine inapplicable on the facts of the state court case. Id., 570, quoting *Transamerica Cash Reserve, Inc.* v. *Dixie Power & Water, Inc.*, 789 P.2d 24, 26 (Utah 1990). The court also observed that *Cascade Energy & Metals Corp.* had noted "three features of the case before it that argued against reverse piercing, and these features do not appear to be significantly present" in *Badger*, including (1) "[t]he corporations sought to be held liable had innocent shareholders," (2) the "liability arose out of a voluntary and contractual relationship, which enabled the victims to protect themselves from loss through guarantees or security agreements," and (3) "an essential feature of all [veil piercing] was absent [as] the plaintiffs had not shown that recognition of the corporate form would sanction a fraud, promote injustice, or produce an inequitable result," stating that "the mere existence of [a corporation's] limited liability would not suffice." (Citations omitted; internal quotation marks omitted.) *United States* v. *Badger*, supra, 569. Accordingly, the Tenth Circuit remanded the case to the district court for further factual development, including consideration of whether "reverse piercing would be inappropriate on the facts of this case," insofar as whether

"corporate formalities were observed, that the third-party entities played no part in Badger's wrongdoing, and [whether] innocent shareholders would be impacted if the district court were to apply reverse piercing."[2] Id., 572.

[2] Subsequent developments have likewise undercut the decision of the California Court of Appeals in *Postal Instant Press, Inc.* v. *Kaswa Corp.*, 162 Cal. App. 4th 1510, 1513, 77 Cal. Rptr. 3d 96 (2008), review denied, California Supreme Court, Docket No. S164823 (August 27, 2008), which has been relied upon for the proposition that California rejects the doctrine of reverse veil piercing. See, e.g., 1 J. Cox & T. Hazen, The Law of Corporations (3d Ed. 2010) § 7:18, p. 443 n.20; N. Allen, "Reverse Piercing of the Corporate Veil: A Straightforward Path to Justice," 85 St. John's L. Rev. 1147, 1148 n.12 (2011). In *Postal Instant Press, Inc.*, the California Court of Appeals heavily relied upon the Tenth Circuit's analysis in *Cascade Energy & Metals Corp.* v. *Banks*, supra, 896 F.2d 1576–77, and observed the following: "Outside reverse piercing can harm innocent shareholders and corporate creditors, and allow judgment creditors to bypass normal judgment collection procedures. Legal theories (such as agency or respondeat superior) and legal remedies (such as claims for conversion or fraudulent conveyance) adequately protect judgment creditors without the need to distort theories of corporate liability." *Postal Instant Press, Inc.* v. *Kaswa Corp.*, supra, 1513.

California courts have since revisited the reverse piercing issue, at least in part, in a more recent decision, *Curci Investments, LLC* v. *Baldwin*, 14 Cal. App. 5th 214, 221 Cal. Rptr. 3d 847 (2017), which suggests that the doctrine is appropriate under the limited circumstances embraced by the majority in the present case. In that case, the court distinguished *Postal Instant Press, Inc.*, describing it as "expressly limited" to corporations, rather than limited liability companies, and also distinguishable because the judgment debtor in the case before it held "a 99 percent interest in [the limited liability company]. His wife holds the remaining 1 percent interest, but she is also liable for the debt owed . . . . There simply is no 'innocent' member of [the limited liability company] that could be affected by reverse piercing here." Id., 222. The court also emphasized the relative lack of judgment collection options available in the context of a limited liability company, because "a creditor does not have the same options against a member of [a limited liability company] as it has against a shareholder of a corporation," given the need to obtain a charging order against distributions to the member—who remains in control of the entity—rather than "step straight into the shoes of the debtor." Id., 223. The court emphasized that it was "unconcerned about reverse veil piercing being used when legal remedies are available. Although legal remedies—e.g., conversion, fraudulent transfer—may be available in many cases, thereby precluding reverse veil piercing, it is precisely the rare situations in which they are not that reverse piercing should deliver justice. Plus, requiring a creditor wishing to

Justice Zarella's concurrence also expressed his concern that "reverse piercing injects uncertainty into the corporate structure in a way that could systemically alter the ability of corporations to obtain loans and investment capital" because the "prospect of losing out to an individual shareholder's creditors will unsettle the expectations of corporate creditors who understand their loans to be secured—expressly or otherwise—by corporate assets. Corporate creditors are likely to insist

invoke the doctrine to demonstrate the absence of a plain, speedy, and adequate remedy at law would protect against reverse piercing being used to bypass legal remedies." Id. In remanding the case for further factual findings, the court emphasized that the "case before us presents a situation where reverse veil piercing might well be appropriate. [The judgment creditor] has been attempting to collect on a judgment for nearly half a decade, frustrated by [the judgment debtor] nonresponsiveness and claimed lack of knowledge concerning his own personal assets and the web of business entities in which he has an interest. Although the formation of [the limited liability company] predates the underlying judgment, its purpose has always remained the same—to serve as a vehicle for holding and investing [the judgment debtor's] money." Id., 224. The court further noted the judgment debtor's "possession of near complete interest in [the limited liability company], and his roles as [chief executive officer] and managing member, [the judgment debtor] effectively has complete control over what [the limited liability company] does and does not do, including whether it makes any disbursements to its members . . . . Since the time judgment was entered in [the judgment creditor's] favor, [the judgment debtor] has used that power to extend the payback date on loans made to ultimately benefit his grandchildren (loans on which not a single cent has been repaid), and to cease making distributions to . . . himself and his wife, despite having made $178 million in such distributions in the six years leading up to the judgment." Id.

I find similarly unpersuasive the Georgia Supreme Court's decision in *Acree* v. *McMahan*, 276 Ga. 880, 882–83, 585 S.E.2d 873 (2003), upon which Justice Zarella also relied in his concurring opinion in *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, supra, 304 Conn. 160–61. Like *Postal Instant Press, Inc.*, the decision in *Acree* relied heavily on the Tenth Circuit's decision in *Cascade Energy & Metals Corp.*, which I believe has been undercut by the subsequent decision in *United States* v. *Badger*, supra, 818 F.3d 563, at least with respect to the narrow application employed by the majority in the present case. See also *Mathias* v. *Rosser*, Ohio Court of Appeals, Docket No. 01AP-768 (CRP), 2002 WL 1066937, *6 (May 30, 2002) (relying on *Cascade Energy & Metals Corp.* and summarily rejecting reverse piercing doctrine under Ohio law).

on being compensated for the increased risk of default posed by outside reverse-piercing claims, which will reduce the effectiveness of the corporate form as a means of raising credit." (Internal quotation marks omitted.) *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, supra, 304 Conn. 160, citing *Floyd* v. *Internal Revenue Service*, supra, 151 F.3d 1299. I believe that this concern is overstated, particularly given the narrow version of the doctrine that I understand the majority to adopt, which, consistent with the decisions of the Colorado Supreme Court in *In re Phillips*, supra, 139 P.3d 647, and the Virginia Supreme Court in *C.F. Trust, Inc.* v. *First Flight, L.P.*, 266 Va. 3, 12–13, 580 S.E.2d 806 (2003), requires consideration of the impact of reverse piercing on innocent shareholders, investors, and creditors.[3] With recognition of outside reverse piercing representing the distinct majority view; see, e.g., 1 C. Jones, Fletcher Cyclopedia of the Law of Corporations (2018–2019 Cum. Supp.) § 41.70, pp. 32–34 and n.2; there has been no "exodus of willing lenders" to closely held corporations,[4] despite the wide-ranging risk of reverse piercing faced by unsecured creditors in tax cases given the embrace of that doctrine by the Internal Revenue Service, as well as bankruptcy cases. A. Lvov, "Preserving Limited Liability: Mitigating the Inequities of Reverse Veil Piercing with a Comprehensive Framework," 18 U.C. Davis Bus. L.J. 161, 192 (2017–2018); see also N. Allen, "Reverse Piercing of the Corporate Veil: A Straightforward Path to Justice," 85 St. John's L. Rev. 1147, 1185–86 (2011).

[3] I note that Virginia also requires "a litigant who seeks reverse veil piercing [to] prove the necessary standards by clear and convincing evidence." *C.F. Trust, Inc.* v. *First Flight L.P.*, supra, 266 Va. 13. Because this issue has not been raised by the parties, I need not consider further whether Connecticut law imposes a higher standard of proof in veil piercing cases.

[4] As the Colorado Supreme Court has noted, these equitable limitations, including those embraced by the majority in this case, render outsider reverse veil piercing "unlikely to impact many business entities other than a limited number of closely held corporations with few shareholders or only a single shareholder." *In re Phillips*, supra, 139 P.3d 647.

Finally, to the extent that that some authorities have suggested that we should wait for the legislature to create a reverse piercing remedy because corporate entities are creatures of statute; see *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, supra, 304 Conn. 160–61 (*Zarella, J.*, concurring); see also *Acree* v. *McMahan*, 276 Ga. 880, 883, 585 S.E.2d 873 (2003); I observe that this court has, for more than a century, recognized that "the general rule, which recognizes the individuality of corporate entities and the independent character of each in respect to their corporate transactions and the obligations incurred by each in the course of such transactions will be disregarded, where, as here, the interests of justice and righteous dealing so demand." *Connecticut Co.* v. *New York, N. H. & H. R. Co.*, 94 Conn. 13, 26–27, 107 A. 646 (1919). The equitable doctrine of piercing the corporate veil has evolved from this general principle, as it is well established that "[c]ourts will . . . disregard the fiction of a separate legal entity to pierce the shield of immunity afforded by the corporate structure in a situation in which the corporate entity has been so controlled and dominated that justice requires liability to be imposed on the real actor," in the "exceptional circumstances, for example, where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice." (Internal quotation marks omitted.) *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, supra, 139; see, e.g., *Naples* v. *Keystone Building & Development Corp.*, supra, 295 Conn. 236; *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, 187 Conn. 544, 555–57, 447 A.2d 406 (1982); *Zaist* v. *Olson*, 154 Conn. 563, 573–74, 227 A.2d 552 (1967); *Hoffman Wall Paper Co.* v. *Hartford*, supra, 114 Conn. 535. That the legislature has, to this point, taken no action applicable to this case in response to this deeply established body of case law,

which exists in concert with our various business entity statutes, suggests to me that we do not overstep our institutional bounds by incrementally extending the doctrine, in its "reverse" form, only to those corporate entities that amount to mere shells in abuse of the privileges extended by our business entity statutes.[5] See *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 327 Conn. 540, 574, 175 A.3d 1 (2018) (*Robinson, J.*, concurring) (recognizing common-law cause of action for breach of patient confidentiality because it complemented federal and state confidentiality statutes); see also *Sky Cable, LLC* v. *DIRECTV, Inc.*, 886 F.3d 375, 389 (4th Cir. 2018) (concluding that Delaware law would recognize outside reverse piercing of corporate veil with respect to limited liability company that is "sham entity" as "alter ego of its sole member" given "Delaware courts' traditional power . . . to look through these legal fictions" and because not recognizing doctrine "would limit Delaware's ability to [prevent] the entities that it charters from being used as vehicles

