U.S. BANK NATIONAL ASSOCIATION, TRUSTEE *v.* ROBIN BLOWERS ET AL.
(SC 20067)

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

Syllabus

The plaintiff bank, as trustee, sought to foreclose a mortgage on certain real property owned by, among others, the defendant P. Following P's default on the mortgage, the plaintiff, through its loan servicing agent, initiated loan modification negotiations with P, but the parties were unable to agree on a binding modification. P then contacted the state Department of Banking, which intervened on his behalf and initiated a modification, but the plaintiff shortly thereafter increased P's monthly mortgage payment. Subsequently, the plaintiff commenced a foreclosure action, and the parties participated in mediation but were unable to reach an agreement. P then asserted special defenses sounding in equitable estoppel and unclean hands, as well as certain counterclaims, contending that the plaintiff engaged in conduct after the note had been executed that wrongfully and substantially increased P's overall indebtedness, caused P to incur costs that impeded his ability to cure the default, and reneged on loan modifications. The plaintiff moved to strike the special defenses and counterclaims, contending that they were legally insufficient because they were not related to the making, validity or enforcement of the note or mortgage and were otherwise insufficient to state a claim on which relief could be granted. The trial court granted the motion to strike, concluding that the counterclaims did not have a reasonable nexus to the making, validity or enforcement of the note because the misconduct alleged related to activities that occurred subsequent to the execution of the note or mortgage. The court did not reach the issue of whether P's allegations were otherwise legally sufficient to support the counterclaims. The trial court found that P had alleged sufficient facts to support his special defenses of equitable estoppel and unclean hands, but, because P did not allege that the parties had agreed to a modification of the loan postforeclosure and could not rely on postforeclosure conduct to support his special defenses, they were legally insufficient, as they did not directly relate to the making, validity or enforcement of the note or mortgage. The trial court rendered judgment of strict foreclosure, from which P appealed to the Appellate Court. The Appellate Court rejected P's request to abandon the making, validity or enforcement test in favor of the transactional test, set forth in the rules of practice (§ 10-10), that requires that counterclaims must arise out of the transaction that is the subject of the plaintiff's complaint. The Appellate Court affirmed the trial court's judgment, and P, on the granting of certification, appealed to this court. *Held* that the Appellate Court incorrectly concluded that P's allegations, made in connection

with his special defenses and counterclaims, did not provide a legally sufficient basis for those defenses and counterclaims, as P's allegations involved the types of misconduct that bore a sufficient connection to the enforcement of the note or the mortgage, and to the extent that the pleadings could be construed to allege that the intervention by the Department of Banking resulted in a binding loan modification, the breach of such an agreement also provided a sufficient basis to withstand a motion to strike in a foreclosure action; accordingly, the judgment of the Appellate Court was reversed, and the case was remanded with direction to reverse the judgment of strict foreclosure and for further proceedings.

Argued December 11, 2018—officially released August 13, 2019

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., brought to the Superior Court in the judicial district of Hartford, where the defendant Farmington Valley Landscape, LLC, et al. were defaulted for failure to appear; thereafter, the defendant C&I Solutions, LLC, was defaulted for failure to plead; subsequently, the named defendant et al. filed special defenses and counterclaims; thereafter, the court, *Dubay, J.*, granted the plaintiff's motion to strike the special defenses and counterclaims; subsequently, the court, *Wahla, J.*, granted the plaintiff's motion for judgment on the counterclaims, the court, *Peck, J.*, granted the plaintiff's motion for summary judgment as to liability and the court, *Wahla, J.*, granted the plaintiff's motion for judgment of strict foreclosure and rendered judgment thereon, from which the defendant Mitchell Piper appealed to the Appellate Court, *Alvord* and *Pellegrino, Js.*, with *Prescott, J.*, dissenting, which affirmed the trial court's judgment, and the defendant Mitchell Piper, on the granting of certification, appealed to this court. *Reversed; further proceedings.*

Eli Jacobs and *Michael Linden*, certified legal interns, with whom were *Jeffrey Gentes* and, on the brief, *J.L. Pottenger, Jr.*, and *Jessica Lefebvre, Victoria Stilwell, Anderson Tuggle*, and *Emily Wanger*, certified legal interns, for the appellant (defendant Mitchell Piper).

Pierre-Yves Kolakowski, with whom was *Zachary Grendi*, for the appellee (plaintiff).

Opinion

McDONALD, J. This certified appeal calls upon the court to decide whether allegations that a mortgagee engaged in a pattern of misrepresentation and delay in postdefault loan modification negotiations before and after initiating a foreclosure action—thereby adding to the mortgagor's debt and frustrating the mortgagor's ability to avoid foreclosure—can establish legally sufficient special defenses and counterclaims in that action. The defendant mortgagor, Mitchell Piper,[1] appeals from the judgment of the Appellate Court affirming the trial court's judgment of strict foreclosure in favor of the plaintiff mortgagee, U.S. Bank National Association,[2] following the trial court's decision striking the defendant's special defenses and counterclaims. See *U.S. Bank National Assn.* v. *Blowers*, 177 Conn. App. 622, 638, 172 A.3d 837 (2017). The defendant's principal claim is that the Appellate Court incorrectly concluded that such allegations cannot establish legally sufficient special defenses or counterclaims because the misconduct alleged does not relate to the making, validity, or enforcement of the note or mortgage. We agree with the defendant and reverse the Appellate Court's judgment.

The record reveals the following undisputed background facts. In August, 2005, the defendant executed a promissory note in exchange for a loan in the original

[1] Robin Blowers, Farmington Valley Landscape, LLC (Farmington), Land Rover Capital Group (Land Rover), C&I Solutions, LLC, and Viking Fuel Oil Company, Inc. (Viking), also were named as defendants in this foreclosure action. Farmington, Land Rover and Viking were defaulted for failure to appear, and the remaining defendants other than Piper declined to appeal from the trial court's judgment. For convenience, we refer to Piper as the defendant.

[2] The full name of the plaintiff is U.S. Bank National Association, as Trustee for the Holders of the First Franklin Mortgage Loan Trust Mortgage Pass-Through Certificates, Series 2005-FF10.

principal amount of $488,000. The plaintiff subsequently became the holder of the note. The note was secured by a mortgage on the defendant's real property in Avon, and the mortgage was assigned to the plaintiff in 2010. The defendant defaulted on the note in January, 2010.

In February, 2014, the plaintiff commenced the present foreclosure action. Upon the defendant's election, the parties participated in the state's court-supervised foreclosure mediation program; see General Statutes §§ 49-31k through 49-31o;[3] but were unable to reach a loan modification agreement during that process. The defendant thereafter filed an answer, special defenses, and counterclaims. The special defenses sounded in equitable estoppel and unclean hands; the counterclaims sounded in negligence and violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.[4]

The defendant alleged the following facts in support of all of his special defenses and counterclaims. In early 2010, the defendant fell behind on his mortgage payments due to decreased business revenue resulting from the "Great Recession."[5] Shortly thereafter, the plain-

[3] In 2008, the legislature established a court-administered and supervised foreclosure mediation program under which neutral mediators assist eligible homeowners facing foreclosure and their lenders or mortgage servicers to achieve a mutually agreeable resolution to a foreclosure action. See General Statutes §§ 49-31k through 49-31o. Mediation "shall . . . address all issues of foreclosure," including, but not limited to, restructuring of the mortgage debt. General Statutes § 49-31m. When a mortgagor elects to participate in the program, the mortgagee is obligated to engage in some form of loss mitigation review with the mortgagor before foreclosure proceedings can proceed. See General Statutes §§ 49-31*l* and 49-31n.

Although §§ 49-31k, 49-31*l* and 49-31n have been amended by the legislature since the events underlying the present case; see, e.g., Public Acts 2015, No. 15-124; those amendments have no bearing on the merits of this appeal.

[4] The defendant also asserted an unjust enrichment special defense and counterclaim but subsequently withdrew both.

[5] "The Great Recession began in December 2007 and ended in June 2009, which makes it the longest recession since World War II. Beyond its duration, the Great Recession was notably severe in several respects. . . . Home prices fell approximately 30 percent, on average, from their mid-2006 peak

tiff, through its servicing agent,[6] reached out to the defendant and offered him a rate reduction that would result in a monthly mortgage payment of $1950.[7] After the defendant successfully completed a three month trial modification period, the plaintiff informed the defendant that the reduced monthly amount previously offered was too low. Thereafter, over an approximately two year period, the plaintiff similarly offered and reneged on at least four additional modifications after accepting trial payments from the defendant. Each successive modification offer sharply increased the defendant's monthly payment, rising from the initial proposal of $1950 to approximately $3445.

In April, 2012, the defendant contacted the state's Department of Banking,[8] which intervened on the defendant's behalf, "resulting in an immediate modification being received." Within months, however, the plaintiff notified the defendant that his monthly payment was increasing nearly 20 percent from that modified payment. The defendant was unable to afford the increased payments but continued to make the monthly payment set by the April modification until October, 2012, when the plaintiff rejected them as " 'partial' " payments.

to mid-2009, while the S&P 500 index fell 57 percent from its October 2007 peak to its trough in March 2009." R. Rich, "The Great Recession," available at https://www.federalreservehistory.org/essays/great recession of 200709 (last visited July 23, 2019). As foreclosure actions soared; see generally *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 145 n.7, 74 A.3d 1225 (2013) (*McDonald, J.*, dissenting) (noting mortgage foreclosure crisis during this period); state and federal legislators stepped in to attempt to staunch the tide. See footnote 3 of this opinion (addressing Connecticut's legislative response).

[6] Because there is no dispute that the plaintiff's servicing agent was acting within the scope of its agency with respect to the conduct alleged, we impute all of the servicer's conduct to the plaintiff in this opinion.

[7] Nothing in the record indicates the amount of the defendant's mortgage payment at the time of default.

[8] The defendant alleges that he contacted the state "banking commission." Because Connecticut does not have a banking commission, we construe the defendant's allegation to mean that he contacted the state's Department of Banking.

In late 2013, the plaintiff erroneously informed the defendant's insurance company that the Avon property was no longer being used as the defendant's residence. As a result, the defendant's insurance policy was cancelled, and the defendant was forced to replace coverage at premium costs that increased from his prior rate of $900 to $4000 per year.

The defendant also alleged that the following conduct occurred after the February, 2014 commencement of the foreclosure action, during the parties' participation in court-supervised mediation. In the course of approximately ten months of mediation, the plaintiff regularly ignored agreed upon deadlines, arrived late to mediation sessions, made duplicative, exhaustive, and ever changing requests, and provided the defendant with conflicting or incomplete information. Due to the plaintiff's tardiness, little was accomplished during mediation sessions given the time constraints of the program's scheduling. Although the plaintiff offered a modification at one point, it could not be finalized because the financial information on which it rested was more than four months out of date by the time it was presented to the defendant.

The defendant alleged that the foregoing preforeclosure and postforeclosure misconduct not only frustrated his ability to obtain a proper modification but also caused thousands of dollars in additional accrued interest, attorney's fees, escrow advances, and other costs to be added to the debt claimed by the plaintiff in the foreclosure action. In his negligence counterclaim, the defendant further alleged that the unnecessary and negligent prolonging of this process had ruined his credit score, which adversely impacted his business and personal affairs, and had caused him to incur significant expenses for legal representation and other professional services. The defendant claimed that the plaintiff should be equitably estopped from collecting the dam-

ages it caused by its own misconduct and that the plaintiff's attempt to foreclose should be barred by the doctrine of unclean hands. He further sought compensatory and punitive damages, injunctive relief, and attorney's fees under his counterclaims.

The plaintiff moved to strike all of the special defenses and counterclaims. It contended that they were legally insufficient because they were not related to the making, validity, or enforcement of the note, as required under appellate precedent, and also were otherwise insufficient to state a claim upon which relief may be granted. The trial court, *Dubay, J.*, granted the motion to strike in its entirety.

With respect to the counterclaims, the trial court explained that the proper application of Practice Book § 10-10, which dictates that counterclaims must "[arise] out of the transaction [that] is the subject of the plaintiff's complaint," requires, in the foreclosure context, consideration of whether the counterclaim has some reasonable nexus to the making, validity, or enforcement of the note. The court concluded that this test was not met in the present case because all of the misconduct alleged related to activities that took place subsequent to the execution of the note or mortgage. The court acknowledged that a foreclosure sought after a modification had been reached during mediation could have the requisite nexus to enforcement of the note, but found that there had been no such modification in the present case. In light of its conclusion that the allegations did not establish this nexus, the court did not reach the issue of whether they were otherwise legally sufficient to support the CUTPA and negligence counterclaims.

Conversely, with respect to the special defenses, the trial court found that the defendant had alleged sufficient facts to support equitable estoppel and unclean hands defenses. It cited, however, Appellate Court case law under which "[a] valid special defense at law to a

foreclosure proceeding must be legally sufficient *and* address the making, validity or enforcement of the mortgage, the note or both." (Emphasis added; internal quotation marks omitted.) *TD Bank, N.A.* v. *J & M Holdings, LLC*, 143 Conn. App. 340, 343, 70 A.3d 156 (2013). As with the counterclaims, the court concluded that, because the defendant did not allege that the parties had agreed to a modification of the loan postforeclosure, he could not rely on postforeclosure conduct to support his special defenses. Therefore, the trial held that the special defenses were legally insufficient because they did not directly relate to the making, validity or enforcement of the note. The trial court, *Wahla, J.*, subsequently rendered a judgment of strict foreclosure.

The defendant appealed from the judgment of strict foreclosure to the Appellate Court, challenging the trial court's decision granting the plaintiff's motion to strike. The Appellate Court panel, with one judge dissenting, affirmed the judgment. *U.S. Bank National Assn.* v. *Blowers*, supra, 177 Conn. App. 638. The Appellate Court majority agreed that the special defenses and counterclaims did not satisfy the making, validity, or enforcement test as required under its precedent. Id., 627–32. It rejected the defendant's request to abandon this test in favor of a straightforward application of the standard transactional test applied in other settings. Id., 633–34. The majority reasoned that "automatically allowing counterclaims and special defenses in foreclosure actions that are based on conduct of the mortgagee arising during mediation and loan modification negotiations would serve to deter mortgagees from participating in these crucial mitigating processes" and would thwart judicial economy. Id., 634. It disagreed that its test was inconsistent with the equitable nature of foreclosure, noting that exceptions to the test's application had been recognized when traditional notions of equity would not be served thereby. Id., 633–34. The majority further noted that mortgagors who do not meet such limited exceptions are not without a remedy for a mort-

gagee's postdefault misconduct because a mortgagor could bring a separate action for damages. Id., 634 n.5. The dissenting judge contended that the court's precedent did not stand for the sweeping proposition that allegations of improper conduct during mediation and modification negotiations lack a reasonable nexus to the making, validity, or enforcement of the note or mortgage. Id., 647 (*Prescott, J.*, dissenting). The dissenting judge recognized that the court previously had concluded that allegations of misconduct during the court-sponsored mediation program lacked such a nexus. Id., 647 (*Prescott, J.*, dissenting). The present case, however, also alleged preforeclosure misconduct, including that the defendant had "received" an "immediate" modification as a result of the intervention of the Department of Banking, an allegation that should have been accepted as true for purposes of the motion to strike. Id., 646–47 (*Prescott, J.*, dissenting).

The defendant's certified appeal to this court followed. The defendant challenges the propriety of the making, validity, or enforcement test, the proper scope of "enforcement" under that test if it does apply to foreclosure actions, and the sufficiency of the allegations to establish that the parties had entered into a binding modification if such allegations are necessary to seek equitable relief on the basis of postorigination conduct.[9]

[9] We granted the defendant's petition for certification to appeal, limited to the following issues:

"1. Did the Appellate Court properly hold that (a) special defenses to a foreclosure action must 'directly attack' the making, validity, or enforcement of the note or mortgage, and (b) counterclaims in a foreclosure action must also satisfy the 'making, validity, or enforcement' requirement? See Practice Book § 10-10.

"2. If the Appellate Court properly addressed the issues in the first question, did it properly hold that alleged postorigination misconduct concerns a plaintiff's 'enforcement' of a note or mortgage only if the plaintiff breaches a loan modification or other similar agreement that affects the enforceability of the note or mortgage?