[5] As the majority recognizes in footnote 27 of its opinion, on June 25, 2019, while this appeal was pending after oral argument, the legislature passed No. 19-181 of the 2019 Public Acts (P.A. 19-181), which codifies the instrumentality test for veil piercing and expressly prohibits the use of the reverse veil piercing doctrine or remedy. That legislation was later signed by the governor on July 9, 2019. I agree with the majority's conclusion that P.A. 19-181 does not affect this appeal, given that the legislature has plainly and unambiguously provided that P.A. 19-181, § 3, is "effective from passage and applicable to any civil action filed *on or after the effective date of this section*." (Emphasis added.) See *Spector Motor Service, Inc.* v. *Walsh*, 135 Conn. 37, 43, 61 A.2d 89 (1948) (effective upon passage means date of governor's signature); *Old Saybrook* v. *Public Utilities Commission*, 100 Conn. 322, 325, 124 A. 33 (1924) (same). Given this plain and unambiguous language with respect to the effect on pending litigation, I conclude that the legislature did not "clearly and unequivocally" express the intent necessary for us to retroactively apply P.A. 19-181 in light of the presumption of prospective application under General Statutes § 55-3, because this change to the remedial scheme would effectively "[bring] about changes to the substantive rights" of the plaintiff. (Internal quotation marks omitted.) *In re Daniel H.*, 237 Conn. 364, 372–73, 678 A.2d 462 (1996); see also, e.g., *D'Eramo* v. *Smith*, 273 Conn. 610, 620, 872 A.2d 408 (2005); *Oxford Tire Supply, Inc.* v. *Commissioner of Revenue Services*, 253 Conn. 683, 693–94, 755 A.2d 850 (2000).

for fraud, and would allow solvent debtors to engage in fraud by using [limited liability companies] solely to avoid liability for their debts" [internal quotation marks omitted]).

In adopting the doctrine of reverse veil piercing as a matter of Connecticut law, the majority utilizes a "three part process" to govern the inquiry, under which the outsider must first prove that, "under the instrumentality and/or identity rules, as set forth in traditional veil piercing cases, the corporate entity has been so controlled and dominated that justice requires liability to be imposed . . . ." (Internal quotation marks omitted.) See also, e.g., *Naples* v. *Keystone Building & Development Corp.*, supra, 295 Conn. 232–33 (identifying factors to consider under instrumentality and identity rules). If the outsider prevails on the first part of the inquiry, the trial court must also consider "the impact of reverse piercing on innocent shareholders and creditors" and "whether adequate remedies at law are available" in deciding whether to reverse pierce the corporate veil. In part III B of its opinion, the majority upholds the trial court's application of the reverse piercing doctrine to those entities only when it did not harm innocent parties, such as nonculpable employees and investors, and the movement of assets between entities made it nearly impossible for the plaintiff, Robert J. McKay, to attach those assets in satisfaction of the debts owed.[6] I emphasize that my agreement with part III of the majority opinion is dependent on that distinction, and I would not permit the doctrine to be employed absent extreme abuse of the corporate form, or in cases where its application would injure a corporation's inno-

[6] Specifically, in part III B 1 of its opinion, the majority concludes that the trial court properly reverse pierced the corporate veil of several corporate defendants, namely, Sapphire Development, LLC, Lurie Investments, LLC, R.I.P.P. Corp., and 2 Great Pasture Road Associates, LLC, while part III B 2 of the majority's opinion affirms the judgment of the trial court declining to disturb the corporate veil of defendants Solaire Development, LLC, Solaire Management, LLC, Solaire Funding, Inc., and W.W. Land Company, LLC.

cent shareholders or employees.[7] I accept that these equitable limitations render outside reverse veil piercing "unlikely to impact many business entities other than a limited number of closely held corporations with few shareholders or only a single shareholder." *In re Phillips*, supra, 139 P.3d 647. Nevertheless, the reverse piercing doctrine retains value as a matter of law in circumstances such as the present case, where traditional collection procedures have been frustrated by corporate forms that are nothing more than shells utilized to perpetrate injustice by hiding assets in evasion of the New York judgment.

Accordingly, I join the majority opinion, insofar as I read part III of that opinion to adopt a very limited approach to the doctrine of reverse piercing of the corporate veil for cases filed before July 9, 2019.

STATE OF CONNECTICUT *v.* DIVENSON PETION (SC 19938)

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

Syllabus

Pursuant to statute (§ 53a-59 [a] [1]), a person is guilty of assault in the first degree when, with intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument.

Pursuant further to statute (§ 53a-3 [4]), "serious physical injury" means physical injury that, inter alia, causes serious disfigurement.

[7] Accordingly, I would overrule the Appellate Court's decision in *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 133, to the extent that it adopted a version of outside reverse veil piercing that mirrors traditional veil piercing, and does not incorporate the additional two factors identified by the majority. See id., 151 ("[w]e . . . recognize that under the appropriate circumstances, i.e., when the elements of the identity or instrumentality rule have been established, a reverse pierce is a viable remedy that a court may employ when necessary to achieve an equitable result and when unfair prejudice will not result"); but see id., 151 n.14 (noting criticisms of doctrine, namely bypass of normal judgment collection procedures and unfair prejudice to innocent shareholders, but stating that they were "not implicated" by facts of case).

Convicted of two counts of the crime of assault in the first degree in connection with a knife attack on two victims, B and R, the defendant appealed to the Appellate Court, claiming, inter alia, that there was insufficient evidence to support a conviction of first degree assault as to B because the state failed to demonstrate that she suffered a serious physical injury in the form of serious disfigurement. The defendant had attacked R during a dispute, and B, in an attempt to stop the defendant from injuring R, inserted herself between the two men. In the process, the defendant cut B's arm. At trial, the state introduced testimony from B's treating physician and two sets of photographs, one set taken shortly after medical treatment had been rendered and one set taken thirty months later, at the time of trial. Each set included one photograph magnifying B's injuries at close range and one photograph in which B displayed the injured area of her arm from a sufficient distance to capture the area from her torso to her head. The evidence established that B had a 1.38 inch abrasion and a 0.30 inch laceration just above her left elbow, and a 1.57 inch laceration just below her left elbow on her forearm. The smaller laceration was closed with a single suture, whereas the larger laceration required ten sutures. At the time of trial, the larger laceration had left a scar approximately the same length as that laceration and was a slightly lighter tone than the surrounding skin. No other injury was apparent, and B's treating physician testified that the scar would remain in its present condition. The Appellate Court affirmed the judgment of conviction, and the defendant, on the granting of certification, appealed to this court. *Held*:

1. The state failed to prove beyond a reasonable doubt that the defendant had committed assault in the first degree by inflicting serious physical injury on B with a dangerous instrument, the evidence having failed to establish that B suffered serious disfigurement as a result of the defendant's assault, and, accordingly, the Appellate Court's judgment was reversed insofar as that court upheld the defendant's conviction of assault in the first degree as to B, and the case was remanded with direction to vacate the defendant's sentence and for resentencing on the remaining count: although the defendant's claim ordinarily is a factual question for the jury, this court determined that there was a legal distinction between physical injury and serious physical injury that was not a purely subjective matter, and, having determined that there was no definition in the Penal Code of the foundational term, disfigurement, this court looked to extratextual sources, including dictionary definitions, Connecticut's workers' compensation scheme, and to definitions and factors identified by other jurisdictions, to conclude that serious disfigurement is an impairment of or injury to the beauty, symmetry or appearance of a person of a magnitude that substantially detracts from the person's appearance from the perspective of an objective observer; moreover, the determination of whether a physical injury caused serious disfigurement shall include consideration of such factors as the duration

of the disfigurement, its location, its size, and its overall appearance, as well as the fact that serious disfigurement need not be permanent or in a location of the body that is readily visible to others; applying that definition and the relevant factors to B's injuries, this court concluded that the evidence established that, although B sustained a disfigurement, in the form of a permanent scar, that disfigurement was not of a magnitude that objectively could be found to substantially detract from B's appearance, as B's scar was not in a prominent location, and was relatively small in size, uniform in shape and otherwise unremarkable in its appearance.

2. The state could not prevail on its claim that, in light of this court's determination that the evidence was insufficient to sustain the defendant's conviction of first degree assault as to B, it should not direct a judgment of acquittal on that charge but, instead, should direct that the judgment be modified to reflect the defendant's conviction of the lesser included offense of assault in the second degree, the highest lesser included offense that requires proof of physical injury rather than serious physical injury: the state conceded that, in accordance with recent precedent, *State* v. *LaFleur* (307 Conn. 115), this court must direct a judgment of acquittal on the defendant's conviction of first degree assault as to B, when the evidence is insufficient to sustain that conviction and the jury was not instructed on a lesser included offense, and the state failed to provide sufficient justification for overruling *LaFleur* in favor of a rule pursuant to which a conviction suffering from evidentiary insufficiency would be modified to the highest lesser included offense supported by the evidence, unless the defendant can prove that the absence of a jury instruction on the lesser included offense was prejudicial; moreover, there was no indication that the rule in *LaFleur* is unworkable, as the state always can request an instruction on a lesser included offense that is supported by the evidence, and, as both parties were aware at trial that *LaFleur* was the controlling law, it would be unfair to the defendant to change the law on appeal because, had the defendant known that the judgment would be modified if he succeeded in challenging his conviction on the ground of evidentiary insufficiency, he might have sought an instruction not only on assault in the second degree but also on other lesser offenses supported by the evidence.

(*One justice concurring separately; three justices dissenting in one opinion*)

Argued November 13, 2018—officially released July 23, 2019

Procedural History

Substitute information charging the defendant with two counts of the crime of assault in the first degree, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the jury before *White*, *J.*; verdict and judgment of guilty, from which the defen-

dant appealed to the Appellate Court, *DiPentima, C. J., and Prescott and Beach, Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Reversed in part; judgment directed in part; further proceedings.*

Jennifer B. Smith, assigned counsel, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom were *Richard J. Colangelo, Jr.*, state's attorney, and *Maureen Ornousky*, senior assistant state's attorney, for the appellee (state).