"3. If the Appellate Court properly addressed the issues in the first and second questions, did it properly hold that the [defendant's] allegations of the plaintiff's misconduct and breach relating to a 'received' 'immediate

At its essence, the defendant's position is that, given the equitable nature of a foreclosure action, a mortgagee's misconduct that hinders a mortgagor's efforts to cure a default, such as through obtaining a modification agreement, and adds to the mortgagor's debt while the mortgagor is making such good faith efforts, is a proper basis for special defenses or counterclaims in that action. Although the defendant suggests that the standard test set forth in our rules of practice should be the sole measure of legal sufficiency, he contends that such misconduct sufficiently relates to enforcement of the note or mortgage if the making, validity, or enforcement test is applied. We conclude that the Appellate Court's judgment must be reversed.

We begin with the observation that the "making, validity, or enforcement test" is a legal creation of uncertain origin, but it has taken root as the accepted general rule in the Superior and Appellate Courts over the past two decades.[10] Its scope, however, has been

modification' did not amount to an allegation that the plaintiff had agreed to a 'final, binding loan modification' that affected the plaintiff's ability to enforce the note or mortgage?" *U.S. Bank National Assn.* v. *Blowers*, 328 Conn. 904, 904–905, 177 A.3d 1160 (2018).

[10] Our research reveals that the limitation applied in the present case first appeared in Connecticut jurisprudence in a Superior Court case. In *Connecticut Savings Bank* v. *Reilly*, 12 Conn. Supp. 327, 327–28 (1944), a foreclosure action, the defendant asserted abuse of process as a special defense, due to the excessiveness of attachment with which suit was commenced. With regard to that special defense, the trial court, in a brief two paragraph decision, noted that abuse of process did not fall within the ambit of defenses this court had recognized at common law—payment, discharge, release, satisfaction or invalidity of the lien. Id., 327. The trial court determined, in a separate memorandum of decision in that same foreclosure action, that the defendant's counterclaim "sounds in tort and its subject matter has no connection with the making, validity or enforcement of the mortgage. This makes it an improper matter for adjudication in this litigation." *Connecticut Savings Bank* v. *Reilly*, 12 Conn. Supp. 328, 329 (1944). In support of this proposition, the trial court cited *Schaefer* v. *O. K. Tool Co.*, 110 Conn. 528, 148 A. 330 (1930), a case in which this court simply had held that it is not permissible to file a counterclaim sounding in tort in a contract action unless the subject matter of the counterclaim is so connected with the matter in controversy under the original complaint that its consideration is necessary for a full determination of the rights of the parties. Id., 531; see *Connecticut Savings Bank* v. *Reilly*, supra, 329. Our research has not revealed any reference to, or application of, the making, validity, or

the subject of some debate in those courts.[11] This court has never expressly endorsed this test. Our lone reference to it was in a case in which we acknowledged that the mortgagee had argued that the mortgagor's equitable special defense did not meet this test; see

---

enforcement test until almost five decades later. In a 1990 foreclosure action, the trial court concluded that special defenses and counterclaims alleging tortious interference with a contract to sell the subject property could not proceed because they did not involve the validity and enforcement of promissory notes, a guarantee and mortgages. See *Citytrust* v. *Kings Gate Developers, Inc.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-90-0106448-S (October 18, 1990) (2 Conn. L. Rptr. 639). That case did not rely on either *Reilly* decision but, instead, relied on *Wallingford* v. *Glen Valley Associates, Inc.*, 190 Conn. 158, 161, 459 A.2d 525 (1983), a case that makes no reference to a making, validity, or enforcement test. *Citytrust* v. *King Gate Developers, Inc.*, supra, 2 Conn. L. Rptr. 639; see *Wallingford* v. *Glen Valley Associates, Inc.*, supra, 159, 160–61 (applying transaction test set forth in what is now Practice Book § 10-10 to conclude that counterclaim alleging tort claim for property damage resulting from surface water diversion did not involve same factual and legal issues as plaintiff's sewer and tax lien foreclosure action, which involved "enforcement of a lien acquired by operation of law").

It appears that this test first entered our appellate foreclosure jurisprudence in 1999. See *Southbridge Associates, LLC* v. *Garofalo*, 53 Conn. App. 11, 17–19, 728 A.2d 1114, cert. denied, 249 Conn. 919, 733 A.2d 229 (1999). The Appellate Court in *Garofalo* did not provide insight into the origins or appropriateness of the making, validity, or enforcement test. Since then, the Appellate Court has applied this test in numerous foreclosure actions.

[11] "There have been many and varied interpretations of the making, validity and enforcement requirement by Connecticut Superior Court decisions. There is a line of cases which interprets the phrase very strictly to mean the execution and delivery of an enforceable instrument, and not the occurrences that may arise between the parties during the course of their loan relationship. . . . A second line of cases, however, interprets the making, validity, and enforcement requirement less rigidly. . . . This court does not subscribe to the literal, chronological test of making, validity and enforcement . . . . [P]ostexecution actions or positions of a lender can relate to the enforcement of a note and mortgage. Each counterclaim or special defense therefore requires a case-by-case analysis, by the court acting as a court of equity, to assess the extent to which the facts alleged relate to the original transaction and not to any different or subsequent transaction." (Citations omitted; internal quotation marks omitted.) *Bank of America, N.A.* v. *Groton Estates, LLC*, Docket No. CV-09-6001697-S, 2010 WL 3259815, *5 (Conn. Super. July 13, 2010); see also *U.S. Bank National Assn.* v. *Blowers*, supra, 177 Conn. App. 648 n.7 (*Prescott, J.*, dissenting) ("I recognize that our jurisprudence is somewhat opaque with regard to the meaning of enforcement in this context and that there can be reasonable and differing views about how to interpret that term in the foreclosure context. For example, enforcement could be construed narrowly to refer only to the

Thompson v. *Orcutt*, 257 Conn. 301, 312, 777 A.2d 670 (2001); but we resolved the case in favor of the mortgagor by application of a different standard. Id., 313.

In reaching our decision, we presume that the Appellate Court did not intend for the making, validity, or enforcement test to require mortgagors to meet a more stringent test than that required for special defenses and counterclaims in nonforeclosure actions. We therefore interpret the test as nothing more than a practical application of the standard rules of practice that apply to all civil actions to the specific context of foreclosure actions. See *CitiMortgage, Inc.* v. *Rey*, 150 Conn. App. 595, 605, 92 A.3d 278 ("a counterclaim must simply have a sufficient relationship to the making, validity or enforcement of the subject note or mortgage in order to meet the transaction test as set forth in Practice Book § 10-10 and the policy considerations it reflects"), cert. denied, 314 Conn. 905, 99 A.3d 635 (2014). We agree with the defendant and the dissenting Appellate Court judge that a proper construction of "enforcement" includes allegations of harm resulting from a mortgagee's wrongful postorigination conduct in negotiating loan modifications, when such conduct is alleged to have materially added to the debt and substantially prevented the mortgagor from curing the default.[12]

I

Appellate review of a trial court's decision to grant a motion to strike is plenary. See, e.g., *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 398, 119 A.3d 462 (2015); *Kumah* v. *Brown*, 307 Conn. 620,

ability of a mortgagee to enforce the note or mortgage or, more broadly, to include a mortgagee's actions related to such enforcement.").

[12] Although the dissenting Appellate Court judge relied in part on a distinction between defenses at law and defenses in equity as a basis for a more expansive meaning of enforcement for the latter; *U.S. Bank National Assn.* v. *Blowers*, supra, 177 Conn. App. 644 (*Prescott, J.*, dissenting); our focus in the present case is on equitable defenses. As such, we have no occasion to address whether legal defenses would be subject to the same broad view.

626, 58 A.3d 247 (2013). This is because "a motion to strike challenges the legal sufficiency of a pleading . . . and, consequently, requires no factual findings by the trial court . . . . In ruling on a motion to strike, the court must accept as true the facts alleged in the special defenses and construe them in the manner most favorable to sustaining their legal sufficiency." (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 398; see also *Kaminski* v. *Fairfield*, 216 Conn. 29, 31, 578 A.2d 1048 (1990). "The allegations of the pleading involved are entitled to the same favorable construction a trier would be required to give in admitting evidence under them and if the facts provable under its allegations would support a defense or a cause of action, the motion to strike must fail." *Mingachos* v. *CBS, Inc.*, 196 Conn. 91, 108–109, 491 A.2d 368 (1985).

The defendant's allegations are not a model of clarity. The ambiguity in the defendant's pleadings is exacerbated by the fact that the defendant has alleged the very same facts in support of various special defenses and counterclaims that require different elements. On one hand, the defendant may be asserting that he satisfied all of the conditions necessary to transition from temporary modifications to permanent modifications but that no such permanent modification was executed. On the other hand, he may be asserting that, even though the plaintiff was not obligated to execute a permanent modification, it induced the defendant to believe that a permanent modification would be executed and engaged in the negotiations in bad faith because it delayed foreclosure with the purpose or effect of extracting additional funds from the defendant, or increasing the defendant's debt.[13] It is also possible

[13] Diane E. Thompson, then counsel for the National Consumer Law Center, explains the financial incentives for a mortgage servicer to draw out a delinquency without a modification or a foreclosure. See D. Thompson, "Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications," 86 Wash. L. Rev. 755 (2011). According to Thompson, servicers'

that the defendant may be advancing both of these arguments as alternative theories. Given the posture of the case, an early stage of litigation, and the obligation to construe the pleadings in the defendant's favor, we assume that the defendant is advancing all of these theories.

Finally, before turning to the merits of the appeal, we emphasize the narrow scope of the issue before us.

"income stream comes primarily from their monthly servicing fee, which is a fixed percentage of the outstanding principal balance." Id., 767. Servicers face competing incentives when deciding whether to offer a modification or proceed with foreclosure. Id., 776–80. She posits that "the true sweet spot lies in stretching out a delinquency without either a modification or a foreclosure. While financing advances is a large expense for servicers, one they will want to end as soon as possible, late fees and other [default related] fees can add significantly to a [servicer's] bottom line, and the longer a homeowner is in default, the larger those fees can be. The nether-world status between a foreclosure and a modification also boosts the monthly servicing fee (because monthly payments are not reducing principal) and slows down servicers' largest [noncash] expense: the amortization of mortgage servicing rights (because homeowners who are in default are unlikely to prepay via refinancing). Finally, foreclosure or modification, not delinquency by itself, usually triggers loss recognition in the pool under the accounting rules. Waiting to foreclose or modify postpones the day of reckoning for a servicer." (Footnotes omitted.) Id., 777. "Servicers do not make binary choices between modification and foreclosure. Servicers may offer temporary modifications, modifications that recapitalize delinquent payments, modifications that reduce interest, modifications that reduce principal, or combinations of all of the above. Servicers may demand upfront payment of fees or waive certain fees. Or servicers may simply postpone a foreclosure, hoping for a miracle. Once a servicer chooses a modification, the servicer must further choose between types of modifications. Servicers will often, if they can, choose a short-term forbearance or repayment agreement over a permanent modification of the loan terms. A permanent modification of the loan terms might involve capitalizing arrears, extending the term, reducing the interest, and reducing or merely forbearing the obligation to repay principal. . . . [T]he weight of servicer incentives is always against principal reductions and weighs heavily in favor of short-term agreements. Principal reductions cut into the servicer's main source of income—the monthly [principal based] servicing fee—without offering any additional income. Short-term modifications delay loss recognition and preserve cash flow to the residual interests held by many servicers. Interest rate reductions are only slightly more favorable from a servicer's standpoint than principal reduction or forbearance: they will still, ultimately, result in a drop in the principal as borrowers pay down principal more quickly over time at a lower interest rate. While the incentives are mixed for a foreclosure, there are more incentives in favor of a foreclosure than against." (Footnote omitted.) Id., 780.

The trial court concluded that the allegations in support of both special defenses of unclean hands and equitable estoppel were legally sufficient, but for the requisite direct connection to the making, validity, or enforcement of the note or mortgage. The court never decided whether the counterclaims adequately stated a claim upon which relief may be granted, resting its conclusion solely on the lack of the requisite connection to enforcement of the note or mortgage. We assume, for purposes of this opinion, that both the defenses and counterclaims would otherwise be legally sufficient and limit our review to the question of whether the allegations bear a sufficient connection to enforcement of the note or mortgage.[14] The meaning of enforcement in this context presents an issue of law over which we also exercise plenary review. See *CitiMortgage, Inc.* v. *Rey*, supra, 150 Conn. App. 602 (plenary review applies to question of which legal standard controls and whether proper standard was applied).

II

Our view of the scope of "enforcement" of the note or mortgage is informed by the following principles. An action for foreclosure is "peculiarly an equitable action . . . ." *Hartford Federal Savings & Loan Assn.* v. *Lenczyk*, 153 Conn. 457, 463, 217 A.2d 694 (1966); accord *New Milford Savings Bank* v. *Jajer*, 244 Conn. 251, 256,

[14] The trial court found that the defendant's allegations that the plaintiff's misleading conduct was calculated to induce the defendant to believe that he was going to get a loan modification and that the defendant acted on the information provided by making payments under the May, 2012 modification were legally sufficient to satisfy the elements of equitable estoppel. The court did not explain why it distinguished the May, 2012 modification from the other modifications previously offered and withdrawn. The court also found that those same allegations, as well as further allegations that the plaintiff conducted itself in wilful or reckless disregard of the harmful consequences of its solicitations and that it failed to conduct itself in an honest and equitable manner were legally sufficient to establish the elements of an unclean hands defense.

708 A.2d 1378 (1998). "A party that invokes a court's equitable jurisdiction by filing an action for foreclosure necessarily invites the court to undertake . . . an inquiry [into his conduct]." *Willow Funding Co., L.P.* v. *Grencom Associates*, 63 Conn. App. 832, 849, 779 A.2d 174 (2001); accord *Basak* v. *Damutz*, 105 Conn. 378, 385, 135 A. 453 (1926) (in court of equity, "the conduct of the plaintiff is subject to scrutiny, since he who claims equity must do equity"). "Equity will not afford its aid to one who by his conduct or neglect has put the other party in a situation in which it would be inequitable to place him." *Glotzer* v. *Keyes*, 125 Conn. 227, 231–32, 5 A.2d 1 (1939). A trial court conducting an equitable proceeding may therefore "consider all relevant circumstances to ensure that complete justice is done." *Reynolds* v. *Ramos*, 188 Conn. 316, 320, 449 A.2d 182 (1982). When a mortgagee's conduct is inequitable, "a trial court in foreclosure proceedings has discretion . . . to withhold foreclosure or to reduce the amount of the stated indebtedness." *Hamm* v. *Taylor*, 180 Conn. 491, 497, 429 A.2d 946 (1980); accord *Southbridge Associates, LLC* v. *Garofalo*, 53 Conn. App. 11, 15, 728 A.2d 1114, cert. denied, 249 Conn. 919, 733 A.2d 229 (1999).

This court previously has declined to take a narrow view of the circumstances under which equitable defenses may be asserted in a foreclosure action. In *Thompson* v. *Orcutt*, supra, 257 Conn. 318, the court held that the mortgagor's special defense of unclean hands, which rested on actions by the mortgagee subsequent to the execution of the note and mortgage, was legally sufficient. In that case, the mortgagee was alleged to have engaged in fraudulent conduct in a bankruptcy proceeding, which, in turn, enabled the mortgagee to pursue the foreclosure action. Id., 304–305. Specifically, the mortgagee was alleged to have intentionally overstated the extent to which the mortgage

encumbered the property, which caused the bankruptcy trustee to abandon the property as an asset of the bankruptcy estate. Id., 304. Before this court, the mortgagee argued that an unclean hands defense should not apply in a mortgage foreclosure action unless the wrongful conduct relates to the making, validity, or enforcement of the mortgage or note. Id., 312. It contended, therefore, that the mortgagor could not assert this defense because the mortgage transaction was not premised on fraud but, rather, the alleged fraud had been undertaken in the bankruptcy action. Id. This court rejected the mortgagee's narrow view. Id., 312–14. It concluded that the mortgagee's alleged misconduct was " 'directly and inseparably connected' " to the foreclosure action and, therefore, was sufficient to support the unclean hands defense to the foreclosure action. Id., 313, 318. In so concluding, this court explained that, although "[t]he original transaction creating the . . . mortgage was not tainted with fraud . . . the plaintiff's ability to foreclose on the defendants' property . . . depended upon his fraudulent conduct in the bankruptcy proceeding." Id., 313–14.

Although *Thompson* is silent on precisely when the alleged misconduct occurred, appellate case law recognizes that conduct occurring after the origination of the loan, after default, and even after the initiation of the foreclosure action may form a proper basis for defenses in a foreclosure action. See *McKeever* v. *Fiore*, 78 Conn. App. 783, 789–90, 829 A.2d 846 (2003) (applying doctrine of unclean hands to reduce interest accrued and attorney's fees incurred over nine year period between plaintiff's initial commencement of foreclosure action and final prosecution of action); *Federal Deposit Ins. Corp.* v. *Voll*, 38 Conn. App. 198, 211, 660 A.2d 358 (concluding that equitable defense of laches, based on delay between commencement of foreclosure action and motion for judgment of foreclosure, could have been asserted in responsive pleading or in objection to calculation of debt when plaintiff moved for judgment of

foreclosure, and, therefore, laches argument could not be raised in proceeding for deficiency judgment), cert. denied, 235 Conn. 903, 665 A.2d 901 (1995).

This broader temporal scope is consistent with the principle that, in equitable actions, "the facts determinative of the rights of the parties are those in existence at the time of final hearing." *Greenwich Trust Co.* v. *Tyson*, 129 Conn. 211, 215, 27 A.2d 166 (1942); accord *E. M. Loew's Enterprises, Inc.* v. *International Alliance of Theatrical Stage Employees*, 127 Conn. 415, 419, 17 A.2d 525 (1941) (whether plaintiff is entitled to equitable relief is determined "not by the situation existing when [the action] is begun, but by that which is developed at the trial"); *Duessel* v. *Proch*, 78 Conn. 343, 350, 62 A. 152 (1905) ("[i]n equitable proceedings, any events occurring after their institution may be pleaded and proved which go to show where the equity of the case lies at the time of the final hearing"). "Equitable proceedings rest upon different foundations [than actions at law], and in them the parties can always rely on new matter, if properly pleaded." *Woodbridge* v. *Pratt & Whitney Co.*, 69 Conn. 304, 334, 37 A. 688 (1897); see Practice Book § 10-10 ("[s]upplemental pleadings showing matters arising since the original pleading may be filed in actions for equitable relief by either party").

This broader temporal scope is not inconsistent with a requirement that a defense sufficiently relates to enforcement of the note or mortgage. The various rights of the mortgagee under the note and mortgage (or related security instruments) are not finally or completely "enforced" until the foreclosure action is concluded. See General Statutes § 49-1 (setting forth general rule that "[t]he foreclosure of a mortgage is a bar to any further action upon the mortgage debt, note or obligation against the person or persons who are liable for the payment thereof who are made parties to the foreclosure"); *JP Morgan Chase Bank, N.A.* v. *Winthrop Properties, LLC*, 312 Conn. 662, 673–74, 94

A.3d 622 (2014) ("The purpose of the foreclosure is to extinguish the mortgagor's equitable right of redemption that he retained when he granted legal title to his property to the mortgagee following the execution of the mortgage. . . . The mortgagee's title does not become absolute, however, until all eligible parties have failed to exercise their rights to redeem the property." [Citations omitted.]); *RAL Management, Inc.* v. *Valley View Associates*, 278 Conn. 672, 685 n.12, 899 A.2d 586 (2006) (amended affidavit of debt filed on day that court reentered judgment of foreclosure, when it set new law days).

The mortgagor's rights and liabilities thus depend not only on the validity of the note and mortgage but also on the amount of the debt. That debt will determine whether strict foreclosure or foreclosure by sale is ordered, and, in turn, whether a deficiency judgment may be recovered and the amount of that deficiency. See *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 131, 74 A.3d 1225, 1233 (2013) ("under Practice Book § 23-18, the court was required to review the note, mortgage and affidavit of debt before finding that the debt exceeded the value of the property and ordering strict foreclosure"); *Federal Deposit Ins. Corp.* v. *Voll*, supra, 38 Conn. App. 207 (deficiency judgment allows note holder to "recover the difference between the amount due on the underlying debt and the amount received upon foreclosure" [internal quotation marks omitted]); see also *TD Bank, N.A.* v. *Doran*, 162 Conn. App. 460, 468, 131 A.3d 288 (2016) ("the strict foreclosure hearing establishes the amount of the debt owed by the defendant"); *Federal Deposit Ins. Corp.* v. *Voll*, supra, 211 ("[d]efenses that could have been raised during the foreclosure proceedings may not be raised at the deficiency hearing"); *Connecticut National Bank* v. *N. E. Owen II, Inc.*, 22 Conn. App. 468, 472, 578 A.2d 655 (1990) ("in a mortgage foreclosure action, a fundamental allegation that must be proved by the plaintiff is the amount of the debt"). The debt may include principal,

interest, taxes, and late charges owed. See, e.g., *New England Savings Bank* v. *Bedford Realty Corp.*, 238 Conn. 745, 748 and n.3, 680 A.2d 301 (1996); *Suffield Bank* v. *Berman*, 228 Conn. 766, 769 and n.9, 773, 639 A.2d 1033 (1994); *Burritt Mutual Savings Bank of New Britain* v. *Tucker*, 183 Conn. 369, 374, 439 A.2d 396 (1981); *Connecticut National Bank* v. *N. E. Owen II, Inc.*, supra, 469; see also General Statutes § 49-2 (a); Practice Book § 23-18. The terms of the note or mortgage may also permit an award of reasonable attorney's fees for expenses arising from any controversy relating to the note or mortgage, which may be collected in connection with the foreclosure action. See *Connecticut National Bank* v. *N. E. Owen II, Inc.*, supra, 470–71 and n.3; 1 D. Caron & G. Milne, Connecticut Foreclosures (9th Ed. 2019) § 6-2:1.2k, p. 419.

These equitable and practical considerations inexorably lead to the conclusion that allegations that the mortgagee has engaged in conduct that wrongly and substantially increased the mortgagor's overall indebtedness, caused the mortgagor to incur costs that impeded the mortgagor from curing the default, or reneged upon modifications are the types of misconduct that are " 'directly and inseparably connected' "; *Thompson* v. *Orcutt*, supra, 257 Conn. 313; to enforcement of the note and mortgage. To the extent that the pleadings reasonably may be construed to allege that the April, 2012 intervention by the Department of Banking resulted in a binding modification, there can be no doubt that the breach of such an agreement would bear the requisite nexus.[15] See *U.S. Bank National Assn.* v. *Blowers*, supra, 177 Conn. App. 630 (acknowledging

[15] The defendant alleged that the Department of Banking "intervened on [his] behalf, resulting in an immediate modification being received." We agree with Judge Prescott that, in light of the liberal construction that the trial court was required to give the pleadings, the defendant's allegations were sufficient to support a claim that a binding modification had been reached prior to the commencement of the foreclosure action. As such, the defendant's pleadings should not have been stricken in their entirety on that basis alone.

this point). Such allegations, therefore, provide a legally sufficient basis for special defenses in the foreclosure action. Insofar as the counterclaims rest, at this stage, upon the same allegations as the special defenses, judicial economy would certainly weigh in favor of their inclusion in the present action. See *Connecticut National Bank* v. *Voog*, 233 Conn. 352, 368, 659 A.2d 172 (1995) ("[b]ecause th[ese] counterclaim[s] paralleled his special defense, [they were] also correctly pleaded in this case rather than as a separate action for damages").

We express no opinion as to whether all of the defendant's allegations necessarily have a sufficient nexus to enforcement of the note or mortgage. Because the trial court, the Appellate Court, and the parties have generally addressed the allegations in toto, we do the same.[16]

Nor do we intend to suggest, at this stage of the litigation, that the allegations in the present case are suffi-

[16] The only distinction that has been made focuses on allegations of conduct during the course of court-supervised mediation. The plaintiff suggested at oral argument before this court that statutory sanctions are the proper remedy to address misconduct during mediation. The mediation scheme acknowledges "an expectation" that the parties will participate in the mediation process "in good faith, but without unreasonable and unnecessary delays" in an effort to reach an agreement to avoid foreclosure or to expedite or facilitate the foreclosure with reasonable speed and efficiency. General Statutes § 49-31k (7). It authorizes the court to impose sanctions on any party or counsel for engaging in "intentional or a pattern or practice of conduct during the mediation process that is contrary to the objectives of the mediation program" and provides that available sanctions "shall include, but not be limited to, terminating mediation, ordering the mortgagor or mortgagee to mediate in person, forbidding the mortgagee from charging the mortgagor for the mortgagee's attorney's fees, awarding attorney's fees, and imposing fines." General Statutes § 49-31n (c) (2).

The present case involves an alleged pattern of misconduct that commenced long before the filing of the foreclosure action and continued during mediation. We have no occasion, therefore, to consider whether the availability of those sanctions reflects a legislative intent to occupy the field when the misconduct is limited to the mediation period. Moreover, the plaintiff has provided no analysis on the issue of whether the legislature intended these sanctions to supplant or otherwise limit the court's inherent power to impose sanctions or otherwise afford equitable relief. Cf. *Mingachos* v. *CBS, Inc.*, supra, 196 Conn. 109–10 ("[b]ecause the [Workers' Compensation Act] provides the exclusive remedy to the employee for conduct alleged in

cient to justify the remedy of withholding foreclosure or reducing the debt. Even if the defendant is able to prove all of his allegations, the trial court would have to be mindful that "[t]he equitable powers of the court are broad, but they are not without limit. 'Equitable power must be exercised equitably.' *Hamm* v. *Taylor*, supra, 180 Conn. 497." *McKeever* v. *Fiore*, supra, 78 Conn. App. 793; see also *Wells Fargo Bank, N.A.* v. *Meyers*, 108 App. Div. 3d 9, 23, 966 N.Y.S.2d 108 (2013) (it was improper for trial court to order mortgagee to execute final loan modification patterned after trial loan modification proposal as remedy for mortgagee's failure to negotiate loan modification in good faith and to direct dismissal of complaint, and "courts must employ appropriate, permissible, and authorized remedies, tailored to the circumstances of each given case" when no sanction is specifically directed). It would be premature for us to express an opinion on that matter at this juncture.

We are not persuaded that our decision today will have the adverse consequences envisioned by the plaintiff and the Appellate Court that would require a different result as a matter of public policy. On this record, we have no basis to conclude that mortgagees will be deterred from engaging in modification negotiations. Under the state's mediation program, when a mortgagor elects to participate in the program, a mortgagee is required to engage in loss mitigation review with the mortgagor before foreclosure proceedings can proceed and faces sanctions for conduct that amounts to a lack of good faith.[17] See General Statutes §§ 49-31*l* and 49-31n. This statutory obligation provides an incentive for the parties to negotiate prior to the filing of a foreclosure action, as do ordinary financial incentives. Our decision serves as a deterrent to wrongful conduct only.

the original complaint, the trial court's denial of the plaintiff's motion to strike the special defense was not clearly erroneous").

[17] A litigation hold is placed on the case, during which time a mortgagee is prohibited from making any motion, request or demand of a mortgagor, except as it may relate to the mediation program; General Statutes § 49-31*l*

Insofar as the mortgagee is conducting itself fairly and within the bounds of the law, we agree with the dissenting Appellate Court judge's confidence that "our trial courts will be able to discern efficiently between claims that are well pleaded and supported by specific factual allegations and those that are merely frivolous and intended only to create unneeded delay." *U.S. Bank National Assn.* v. *Blowers*, supra, 177 Conn. App. 649 (*Prescott, J.*, dissenting).

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of strict foreclosure and to remand the case to the trial court for further proceedings in accordance with this opinion.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* EUGENE L. WALKER (SC 20101)

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

Syllabus

Convicted of the crimes of felony murder, manslaughter in the first degree with a firearm, attempt to commit robbery in the first degree, and criminal possession of a pistol or revolver in connection with the shooting death of the victim, the defendant appealed to the Appellate Court, claiming that his federal constitutional right to confront the witnesses against him had been violated by the admission of certain evidence connecting him to the shooting. At trial, a supervisory forensic analyst employed by the state, D, testified that the defendant was a major contributor to the DNA on a bandana that had been found at the crime scene and that allegedly had been worn by the person who shot the victim. In conjunction with D's testimony, the state also introduced into evidence a written report signed by D containing specific numerical DNA profiles from the bandana and a postarrest buccal swab of the defendant's mouth that had previously been conducted pursuant to a court order. D testified that, although she analyzed the DNA on the

(c) (6); and no judgment of strict foreclosure or foreclosure by sale may be rendered against the mortgagor during the mediation period. General Statutes §§ 49-31*l* (c) (6) and 49-31n (c) (9).

bandana and conducted the ultimate comparison, the numerical DNA profile from the defendant's buccal swab had been generated by another forensic analyst or analysts. Although D had neither participated in nor observed the analysis of the defendant's buccal swab, D testified that she had received paperwork showing that standard laboratory procedures had been followed and explicitly swore to the accuracy of the resulting numerical DNA profile. On appeal to the Appellate Court, the defendant claimed that the evidence regarding the numerical DNA profile that had been presented through D contained testimonial hearsay and that he had been deprived of his right to confrontation because the state had failed to call a witness with personal knowledge of the testing of the buccal swab. The Appellate Court rejected that claim, concluding that, because D had conducted the ultimate analysis and made the resulting findings that connected the defendant's DNA to the bandana, and because D testified and was subjected to cross-examination at trial, the defendant's right to confrontation had not been violated. Although the Appellate Court vacated the defendant's manslaughter conviction on a separate ground, it affirmed the trial court's judgment in all other respects. On the granting of certification, the defendant appealed to this court, claiming that the introduction of evidence concerning his numerical DNA profile through D's testimony violated his right to confrontation. *Held* that the Appellate Court incorrectly concluded that the admission of D's testimony concerning the numerical DNA profile from the defendant's buccal swab did not violate the defendant's right to confrontation, and, because the state did not advance a claim of harmless error, the defendant was entitled to a new trial: D's testimony, which did not consist merely of her own independent opinion, introduced to the jury the other analyst's or analysts' out-of-court statements about the defendant's numerical DNA profile, as D had explicitly referred to, relied on, and vouched for the accuracy of work by the other analyst or analysts that she did not perform or otherwise observe, and such evidence constituted hearsay in light of the state's concession that it was offered to prove the truth of the matter asserted; moreover, the evidence relating to the defendant's numerical DNA profile was testimonial in nature because it was created for the primary purpose of establishing the defendant's guilt at trial, as the buccal swab was performed after the defendant had been arrested and charged with various crimes, was obtained by court order for comparison with any DNA found on the bandana discovered at the crime scene, and was processed in such a way that the evidentiary purpose of the buccal swab analysis would have been readily apparent to the analyst or analysts who conducted it; furthermore, although all analysts who participate in the process of generating a DNA profile need not testify, the state must call as a witness an analyst with personal knowledge concerning the accuracy of a numerical DNA profile, and, because D simply relayed to the jury the DNA profile that had been provided to her by the analyst or analysts

and did not possess such knowledge with respect to the processing of the defendant's buccal swab, D was not a sufficient substitute witness for purposes of the right to confrontation.

Argued January 23—officially released August 13, 2019

Procedural History

Substitute information charging the defendant with the crimes of felony murder, manslaughter in the first degree with a firearm, attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree, and criminal possession of a pistol or revolver, brought to the Superior Court in the judicial district of Ansonia-Milford and tried to the jury before *Markle, J.*; verdict and judgment of guilty of felony murder, manslaughter in the first degree with a firearm, attempt to commit robbery in the first degree, and criminal possession of a pistol or revolver, from which the defendant appealed to the Appellate Court, *Alvord*, *Kahn* and *Bear, Js.*, which affirmed in part and reversed in part the judgment of the trial court and remanded the case for resentencing, and the defendant, on the granting of certification, appealed to this court. *Reversed in part; new trial.*

John L. Cordani, Jr., assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, *Cornelius Kelly*, senior assistant state's attorney, and *Rocco A. Chiarenza*, assistant state's attorney, for the appellee (state).