Opinion

McDONALD, J. Whether an assault results in physical injury or *serious* physical injury can have profound ramifications for the victim. Consequently, substantially greater punishment may be imposed for the latter injury than the former.[1] Although this court has acknowledged "the difficulty of drawing a precise line as to where physical injury leaves off and serious physical injury begins" (internal quotation marks omitted); *State* v. *Ovechka*, 292 Conn. 533, 546–47, 975 A.2d 1 (2009); see also *State* v. *Almeda*, 211 Conn. 441, 451, 560 A.2d 389 (1989); the present case provides an opportunity to illuminate that distinction. In particular, we use this occasion to examine the parameters that should be used by the trier of fact to assess whether a defendant has inflicted serious physical injury in the form of serious disfigurement. See General Statutes § 53a-3 (4).

The defendant, Divenson Petion, appeals from the Appellate Court's judgment affirming his conviction of two counts of assault in the first degree in violation of

[1] An exception, not relevant to the present case, arises when a defendant inflicts physical injury by means of the discharge of a firearm. See footnote 2 of this opinion.

General Statutes § 53a-59 (a) (1).[2] See *State* v. *Petion*, 172 Conn. App. 668, 669–70, 687, 161 A.3d 618 (2017). The defendant claims that the forearm scar sustained by one of the two victims was an insufficient basis for the jury to find the serious physical injury necessary to support that charge. The state disagrees but requests, in the event that we conclude otherwise, that a judgment of acquittal not be rendered on that charge and, instead, that the judgment be modified to reflect a conviction of the lesser included offense of assault in the second degree; see General Statutes § 53a-60 (a) (2); and the case be remanded for resentencing. We conclude that the evidence was insufficient to support the challenged conviction. We further conclude that, under *State* v. *LaFleur*, 307 Conn. 115, 51 A.3d 1048 (2012), the state is not entitled to have the defendant's conviction modified. Therefore, we reverse in part the Appellate Court's judgment.

I

The Appellate Court's opinion sets forth the facts that the jury reasonably could have found; see *State* v. *Petion*, supra, 172 Conn. App. 670–72; which we summarize as follows. In 2008, the defendant began dating Rosa Bran. Bran gave birth to the defendant's daughter

[2] General Statutes § 53a-59 (a) provides: "A person is guilty of assault in the first degree when: (1*) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument*; or (2) with intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such person or to a third person; or (3) under circumstances evincing an extreme indifference to human life he recklessly engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person; or (4) with intent to cause serious physical injury to another person and while aided by two or more other persons actually present, he causes such injury to such person or to a third person; or (5) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of the discharge of a firearm." (Emphasis added.)

in February, 2010. Bran also had a son from a prior relationship. After the birth of his daughter, the defendant's romantic relationship with Bran ended. However, they remained in contact, and the defendant occasionally would visit his daughter, sometimes showing up unannounced. The defendant told Bran that he did not want other men around his daughter.

Shortly before the May, 2012 incident giving rise to the criminal charges at issue, Bran resumed a friendship with a former boyfriend, Robert Raphael. On the day of the incident, Bran invited Raphael to her apartment, and he arrived in the early afternoon. In addition to Bran and her two children, her cousin's two children were present. Later that afternoon, there was a knock on the door. Bran answered the door, expecting that it was her cousin arriving to pick up her children, but it was the defendant. He asked to see his daughter. Bran explained that it was not a good time because the child was asleep.

The defendant then saw Raphael. The defendant became angry, pushed Bran aside, and entered the apartment. He began to shout at Raphael to get out of the apartment. Raphael did not want to leave Bran and the children alone with the defendant in his agitated state, and told the defendant that he was staying. In response, the defendant began pushing and punching Raphael. As Raphael retreated further into the apartment, the defendant pursued him. The defendant pulled out a knife from his pocket and slashed Raphael across the face, cutting from Raphael's ear to along his jaw bone, deeply enough to damage a facial nerve and cut a branch of his jugular vein. Bran inserted herself between the two men during the confrontation, hoping to stop the defendant from injuring Raphael. In the process, the defendant cut Bran on her left arm. Raphael, who was bleeding profusely, ran out of the

apartment, got in his car, and drove himself to the hospital.[3]

The defendant repeatedly apologized to Bran and then left the apartment. Bran was not immediately aware that she had been cut. She realized that she had been injured when her son came downstairs, alerted Bran that she was bleeding, and grabbed a towel to cover her wound. Shortly after the incident, Bran's cousin arrived to pick up her children, and she drove Bran to the hospital.

When she arrived at the hospital, Bran had an abrasion and two lacerations on her left arm, one measuring three-quarters of one centimeter and another measuring four centimeters.[4] The smaller laceration was treated with a single suture. The larger laceration was closed with ten sutures, which left a scar after the laceration healed.

The record reveals the following additional facts. The state charged the defendant with two counts of assault in the first degree in violation of § 53a-59 (a) (1). The first count alleged that, with the intent to cause serious physical injury to Raphael, the defendant caused such injury to Raphael by means of a dangerous instrument. The second count alleged that, with the intent to cause serious physical injury to Raphael, the defen-

[3] Raphael was in critical condition when he was admitted to the hospital. *State* v. *Petion*, supra, 172 Conn. App. 672 n.2. His injuries required immediate surgery and resulted in permanent scarring and nerve damage to his face. Id.

[4] Bran's treating physician testified that Bran's vital signs—blood pressure and respiratory rate—were "grossly abnormal" when he first had contact with her but acknowledged that the elevated levels were a function of adrenaline when someone is injured. He offered no testimony as to whether or how long these levels were sustained; nor did he suggest that these levels created a substantial risk of death, or caused a serious impairment of health or serious loss or impairment of the function of any bodily organ. See General Statutes § 53a-3 (4) (defining serious physical injury). Bran was not admitted to the hospital for observation and received no treatment other than sutures for the lacerations.

dant caused such injury to Bran by means of a dangerous instrument.

At trial, the defendant presented an alibi witness, a family friend. At the close of evidence, the defendant moved for a judgment of acquittal on the charge of first degree assault as to Bran. The court denied the motion. Neither the defendant nor the state elected to have the jury charged on any lesser included offense. The jury returned a guilty verdict on both counts. On each count, the trial court imposed a seventeen year term of imprisonment, followed by three years of special parole, to run concurrently.

The defendant appealed from the judgment of conviction to the Appellate Court. He argued, in relevant part, that there was insufficient evidence to support a conviction of first degree assault as to Bran because the state had failed to demonstrate beyond a reasonable doubt that she suffered a " 'serious physical injury.' "[5] Id., 669. The Appellate Court agreed with the state "that the evidence presented to the jury showed that one of the two lacerations that Bran received resulted in a significant and readily visible scar and that, under our law, a jury reasonably could have found that such scarring constituted a serious disfigurement and, therefore, a serious physical injury." Id., 673. The Appellate Court affirmed the judgment of conviction. Id., 687.

We thereafter granted the defendant's petition for certification to appeal, limited to the following issue: "In rejecting the defendant's claim that there was insufficient evidence to support his conviction of assault in the first degree in violation of . . . § 53a-59 (a) (1) with

[5] The defendant challenged the sufficiency of the evidence only with respect to the assault charge involving Bran. The defendant contended that prosecutorial improprieties deprived him of a fair trial with respect to the charges of assault as to both Raphael and Bran. The Appellate Court rejected that claim; see *State* v. *Petion*, supra, 172 Conn. App. 678; and the defendant has not challenged that aspect of the court's decision.

respect to . . . Bran, did the Appellate Court properly conclude that a jury reasonably could have found that the one and one-half inch scar on her forearm constituted serious disfigurement and, therefore, a serious physical injury?" *State* v. *Petion*, 326 Conn. 906, 163 A.3d 1205 (2017).

In their responses to this question, the parties devote significant portions of their analyses to a comparison between those injuries that the Appellate Court has deemed sufficient to support a jury's finding of serious disfigurement in other cases and Bran's injury in the present case. Although they disagree as to which side of the line the present case falls, they agree that juries would be aided in making this determination by factors to guide them.[6]

We do not find the comparative approach taken by the parties to be useful here, particularly because the Appellate Court had not examined the meaning of "serious disfigurement" in any of these cases,[7] and this court previously had given no guidance on the matter. Thus, before we can consider the evidence, we must ascertain the meaning of the legal standard against which we assess that evidence. See *State* v. *Drupals*, 306 Conn. 149, 159, 49 A.3d 962 (2012). The statutory text is our lodestar in this endeavor, and we consider relevant extratextual sources to illuminate any ambiguity therein to ascertain legislative intent. See General Statutes § 1-2z. Insofar as any ambiguity exists, "[i]t is a fundamental tenet of our law to resolve doubts in the enforcement

[6] Although the trial court's charge provided no such factors to guide the jury, the defendant does not raise a claim of instructional error.

[7] In one earlier case, cited by the Appellate Court in the present case; see *State* v. *Petion*, supra, 172 Conn. App. 674–75; the Appellate Court considered dictionary definitions of "disfigurement" but did not further consider how "serious" modified that meaning. See *State* v. *Barretta*, 82 Conn. App. 684, 689, 846 A.2d 946, cert. denied, 270 Conn. 905, 853 A.2d 522 (2004). By declining to use these cases as benchmarks, we do not intend to express a view as to whether they were correctly decided.

of a [P]enal [C]ode against the imposition of a harsher punishment." (Internal quotation marks omitted.) *State* v. *Drupals*, supra, 160.

The defendant was convicted of violating § 53a-59 (a) (1), which provides in relevant part: "A person is guilty of assault in the first degree when . . . [w]ith intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of . . . a dangerous instrument . . . ."[8] The Penal Code in turn defines certain essential terms. " 'Physical injury' means impairment of physical condition or pain . . . ." General Statutes § 53a-3 (3). " 'Serious physical injury' means physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . ." General Statutes § 53a-3 (4).

These definitions plainly reflect a legislative intention to establish a material degree of difference between mere physical injury and *serious* physical injury. This differentiation is reflected in the severity of punishment attendant to each. Assault resulting in physical injury, unless inflicted by discharge of a firearm, carries a maximum term of imprisonment of five years, whereas assault resulting in serious physical injury carries a maximum term of imprisonment of twenty years. See General Statutes §§ 53a-35a (6) and (7), 53a-59 (b) and 53a-60 (b). Thus, "[a]lthough it may often be difficult to distinguish between the two, such a distinction *must* be drawn; a person can be found guilty of assault in the first degree under . . . § 53a-59 [a] [1] only if he 'causes *serious* physical injury to another person.' "

[8] " 'Dangerous instrument' means any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury . . . ." General Statutes § 53a-3 (7).