Opinion

MULLINS, J. The sole issue in this certified appeal is whether the Appellate Court correctly concluded that the defendant, Eugene L. Walker, failed to establish a violation of his right under the sixth amendment to the United States constitution to confront witnesses against him. Specifically, the defendant asserts that the state

violated his right to confrontation by introducing evidence at trial that his DNA profile, which had been generated from a postarrest buccal swab, matched the DNA found on evidence from the crime scene without calling as a witness the analyst who processed the buccal swab and generated the DNA profile used in that comparison.

The defendant's DNA profile was created after his arrest in aid of an ongoing criminal investigation and under circumstances objectively indicating that it was created for the primary purpose of being used as evidence in the defendant's criminal case. In addition, the sole analyst who testified about the DNA evidence at trial neither performed nor observed the analysis of the buccal swab that produced the DNA profile and, therefore, was not a sufficient substitute witness to satisfy the defendant's right to confrontation. We conclude that, under the specific circumstances of this case, the defendant has established a violation of his right to confrontation. As a result, we reverse in part the judgment of the Appellate Court.

The Appellate Court's decision sets forth the following relevant facts, which the jury reasonably could have found. "On the night of October 28, 2012, Anthony Adams, the codefendant in this consolidated trial, telephoned Alexis Morrison to ask if she knew 'somebody that could sell him some weed.' Morrison called Neville Malacai Registe, the victim, to arrange for him to meet with Adams in the parking lot of her West Haven residence. When the victim received Morrison's telephone call, he was with his friend, Stephon Green, at his mother's home in New Haven. After some time, the victim and Green left in the victim's Acura. As they approached the designated parking lot, the victim called Morrison. Morrison then telephoned Adams to tell him that the victim 'was there.' Adams replied that he had already left because the victim 'took too long . . . and that

Day-Day and GZ [were] going to get the weed.' 'Day-Day' and 'GZ' were nicknames for Daquane Adams, who is Anthony Adams' cousin, and the defendant, respectively, both of whom Morrison knew.

"When the victim and Green arrived in the parking lot, the victim backed his car into a parking space. Green, who was rolling a marijuana joint in the front passenger seat, looked up and noticed two men approaching the Acura. He returned his attention to his task, and the victim opened the driver's door to talk to one of the men. [That] man, who was wearing a black bandana and who was later identified as the defendant, held a revolver inside the car and said, 'run it,' meaning, 'give me it. It's a robbery . . . .' A physical altercation ensued. The second man, later identified as Daquane Adams, stepped away from the Acura and placed a cell phone call to someone. A Toyota arrived, and a third man exited that car and asked the defendant for the gun.[1] The struggle over the gun continued inside the victim's Acura, and someone knocked Green into the backseat. Daquane Adams and the third man pulled the defendant out of the [Acura] and, as Green was climbing back into the front passenger seat, a shot was fired. Green heard the victim say, 'oh, shit,' and then heard a second shot.

"The defendant, Daquane Adams, and the third man got in the Toyota and drove toward the parking lot exit. With the victim slumped over in the driver's seat, Green pursued the Toyota. He caught up to it at the end of the street and rammed the Acura into the back of the Toyota. The victim's Acura was disabled, but the Toyota was able to be driven away. The victim died of a gunshot wound to his head." (Footnote in original.) *State* v. *Walker*, 180 Conn. App. 291, 296–97, 183 A.3d 1 (2018).

[1] "The Toyota was [determined] to belong to Ronja Daniels, Daquane Adams' girlfriend. Daniels testified that earlier that night, Daquane Adams had dropped her off at work and borrowed her car." *State* v. *Walker*, 180 Conn. App. 291, 296 n.1, 183 A.3d 1 (2018).

The record reveals the following additional relevant facts and procedural history. In December, 2012, the defendant was arrested and charged with felony murder in violation of General Statutes (Rev. to 2013) § 53a-54c, conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134, and attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a) (2). Anthony Adams and Daquane Adams also were arrested in December, 2012, and were subsequently charged with various offenses.

After the defendant's arrest, the state continued its investigation into the respective roles played by the defendant, Anthony Adams, and Daquane Adams in the shooting. During their initial investigation, the police recovered from the Acura the black bandana that Green identified as having been worn by the man who shot the victim. The police sent the bandana to a laboratory run by the Division of Scientific Services of the Department of Emergency Services and Public Protection to be analyzed for DNA. In June, 2013, the state filed a motion in the present case requesting that the defendant submit to a buccal swab of his mouth[2] "for purposes of obtaining a DNA sample." The state argued that the DNA "will be of material aid in determining whether the defendant committed the crime of felony murder." The court granted the state's motion, and Tammy Murray, a detective in the West Haven Police Department, took the defendant's buccal swab on June 19, 2013. Murray also took buccal swabs from Anthony Adams and Daquane Adams.[3] Those three buccal swabs, as well as a sample of the victim's blood, were then sent to the laboratory to be analyzed.

[2] A buccal swab involves rubbing a Q-tip like instrument along the inside of the cheek to collect epithelial cells.

[3] At trial, Murray testified that she followed the standard procedures when taking the buccal swabs from the defendant, Daquane Adams, and Anthony Adams.

At the laboratory, Heather Degnan, a supervisory forensic analyst, received the three buccal swabs and the victim's blood sample and sent them to the "known processing group"—a group within the laboratory that processes all known DNA samples to be used in comparisons—to be analyzed. The known processing group generated a DNA profile from each sample and provided the profiles to Degnan. Degnan generated DNA profiles from the bandana, which she then compared with the known profiles that had been provided to her. As a result of that comparison, Degnan determined that the defendant was a major contributor to the DNA on the bandana. The victim, Anthony Adams, and Daquane Adams were eliminated as potential contributors. Degnan memorialized her findings in a "DNA Report" dated August 28, 2013 (report).

After Degnan issued her report linking the defendant to the bandana believed to have been worn by the shooter, the state filed an amended substitute information charging the defendant with the additional crimes of manslaughter in the first degree with a firearm in violation of General Statutes §§ 53a-55 (a) (1) and 53a-55a (a), and criminal possession of a pistol or revolver in violation of General Statutes (Rev. to 2013) § 53a-217c (a) (1).

The envelope containing the defendant's buccal swab that Murray submitted to the laboratory was admitted into evidence. A review of that exhibit reveals that the envelope is labeled with the defendant's name, his right thumbprint, and the words "DNA Buccal Swab Kit." The envelope lists "West Haven P.D." as the submitting agency and displays a notation reading "Incident: Homicide." The envelope identifies the defendant's address as the MacDougall-Walker Correctional Institution.

Following Murray's testimony, the state called Degnan to testify. She began by explaining the standard

DNA typing techniques used by the laboratory in generating DNA profiles. She testified that the process involves four steps: (1) extracting DNA from the sample and purifying it of contaminants; (2) quantitating the DNA, i.e., determining the amount of DNA that has been extracted; (3) amplifying the DNA using a thermal cycler machine, i.e., creating many copies of different regions of the DNA; and (4) interpreting the data generated from these steps and constructing the numerical DNA profile, which consists of a series of numbers to designate the "alleles."[4]

Degnan further testified about her analysis and findings. Degnan testified that she personally analyzed the bandana using standard DNA typing techniques. She isolated DNA from both sides of the bandana and generated DNA profiles of at least two contributors, a major contributor and a minor contributor. With respect to the buccal swabs and the victim's blood sample, however, Degnan testified that she did not generate those DNA profiles herself. Degnan explained that the swabs and blood sample were sent to the known processing group, which generated DNA profiles from the samples and then "provided" those profiles to her for comparison with the DNA from the bandana.

Before Degnan testified as to the results of her comparison, defense counsel objected to the admission of this evidence on the ground that Degnan had not been qualified as an expert. During voir dire examinations conducted in the jury's presence, Degnan admitted that she neither participated in the known processing group's analysis of the defendant's buccal swab nor observed the analysis being conducted.

Nonetheless, when asked whether she was "swearing to the accuracy" of the DNA profile provided to her,

[4] "An allele is defined as one or two or more alternative forms of a gene." (Internal quotation marks omitted.) *State* v. *Pappas*, 256 Conn. 854, 880 n.7, 776 A.2d 1091 (2001).

Degnan responded by saying "[y]es." Degnan further testified that, in addition to the profile itself, the known processing group provided her with "paperwork" indicating that "all of the checkboxes were check[ed]"—that is, that the analyst or analysts who processed the known samples "did it properly, followed standard operating procedures." Degnan confirmed, however, that she "wasn't there" when the known processing group analyzed the defendant's buccal swab.

Ultimately, the trial court overruled the objection and permitted Degnan to testify to the results of her analysis. Degnan testified that, based on her analysis and DNA comparison, the defendant was a major contributor to the DNA found on both sides of the bandana. Degnan's report was admitted into evidence.[5] In the report, Degnan explained that the buccal swab was analyzed in accordance with standard laboratory procedures. The report also contains a table setting forth the numerical profiles generated from the defendant's buccal swab, the bandana, and the victim's blood sample. On the basis of a comparison of these profiles, Degnan concluded that the defendant "is included as a contributor to the DNA profiles" obtained from the bandana. The report was signed by Degnan and Dahong Sun, a "technical reviewer" who reviewed Degnan's work and confirmed the accuracy of her conclusions. The final page of the report, just above Degnan's and Sun's signatures, provides: "This report reflects the test results, conclusions, interpretations, and/or the findings of the analyst as indicated by their signature below."[6] No one from the known processing group testified at trial.

[5] References to Anthony Adams and Daquane Adams were redacted from the report.

[6] Degnan also entered the numerical DNA profile of the major contributor to the DNA found on the bandana into the Connecticut and national DNA databases, which returned a "hit" on the defendant because the defendant's DNA had previously been entered into the database as a result of a prior felony conviction. Evidence of this match, however, was not offered into evidence at trial.

The jury found the defendant guilty of felony murder, manslaughter in the first degree with a firearm, attempt to commit robbery in the first degree, and criminal possession of a pistol or revolver.[7] *State* v. *Walker*, supra, 180 Conn. App. 297. The court imposed a total effective sentence of forty-five years incarceration to be followed by ten years of special parole. Id.

The defendant then appealed to the Appellate Court, claiming, inter alia, that he was deprived of his sixth amendment right to confront witnesses against him because the trial court admitted the evidence of Degnan's comparison without requiring an analyst from the known processing group who generated the known DNA profile used in that comparison to testify. Id., 297–98. The Appellate Court first concluded that, despite the defendant's failure to raise the confrontation clause as an objection at trial, the claim was reviewable under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). *State* v. *Walker*, supra, 180 Conn. App. 301–302.

The Appellate Court further concluded, however, that the defendant's claim failed under *Golding* because the admission of the DNA evidence did not violate his constitutional right to confrontation. Id., 302. The Appellate Court reasoned principally that Degnan, the analyst who "conducted the critical analysis and made the resulting findings" that connected the defendant to the bandana from the crime scene, testified and was available for cross-examination at trial regarding her analysis and findings. Id.[8]

[7] The defendant was acquitted of the charge of conspiracy to commit robbery.

[8] The Appellate Court also concluded that "the defendant's conviction of felony murder and manslaughter violate[d] his constitutional protections against double jeopardy" and remanded the case with direction to vacate the defendant's conviction with respect to the latter. *State* v. *Walker*, supra, 180 Conn. App. 330–31. This aspect of the Appellate Court's decision, however, is not at issue in the present appeal.

Upon our grant of certification to appeal, the defendant claims that the Appellate Court incorrectly concluded that the introduction of the evidence concerning his DNA profile did not violate his confrontation rights.[9] Because the defendant failed to raise a confrontation clause objection in the trial court, we review this claim pursuant to *Golding*. See, e.g., *State* v. *Smith*, 289 Conn. 598, 620–21, 960 A.2d 993 (2008). Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; internal quotation marks omitted.) *State* v. *Newton*, 330 Conn. 344, 353, 194 A.3d 272 (2018); see also *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*).

The first two prongs of *Golding* are satisfied here. The record is adequate for review, and the defendant's claim is of constitutional magnitude because it implicates his sixth amendment right to confrontation. Furthermore, the state does not attempt to meet its burden of establishing that the error was harmless beyond a reasonable doubt. Accordingly, the sole issue in this appeal concerns the third prong of *Golding*—namely, whether the defendant has established a violation of his sixth amendment confrontation rights.

[9] Specifically, we granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly determine that the defendant's sixth amendment right to confrontation was not violated by testimony from a lab analyst regarding a known DNA profile generated from a swab processed by another analyst who did not testify at trial?" *State* v. *Walker*, 328 Conn. 934, 183 A.3d 634 (2018).

The defendant claims that his right to confrontation was violated because the DNA profile generated from his postarrest buccal swab and provided to Degnan for use in a comparison was testimonial hearsay, and the analyst who generated the profile was not made available for cross-examination at trial. As support for this claim, the defendant contends that the evidence of his DNA profile was offered for its truth and was generated for the primary purpose of providing evidence against him in his criminal case. In response, the state contends that the evidence admitted concerning Degnan's DNA comparison was neither hearsay nor testimonial in nature. Alternatively, the state contends that, even if the DNA profile were testimonial hearsay, the defendant's right to confrontation was satisfied because he had the opportunity to cross-examine Degnan, who personally processed the bandana and made the comparison, and who was familiar with the laboratory's standard procedures for conducting DNA analyses. We agree with the defendant that, under the circumstances of this case, the admission of the evidence concerning his DNA profile violated his sixth amendment right to confrontation.

The sixth amendment to the United States constitution, applicable to the states through the fourteenth amendment,[10] provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const., amend. VI. "In *Crawford* v. *Washington*, [541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)], the [United States] Supreme Court substantially revised its approach to confrontation clause claims. Under *Crawford*, testimonial hearsay is admissible against a criminal defendant at trial only if the defendant had a prior opportunity for cross-examination and the witness is unavailable to testify at trial. . . . In adopting this 'categorical' approach, the court overturned existing precedent that had applied an 'open-ended balancing

[10] *Pointer* v. *Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

[test]' . . . conditioning the admissibility of out-of-court statements on a court's determination of whether the proffered statements bore 'adequate indicia of reliability.' . . . Although *Crawford*'s revision of the court's confrontation clause jurisprudence is significant, its rules govern the admissibility only of certain classes of statements, namely, testimonial hearsay." (Citations omitted.) *State* v. *Buckland*, 313 Conn. 205, 212–13, 96 A.3d 1163 (2014), cert. denied, U.S. , 135 S. Ct. 992, 190 L. Ed. 2d 837 (2015). Accordingly, the threshold inquiries in a confrontation clause analysis "are whether the statement was hearsay, and if so, whether the statement was testimonial in nature . . . ." *State* v. *Smith*, supra, 289 Conn. 618–19. These are questions of law over which our review is plenary. Id., 619.

With these principles in mind, we address the three components of the defendant's confrontation clause claim: (1) whether the evidence was hearsay, (2) whether the evidence was testimonial, and (3) whether the defendant's cross-examination of Degnan was sufficient to satisfy the confrontation clause.

I

The defendant first contends that the evidence of his known DNA profile, which Degnan testified she utilized in making her comparison to the DNA on the bandana, was hearsay. The defendant notes that Degnan neither participated in nor observed the analysis of his buccal swab that yielded the profile but, instead, relied upon the profile provided to her by the known processing group in conducting her comparison. Therefore, the defendant maintains, Degnan's testimony necessarily introduced the known processing group's hearsay statements about the numerical profile.

In response, the state concedes that the evidence of the defendant's DNA profile was offered for its truth but nonetheless contends that the evidence was not

hearsay because Degnan, an expert witness, testified in court to her own independent opinion that the DNA profile was accurate. In other words, the state contends that Degnan's testimony did not introduce any *out-of-court* statements concerning the profile because Degnan adopted any such statements as her own and was cross-examined about them at trial. We agree with the defendant that the evidence of his DNA profile was hearsay.

"Hearsay" is "a statement, *other than one made by the declarant while testifying at the proceeding*, offered in evidence to establish the truth of the matter asserted." (Emphasis added.) Conn. Code Evid. § 8-1 (3). The confrontation clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Crawford* v. *Washington*, supra, 541 U.S. 60 n.9.

Because the state concedes that the evidence of the numerical DNA profile generated from the defendant's buccal swab was offered for its truth, the sole issue in our hearsay analysis is whether Degnan's testimony introduced into evidence the known processing group's out-of-court statements about the profile, as the defendant contends, or merely presented her own, independent opinion that the profile provided to her was accurate.

As a general matter, we acknowledge that expert witnesses such as Degnan may base their testimony on information provided to them by other sources without their testimony necessarily being regarded as introducing hearsay. Indeed, § 7-4 (b) of the Connecticut Code of Evidence provides in relevant part: "The facts in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the proceeding. The facts need not be admissible in evidence if of a type customarily relied

on by experts in the particular field in forming opinions on the subject. . . ." The "[i]nadmissible facts upon which experts customarily rely in forming opinions can be derived from sources such as conversations, informal opinions, written reports and data compilations." (Internal quotation marks omitted.) *Milliun* v. *New Milford Hospital*, 310 Conn. 711, 726, 80 A.3d 887 (2013), quoting Conn. Code Evid. (2009) § 7-4 (b), commentary. Accordingly, "[w]hen the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, *that opinion is regarded as evidence in its own right and not as hearsay in disguise*." (Emphasis added; internal quotation marks omitted.) *Milliun* v. *New Milford Hospital*, supra, 726–27.

Nonetheless, the underlying information upon which the expert's opinion is based may not itself be admitted into evidence for its truth. Indeed, § 7-4 (b) of the Connecticut Code of Evidence further provides in relevant part: "The facts relied on [by the expert] pursuant to this subsection are not substantive evidence, unless otherwise admissible as such evidence." This language "expressly forbids the facts upon which the expert based his or her opinion *to be admitted for their truth* unless otherwise substantively admissible under other provisions of the Code. Thus, [§ 7-4] (b) does not constitute an exception to the hearsay rule or any other exclusionary provision of the Code." (Emphasis in original; internal quotation marks omitted.) *Milliun* v. *New Milford Hospital*, supra, 310 Conn. 726, quoting Conn. Code Evid. (2009) § 7-4 (b), commentary. Accordingly, the testimony of an expert witness improperly introduces hearsay when the out-of-court statements upon which it is based are themselves admitted into evidence to prove the truth of what they assert. See, e.g., id., 728 (observing that physician's report offered for substan-

tive purposes would be barred if it "include[d] hearsay statements"); *Farrell* v. *Bass*, 90 Conn. App. 804, 817–19, 879 A.2d 516 (2005) (concluding that trial court properly precluded expert witness from testifying about hearsay contents of article that supported his opinion where article itself was not admitted into evidence).

In criminal cases, the admission of expert testimony that is based upon an out-of-court statement may implicate the confrontation clause if the underlying statement itself is testimonial. Acknowledging these concerns, courts have held that expert witnesses may base their opinions on the testimonial findings of other experts without violating the confrontation clause if those underlying findings are not themselves put before the jury. See *Williams* v. *Illinois*, 567 U.S. 50, 71, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012) (plurality opinion) (no confrontation clause violation where testifying expert "made no . . . reference to the [nontestifying analyst's] report, which was not admitted into evidence and was not seen by the trier of fact," and did not testify to "anything that was done at the [nontestifying expert's] lab [or] vouch for the quality of [the] work"); *Bullcoming* v. *New Mexico*, 564 U.S. 647, 673, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011) (Sotomayor, J., concurring in part) (concluding that admission of testimonial report violated confrontation clause but noting that "[w]e would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence"); *United States* v. *Locascio*, 6 F.3d 924, 937–38 (2d Cir. 1993) (expert's opinion that was based upon information gleaned from "countless nameless informers and countless tapes *not in evidence*" did not violate hearsay bar or confrontation clause [emphasis added; internal quotation marks omitted]), cert. denied, 511 U.S. 1070, 114 S. Ct. 1645, 128 L. Ed. 2d 365 (1994);

State v. *Griep*, 361 Wis. 2d 657, 682–83, 863 N.W.2d 567 (2015) (no confrontation clause violation where nontestifying analyst's "testimonial statements do not come into evidence, i.e., where the testimonial forensic report is not admitted and the expert witness who testifies at trial gives his or her independent opinion after review of laboratory data"), cert. denied, U.S. , 136 S. Ct. 793, 193 L. Ed. 2d 709 (2016); *Paredes* v. *State*, 439 S.W.3d 522, 526 (Tex. App. 2014) ("a testifying expert may rely on unadmitted data generated by a [nontestifying] analyst . . . without violating the [c]onfrontation [c]lause"), aff'd, 462 S.W.3d 510 (Tex.), cert. denied, U.S. , 136 S. Ct. 483, 193 L. Ed. 2d 354 (2015).

On the other hand, where the testifying expert explicitly refers to, relies on, or vouches for the accuracy of the other expert's findings, the testifying expert has introduced out-of-court statements that, if offered for their truth and are testimonial in nature, are subject to the confrontation clause. As the District of Columbia Court of Appeals explained in *Young* v. *United States*, 63 A.3d 1033 (D.C. 2013), a testifying expert "relayed hearsay" when she testified "that she matched a DNA profile derived from [the defendant's] buccal swab with male DNA profiles derived from [the victim's] vaginal swabs and her discarded tissue. Because [the testifying expert] was not personally involved in the process that generated the [DNA] profiles, she had no personal knowledge of how or from what sources the profiles were produced. She was relaying, for their truth, the substance of out-of-court assertions by absent lab technicians that, employing certain procedures, they derived the profiles from the evidence furnished by [the victim] or [the defendant]. Those assertions were hearsay." Id., 1045; see also *United States* v. *Pablo*, 696 F.3d 1280, 1288 (10th Cir. 2012) ("[i]f an expert simply parrots another individual's out-of-court statement,

rather than conveying an independent judgment that only incidentally discloses the statement to assist the jury in evaluating the expert's opinion, then the expert is, in effect, disclosing that out-of-court statement for its substantive truth; the expert thereby becomes little more than a backdoor conduit for an otherwise inadmissible statement"); *United States* v. *Dukagjini*, 326 F.3d 45, 59 (2d Cir. 2003) (expert's opinion about interpretation of coded language in recorded conversations violated hearsay bar and confrontation clause because testimony explicitly referred to conversations between expert and informants as bases for expert's opinion), cert. denied sub nom. *Griffin* v. *United States*, 541 U.S. 1092, 124 S. Ct. 2832, 159 L. Ed. 2d 259 (2004); *Commonwealth* v. *Barbosa*, 457 Mass. 773, 783–86, 933 N.E.2d 93 (2010) (confrontation rights were violated by analyst's testimony that other analyst agreed with testifying analyst's opinion regarding DNA testing, and by admission into evidence of table showing nontestifying analyst's findings), cert. denied, 563 U.S. 990, 131 S. Ct. 2441, 179 L. Ed. 2d 1214 (2011).

Therefore, as courts consistently have recognized, expert witnesses cannot be used as conduits for the admission into evidence of the testimonial statements of others. This would permit testifying experts to simply relay the findings of other experts while immunizing those underlying findings from scrutiny on cross-examination. The state cannot "rely on [the testifying witness'] status as an expert to circumvent the [c]onfrontation [c]lause's requirements." *Williams* v. *Illinois*, supra, 567 U.S. 126 (Kagan, J., dissenting); see *United States* v. *Johnson*, 587 F.3d 625, 635 (4th Cir. 2009) ("[a]llowing a witness simply to parrot out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of expert opinion would provide an end run around *Crawford*" [internal quotation marks omitted]); *Common-*

wealth v. *Barbosa*, supra, 457 Mass. 784 (admission of second expert's opinion through testifying expert would violate confrontation clause "because the opinion of the second expert would not be subject to cross-examination"); *People* v. *John*, 27 N.Y.3d 294, 309, 52 N.E.3d 1114, 33 N.Y.S.3d 88 (2016) ("[T]hese critical analysts who engaged in an independent and qualitative analysis of the data during the DNA typing tests—none of whom was claimed to be unavailable—were effectively insulated from cross-examination. [The testifying analyst], instead, was permitted to parrot the recorded findings that were derived from the critical witnesses' subjective analyses."); see also *United States* v. *Meises*, 645 F.3d 5, 22 (1st Cir. 2011) (prosecutors "cannot be permitted to circumvent the [c]onfrontation [c]lause by introducing the same substantive testimony in a different form" [internal quotation marks omitted]).

In the present case, Degnan testified at trial to her opinion that the defendant was a contributor to the DNA on the bandana recovered from the crime scene. She based this testimony on her comparison of the DNA profiles she derived from the bandana to the DNA profile generated by the known processing group from the defendant's buccal swab. Degnan performed the analysis of the bandana and conducted the ultimate comparison herself. She was not, however, involved in the analysis of the buccal swab, which was an essential component of the comparison making her opinion possible. There was no comparison without the buccal swab analysis. Rather, the known processing group conducted this analysis and provided the resulting DNA profile to Degnan for her to use in her comparison. Degnan neither participated in nor observed this analysis. There is also no evidence contained within the record indicating that the known processing group provided Degnan with the raw machine data generated from the preliminary stages of the analysis such that

Degnan could independently verify that the DNA profile had accurately been constructed.[11] Despite having been uninvolved in the analysis, Degnan relied on that known profile in order to complete her analysis and testified that she was "swearing to the accuracy" of the DNA profile that the known processing group had provided to her.

We agree with the defendant that Degnan's testimony at trial necessarily introduced the out-of-court statements of the known processing group and did not consist merely of her own independent opinion. To be clear, Degnan's testimony about the DNA profiles she generated from the bandana was not hearsay because she conducted these analyses herself. Rather, Degnan explicitly referred to, relied on, and vouched for the quality of work that she did not perform and, in so doing, relayed to the jury the known processing group's out-of-court statements about the defendant's numerical DNA profile. See *People* v. *Austin*, 30 N.Y.3d 98, 105, 86 N.E.3d 542, 64 N.Y.S.3d 650 (2017) ("Although the criminalist [who testified at trial] may have had some level of involvement in [the laboratory's] handling of some of the . . . crime scene swabs, he had no role whatsoever in the testing of [the] defendant's post-accusatory buccal swab. His testimony was, therefore, merely a conduit for the conclusions of others . . . ." [Citation omitted; internal quotation marks omitted.]). These assertions were hearsay.

Moreover, Degnan introduced the known processing group's out-of-court statements by including in her report, which was admitted into evidence without limi-

[11] Although Degnan testified that the known processing group provided her with "paperwork" indicating that the group had "followed standard operating procedures," there is no evidence that Degnan independently verified the accuracy of the profile beyond simply relying on the group's representation that they adhered to standard protocol. See part III of this opinion.

tation, the allele numbers comprising the defendant's DNA profile that the known processing group had provided to her. See *Commonwealth* v. *McCowen*, 458 Mass. 461, 482–83, 939 N.E.2d 735 (2010) (concluding that testifying analyst introduced hearsay by admitting chart into evidence that compared alleles from DNA taken from victim, which analyst generated herself, and alleles from defendant's known sample, which were generated by another analyst). The report provides that the DNA was extracted from the defendant's buccal swab and analyzed according to standard laboratory procedure. The report then states that "[t]he following results were obtained on the amplified items" and lists the alleles generated by the known processing group. The report further contains Degnan's conclusion that, based on the comparison of the alleles from the buccal swab and the profiles she generated from the bandana, the defendant was a contributor to the DNA on the bandana. Finally, just above Degnan's signature, the report contains the following language: "This report reflects the test results, conclusions, interpretations, and/or the findings of the analyst as indicated by their signature below," with no disclaimer that Degnan was not involved in generating the known profile.

We therefore do not agree with the state's contention that Degnan's testimony did not introduce any out-of-court statements. In order for Degnan to reach her conclusion that the defendant was a match to the DNA found on the bandana, she had to rely on and incorporate the known processing group's findings into her own. Moreover, the underlying findings of the known processing group upon which she relied were themselves admitted into evidence in multiple forms. Because the state concedes that this evidence was offered for its truth—a concession we think unavoidable—it is hearsay and, if testimonial in nature; see part II of this opinion; implicates the defendant's confronta-

tion rights. Concluding otherwise merely because Degnan is an expert witness would immunize from cross-examination the analyst or analysts of the known processing group who made the critical findings upon which Degnan's comparison was based.

Finally, we note that the Appellate Court concluded that the evidence of the defendant's DNA profile was not offered for its truth but, rather, to explain the assumptions upon which Degnan based her opinion that the defendant's DNA profile matched the DNA found on the bandana. *State* v. *Walker*, supra, 180 Conn. App. 307. As support for this conclusion, the Appellate Court cited the plurality opinion in *Williams* v. *Illinois*, supra, 567 U.S. 50, and, specifically, the plurality's observation that "[o]ut-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the [c]onfrontation [c]lause." Id., 58. We have recognized this evidentiary principle in other contexts. See *State* v. *Copas*, 252 Conn. 318, 328, 746 A.2d 761 (2000) ("[a]lthough some of the facts considered by the experts . . . may not [be] substantively admissible . . . the parties [are] not precluded from examining the experts about those facts insofar as they related to the basis for the experts' opinions" [citations omitted]).

As previously noted, however, on appeal to this court the state has conceded, and we agree, that the evidence of the defendant's known DNA profile *was* offered for its truth. The present case therefore does not involve a situation in which the evidence was offered "solely" for the purposes of explaining an expert's assumptions, as the plurality believed to be the case in *Williams*. We note, moreover, that five justices in *Williams* rejected the plurality's hearsay analysis and instead concluded that the evidence of the DNA profile used as part of a comparison was offered for its truth because it lacked

any relevance to the case apart from its truth. See *Williams* v. *Illinois*, supra, 567 U.S. 106 (Thomas, J., concurring in judgment); id., 126–27 (Kagan, J., dissenting); see also *United States* v. *James*, 712 F.3d 79, 95 (2d Cir. 2013) ("[t]he *Williams* plurality's first rationale—that the laboratory report there was offered as basis evidence, and not for its truth—was roundly rejected by five [j]ustices"), cert. denied, 572 U.S. 1134, 134 S. Ct. 2660, 189 L. Ed. 2d 208 (2014); *Young* v. *United States*, supra, 63 A.3d 1045 (evidence of known DNA profiles necessarily were offered for their truth because, without nontestifying analysts' assertions regarding accuracy of profiles, "what would have been left of [the testifying analyst's] testimony—that she matched two DNA profiles she could not herself identify—would have been meaningless"). Because the evidence was offered for its truth, we need not address the question of whether such DNA evidence could, in other circumstances, be admitted for a nonhearsay purpose.

II

The defendant next contends that the evidence of his numerical DNA profile was testimonial because it was created for the primary purpose of establishing his guilt at trial. We agree with the defendant that, under the circumstances of this case, the known DNA profile was testimonial.

We begin with the general principles governing our analysis. "[T]he confrontation clause applies only to statements that are testimonial in nature. . . . As a general matter, a testimonial statement is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. . . . Although the United States Supreme Court did not provide a comprehensive definition of what constitutes a testimonial statement in *Crawford*, the court did describe three

core classes of testimonial statements: [1] ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . [2] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions [and] . . . [3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . .'' (Citations omitted; internal quotation marks omitted.) *State* v. *Smith*, supra, 289 Conn. 622–23. The present case concerns only this third category form of testimonial statements.

''[I]n *Davis* v. *Washington*, [547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)], the United States Supreme Court elaborated on the third category and applied a 'primary purpose' test to distinguish testimonial from nontestimonial statements given to police officials, holding: 'Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.' . . .

''In *State* v. *Slater*, [285 Conn. 162, 172 n.8, 939 A.2d 1105, cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008)], we reconciled *Crawford* and *Davis*, noting: 'We view the primary purpose gloss articulated in *Davis* as entirely consistent with *Crawford*'s focus on the reasonable expectation of the declarant. . . .

[I]n focusing on the primary purpose of the communication, *Davis* provides a practical way to resolve what *Crawford* had identified as the crucial issue in determining whether out-of-court statements are testimonial, namely, whether the circumstances would lead an objective witness reasonably to believe that the statements would later be used in a prosecution.' " (Citations omitted.) *State* v. *Smith*, supra, 289 Conn. 623–24.

With these background principles in mind, our analysis of the testimonial nature of the DNA evidence at issue in the present case requires a review of the trilogy of United States Supreme Court cases applying these principles in the context of forensic evidence—*Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), *Bullcoming* v. *New Mexico*, supra, 564 U.S. 647, and *Williams* v. *Illinois*, supra, 567 U.S. 50.