(Emphasis in original.) *State* v. *Rossier*, 175 Conn. 204, 207, 397 A.2d 110 (1978).

We need not attempt, in the present case, to draw comprehensive distinctions for general application. Our focus is on one type of serious physical injury—serious disfigurement. See General Statutes § 53a-3 (4).

We begin by examining the foundational term "disfigurement." Our Penal Code does not define this term. Neither did New York's Penal Code, from which our code's relevant definitions and many of its core provisions, such as our assault provisions, were drawn. See, e.g., *State* v. *Courchesne*, 296 Conn. 622, 671–73, 998 A.2d 1 (2010); *State* v. *Havican*, 213 Conn. 593, 601, 569 A.2d 1089 (1990); Conn. Joint Standing Committee Hearings, Judiciary, Pt. 1, 1969 Sess., p. 11; Report of the Commission to Revise the Criminal Statutes (1967) pp. 114–15, reprinted in 1 Law and Legislative Reference Unit, Connecticut State Library, Connecticut Legislative Histories Landmark Series: 1969 Public Act No. 828 (2005). Under the common meaning at the time our code was adopted in 1969, "disfigurement" was defined simply as "something that disfigures, as a scar." The Random House Dictionary of the English Language (Unabridged Ed. 1966) p. 411. "Disfigure," in turn, was commonly defined as "to mar the appearance or beauty of; deform"; id.; "to spoil the appearance of"; Webster's Seventh New Collegiate Dictionary (1969) p. 239; or "to deform; to impair, as shape or form; to mar; to deface; to injure the appearance or attractiveness of . . . ." Webster's New Twentieth Century Dictionary (2d Ed. 1964) p. 524. Legal dictionaries of the day reflected a similar definition for "disfigurement" that had been adopted under workers' compensation law in some jurisdictions: "That which impairs or injures the beauty, symmetry, or appearance of a person . . . that which renders unsightly, misshapen, or imperfect, or deforms in some manner." Black's Law Dictionary (4th Ed. 1968)

p. 554; accord Ballentine's Law Dictionary (3d Ed. 1969) p. 554. Our legislature subsequently adopted a substantially similar definition for our workers' compensation scheme. See Public Acts 1991, No. 91-339, § 1, codified as amended at General Statutes § 31-275 (8) (" '[d]isfigurement' means impairment of or injury to the beauty, symmetry or appearance of a person that renders the person unsightly, misshapen or imperfect, or deforms the person in some manner, or otherwise causes a detrimental change in the external form of the person").

Although this court has not previously considered whether this statutory definition would apply to the Penal Code, we note that every other jurisdiction that has considered the term's meaning as applied to penal statutes generally or assault provisions specifically, including New York, has adopted a definition of disfigurement that largely conforms to our workers' compensation definition.[9] Therefore, we conclude that this

[9] See, e.g., *Akaran* v. *State*, Docket No. A-8690, 2005 WL 1026992, *4 (Alaska App. May 4, 2005) (defining disfigurement as "an injury [that] mars the [victim's] physical appearance"); *Williams* v. *State*, 248 Ga. App. 316, 318, 546 S.E.2d 74 (2001) (applying definition of disfigurement "as that which impairs or injures the appearance of a person"); *State* v. *Silva*, 75 Haw. 419, 433, 864 P.2d 583 (1993) ("a 'disfigurement' is, in relevant part, 'something that disfigures, as a scar,' while to 'disfigure' is 'to mar the effect or excellence of' "); *James* v. *State*, 755 N.E.2d 226, 230 (Ind. App.) (applying definition of disfigure as " 'to make less complete, perfect or beautiful in appearance or character: deface, deform, mar' "), appeal denied, 761 N.E.2d 423 (Ind. 2001); *Thomas* v. *State*, 128 Md. App. 274, 303, 737 A.2d 622 (applying definition of disfigurement as " 'an externally visible blemish or scar that impairs one's appearance' "), cert. denied, 357 Md. 192, 742 A.2d 521 (1999); *State* v. *Bledsoe*, 920 S.W.2d 538, 540 (Mo. App. 1996) (disfigure "means to deface or mar the appearance or beauty of someone"); *State* v. *Clark*, 974 A.2d 558, 572 (R.I. 2009) (disfigurement means " 'that which impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, misshapen or imperfect or deforms in some manner' "); see also *State* v. *Ferrer*, Docket No. 47687-8-II, 2018 WL 4896669, *2 (Wn. App. October 9, 2018) (trial court instructed jury that "[d]isfigurement means that which impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner" [internal quotation marks omitted]) (decision without published opinion, 5 Wn. App. 2d 1034 [2018]).

meaning should apply to our Penal Code. See General Statutes § 1-1 (a) (directing that words that have acquired particular and appropriate meaning in law be construed as such and otherwise be construed in accordance with commonly approved usage).

We next consider the difference between disfigurement and *serious* disfigurement. At the time of the Penal Code's adoption, the common meaning of "serious," specifically in relation to injury, was "having important or dangerous possible consequences . . . ." Webster's Seventh New Collegiate Dictionary, supra, p. 792. Other jurisdictions have applied similar definitions to "serious" as a modifier to "disfigurement" in their penal statutes:[10] "grave, or great"; *Williams* v. *State*, 248 Ga.

[10] Penal laws in the majority of jurisdictions also define serious physical or bodily injury to include serious disfigurement, although many of those jurisdictions add a durational term (e.g., protracted, prolonged, permanent). See Ala. Code § 13A-1-2 (14) (2015) ("serious and protracted disfigurement"); Alaska Stat. § 11.81.900 (b) (58) (B) ("serious and protracted disfigurement") (LexisNexis 2012); Ariz. Rev. Stat. Ann. (Cum. Supp. 2018) § 13-105 (39) ("serious and permanent disfigurement"); Cal. Penal Code § 243 ("serious disfigurement" for purposes of assault statutes) (Deering Supp. 2018); Colo. Rev. Stat. § 18-1-901 (3) (p) (2017) ("substantial risk of serious permanent disfigurement"); Del. Code. Ann. tit. 11, § 222 (26) (Supp. 2012) ("serious and prolonged disfigurement"); Ga. Code Ann. § 16-5-24 (a) (Supp. 2018) ("seriously disfiguring" for purposes of aggravated battery); Haw. Rev. Stat. § 707-700 (2014) ("serious, permanent disfigurement"); Ind. Code Ann. § 35-31.5-2-292 (1) (LexisNexis 2012) ("serious permanent disfigurement"); Iowa Code § 702.18 (2001) ("serious permanent disfigurement"); Ky. Rev. Stat. Ann. § 500.080 (15) (LexisNexis Cum. Supp. 2018) ("serious and prolonged disfigurement"); Me. Rev. Stat. Ann. tit. 17-a, § 2 (23) (Cum. Supp. 2018) ("serious, permanent disfigurement"); Md. Code Ann., Criminal Law § 3-201 (d) (2) (i) (LexisNexis 2012) ("permanent or protracted serious . . . disfigurement"); Mass. Ann. Laws ch. 265, § 13A (c) (LexisNexis 2010) ("permanent disfigurement" for purposes of assault and battery); Minn. Stat. § 609.02 (8) (West 2018) ("serious permanent disfigurement"); Mo. Rev. Stat. § 556.061 (44) (Cum. Supp. 2018) ("serious disfigurement"); Mont. Code Ann. § 45-2-101 (66) (a) (ii) (2017) ("serious permanent disfigurement"); Neb. Rev. Stat. § 21-109 (21) (2016) ("serious permanent disfigurement"); Nev. Rev. Stat. 0.060 (1) (2017) ("serious, permanent disfigurement"); N.J. Stat. Ann. § 2C:11-1 (b) (West 2015) ("serious, permanent disfigurement"); N.M. Stat. Ann. § 30-1-12 (A) (2004) ("serious disfigurement"); N.Y. Penal Law § 10.00 (10) (McKinney Cum. Supp. 2019) ("serious and protracted

App. 316, 318, 546 S.E.2d 74 (2001); "giving cause for apprehension; critical"; *State* v. *Silva*, 75 Haw. 419, 434, 864 P.2d 583 (1993); "grave and not trivial in quality or manner." *State* v. *Clark*, 974 A.2d 558, 573 (R.I. 2009).

Thus, just as inflicting serious physical injury is deemed to be conduct of significantly greater culpability than inflicting physical injury, it is evident that " 'to disfigure . . . seriously' must be to inflict some harm substantially greater than the minimum required for 'disfigurement.' " *People* v. *McKinnon*, 15 N.Y.3d 311, 315, 937 N.E.2d 524, 910 N.Y.S.2d 767 (2010). Other jurisdictions that have given a unified definition to serious disfigurement under their penal laws, rather than

disfigurement"); N.C. Gen. Stat. 14-32.4 (a) (2017) ("serious permanent disfigurement" for purposes of assault); N.D. Cent. Code § 12.1-01-04 (27) (Supp. 2017) ("serious permanent disfigurement"); Or. Rev. Stat. § 161.015 (8) (2017) ("serious and protracted disfigurement"); 18 Pa. Stat. and Const. Stat. Ann. § 2301 (West 2015) ("serious, permanent disfigurement"); R.I. Gen. Laws § 11-5-2 (c) (Cum. Supp. 2018) ("serious permanent disfigurement"); S.C. Code Ann. § 16-3-600 (A) (1) (2015) ("serious permanent disfigurement"); S.D. Codified Laws § 22-18-1.5 (2017) ("serious permanent disfigurement" for purposes of assault); Tex. Penal Code Ann. § 1.07 (a) (46) (Cum. Supp. 2018) ("serious permanent disfigurement"); Utah Code Ann. § 76-1-601 (11) (LexisNexis 2012) ("serious permanent disfigurement"); Wn. Rev. Code Ann. § 9A.04110 (b) and (c) (West 2015) (substantial bodily harm includes "temporary but substantial disfigurement"; great bodily harm includes "serious permanent disfigurement"); Wis. Stat. § 939.22 (Cum. Supp. 2018) ("serious permanent disfigurement").