In *Melendez-Diaz*, during the defendant's trial on narcotics violations, the prosecution introduced into evidence three laboratory " 'certificates of analysis' " stating that the substance seized from the defendant was cocaine. *Melendez-Diaz* v. *Massachusetts*, supra, 557 U.S. 308. The United States Supreme Court held that the certificates were within the "core class of testimonial statements" because they were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (Internal quotation marks omitted.) Id., 310. The court explained that the analysts' reports were "quite plainly" affidavits, that is, "declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths," and were "functionally identical to live, in-court testimony." (Internal quotation marks omitted.) Id., 310–11. The court also noted that, under Massachusetts law, the "sole purpose" of the affidavits was to establish the composition, quality and weight of the substance

believed to be cocaine and that it could be "safely assume[d]" that the analysts "were aware of the affidavits' evidentiary purpose, since that purpose . . . was reprinted on the affidavits themselves." Id., 311.

In *Bullcoming* v. *New Mexico*, supra, 564 U.S. 663, the court held that the admission at trial of a lab report certifying that the defendant's blood alcohol content exceeded the threshold for the offense of aggravated driving while intoxicated violated the confrontation clause. Emphasizing that "[a] document created solely for an 'evidentiary purpose' . . . made in aid of a police investigation, ranks as testimonial," the court concluded that the report, although not sworn or notarized, closely resembled the reports at issue in *Melendez-Diaz*. Id., 664. That is, law enforcement had provided seized evidence to a state laboratory for testing, an analyst tested the evidence and prepared a certificate concerning the results, and the certificate was formalized in a signed document entitled " 'report,' " which contained a reference to local rules concerning the admission of certified blood alcohol test results. Id., 665. These circumstances, the court concluded, were "more than adequate" to qualify the analyst's report as testimonial. Id. Furthermore, the court held that the testimony of a surrogate witness, who was familiar with the device used in the test and the laboratory's testing procedures but who did not conduct or observe this particular test, was insufficient to satisfy the confrontation clause. Id., 661–62.

Finally, in *Williams* v. *Illinois*, supra, 567 U.S. 59, an outside laboratory provided the police with a DNA profile generated from semen found on a vaginal swab of the victim of a rape. The police entered the profile into its DNA database and received notification of a cold hit with the defendant's DNA profile, which had been entered into the database due to an unrelated arrest. Id. The defendant was arrested and charged with

the victim's rape. Id., 59–60. At trial, the prosecution called the analyst who prepared the defendant's DNA profile in connection with the unrelated arrest, as well as the analyst who compared that profile to the DNA generated by the outside laboratory from the victim's vaginal swab. Id., 60–62. No one from the outside laboratory who generated the profile from the vaginal swab, however, testified at trial. Id., 62.

Five justices agreed that the profile from the vaginal swabs relied upon by the analyst to make her comparison was not testimonial but the fifth justice rejected the plurality's "flawed analysis"; id., 104 (Thomas, J., concurring in judgment); as did the four dissenting justices. Id., 135–38 (Kagan, J., dissenting). The plurality opinion, written by Justice Alito, concluded that the evidence was not testimonial because "the primary purpose of the [outside laboratory's] report, viewed objectively, was not to accuse [the defendant] or to create evidence for use at trial. When the [police] sent the sample to [the outside laboratory], its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against [the defendant], who was neither in custody nor under suspicion at that time." Id., 84. The plurality reasoned that, because no one from the outside laboratory could have known the profile would inculpate the defendant—or anyone else whose DNA profile was in the police database—"there was no prospect of fabrication and no incentive to produce anything other than a scientifically sound and reliable profile."[12] (Internal quotation marks omitted.) Id., 84–85.

[12] As an independent basis for concluding that the admission of the DNA evidence did not violate the confrontation clause, the plurality reasoned that, to the extent the substance of the outside laboratory's report was admitted into evidence—the report itself was not offered as an exhibit—it was offered not for its truth but, rather, to explain the assumptions upon which the testifying analyst based her expert opinion that the DNA profile from the vaginal swabs matched the defendant's DNA. *Williams* v. *Illinois*, supra, 567 U.S. 57–58. The plurality concluded that the out-of-court state-

Justice Thomas authored a separate opinion concurring in the judgment reiterating his view that the confrontation clause covers only "formalized testimonial materials, such as depositions, affidavits, and prior testimony, or statements resulting from formalized dialogue, such as custodial interrogation." (Internal quotation marks omitted.) Id., 111. He reasoned that the primary purpose test, as articulated in *Davis*, was a necessary but insufficient criterion to render a statement testimonial because statements often serve more than one purpose. Id., 114. He concluded that the report at issue was not sufficiently formal to be testimonial because it was not sworn or certified. Id., 111. Justice Thomas and the four dissenting justices, however, rejected the plurality's view that a statement must have the primary purpose of accusing a targeted individual of criminal conduct in order to be testimonial. Id., 114. (Thomas, J., concurring in judgment); id., 135 (Kagan, J., dissenting).

Justice Kagan, writing for the four dissenting justices, concluded that the court's prior decisions in *Melendez-Diaz* and *Bullcoming* compelled the conclusion that the DNA profile in the outside laboratory's report was testimonial because it was "a statement [that] was made for the primary purpose of establishing past events potentially relevant to later criminal prosecution—in other words, for the purpose of providing evidence." (Internal quotation marks omitted.) Id., 135. The dissenting justices rejected Justice Thomas' view that the

ments were not hearsay and, therefore, that they fell outside the scope of the confrontation clause. Id., 58. Five justices, however, disagreed with this reasoning. Id., 104–109 (Thomas, J., concurring in judgment); id., 125–32 (Kagan, J., dissenting). The state concedes that this aspect of *Williams* is not relevant in the present case because the out-of-court statements made by the known processing group concerning the defendant's known DNA profile were offered for their truth and not merely to explain the basis for Degnan's opinion that the defendant's DNA matched the DNA found on the bandana.

statements were not testimonial because they were not sworn or certified, arguing that, similar to the reports deemed testimonial in the court's prior cases, the report was "an official and signed record of laboratory test results, meant to establish a certain set of facts in legal proceedings." Id., 139 (Kagan, J., dissenting).

Due to the fractured nature of the *Williams* decision, courts have struggled to determine the effect of *Williams*, if any, on the legal principles governing confrontation clause claims. See *United States* v. *James*, supra, 712 F.3d 95–96 (applying previous case law because *Williams* yielded no single, useful holding); see also *Williams* v. *Illinois*, supra, 567 U.S. 141 (Kagan, J., dissenting) ("[t]he five [j]ustices who control the outcome of today's case agree on very little" and "have left significant confusion in their wake"). In ascertaining the effect of *Williams*, we note that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five [j]ustices, the holding of the [c]ourt may be viewed as that position taken by those [m]embers who concurred in the judgments on the narrowest grounds." (Internal quotation marks omitted.) *Marks* v. *United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). As we recently observed, the court in *Williams* "made it impossible to identify the narrowest ground because the analyses of the various opinions are irreconcilable." *State* v. *Sinclair*, 332 Conn. 204, 225, A.3d (2019). Consequently, we explained in *Sinclair* that "we must rely on Supreme Court precedent before *Williams* to the effect that a statement triggers the protections of the [c]onfrontation [c]lause when it is made with the primary purpose of creating a record for use at a later criminal trial." (Internal quotation marks omitted.) *State* v. *Sinclair*, supra, 225, quoting *United States* v. *James*, supra, 712 F.3d 95–96; see also *United States* v. *Duron-Caldera*, 737 F.3d 988, 994 and n.4 (5th Cir. 2013).

The issue in the present case does not concern the testimonial nature of Degnan's report or DNA comparison. Degnan made the comparison herself and was cross-examined about it at trial. Instead, we must determine whether the defendant's known DNA profile, which was obtained from a postarrest buccal swab and provided to Degnan for her to use in making a comparison to DNA found on crime scene evidence, ranks as testimonial.

As to this specific question, we find persuasive a series of decisions from the New York Court of Appeals. In *People* v. *John*, supra, 27 N.Y.3d 297–98, the defendant was charged with illegal possession of a firearm arising from an incident in which he allegedly pointed a gun at another individual. The police swabbed the firearm found in the basement of the defendant's apartment building and submitted the swabs to the crime laboratory to be analyzed for DNA. Along with the swabs, the police sent an evidence request listing the defendant as the arrestee and providing, as the reason for the request, " 'PERP HANDLED THE FIREARM.' " Id., 298. Following his indictment, the defendant submitted to a court-ordered buccal swab. Id., 299. The laboratory generated a report listing the numerical DNA profiles from the firearm and the buccal swab in a comparison table, showing an identical match. Id.

The New York Court of Appeals concluded: "[T]he laboratory reports as to the DNA profile generated from the evidence submitted to the laboratory by the police in a pending criminal case were testimonial. The DNA profiles were generated in aid of a police investigation of a particular defendant charged by an accusatory instrument and created for the purpose of substantively proving the guilt of a defendant in his pending criminal action." Id., 308. In addition, the court observed that "the primary purpose of the laboratory examination on the gun swabs could not have been lost on the . . .

analysts" in light of the accompanying evidence request indicating that the basis for the request was that the firearm had been handled by the defendant. Id.

The New York Court of Appeals' subsequent decision in *People* v. *Austin*, supra, 30 N.Y.3d 98, is squarely analogous to the present case. In that case, the crime laboratory generated DNA profiles from blood recovered from the scene of multiple burglaries. Id., 100. The police uploaded one of the profiles into their database and returned a "match" for the defendant. Id., 100–101. The defendant was subsequently charged with the burglaries. Id., 101. At trial, the prosecutor opted not to call as a witness the analyst who prepared the profile from the database. Instead, the prosecutor had the defendant submit to a buccal swab, which yielded a DNA profile determined to match the DNA from the crime scene evidence. Id. At trial, the prosecution's sole forensic witness was a criminalist who testified that he reviewed the DNA profiles prepared by the analysts and determined that they matched. Id. The analysts who generated the DNA profiles from the buccal swab and the crime scene evidence did not testify. Id.

The New York Court of Appeals held that the admission of the criminalist's testimony concerning the DNA profile generated from the defendant's postarrest buccal swab "easily satisfies the primary purpose test." Id., 104. The court reasoned that, in establishing that the defendant's DNA matched the DNA from the crime scene, the prosecution relied "solely on the evidence of the DNA profile generated from [the] buccal swab, which was developed during the course of a pending criminal action and was created in order to prove [the defendant's] guilt at trial. . . ." (Citation omitted.) Id. Therefore, the court explained, "the buccal swab was obtained and the resulting profile was compared with the DNA profile generated from the . . . burglaries, with the primary (truly, the sole) purpose of proving

a particular fact in a criminal proceeding—that [the] defendant . . . committed the crime [with] which he was charged . . . .'' (Citation omitted; internal quotation marks omitted.) Id.

We also find instructive the decision of the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *McCowen*, supra, 458 Mass. 461, which involves facts nearly identical to those of the present case. In *McCowen*, the defendant, who was a suspect in a rape and murder investigation, submitted to a buccal swab, which yielded a DNA profile that the police later determined matched the DNA derived from swabs taken from the victim. Id., 465. At trial, the sole analyst called to testify had developed the DNA profiles from the samples taken from the victim and conducted the comparative analysis but had not been involved in the generation of the profile from the defendant's buccal swab. Id., 482–83. The analyst testified to her opinion that the defendant was a contributor to the DNA found on the victim, and illustrated her analysis with a chart that made a side-by-side comparison of the allele numbers generated from the victim and those from the defendant's buccal swab. Id., 483.

The Supreme Judicial Court concluded that ''the allele numbers derived from the testing of the known samples by another analyst that were included in [the testifying analyst's] chart were testimonial hearsay, because these were factual findings made by a nontestifying witness for the purpose of investigating the murder.'' Id., 483; see also *Young* v. *United States*, supra, 63 A.3d 1047–48 (The court held that a DNA profile generated from the defendant's buccal swab, which was taken after the defendant was identified as a suspect, was ''generated for the primary purpose of establishing or proving a past fact relevant to later criminal prosecution, namely the identity of [the victim's] assailant.

Under the basic 'evidentiary purpose' test, that is enough to render the test results testimonial.").[13]

In light of the foregoing case law, we conclude that the DNA profile was generated from the defendant's buccal swab for "the primary purpose of creating a record for use at a later criminal trial." (Internal quotation marks omitted.) *State* v. *Sinclair*, supra, 332 Conn. 225. The police took the buccal swab after the defendant was arrested and charged with various crimes in connection with his participation in the murder. The state obtained court authorization to conduct the buccal swab by filing a motion in the defendant's criminal case representing that the buccal swab and resulting DNA profile "will be of material aid in determining whether the defendant committed the crime of felony murder."

The purpose of obtaining the defendant's known DNA profile was to compare it with DNA from the bandana found at the crime scene, which Green indicated had been worn by the person who shot and killed the victim. The defendant's DNA profile was, therefore, generated in aid of an ongoing police investigation for the primary—indeed, the sole—purpose of proving a fact in his criminal trial, namely, that his DNA was found on

[13] The state relies on *State* v. *Ortiz*, 238 Ariz. 329, 360 P.3d 125 (App. 2015), *State* v. *Lui*, 179 Wn. 2d 457, 315 P.3d 493, cert. denied, 573 U.S. 933, 134 S. Ct. 2842, 189 L. Ed. 2d 810 (2014), and *State* v. *Deadwiller*, 350 Wis. 2d 138, 834 N.W.2d 362 (2013), in support of its claim that the defendant's DNA profile was not testimonial. In each of those cases, however, the courts decided the testimonial question by applying the three *Williams* rationales to the facts of the case to determine how five justices would have ruled. See *State* v. *Ortiz*, supra, 341; *State* v. *Lui*, supra, 478–79; *State* v. *Deadwiller*, supra, 162–63. As previously explained in this opinion, however, we decline to apply *Williams* in this manner, as that case resulted in no controlling holding. See *State* v. *Sinclair*, supra, 332 Conn. 225. Instead, we "rely on Supreme Court precedent before *Williams* to the effect that a statement triggers the protections of the [c]onfrontation [c]lause when it is made with the primary purpose of creating a record for use at a later criminal trial." (Internal quotation marks omitted.) Id. Accordingly, given our decision in *Sinclair*, we do not find the cases cited by the state persuasive.

the bandana worn by the shooter. Indeed, after Degnan received the defendant's DNA profile from the known processing group and determined that it matched the DNA from the bandana, thereby implicating the defendant as the shooter, the state charged the defendant with the additional crimes of manslaughter in the first degree with a firearm and criminal possession of a pistol or revolver.

We further conclude that the analyst or analysts of the known processing group who processed the defendant's buccal swab reasonably could have expected that the resulting DNA profile would later be used for prosecutorial purposes. See *Ohio* v. *Clark*, U.S. , 135 S. Ct. 2173, 2181–82, 192 L. Ed. 2d 306 (2015) (analyzing primary purpose of individuals who elicited statements, as well as primary purpose of declarant, in determining whether statements were testimonial); *State* v. *Slater*, supra, 285 Conn. 172 (analysis of testimonial nature of statement "focuse[s] on the reasonable expectation of the declarant that, under the circumstances, his or her words later could be used for prosecutorial purposes"). The known processing group is a component of the Division of Scientific Services, which is required by statute to assist law enforcement in ongoing investigations. General Statutes § 29-7b; see also *Bullcoming* v. *New Mexico*, supra, 564 U.S. 665 (relying on laboratory's legal obligation to assist law enforcement in concluding that its report was testimonial). More directly, the envelope containing the buccal swab that Murray submitted to the laboratory was labeled with the defendant's name and fingerprint; listed "West Haven P.D." as the submitting agency, listed the MacDougall Walker Correctional Institution as the defendant's address, and displayed a notation reading "Incident: Homicide." The investigatory and, thus, evidentiary purpose of the buccal swab analysis would therefore have been readily apparent to the analyst who conducted it.

Additionally, Degnan testified that the known processing group generates DNA profiles for all known samples submitted to the laboratory and then provides those profiles to other analysts who then make the comparisons. In light of this standard practice, it is safe to assume that the analyst who processed the defendant's buccal swab was aware of the likelihood that the resulting DNA profile would be used as part of a comparison with other evidence and, therefore, potentially utilized in a criminal proceeding. Put simply, the police sought the DNA profile as part of an ongoing criminal investigation, and we do not believe that that fact would have been lost on the known processing group.

Finally, a word about formality. We observed in *State* v. *Sinclair*, supra, 332 Conn. 225, that "[t]he one thread of *Williams* that is consistent with . . . earlier precedent is that . . . the formality attendant to the making of the statement must be considered." In the present case, the precise level of formality surrounding the known processing group's submission of the profile to Degnan is not entirely clear from the record. Under the circumstances, however, we do not believe that this consideration compels a different result. We note that the formality attending a particular statement, although relevant in the primary purpose analysis, is not dispositive. See *Bullcoming* v. *New Mexico*, supra, 564 U.S. 671 (Sotomayor, J., concurring in part) ("[a]lthough [f]ormality is not the sole touchstone of our primary purpose inquiry, a statement's formality or informality can shed light on whether a particular statement has a primary purpose of use at trial" [internal quotation marks omitted]); *Michigan* v. *Bryant*, 562 U.S. 344, 366, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011) ("although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution . . .

informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent" [citation omitted; internal quotation marks omitted]).

Indeed, strict adherence to formality requirements may be especially problematic in the context of scientific evidence, as this requirement "can be easily subverted by . . . simple omission in the format of the documents, with a design to facilitate their use as evidence in a criminal trial." *People* v. *John*, supra, 27 N.Y.3d 312; see also *Davis* v. *Washington*, supra, 547 U.S. 826 (confrontation clause cannot "readily be evaded" by parties' keeping written product of interrogation informal "instead of having the declarant sign a deposition"). At any rate, the buccal swab and DNA profile were obtained pursuant to a postarrest court order. The known processing group provided the DNA profile to Degnan along with "paperwork" indicating that the sample was analyzed according to accepted laboratory procedures. These facts are suggestive of a certain level of formality that, together with the circumstances set forth previously in this opinion, are sufficient to render the statement testimonial.

The state, relying on the plurality opinion in *Williams*, contends that the defendant's known DNA profile was not testimonial because it did not directly accuse the defendant of any criminal conduct but became accusatory only when compared with the DNA found on the bandana. In *Williams*, the plurality concluded that the DNA profile generated from vaginal swabs of the victim was not to accuse the defendant or create evidence at trial because "no one at [the laboratory] could have possibly known that the profile that it produced would turn out to inculpate [the defendant]—or for that matter, anyone else whose DNA profile was in a law enforcement database." *Williams* v. *Illinois*, supra, 567 U.S. 84–85.

We disagree. This line of reasoning was foreclosed by *Melendez-Diaz*, which, as previously explained,

remains controlling in the present case due to the lack of any definitive holding in *Williams*. See *State* v. *Sinclair*, supra, 332 Conn. 225. In *Melendez-Diaz*, the state asserted that the certificates of analysis stating that the seized substances were narcotics were not subject to confrontation because the analysts who prepared them were not " 'accusatory' " witnesses. *Melendez-Diaz* v. *Massachusetts*, supra, 557 U.S. 313. The state argued that the certificates did not "directly accuse [the defendant] of wrongdoing" but were "inculpatory only when taken together with other evidence . . . ." Id. The United States Supreme Court rejected this argument, reasoning that the analysts "certainly provided testimony *against* [the defendant], proving one fact necessary for his conviction—that the substance he possessed was cocaine." (Emphasis in original.) Id. The court explained that the text of the confrontation clause "contemplates two classes of witnesses—those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. [T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." (Emphasis in original; footnote omitted.) Id., 313–14.

Indeed, citing this portion of *Melendez-Diaz*, five justices in *Williams* rejected the plurality's rationale and concluded that DNA analyses may be testimonial regardless of whether they are inherently inculpatory. *Williams* v. *Illinois*, supra, 567 U.S. 116 (Thomas, J., concurring); id., 135–36 and n.5 (Kagan, J., dissenting); see also *Washington* v. *Griffin*, 876 F.3d 395, 407 n.10 (2d Cir. 2017) ("[The lower court] erred insofar as it held that DNA profiles, as a categorical matter, are [nontestimonial] because standing alone, [they] shed no light on the issue of the defendant's guilt. As previously noted . . . five [j]ustices in *Williams* . . . agreed that the introduction of DNA profiles could, under proper circumstances, run afoul of the [c]onfron-

tation [c]lause." [Citation omitted; internal quotation marks omitted.]), cert. denied, U.S. , 138 S. Ct. 2578, 201 L. Ed. 2d 299 (2018); *United States* v. *Duron-Caldera*, supra, 737 F.3d 994–95 (declining to adopt inherently inculpatory rationale because it was rejected by five justices as well as *Melendez-Diaz*). Accordingly, statements are not rendered nontestimonial merely because the content of the statements does not directly accuse the defendant of criminal wrongdoing.

The state further contends, again relying on the plurality opinion in *Williams*, that the DNA profile is not testimonial because "numerous technicians" worked on the defendant's known DNA profile and that, "[w]hen the work of a lab is divided up in such a way, it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures." *Williams* v. *Illinois*, supra, 567 U.S. 85. The plurality opinion in *Williams* observed that, under such circumstances, there is no "prospect of fabrication and no incentive to produce anything other than a scientifically sound and reliable profile." (Internal quotation marks omitted.) Id., 85.

We are not persuaded. As a factual matter, nothing in the record indicates whether multiple analysts from the known processing group analyzed the buccal swab, as opposed to a single analyst. This aspect of *Williams* is, therefore, not implicated in the present case. Moreover, as a matter of law, not only are we not bound by the result in *Williams*; see *State* v. *Sinclair*, supra, 332 Conn. 225; we disagree with the underlying proposition that the right to confrontation categorically does not apply to forensic evidence whenever there is no incentive to fabricate or falsify evidence.

To be sure, "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Melendez-Diaz* v. *Massachusetts*, supra, 557 U.S. 319. "[C]onfrontation protects against a wide

range of witness reliability concerns beyond personal bias, such as perception, memory, narration, and sincerity." *United States* v. *Duron-Caldera*, supra, 737 F.3d 996; see *Melendez-Diaz* v. *Massachusetts*, supra, 320 ("an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination"); see also *Williams* v. *Illinois*, supra, 567 U.S. 135–36 (Kagan, J., dissenting) ("[S]urely the typical problem with laboratory analyses—and the typical focus of cross-examination—has to do with careless or incompetent work, rather than with personal vendettas. And as to that predominant concern, it makes not a whit of difference whether, at the time of the laboratory test, the police already have a suspect."). The absence of an incentive to fabricate does not foreclose the potential for honest mistakes, which is independently sufficient to trigger the right to confrontation.

Accordingly, we conclude that the evidence of the DNA profile generated by the known processing group from the defendant's postarrest buccal swab was testimonial hearsay.

III

Finally, the state contends that the defendant's right to confrontation was satisfied in this case because Degnan, the laboratory supervisor who was familiar with the standard DNA testing procedures, testified and was subject to cross-examination. We disagree.

The state's argument that Degnan was a sufficient substitute witness is incompatible with *Bullcoming* v. *New Mexico*, supra, 564 U.S. 647. In that case, the analyst who conducted the defendant's blood test and prepared the lab report certifying to his blood alcohol content did not testify at trial. Instead, the prosecution called a different analyst who did not conduct or observe the test but " 'qualified as an expert witness' " with respect to the device used in the test and the

laboratory's testing procedures. Id., 661. Concluding that such surrogate testimony was insufficient to satisfy the confrontation clause, the court reasoned that, despite the analyst's qualifications, "surrogate testimony of the kind [the analyst] was equipped to give could not convey what [the nontestifying analyst] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." (Footnote omitted.) Id., 661–62. The court emphasized that the confrontation clause "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." Id., 662.

Degnan, although familiar with the devices used to process DNA and the laboratory's standard testing procedures, did not conduct the analysis of the defendant's buccal swab or observe the analysis being conducted. Accordingly, although defense counsel cross-examined Degnan about the methods she used when analyzing the bandana and comparing the profiles, he could not cross-examine her about the analysis of the buccal swab or the methods employed by the known processing group in generating that profile. See *People* v. *Austin*, supra, 30 N.Y.3d 104–105 ("in order to satisfy the [c]onfrontation [c]lause, [the] defendant was entitled to cross-examine the analyst who either performed, witnessed or supervised the generation of the critical numerical DNA profile or who used his or her independent analysis on the raw data to arrive at his or her own conclusions"); see also *Young* v. *United States*, supra, 63 A.3d 1048 ("without evidence that [the testifying analyst] performed or observed the generation of the DNA profiles . . . herself, her supervisory role and independent evaluation of her subordinates' work product are not enough to satisfy the [c]onfrontation [c]lause

because they do not alter the fact that she relayed testimonial hearsay"); D. Kaye et al., The New Wigmore: A Treatise on Evidence (Cum. Supp. 2014) § 4.12.4, p. 50 ("Permitting a supervisor [to testify] is a superficially attractive approach, but it is not supported by careful scrutiny unless . . . the supervisor observed the analyst conducting the test. If not, the supervisor has no greater connection to *this specific test* than does any other qualified laboratory employee." [Emphasis in original.]).

The state relies on a line of cases from other jurisdictions generally holding that the confrontation clause can be satisfied through the testimony of a supervisory analyst who reviewed the data prepared by the nontestifying analyst and formed his or her own opinion concerning that analyst's conclusions. See, e.g., *Commonwealth* v. *Yohe*, 621 Pa. 527, 561, 79 A.3d 520 (2013) (testifying expert's analysis "did not simply parrot another analyst . . . rather, he was involved with reviewing all of the raw testing data, evaluating the results, measuring them against lab protocols to determine if the results supported each other, and writing and signing the report" [citation omitted]), cert. denied, 572 U.S. 1135, 134 S. Ct. 2662, 189 L. Ed. 2d 209 (2014); *State* v. *Michaels*, 219 N.J. 1, 6, 95 A.3d 648 (confrontation clause was satisfied by testimony of supervisory analyst who had "reviewed the [machine generated] data from the testing, had determined that the results demonstrated that [the] defendant had certain drugs present in her system, and had certified the results in a report"), U.S. , 135 S. Ct. 761, 190 L. Ed. 2d 635 (2014); *State* v. *Griep*, supra, 361 Wis. 2d 683 ("when a [nontestifying] analyst documents the original tests with sufficient detail for another expert to understand, interpret, and evaluate the results, that expert's testimony does not violate the [c]onfrontation [c]lause" [internal quotation marks omitted]).

In the present case, the record provides no basis for the claim that Degnan was provided with the raw data prepared by the known processing group and came to her own conclusion concerning the defendant's DNA profile. Degnan did testify that the known processing group provided "paperwork" to her so that she "could see that all of the checkboxes were check[ed], that they did it properly, followed standard operating procedures." This testimony merely establishes, however, that the known processing group represented to Degnan that they followed proper procedures during testing. As to the numerical profile produced from that testing, there is no evidence Degnan did anything at trial other than simply relay to the jury the profile that had been provided to her. Degnan was, therefore, not a sufficient substitute witness to satisfy the defendant's right to confrontation.

We observe that this opinion does not conclude that all analysts who participate in the process of generating a DNA profile necessarily must testify. We simply conclude that, where the generation of a DNA profile is testimonial, "at least one analyst with the requisite personal knowledge must testify." *People* v. *John*, supra, 27 N.Y.3d 313. In this regard, we agree with the New York Court of Appeals that "the analysts involved in the preliminary testing stages, specifically, the extraction, quantitation or amplification stages," are not necessary witnesses. Id. Rather, "it is the generated numerical identifiers and the calling of the alleles at the final stage of the DNA typing that effectively accuses [the] defendant of his role in the crime charged." Id. Accordingly, to satisfy the confrontation clause, the state need only call as a witness an analyst with personal knowledge concerning the accuracy of the numerical DNA profile generated from the preliminary stages of testing.

Because the state did not do so in the present case, we conclude that the defendant has established a violation of his sixth amendment right to confront the wit-

nesses against him. As the state has not asserted that this error is harmless beyond a reasonable doubt, the defendant is entitled to a new trial under *Golding*.

The judgment of the Appellate Court is reversed insofar as that court upheld the defendant's conviction as to the charges of felony murder, attempt to commit robbery in the first degree, and criminal possession of a pistol or revolver, and the case is remanded to that court with direction to reverse the trial court's judgment with respect to those charges and to remand the case to the trial court for a new trial.

In this opinion the other justices concurred.

BRENDA SNELL *v.* NORWALK YELLOW CAB, INC., ET AL. (SC 19929)

Palmer, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, a taxicab company, its owner, and its employee, S, for personal injuries she sustained when she was struck by a taxicab that had been stolen and driven by two teenagers. The plaintiff alleged that S's negligence in leaving the taxicab unattended with the key in the ignition in a high crime area created the reasonably foreseeable risk that the taxicab would be stolen, driven in an unsafe manner, and cause injury. The defendants raised as a special defense the doctrine of superseding cause, claiming that the intentional, criminal, or reckless acts of the two teenagers had broken the chain of causation between S's alleged negligence and the plaintiff's injuries and, thus, relieved them of liability. After the close of evidence, the trial court held a charging conference at which it solicited comments from counsel regarding its proposed charge on superseding cause, which instructed the jury that, if it found that the theft of the taxicab and the resulting accident involved intentional acts that were outside the scope of the risk created by S's conduct, the defendants could not be held liable for the plaintiff's injuries. The court also proposed a related interrogatory asking the jury whether the defendants had proven that the accident was outside the scope of the risk created by S's conduct. The plaintiff objected to the instruction and interrogatory regarding the scope of the risk, but the court overruled the plaintiff's objection and instructed the

jury on superseding cause. Thereafter, the jury returned a verdict for the defendants, indicating in two separate interrogatories that, although S's negligence was a proximate cause of the plaintiff's injuries, the accident that ensued was outside the scope of the risk created by S's negligence and, therefore, that the defendants were not liable for the plaintiff's injuries. Subsequently, the plaintiff filed a motion to set aside the verdict and for a new trial on the grounds that the court should not have submitted the doctrine of superseding cause to the jury because it was inapplicable and that the jury's answers to the interrogatories were inconsistent. The trial court denied the motion and rendered judgment in accordance with the verdict, from which the defendants appealed to the Appellate Court. On appeal to that court, the defendants claimed, inter alia, that the doctrine of superseding cause was not applicable because the teenagers were merely criminally reckless and the doctrine applies only to intervening acts that are unforeseeable and intended to cause harm, and that the trial court improperly denied her motion to set aside the verdict and for a new trial because the jury's responses to the interrogatories that S's conduct was a proximate cause of the plaintiff's injuries but that the manner in which her injuries occurred was outside the scope of the risk created by S's negligence were inconsistent. The Appellate Court affirmed the judgment of the trial court, concluding that, although this court in *Barry* v. *Quality Steel Products, Inc.* (263 Conn. 424) abrogated the doctrine of superseding cause in cases in which intervening acts merely were negligent, it retained the doctrine for unforeseeable intentional torts, forces of nature, and criminal events, which encompassed the acts of the teenagers. The Appellate Court also rejected the plaintiff's contention that the jury's answers to the interrogatories were inconsistent. On the granting of certification, the plaintiff appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the doctrine of superseding cause applies in cases in which the conduct of a third party is criminally reckless: a review of the case law addressing the doctrine of superseding cause and the history of tort reform in this state led this court to conclude that the doctrine applies to criminally reckless conduct, as the concerns that led this court in *Barry* to abrogate the doctrine in cases in which a defendant alleges that his negligent conduct is superseded by a third party's subsequent negligent act were not implicated in cases, like the present one, involving a third party's subsequent criminally reckless act, because apportionment of liability is unavailable under such circumstances pursuant to statute (§ 52-572h [o]); accordingly, the doctrine of superseding cause is not limited to a third party's intervening act that was intended to cause harm and remains a viable defense in cases in which apportionment is unavailable, but a negligent defendant will not be relieved of liability by virtue of a third party's reckless or intentional conduct if the type of harm sustained by the plaintiff is within the scope of the risk that was created by the defendant's negligent conduct.