Other jurisdictions that define serious physical injury to include disfigurement but do not use the term "serious" include the following: Ark. Code Ann. § 5-1-102 (21) (2013) ("protracted disfigurement"); Idaho Code § 18-907 (West 2016) ("permanent disfigurement" for purposes of aggravated battery); 720 Ill. Comp. Stat. 5/12-3.05 (West 2017) ("permanent . . . disfigurement" for purposes of aggravated battery); Kan. Stat. Ann. § 21-5413 (b) (1) (A) (Cum. Supp. 2018) ("disfigurement" for purposes of aggravated battery); La. Rev. Stat. Ann. § 14:34.7 (B) (3) (2016) ("protracted and obvious disfigurement"); Ohio Rev. Code Ann. § 2901.01 (A) (5) (d) (West Supp. 2018) ("permanent disfigurement" or "temporary, serious disfigurement"); Okla. Stat. Ann. tit. 21, § 646 (B) (West 2018) ("protracted and obvious disfigurement"); Tenn. Code Ann. § 39-11-106 (a) (34) (D) (West 2018) ("protracted or obvious disfigurement"); Wyo. Stat. Ann. § 6-1-104 (x) (C) (2013) ("severe disfigurement").

define each word separately, have defined it as " 'an injury [that] mars the [victim's] physical appearance and causes a degree of unattractiveness sufficient to bring negative attention or embarrassment' "; *Akaran* v. *State*, Docket No. A-8690, 2005 WL 1026992, *4 (Alaska App. May 4, 2005); an injury that would "make the victim's appearance distressing or objectionable to a reasonable person observing her"; *People* v. *McKinnon*, supra, 316; or a "significant cosmetic deformity caused by the injury." *Hernandez* v. *State*, 946 S.W.2d 108, 113 (Tex. App. 1997). Cf. *People* v. *McKinnon*, supra, 315 (explaining that "serious" disfigurement would not rise to level of "severe" disfigurement, such that it need not be " 'abhorrently distressing, highly objectionable, shocking or extremely unsightly' to a reasonable person"). In defining a similar term in our workers' compensation scheme, our legislature defined "significant disfigurement" as "any disfigurement that is of such a character that it substantially detracts from the appearance of the person bearing the disfigurement."[11] Public Acts 1991, No. 91-339, § 1, codified at General Statutes (Rev. to 1993) § 31-275 (8). Because "serious" means, at a minimum, "significant"; see Webster's Seventh New Collegiate Dictionary, supra, pp. 792, 809 (defining "serious" as "having important or dangerous possible consequences," and "significant" as "important, weighty"); see also *Fisher* v. *Blankenship*, 286 Mich. App. 54, 66, 777 N.W.2d 469 (2009) (disfigurement will be considered serious if it is significant); we also conclude that applying a similar definition to the Penal Code would be appropriate.

[11] The legislature repealed this definition when it decided to limit the circumstances under which compensation would be provided for serious disfigurement or scarring, adding instead language to the statute prescribing those particular limitations. See Public Acts 1993, No. 93-228, §§ 1, 19, codified at General Statutes (Rev. to 1995) § 31-308 (c) (precluding compensation "for any scar or disfigurement which is not located on [A] the face, head or neck, or [B] any other area of the body which handicaps the employee in obtaining or continuing to work").

In considering how to apply this definition to the evidence in a given case, the present case requires consideration of whether, and the extent to which, the duration of the disfigurement is relevant. Unlike many other jurisdictions, our Penal Code does not expressly require an injury to persist for any particular duration to qualify as a serious physical injury, including serious disfigurement. See footnote 11 of this opinion. Early drafts of our Penal Code defined "serious physical injury" to include "serious *and protracted* disfigurement, *protracted* impairment of health or *protracted* loss or impairment of any of the bodily functions." (Emphasis added.) Report of the Commission to Revise the Criminal Statutes, supra, p. 6; Proposed House Bill No. 7182, § 4 (4), 1969 Jan. Sess. In the substitute bill that was favorably reported out of committee, "serious" was substituted for "protracted" where the former had not been included; see Substitute House Bill No. 7182, 1969 Sess.; without explanation.

We do not view this change to mean that the duration of the injury is not a proper consideration under § 53a-59 (a) (1). The term "serious" is broader than "prolonged" in that it covers more than only the temporal dimension, and it would appear that the legislature decided that the broader term was all that was necessary. See *State* v. *Bledsoe*, 920 S.W.2d 538, 540 (Mo. App. 1996) ("[a]lthough no longer statutorily required . . . permanency of disfigurement is relevant, as a matter of evidence, on the element of seriousness" [citations omitted]). For example, a transitory blemish to one's appearance that heals without medical treatment (e.g., a bruise, an abrasion) could hardly be deemed serious disfigurement. See *Williams* v. *State*, supra, 248 Ga. App. 319 ("[i]n every aggravated battery based upon a serious disfigurement, including those in which the disfigurement was temporary, the injury inflicted was more than a superficial wound, that is, a scrape, bruise,

discoloration, or swelling"). Conversely, injuries of more lasting duration are more likely to be serious, even when they heal without medical intervention.[12] See, e.g., *State* v. *Barretta*, 82 Conn. App. 684, 689–90, 846 A.2d 946 (there was sufficient evidence to establish serious disfigurement when, as result of being viciously beaten with baseball bat, victim sustained contusions, severe bruising, and abrasions all over his body), cert. denied, 270 Conn. 905, 853 A.2d 522 (2004); *State* v. *Hughes*, 469 S.W.3d 894, 901 (Mo. App. 2015) (there was sufficient evidence to establish serious disfigurement when victim was badly beaten in assault, but injuries would all heal: victim had black eye, swollen eye barely open, bruising around neck from scarf used

[12] Although we have no evidence that this substantive consideration motivated the legislature's decision to eliminate "prolonged," the omission of any specific durational requirement raises a question about the impact that surgery has in terms of minimizing the period of disfigurement. In some jurisdictions that require prolonged or permanent disfigurement, courts have considered the seriousness of the condition only after surgery. See, e.g., *State* v. *Malufau*, 80 Haw. 126, 131, 906 P.2d 612 (1995) (under statute requiring serious, permanent disfigurement, court expressed disapproval of case relying on physician's testimony regarding potential severity of victim's injuries in absence of medical treatment); *People* v. *Rosado*, 88 App. Div. 3d 454, 454–55, 930 N.Y.S.2d 10 (2011) (assessing sufficiency of evidence of serious disfigurement in relation to victim's appearance after his broken nose and chipped teeth were repaired by surgery; likelihood, and not possibility, of future adverse impact on appearance was relevant consideration), appeal denied, 18 N.Y.3d 928, 965 N.E.2d 969, 942 N.Y.S.2d 467 (2012). In some other jurisdictions, "the relevant issue was the disfiguring and impairing quality of the bodily injury *as it was inflicted*, not after the effects had been ameliorated or exacerbated by other actions such as medical treatment." (Emphasis in original; internal quotation marks omitted.) *Fancher* v. *State*, 659 S.W.2d 836, 838 (Tex. App. 1983); see, e.g., *Lenzy* v. *State*, 689 S.W.2d 305, 310 (Tex. App. 1985) (concluding that evidence established protracted loss or impairment of function of any bodily member when victim's teeth were fractured and their utility was restored by performance of root canals and installation of porcelain crowns, when dentist's testimony established that, "without his remedial work and treatment, the teeth in question would have been lost or their use substantially impaired"). We note that the former approach would appear to allow the severity of the crime to depend on the fortuity of the level of care that the victim received or was able to afford.

to choke her, bruising and discoloration on both cheeks, scratches on right side of mouth, and abrasions to lip).

In the same way that permanence is not a necessary condition for serious disfigurement; cf. General Statutes § 53a-59 (a) (2) (intent and effect of disfiguring another person "seriously *and permanently*" is one basis of assault in first degree [emphasis added]);[13] neither is it a sufficient condition, in and of itself, to establish serious disfigurement. We are mindful that some of our Appellate Court's decisions appear to suggest that, whenever a defendant inflicts an injury that leaves a permanent scar, the evidence would be sufficient to permit the trier of fact to determine that serious disfigurement exists. See, e.g., *State* v. *Griffin*, 78 Conn. App. 646, 655 n.3, 828 A.2d 651 (2003) ("[a] permanent scar constitutes serious and permanent disfigurement"). But see *State* v. *Huckabee*, 41 Conn. App. 565, 570–71, 677 A.2d 452 ("[a] bullet wound is not per se serious physical injury"), cert. denied, 239 Conn. 903, 682 A.2d 1009 (1996). We agree with those jurisdictions that have recognized that, because any visible scar would mar the victim's appearance and thus constitute disfigurement, the legislative choice of "serious" disfigurement evidences an intent to require the presence of some other factor(s) in addition to permanence to render a scar a "serious" disfigurement. See, e.g., *Saelee* v. *State*, Docket No. A-10004, 2011 WL 807391, *9 (Alaska App. March 2, 2011) ("Even in the photographic exhibit, it is difficult to see this scar if one is not looking closely. If we were to declare this evidence sufficient to establish

[13] This court has similarly concluded that other forms of serious physical injury need not be permanent. See *State* v. *Ovechka*, supra, 292 Conn. 542 (deeming temporary but grave condition, loss of sight, to be serious physical injury); *State* v. *Barretta*, supra, 82 Conn. App. 684, 689 ("a victim's complete recovery is of no consequence" in assessing whether victim suffered serious physical injury); *State* v. *Denson*, 67 Conn. App. 803, 811, 789 A.2d 1075 ("[i]t is entirely possible to cause serious physical injury without causing . . . a permanent injury"), cert. denied, 260 Conn. 915, 797 A.2d 514 (2002).

a 'serious and protracted disfigurement,' we would essentially be saying that any visible scar constitutes a 'serious physical injury' for purposes of the assault statutes. We do not believe that the legislature intended this term to be interpreted so broadly."); *State* v. *Silva*, supra, 75 Haw. 433 ("[E]ven a small but noticeable scar on a person's face, for example, is a disfigurement. However, such a scar would certainly not qualify as a 'serious bodily injury' under the statutory definition nor should it."); *Hernandez* v. *State*, supra, 946 S.W.2d 113 ("Simply that an injury causes a scar is not sufficient to establish serious permanent disfigurement. . . . There must be evidence of some significant cosmetic deformity caused by the injury." [Citation omitted.]); see also *State* v. *Hanes*, 790 N.W.2d 545, 554 (Iowa 2010) ("[s]carring may in some circumstances rise to the level of serious permanent disfigurement"); *State* v. *Bledsoe*, supra, 920 S.W.2d 540 ("permanency of disfigurement is relevant . . . on the element of seriousness").

Factors identified by other jurisdictions as relevant to the seriousness of a disfigurement in the form of a scar include its permanence, but also its location, size, and general appearance. See, e.g., *State* v. *Roper*, 136 S.W.3d 891, 898 (Mo. App. 2004); *State* v. *Demers*, Docket No. CX-03-297, 2003 WL 22952813, *1 (Minn. App. December 16, 2003), review denied, Minnesota Supreme Court (February 25, 2004); *People* v. *McKinnon*, supra, 15 N.Y.3d 316. If there is more than one disfiguring feature, courts, including our Appellate Court, have considered the cumulative effect of those features to assess seriousness. See, e.g., *State* v. *Anderson*, 16 Conn. App. 346, 357, 547 A.2d 1368, cert. denied, 209 Conn. 828, 552 A.2d 433 (1988); *Levin* v. *State*, 334 Ga. App. 71, 74, 778 S.E.2d 238 (2015), cert. denied, Georgia Supreme Court, Docket No. S16C0249 (January 11, 2016); *Sloan* v. *State*, Docket No. 49A02-1002-CR-

195, 2010 WL 4813600, *2 (Ind. App. November 24, 2010) (decision without published opinion, 937 N.E.2d 938 [Ind. App. 2010]); *State* v. *Roper*, supra, 898. Similar factors have been identified under our workers' compensation scheme. See General Statutes § 31-308 (c) ("[i]n making any award under this subsection, the commissioner shall consider [1] the location of the scar or disfigurement, [2] the size of the scar or disfigurement, [3] the visibility of the scar or disfigurement due to hyperpigmentation or depigmentation, whether hypertrophic or keloidal, [4] whether the scar or disfigurement causes a tonal or textural skin change, causes loss of symmetry of the affected area or results in noticeable bumps or depressions in the affected area, and [5] other relevant factors").

On the basis of the foregoing analysis, we discern the following distinction between disfigurement and serious disfigurement. "Disfigurement" means impairment of or injury to the beauty, symmetry or appearance of a person that renders the person unsightly, misshapen or imperfect, or deforms the person in some manner, or otherwise causes a detrimental change in the external form of the person. "Serious disfigurement" is an impairment of or injury to the beauty, symmetry or appearance of a person of a magnitude that substantially detracts from the person's appearance from the perspective of an objective observer. In assessing whether an impairment or injury constitutes serious disfigurement, factors that may be considered include the duration of the disfigurement, as well as its location, size, and overall appearance. Serious disfigurement does not necessarily have to be permanent or in a location that is readily visible to others.[14] The jury is not bound by any strict formula in weighing these

[14] The mere fact that a scar is in a location that may be seen only by someone with whom the victim has an intimate relationship would not preclude a finding of serious disfigurement.

factors, as a highly prominent scar in a less visible location may constitute serious disfigurement, just as a less prominent scar in a more visible location, especially one's face, may constitute serious disfigurement.

With these principles in mind, we turn to the defendant's claim that the evidence in the present case is insufficient to establish that Bran suffered a "serious physical injury" in the form of "serious disfigurement." Although ordinarily a factual question for the jury; see, e.g., *State* v. *Almeda*, supra, 211 Conn. 450; *State* v. *Miller*, 202 Conn. 463, 489, 522 A.2d 249 (1987); there is a legal distinction between physical injury and serious physical injury that is not a purely subjective matter, and it is ultimately our responsibility to draw that line. See *State* v. *Rossier*, 175 Conn. 204, 207, 397 A.2d 110 (1978) ("[a]lthough it may often be difficult to distinguish between [physical injury and serious physical injury], such a distinction *must be drawn*" before defendant can be found guilty of assault in first degree under § 53a-59 [a] [1] [emphasis added]); *State* v. *Jeustiniano*, 172 Conn. 275, 281, 374 A.2d 209 (1977) ("[t]he degree of the injuries suffered by [the victim] was a proper question for the jury to decide if sufficient evidence were introduced"); *Hernandez* v. *State*, supra, 946 S.W.2d 113 ("Disfigurement, like beauty, is in the eye of the beholder. However, when distinguishing between 'bodily injury' and 'serious bodily injury' it is, again, a matter of degree. Simply that an injury causes a scar is not sufficient to establish serious permanent disfigurement. . . . There must be evidence of some significant cosmetic deformity caused by the injury." [Citation omitted.]).

"In reviewing the [legal] sufficiency of the evidence concerning this element of assault in the first degree, our task is to construe the evidence in the light most favorable to sustaining the jury's verdict, and then to determine whether any rational trier of fact could have

found that the harm suffered rose to the level of a serious physical injury under the statute." (Internal quotation marks omitted.) *State* v. *Almeda*, supra, 211 Conn. 450; accord *State* v. *Adams*, 327 Conn. 297, 304–305, 173 A.3d 943 (2017).

The evidence regarding Bran's injuries principally came from the testimony of her treating physician at the hospital and two sets of photographs of the injured area: one set taken shortly after medical treatment was rendered and the other set taken thirty months later, at the time of trial. Each set included one photograph magnifying the injuries at close range and one photograph in which Bran displayed the injured area of her arm, taken from a sufficient distance to capture the area from Bran's upper torso to her head. Bran's physician testified that the scar would remain in its present condition.

Bran testified that she was unaware that she had been cut until her son told her that she was bleeding. Her only testimony relating to the appearance of her injury was her agreement that the photographs taken after treatment accurately depicted her condition at that time and her estimation of the approximate size of the scar at the time of trial. No testimony was provided regarding the impact of the scar on her appearance. The state opted not to have Bran display her scar to the jury directly, presenting the contemporaneous photographs instead.

The evidence collectively established the following undisputed facts. Immediately following the incident, Bran had an approximately 1.38 inch (three and one-half centimeters) abrasion and an approximately 0.30 inch (three-quarters of one centimeter) laceration just above her left elbow. Just below her left elbow, on her forearm, Bran had an approximately 1.57 inch (four centimeter) laceration. The smaller laceration was

closed with a single suture; the larger laceration was closed with ten sutures. The closed lacerations appear quite narrow.[15] By the time of trial, the larger of the two lacerations had left a scar approximately the same length as the laceration, although it appears to be slightly wider in the magnified close-up than when sutured. The scar is a slightly lighter tone than the surrounding skin. No other injury is apparent.

Our application of the factors previously identified as relevant to assessing whether the victim has sustained a serious disfigurement establishes that Bran sustained a disfigurement, in the form of a permanent scar. That scar is in a location that could be seen if Bran wears anything shorter than a three-quarter sleeve top. The scar is not, however, in a prominent location such as her face or neck.[16] It is relatively small in size, uniform in shape (a straight line), and otherwise unremarkable in its general appearance. Although the scar is visible if one looks for it, in the photograph that appears to have been taken from a distance of normal social interaction, its appearance is not such that one's eye naturally would be drawn to it. Serious disfigurement requires something more than visibility, as it must be visible to mar one's appearance and, hence, meet the threshold for disfigurement. See *Akaran* v. *State*, supra, 2005 WL 1026992, *3 (noting that "courts agree that if a scar is observable from a normal social distance,

[15] The photograph magnifying the laceration at close range shows loose threads from bandages that were removed to reveal the wounds. The width of those threads appears to be roughly the same width as the laceration. No evidence was proffered regarding the depth of the lacerations or their appearance prior to suturing.

[16] We disagree with the Appellate Court's conclusion that the location of Bran's scar made it "no less observable than a facial scar." *State* v. *Petion*, supra, 172 Conn. App. 677. Other courts have recognized as much. See, e.g., *State* v. *Hughes*, supra, 469 S.W.3d 900 ("[v]isibility of scarring, *particularly on the face*, size of scars, and the presence of additional injuries are all factors in determining disfigurement" [emphasis added]).

it constitutes a disfigurement," and then considering whether scar is also serious disfigurement); *Thomas* v. *State*, 128 Md. App. 274, 303, 737 A.2d 622 ("[d]isfigurement is generally regarded as an externally *visible* blemish or scar that impairs one's appearance" [emphasis added]), cert. denied, 357 Md. 192, 742 A.2d 521 (1999).

This evidence compels the conclusion that the disfigurement is not of a magnitude that objectively could be found to *substantially* detract from Bran's appearance. We hold that the evidence is not legally sufficient to meet the threshold for serious disfigurement.

We note that, while no two cases are precisely the same, other jurisdictions considering a single scar of roughly similar size, location, and/or appearance as the one in the present case have concluded that the evidence did not rise to the level of serious disfigurement. See, e.g., *Vo* v. *State*, 612 So. 2d 1323, 1325 (Ala. App. 1992) (bullet wound through arm was not serious physical injury), cert. denied, Alabama Supreme Court, Docket No. 1920350 (February 19, 1993); *Davis* v. *State*, 467 So. 2d 265, 266–67 (Ala. App. 1985) (scars on victim's hand from bullet going through it was not serious disfigurement); *McDaniel* v. *Commonwealth*, 415 S.W.3d 643, 659 (Ky. 2013) (small scar on victim's wrist from bullet wound, barely visible in video, was not serious disfigurement, consistent with cases in which court previously held that scar from small stab wound was not serious disfigurement); *People* v. *Stewart*, 18 N.Y.3d 831, 832, 962 N.E.2d 764, 939 N.Y.S.2d 273 (2011) (six to seven centimeter [approximately two and one-half inch] wound on victim's inner forearm requiring sutures was not shown to be objectively distressing or objectionable so as to justify conclusion that it constituted serious disfigurement predicate for first degree assault); *People* v. *McKinnon*, supra, 15 N.Y.3d 316 (two scars of moderate size on victim's inner forearm were not serious disfigurement, in absence of evidence that there was

something unusually disturbing about scars); *Bueno* v. *State*, 996 S.W.2d 406, 408 (Tex. App. 1999) (two inch scar on abdomen was not sufficient to show serious, permanent disfigurement); *Hernandez* v. *State*, supra, 946 S.W.2d 113 (one inch scar on abdomen did not amount to serious, permanent disfigurement); *McCoy* v. *State*, 932 S.W.2d 720, 724 (Tex. App. 1996) (scar on victim's lip that was permanent but not visible unless individual looked for it was not sufficient to constitute serious, permanent disfigurement). But cf. *Sloan* v. *State*, supra, 2010 WL 4813600, *1–2 (five scars from stab wounds in left arm and shoulder were sufficient evidence of serious, permanent disfigurement); *Thomas* v. *State*, supra, 128 Md. App. 303 (court could not conclude that there was insufficient evidence of serious physical injury as result of bite wound on arm that left scar because court did not see scar and, therefore, could not say that reasonable jurors who did see it could not conclude that it was serious, permanent/protracted disfigurement); *State* v. *Williams*, 784 S.W.2d 309, 311 (Mo. App. 1990) (three inch laceration to victim's neck, described in hospital record as superficial, was held to constitute serious disfigurement due to keloid formation of scar tissue); *State* v. *Pettis*, 748 S.W.2d 793, 794 (Mo. App. 1988) (four inch scar on arm constituted serious disfigurement); *State* v. *Williams*, 740 S.W.2d 244, 246 (Mo. App. 1987) (five inch wound on neck with resulting hypertrophic, or elevated, scar was held to constitute serious disfigurement); *People* v. *Ahearn*, 88 App. Div. 2d 691, 692, 451 N.Y.S.2d 318 (1982) ("[i]t is reasonable to characterize the *extensive* permanent scar [on the victim's arm] as a 'serious and protracted disfigurement' " [emphasis added]).

These cases reflect that, even though no bright line can be drawn between simple disfigurement and serious disfigurement, the courts have a role in ensuring that the evidence meets a minimum threshold that distinguishes

the two. When reasonable minds could disagree as to the side of the line on which the injury falls, it would be improper for this court to act as a seventh juror and to substitute its own view for that of the jury. However, this is not such a case.

Although the state framed its disfigurement argument to the jury solely in reference to Bran's scar at the time of trial, it asserts in its brief to this court that the jury also was free to consider the appearance of Bran's injuries when inflicted, and properly could have rendered its verdict on that basis. We agree that, in assessing the seriousness of the disfigurement, the jury was not limited to considering the injury in its final, fully healed state. See, e.g., *State* v. *Barretta*, supra, 82 Conn. App. 686, 688–90 (contusions and severe bruising all over body from beating with baseball bat established serious disfigurement). But we are not persuaded that this perspective changes the outcome. The nature of the injury on Bran's arm at the time it was inflicted and at the time of the trial was not significantly different. The forearm laceration was appreciably more apparent immediately after the wound was sutured than after it healed, but it still retained the relatively undistinguishing features previously discussed.[17] Consequently, this evidence also was legally insufficient to support a finding of serious disfigurement.

We emphasize that, in concluding that the evidence was not legally sufficient to establish that the defendant

[17] The state did not produce evidence to establish how long the laceration remained in the condition reflected in the photographs or when the sutures were removed, a fact from which such an inference arguably might be drawn. Although the sutures undoubtedly make Bran's appearance less attractive than after they were removed, the state has not claimed that the jury could properly assess the seriousness of the injury on the basis of the treatment method selected by the victim's physician (e.g., closing a wound with glue, which would not be visible, versus with sutures or some other visible means). Our review of case law from other jurisdictions has not revealed any authority supporting that proposition.

caused Bran to suffer serious disfigurement, we do not intend to trivialize the assault or the physical legacy of it that remains with Bran. However, it is clear that the state failed to prove beyond a reasonable doubt that the defendant committed assault in the first degree by inflicting serious physical injury on Bran with a dangerous instrument. Therefore, the defendant's conviction of that charge must be reversed.

II

In light of this determination, we must consider the state's contention that we should not direct a judgment of acquittal on this charge but, instead, that the judgment should be modified to reflect the highest lesser included offense that requires only physical injury, not serious physical injury, i.e., assault in the second degree in violation of § 53a-60 (a) (2),[18] and the defendant should be resentenced accordingly. The state concedes that, under *State* v. *LaFleur*, supra, 307 Conn. 115, the judgment of conviction must be reversed. It contends, however, that we should reconsider this precedent—despite its relatively recent vintage—because its reasoning is unsound. The state asks us, instead, to overrule *LaFleur* in favor of a rule under which a conviction suffering from evidentiary insufficiency would be modified to the highest lesser included offense supported by the evidence, unless the defendant can prove that the absence of a jury instruction on that lesser included offense was prejudicial. The state contends that the fact that the jury was never charged on the lesser offense does not demonstrate such prejudice because, by finding that the evidence supported all the elements of the greater offense, the jury necessarily

[18] General Statutes § 53a-60 (a) provides in relevant part: "A person is guilty of assault in the second degree when . . . (2) with intent to cause physical injury to another person, the actor causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument other than by means of the discharge of a firearm . . . ."

found that the evidence supported the elements of the lesser included offense. We decline to overrule *LaFleur*.

Our decision in *LaFleur* hewed closely to the analysis applied in *State* v. *Sanseverino*, 291 Conn. 574, 969 A.2d 710 (2009). That case involved an instructional error based on a posttrial change to our long-standing interpretation of the kidnapping statute under which the defendant was convicted. Id., 577–78, 595. In light of that error, this court considered the state's contention that, if it elected not to retry the defendant on the kidnapping charge, it would be entitled to a modification of the judgment to reflect the lesser included offense of unlawful restraint in the second degree. Id., 590. The court noted a split of authority in state and federal courts as to whether modification is proper if the jury had not been instructed on the lesser included offense, as was the case in *Sanseverino*. Id., 593. One group held that modification is never proper under those circumstances; the other group held that modification is proper as long as there is no prejudice to the defendant. Id., 593–94. This court concluded in *Sanseverino* that, "[u]nder the unique circumstances" of the case; id., 595; the judgment could be modified to reflect the lesser included offense because (1) there was no reason to believe that the state had opted against seeking a jury instruction on that lesser included offense for strategic purposes (because our precedent was so well settled), (2) the defendant had benefited from our holding in the case that had overruled precedent, even though he had not raised a claim challenging that precedent, (3) the defendant had not objected to the state's request for a modification of the judgment, and (4) we could conceive of no reason why it would be unfair to the defendant to impose a conviction of unlawful restraint in the second degree (given the preceding circumstances and the fact that the jury "*necessarily*" found the defendant guilty of the lesser

included offense by finding him guilty of the greater offense). (Emphasis in original.) Id., 595 and 596 n.17.

Three years later, in *LaFleur*, this court similarly was faced with the question of whether instructional error on an element of assault in the first degree required the conviction to be reversed or the judgment to be modified to the lesser included offense of assault in the second degree when the jury had not been instructed on that lesser offense. *State* v. *LaFleur*, supra, 307 Conn. 140–42. The instructional error in *LaFleur* stemmed from an issue of first impression, whether a fist is a "dangerous instrument." Id., 140. In a closely divided decision, this court concluded that modification was not appropriate. Id., 153–54; id., 164-85 (*Palmer, J.*, dissenting). The majority pointed to the split of authority on this issue that had been acknowledged in *Sanseverino*. Id., 142–43. It rejected the approach of the courts permitting modification in the absence of evidence of undue prejudice to the defendant because that approach did not give any weight to the fact that the jury had not been charged on the lesser included offense, and did not consider that the state may have had a strategic reason for not requesting the lesser charge. Id., 145–47. Ultimately, the majority in *LaFleur* looked to the circumstances that justified modification in *Sanseverino* and concluded that, because these circumstances were not present in *LaFleur*, the court could not conclude that it would be fair to the defendant to allow modification. Id., 147–51.

The majority cited several reasons why, in the absence of those unusual circumstances, a court should not modify a conviction when the state did not request a charge on the lesser included offense: "First, an appellate court does not sit as a [fact finder] in a criminal case and should avoid resolving cases in a manner [that] appears to place the appellate court in the jury box. . . .

"Second . . . this view preserves the important distinction between an appellate determination [that] the record contains sufficient evidence to support a guilty verdict and a jury determination [that] the [s]tate proved its case beyond a reasonable doubt. . . .

"Third, when [a jury instruction on the lesser offense has been given] . . . it can be said with some degree of certainty that a [sentencing remand] is but effecting the will of the fact finder within the limitations imposed by law . . . and . . . that the appellate court is simply passing on the sufficiency of the implied verdict. When, however, no instruction at all has been offered on the lesser offense, second guessing the jury becomes far more speculative. . . .

"Fourth, when the jury could have explicitly returned a verdict on the lesser offense, the defendant is well aware of his potential liability for the lesser offense and usually will not be prejudiced by the modification of the judgment from the greater to the lesser offense. . . .

"Fifth, adopting a practice of remanding for sentencing on a lesser included offense when that offense has not been submitted to the jury may prompt the [s]tate to avoid requesting or agreeing to submit a lesser included offense to the jury. . . .

"Sixth, the [s]tate would obtain an unfair and improper strategic advantage if it successfully prevents the jury from considering a lesser included offense by adopting an all or nothing approach at trial, but then on appeal, perhaps recognizing [that] the evidence will not support a conviction [of] the greater offense, is allowed to abandon its trial position and essentially concede [that] the lesser included offense should have been submitted to the jury. . . .

"Seventh . . . [t]he defendant may well have [forgone] a particular defense or strategy due to the trial

[court's] rejection of a lesser included offense." (Internal quotation marks omitted.) Id., 152 n.30, quoting *State* v. *Brown*, 360 S.C. 581, 594–97, 602 S.E.2d 392 (2004); see *State* v. *Brown*, supra, 594–97 (explaining why charge on lesser included offense is necessary prerequisite to modification).

The majority's analysis in *LaFleur* resulted in two notable clarifications of the *Sanseverino* factors. First, the majority effectively determined that it would presume that the state's failure to request an instruction on the lesser included offense was strategic unless the evidentiary deficiency resulted from an unforeseeable change in the law, not merely the resolution of an issue of first impression, such that the state could not have anticipated the change. Id., 147. Second, it effectively presumed that the absence of an instruction on the lesser included offense prejudiced the defendant: "Regardless of whether the defense challenged the state's claims as to elements of the lesser included charge, trial strategy and jury deliberations are *inevitably* colored by the inclusion of a lesser included charge to the jury." (Emphasis added.) Id., 151.

The dissent in *LaFleur* argued that the *Sanseverino* factors were never intended to apply as a general framework for assessing whether modification of the judgment is proper in the absence of a jury charge on the lesser included offense. Id., 166–67 (*Palmer*, *J.*, dissenting). It contended that, as a general matter, modification is not unfair to the defendant in such cases because the greater offense puts the defendant on notice of the lesser offense and a jury finding on the greater offense necessarily means that the jury finds the elements of the lesser offense satisfied. Id., 168, 173–74 (*Palmer*, *J.*, dissenting). The dissent contended that, unless the defendant can offer a legitimate reason why it would be unfair to sentence him to the lesser included offense, modification of the judgment achieves

the result most consonant with justice. Id., 166, 173–81 (*Palmer*, *J.*, dissenting). It criticized the majority for purporting to reject a bright line rule when, in reality, it had adopted one, asserting that the state will be unable to prove either that its failure to seek an instruction on the lesser included offense was not strategic or that the defendant would not have altered his trial strategy had such an instruction been given. Id., 173 (*Palmer*, *J.*, dissenting).

Having thus provided a comprehensive review of the precedent that the state seeks to overrule, we must consider whether the prudential doctrine of stare decisis counsels against that action. Stare decisis "counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. . . . Stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 417, 195 A.3d 664 (2018). "While stare decisis is not an inexorable command . . . the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification. . . . *Dickerson* v. *United States*, 530 U.S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). Such justifications include the advent of subsequent changes or development in the law that undermine[s] a decision's rationale . . . the need to bring [a decision] into agreement with experience and with facts newly ascertained . . . and a showing that a particular precedent has become a detriment to coherence and consistency in the law . . . ." (Internal quotation marks omitted.) *Sepega* v. *DeLaura*, 326 Conn. 788, 798–99 n.5, 167 A.3d 916 (2017). "When a prior decision is seen so clearly as error that its enforcement [is] for

that very reason doomed . . . the court should seriously consider whether the goals of stare decisis are outweighed, rather than dictated, by the prudential and pragmatic considerations that inform the doctrine to enforce a clearly erroneous decision." (Citation omitted; internal quotation marks omitted.) *Conway* v. *Wilton*, 238 Conn. 653, 659, 680 A.2d 242 (1996). In making this determination, the court should consider whether the parties acted in reliance on the rule at issue. See *Spiotti* v. *Wolcott*, 326 Conn. 190, 202–203, 163 A.3d 46 (2017) ("a departure from precedent may be justified when the rule to be discarded may not be reasonably supposed to have determined the conduct of the litigants" [internal quotation marks omitted]).

We are not persuaded that the state has provided a sufficient justification for overruling *LaFleur*. The state's reasons mirror those made by the dissent in *LaFleur*, which did not carry the day. The state does not argue that the split among both federal and state courts on this issue has evolved to a greater consensus favoring modification. The very fact that reasonable jurists disagree on this matter suggests that *LaFleur* has not been proven "clearly" wrong.

Nor is there any evidence that the rule in *LaFleur* is unworkable. If the state wants to avoid the possibility that the evidence will be deemed insufficient to support the charge, whether by the jury or a reviewing court, it can simply request an instruction on any lesser included offense supported by the evidence. In fact, we agree with the dissent in *LaFleur* that the practical effect of the majority's analysis is a bright line rule.

Reliance interests also favor application of the holding in *LaFleur* to the present case. Both parties were on notice at trial that *LaFleur* was the controlling law. Knowing this, the state chose to gamble that the evidence would be found factually and legally sufficient to support a conviction of assault in the first degree as

to both victims, despite the obvious disparity in the seriousness of their injuries. It is fair to presume, under these circumstances, that the defendant believed that the evidence was insufficient to support a charge of assault in the first degree as to Bran and that, in the absence an instruction on a lesser included offense, either (a) the jury would find him not guilty; see *Fair* v. *Warden*, 211 Conn. 398, 404, 559 A.2d 1094 ("[i]t may be sound trial strategy not to request a lesser included offense instruction, hoping that the jury will simply return a not guilty verdict"), cert. denied, 493 U.S. 981, 110 S. Ct. 512, 107 L. Ed. 2d 514 (1989); or (b) his conviction would be vacated under *LaFleur*. It would be unfair to the defendant to change the law on appeal. Had he known that the judgment would be modified if he succeeded on his evidentiary sufficiency challenge, he might have sought an instruction not only on assault in the second degree, a class D felony, but also on assault in the third degree, a class A misdemeanor. See General Statutes §§ 53a-60 (a) (2) and (b) and 53a-61.[19] Under our law, the defendant would have been entitled to instructions all the way down to the lowest offense supported by the evidence. See, e.g., *State* v. *Vasquez*, 176 Conn. 239, 241, 244, 405 A.2d 662 (1978) (when information charged defendant with robbery in first degree, he was entitled to jury charge on robbery in second degree, robbery in third degree, and larceny in fourth degree on ground that those offenses are lesser included crimes of robbery in first degree). We conclude, therefore, that the state has not provided a substantial justification for departing from the holding in *LaFleur*.

[19] See footnote 18 of this opinion for the text of § 53a-60 (a) (2). General Statutes § 53a-61 (a) provides in relevant part: "A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person . . . or (3) with criminal negligence, he causes physical injury to another person by means of a deadly weapon, a dangerous instrument or an electronic defense weapon."

The state contends, however, that there is evidence here, unlike in *LaFleur*, to establish that the defendant was not prejudiced by the lack of an instruction on the lesser included offense of assault in the second degree. The state points to the fact that the defendant submitted proposed jury instructions on the first day of evidence that included a request to charge on assault in the second degree with respect to Bran but that he withdrew that request at the charging conference at the close of evidence.[20] Given this timing, the state claims that "the defendant put on his entire defense anticipating that a lesser charge would be given before withdrawing the request" and, therefore, could not have been prejudiced by the absence of the instruction. We disagree. The timing of the withdrawal does not necessarily correlate to the timing of the defendant's decision, as there was no need to inform the court of that decision prior to the charging conference. The defendant may have made that determination during or at the close of the state's case-in-chief, after it likely became apparent that the state's proof as to Bran fell short of the evidence needed for a conviction of assault in the first degree. Moreover, as previously noted, had the state sought an instruction on assault in the second degree at the charging conference, the defendant might have requested a charge on a still lesser offense.

We therefore conclude that the defendant's conviction of assault in the first degree as to Bran must be

[20] That request to charge was for an instruction under the subsection requiring that "the actor *recklessly* causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument"; (emphasis added) General Statutes § 53a-60 (a) (3); whereas the state seeks to modify the judgment to reflect a conviction under the subsection requiring that, "with intent to cause physical injury to another person, the actor causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument other than by means of the discharge of a firearm . . . ." General Statutes § 53a-60 (a) (2). The former is a class C felony because it requires serious physical injury, whereas the latter is a class D felony. See General Statutes § 53a-60 (b).

reversed. In light of this determination, one further observation is warranted. "This court has endorsed the . . . aggregate package theory of sentencing. . . . Pursuant to that theory, we must vacate a sentence in its entirety when we invalidate any part of the total sentence. On remand, the resentencing court may reconstruct the sentencing package or, alternatively, leave the sentence for the remaining valid conviction or convictions intact. . . . Thus, we must remand this case for resentencing on the sole [count] on which the defendant stands convicted." (Citation omitted; internal quotation marks omitted.) *State* v. *LaFleur*, supra, 307 Conn. 164.

The judgment of the Appellate Court is reversed only with respect to the conviction of assault in the first degree as to Bran and the case is remanded to that court with direction to remand the case to the trial court with direction to render judgment of acquittal on that charge, to vacate the defendant's sentence, and to resentence him on the remaining charge; the judgment of the Appellate Court is affirmed in all other respects.

In this opinion KAHN and ECKER, Js., concurred.

PALMER, J., concurring in the judgment. I agree with and join part I of the majority opinion,[1] in which the majority concludes that there was insufficient evidence of serious physical injury to support the conviction of the defendant, Divenson Petion, on one of two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (1). Although I concur in the judgment, I do not join part II of the majority opinion, in

[1] Although I agree with and join part I of Justice McDonald's opinion, and concur in the judgment, for reasons stated hereinafter, I do not join part II of Justice McDonald's opinion. Therefore, that opinion, in which Justices Kahn and Ecker join, is technically not a majority opinion but, rather, an opinion announcing the judgment of the majority of this court. In the interest of simplicity, however, I refer to that opinion as the majority opinion.

which the majority rejects the state's request to modify the judgment of conviction to reflect the defendant's conviction of the lesser included offense of assault in the second degree in violation of General Statutes § 53a-60 (a) (2) in light of this court's reversal of the defendant's conviction of first degree assault on the basis of evidentiary insufficiency.

I continue to maintain my view that *State* v. *LaFleur*, 307 Conn. 115, 151–54, 51 A.3d 1048 (2012), in which this court effectively adopted a bright line rule requiring that a conviction be vacated under the present circumstances, was wrongly decided. See id., 164–66 (*Palmer, J.*, dissenting). As I explained in my dissenting opinion in *LaFleur*, the majority in that case employed a flawed analysis that failed to account for the fact that the categorical rule it adopted—albeit while claiming to adopt a fairness based, case-by-case approach, a claim that, as the majority in the present case candidly acknowledges, is groundless—penalizes the state for failing to request a charge on the lesser included offense, even though the defendant himself had the absolute right to seek and obtain such an instruction, and irrespective of whether the defendant suffered any prejudice as a result of that omission. Id., 181–85 (*Palmer, J.*, dissenting). In so doing, the rule "bestows a windfall on the wholly undeserving defendant—and does so at the expense of the victim of the assault, the state and the general public—without any countervailing public benefit." Id., 165 (*Palmer, J.*, dissenting).

That having been said, *LaFleur* was the governing law at the time of trial in the present case, and the defendant was entitled to rely on that law when he opted against seeking a lesser included offense instruction. Therefore, even if I would favor overruling *LaFleur*, I would do so prospectively only. Accordingly, I agree that the defendant's conviction on one of two of the first

degree assault counts should be reversed and concur in the judgment.

MULLINS, J., with whom ROBINSON, C. J., and D'AURIA, Js., join, dissenting. I agree with much of the well reasoned analysis set forth in today's decision. In particular, I agree with the definitions that it articulates and the factors that it identifies as relevant to assessing whether a disfigurement rises to the level of "serious disfigurement." General Statutes § 53a-3 (4). Certainly, this area was in need of clarification, which this court now has provided. I do not agree, however, that, under the clarification provided today, no reasonable juror could find that the injury the defendant, Divenson Petion, inflicted on the victim, Rosa Bran, rose to the level of serious disfigurement. The source of my disagreement stems from the fact that the question of whether this injury constituted a serious disfigurement is a quintessential jury question. Under the facts of the present case, I cannot conclude that, as a matter of law, no reasonable juror could find that Bran's principal injury, namely the larger cut that required ten stitches to close and left a one and one-half inch permanent scar on her forearm, rose to the level of serious disfigurement.

Indeed, although I might not view Bran's injury as one that substantially detracts from her appearance, I cannot conclude that no reasonable juror could conclude otherwise. The injury is permanent, of a sufficient size, and in a sufficiently visible location that others might view it as a significant cosmetic deformity. I do not intend to suggest that this court has no role in reviewing such findings. A disfigurement that is not permanent, or one that is permanent but far less visible, might clearly fail to meet the threshold. That is not the present case. Thus, I would conclude that the evidence presented in this case was sufficient for a reasonable

juror to determine that Bran's injury "is an impairment of or injury to the beauty, symmetry or appearance of a person of a magnitude that substantially detracts from the person's appearance from the perspective of an objective observer." Accordingly, I would affirm the judgment of the Appellate Court.

Finally, because I believe the defendant's conviction should be upheld, I need not reach the issue of whether this court should overrule *State* v. *LaFleur*, 307 Conn. 115, 51 A.3d 1048 (2012). For the foregoing reasons, I respectfully dissent.