2. The Appellate Court incorrectly determined that that the jury's responses to the interrogatories were legally consistent and, therefore, improperly upheld the trial court's denial of the plaintiff's motion to set aside the verdict and for a new trial: under this court's precedent, a finding that a third party's conduct constitutes a superseding cause precludes the defendant's negligence from being deemed a proximate cause of those injuries, and, because the jury found in its interrogatories both that S's negligence was a proximate cause of the plaintiff's injuries and that the teenagers' actions were a superseding cause of those injuries, this court could not conclude that the jury followed the trial court's instructions with respect to the issue of causation; accordingly, the plaintiff was entitled to a new trial.

(*One justice concurring separately*)

Argued September 13, 2018—officially released August 13, 2019

Procedural History

Action to recover damages for the alleged negligence of the defendant Johnley Sainval, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the jury before *Povodator, J.*; verdict for the defendants; thereafter, the court, *Povodator, J.*, denied the plaintiff's motion to set aside the verdict and for a new trial, and rendered judgment in accordance with the verdict, from which the plaintiff appealed to the Appellate Court, *Keller*, *Prescott* and *Harper*, *Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Reversed*; *new trial.*

Adam J. Blank, with whom was *Sarah Gleason*, for the appellant (plaintiff).

Laura Pascale Zaino, with whom were *Gregory S. Kimmel* and, on the brief, *Kevin M. Roche*, *Logan A. Carducci* and *Zachary M. Dunn*, for the appellees (named defendant et al.).

Jeffrey R. Babbin and *Christopher P. Kriesen* filed a brief for the Connecticut Defense Lawyers Association as amicus curiae.

Opinion

PALMER, J. The plaintiff, Brenda Snell, brought this negligence action against the defendants, Johnley Sainval, a taxicab driver, his employer, Norwalk Yellow Cab, Inc. (Yellow Cab), and Vito Bochicchio, Jr., the sole shareholder of Yellow Cab, seeking damages for serious injuries she sustained when she was struck by a taxicab that had been stolen from Sainval by two teenagers after Sainval left the vehicle unattended with the key in the ignition in a Norwalk neighborhood known to have a higher than average crime rate. A jury trial ensued at which the defendants claimed, inter alia, that the conduct of the two thieves was a superseding cause that relieved Sainval of any liability to the plaintiff for his alleged negligence. At the conclusion of the trial, the jury, in response to interrogatories submitted to it by the trial court, found that Sainval was negligent in leaving the taxicab unattended with the key in the ignition; that, in light of the surrounding neighborhood, it was reasonably foreseeable that the vehicle would be stolen and operated in an unsafe manner; and that Sainval's negligence was a proximate cause of some or all of the plaintiff's injuries. The jury also found, nevertheless, that the defendants were not liable for the plaintiff's injuries because the accident that occurred was not within the scope of the risk created by Sainval's negligence.

The plaintiff thereafter filed a motion to set aside the verdict and for a new trial claiming, inter alia, that the jury's finding that Sainval's negligence constituted a proximate cause of the accident was legally inconsistent with its finding that the accident was outside the scope of the risk created by Sainval's negligence. The court denied the motion and rendered judgment in accordance with the jury's verdict. The plaintiff then appealed to the Appellate Court, claiming that (1) it was improper for the trial court to instruct the jury on the doctrine of superseding cause, (2) even if the

doctrine were properly submitted to the jury, the court's instructions and interrogatories misled the jury, and (3) the trial court improperly denied the plaintiff's motion to set aside the verdict and for a new trial on the ground that the jury's verdict was irreconcilable with its responses to the interrogatories. *Snell* v. *Norwalk Yellow Cab, Inc.*, 172 Conn. App. 38, 41, 158 A.3d 787 (2017). The Appellate Court rejected the plaintiff's claims; id., 41–42; and we granted the plaintiff's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court correctly determine that the judgment of the trial court should be affirmed on the basis that the doctrine of superseding cause applies in cases in which the conduct of a third party is criminally reckless?" *Snell* v. *Norwalk Yellow Cab, Inc.*, 325 Conn. 927, 927–28, 169 A.3d 232 (2017). And (2) "Did the Appellate Court correctly determine that the trial court did not abuse its discretion when it denied the plaintiff's motion to set aside the verdict and for a new trial?" Id., 928. Although we answer the first question in the affirmative, we answer the second in the negative and, accordingly, reverse the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following relevant facts, which the jury reasonably could have found, and procedural history. "On December 3, 2009, Sainval, who was employed by Yellow Cab as a taxicab driver, was operating a taxicab owned by Yellow Cab in Norwalk. In the early evening, he drove the taxicab to Monterey Village, a housing complex located in an area of the city with significant criminal activity. Sainval parked the taxicab and went inside one of the apartments, leaving the taxicab unlocked and unattended with the keys in the ignition.

"Two teenagers, Shaquille Johnson and Deondre Bowden, who that afternoon had been consuming alcohol and smoking marijuana, noticed the parked taxicab. Although they initially intended to steal anything of

value that they could find inside the unlocked taxicab, once they observed the keys in the ignition, the two teens decided to steal the taxicab and to go on a 'joy-ride.' They drove the taxicab from Norwalk to Stamford, making one brief stop in between, with each of the teens taking a turn driving the vehicle.

"When they reached Stamford, they [encountered] traffic. At that time, Bowden was driving the taxicab. He 'kind of nodded off' and rear-ended the vehicle in front of him. Bowden, who was both 'tipsy' and 'high,' then attempted to flee the scene. In order to maneuver the taxicab around the vehicle he had struck, Bowden drove the taxicab up over the curb of the road and onto the adjoining sidewalk. In doing so, Bowden first hit a fire hydrant before striking the plaintiff with the taxicab.

"The plaintiff sustained severe physical injuries, particularly to her midsection, requiring millions of dollars in medical expenditures as of the time of trial, with additional treatments and surgeries expected. After hitting the plaintiff, Bowden never attempted to stop the vehicle; he and Johnson exited the stolen taxicab while it was still moving and fled the scene on foot, returning home by train. The police later identified the teens as the individuals involved in the hit and run of the plaintiff and arrested them.[1]

"The plaintiff initially commenced this action solely against Sainval and Yellow Cab.[2] Johnson and Bowden

[1] "Bowden admitted during his trial testimony that he had pleaded guilty to larceny, assault in the first degree, reckless endangerment, and evading responsibility with death or serious injury resulting." *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 43 n.3.

[2] "The plaintiff filed a separate civil action alleging negligent security practices by the companies that purportedly owned and managed Monterey Village. That action was consolidated with the present case but later was settled and withdrawn prior to trial. The jury nevertheless heard evidence pertaining to one of those companies, Vesta Management Corporation, and was instructed that it could consider for apportionment purposes whether and to what extent its negligence was also a cause of the plaintiff's injuries." *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 43 n.4.

were not named by the plaintiff as defendants in the civil action. Although the defendants filed an apportionment complaint against the two teens, the court later granted the plaintiff's motion to strike the apportionment complaint, agreeing with the plaintiff that apportionment was unavailable in the present case because the misconduct of the teenagers was not pleaded as mere negligence but as reckless or intentional conduct. See General Statutes § 52-572h (o) ('there shall be no apportionment of liability or damages between parties liable for negligence and parties liable on any basis other than negligence including, but not limited to, intentional, wanton or reckless misconduct'); *Allard* v. *Liberty Oil Equipment Co.*, 253 Conn. 787, 801, 756 A.2d 237 (2000) (recognizing that § 52-575h [o] was enacted to expressly overrule in part *Bhinder* v. *Sun Co.*, 246 Conn. 223, 234, 717 A.2d 202 [1998], in which [this court] had recognized [common-law] extension of statutory apportionment liability for parties whose conduct was reckless, wilful and wanton).

"The operative second amended complaint contains two counts relevant to the issues on appeal.[3] Count one sounds in negligence against Sainval. According to the plaintiff, Sainval acted negligently by leaving his taxicab in an unguarded public parking lot in a high crime area with the keys in the ignition, which created the reasonably foreseeable risk that the taxicab would be stolen and that a thief would drive the taxicab in an

[3] "The operative complaint contained four additional counts directed at Yellow Cab and its owner and sole shareholder, [Bochicchio]. These additional counts alleged that Bochicchio had, among other things, misdirected assets away from Yellow Cab's accounts in an effort to keep funds away from the plaintiff. The counts sounded in fraud and fraudulent transfer, and sought to 'pierce the corporate veil' between Yellow Cab and Bochicchio in the event Yellow Cab was found vicariously liable to the plaintiff for damages. The parties agreed with the court's decision to proceed with a bifurcated trial in which the additional counts would be presented to the jury only if the jury returned a verdict for the plaintiff on the negligence counts and awarded damages." *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 44 n.5.

unsafe manner and cause injury to a person or to property. Count two alleges that Yellow Cab was vicariously liable for Sainval's negligence on a theory of respondeat superior. Prior to trial, Yellow Cab conceded that it would be liable to the same extent that Sainval was found liable on count one.

"In their amended answer, the defendants, by way of a special defense, raised the doctrine of superseding cause. The defendants pleaded that, '[i]f the plaintiff sustained the injuries and losses as alleged in her complaint, said injuries and losses were the result of the intentional, criminal, reckless and/or negligent conduct of a third party, which intervened to break the chain of causation between [Sainval's] alleged negligence and/or carelessness and the plaintiff's alleged injuries and losses.' " (Footnotes altered; footnote in original, footnotes omitted.) *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 42–45.

"[T]he court initially indicated to the parties that it was not inclined to give a superseding cause instruction to the jury because, on the basis of its reading of . . . *Barry* v. *Quality Steel Products, Inc.*, [263 Conn. 424, 820 A.2d 258 (2003)], superseding cause was no longer part of our tort jurisprudence except in limited circumstances, specifically, cases involving either an intervening intentional tort, act of nature, or criminal event that was unforeseeable to the defendant. The court suggested that the exception was not at issue in the present case because, under the plaintiff's theory of liability, the intervening theft of the car was entirely foreseeable.

"The defendants, however, argued that the court was focusing on the wrong criminal act. They indicated that it was not necessarily the theft of the taxicab in this case that warranted an instruction on superseding cause but the unforeseeability of the thieves' subsequent criminal

conduct, namely, intentionally driving the taxicab up onto a sidewalk to evade responsibility for a rear-end collision and the ensuing criminal assault on the plaintiff. Furthermore, the defendants noted that part of the court's rationale in *Barry* for abandoning the doctrine of superseding cause in cases alleging that an intervening negligent act or acts contributed to a plaintiff's injuries was that apportionment of liability between tortfeasors was permitted, which would prevent a less culpable defendant from inequitably shouldering full responsibility for injuries that resulted from multiple negligent acts. The defendants contended that, unlike *Barry*, this case involved intervening actions of other tortfeasors that were not merely negligent but reckless and criminal. In such a case, the defendants argued, apportionment of liability is unavailable by statute; see General Statutes § 52-572h (o); and, thus, the primary policy rationale underlying the abolishment of the doctrine of superseding cause was absent. The court indicated that it would review the case law and give the issue further consideration in light of these arguments.

"[Subsequently], the court provided counsel with the latest draft of its jury instructions and also with copies of draft interrogatories that the court intended to submit to the jury. The court indicated that the current version of the instructions included a new paragraph that the court had decided to add after further consideration of the case law concerning superseding cause and its discussions with the parties. That paragraph instructed the jury to consider whether the theft of the taxicab and the resulting accident involved intentional acts that were outside the scope of the risk created by Sainval's conduct, and that if the jury found this to be so, then the defendants should not be found responsible for the plaintiff's injuries because the conduct of the two teens would have been the proximate cause of those injuries, thus relieving the defendants of any liability. The court

also drafted a new, related interrogatory that asked the jury to state whether the 'accident' that occurred was outside the scope of the risk created by Sainval's act of leaving the keys in the ignition of the taxicab. The court directed the jury to return a verdict for the defendants if the answer to that inquiry was yes.

"Following the close of evidence later that day, the court held a charging conference. At the charging conference, the plaintiff stated that it believed the additional paragraph added by the court to its latest draft instructions was unnecessary and confusing and that, in defining and explaining the concept of proximate cause, the court adequately had covered both foreseeability and whether Sainval's conduct was a substantial factor in causing the plaintiff's injuries. The plaintiff also stated that she did not think there was any evidence from which the jury could construe that the teens had intentionally sought to harm her. The court suggested that the additional instruction was necessary to comport with case law, referring in particular to *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 971 A.2d 676 (2009). It indicated its belief that foreseeability for purposes of determining negligence and scope of the risk for purposes of applying superseding cause, although closely related, were slightly different concepts.[4] The court agreed that there was nothing in

[4] As we explain more fully in part II of this opinion, the trial court determined that "foreseeability" for purposes of determining negligence and "scope of the risk" for purposes of applying superseding cause were different concepts, in part, on the basis of § 440 of the Restatement (Second) of Torts, and the notes accompanying Connecticut Civil Jury Instruction 3.1-5, which describe "superseding cause" as "any cause intervening between the time of the defendant's allegedly tortious conduct and that of the plaintiff's claimed injury [that], although not disproving that the defendant's conduct proximately caused the plaintiff's claimed injury, prevented the defendant's conduct from being considered a legal cause of that injury." Connecticut Civil Jury Instructions 3.1-5, available at http://www.jud.ct.gov/JI/Civil/Civil.pdf (last visited August 5, 2019). Specifically, the trial court understood the latter statement to mean that the superseding cause doctrine is a special defense that admits the truth of the allegations contained in the plaintiff's

the record to support a finding that the assault on the plaintiff was intentional but noted that the two teens had also engaged in other criminal conduct, including intentionally stealing the taxicab and intentionally fleeing the scene to evade responsibility after striking the plaintiff.

"The defendants noted that, although the court's proposed jury instruction made reference to a special defense, it never identified that defense; in fact, the term 'superseding cause' was never used by the court. The defendants argued that they intended to reference that term in . . . closing arguments and that they were entitled to a separate charge addressing their superseding cause defense. The defendants also took the position that, unlike in criminal law, tort law made no meaningful distinction between reckless and intentional conduct, and, thus, they asserted that it was inconsequential whether the criminal assault on the plaintiff was the result of intentional or reckless conduct for purposes of applying the doctrine of superseding cause.

"On December 11, 2014, prior to closing arguments, the plaintiff requested that the court change the order of the proposed interrogatories. The interrogatory that the court had added regarding scope of the risk, which the court indicated related to the special defense of superseding cause, was, at the time, interrogatory number four. Interrogatory number five at that time asked whether the plaintiff had proven that some or all of her injuries were proximately caused by Sainval. The plaintiff argued that because proximate cause was an element of her prima facie case, it made more sense for the jury to answer that interrogatory and fully establish a prima facie case before turning to any consider-

complaint, including the plaintiff's contention that the defendant's negligence proximately caused the plaintiff's injuries, but seeks to demonstrate that the plaintiff cannot prevail against the defendant.

ation of a special defense. According to the plaintiff, this would also negate the need for a retrial in the event there was a defendants' verdict on the special defense that was overturned later on appeal; all that would be required would be a hearing in damages. The defendants did not agree that a switch was necessary. The court nevertheless indicated that it would most likely make the switch and later incorporated the change in the interrogatories it submitted to the jury. The court also indicated that it had made some additional changes based [on] the positions of the parties at the charging conference, including referring to the doctrine of superseding cause by name.

"After the parties concluded their closing arguments, the court read its instructions to the jury. The relevant portions of the court's instructions for purposes of the present appeal are those addressing proximate causation, which provided in relevant part as follows: 'Once you've gotten past factual causation, you need to address proximate cause. Proximate cause means that there must be a sufficient causal connection between the act or omission alleged, and any injury or damage sustained by the plaintiff.

" 'An act or omission is a proximate cause if it was a substantial factor in bringing about or actually causing the injury. That is, if the injury or damage was a direct result, or a reasonable and probable consequence of the defendant's act or omission, it was proximately caused by such an act or omission.

" 'In other words, if an act had such an effect in producing the injury that reasonable persons would regard it as being a cause of the injury, then the act or omission is a proximate cause. In order to recover damages for any injury, the plaintiff must show by a preponderance of the evidence that such injury would not have occurred without the negligence of the defendant.

" 'If you find that the plaintiff complains about an injury which would have occurred even in the absence of the defendant's conduct, or is not causally connected to this accident, you must find that the defendant did not proximately cause that injury.

" 'Under the definitions I have given you, negligent conduct can be a proximate cause of an injury, if it is not the only cause, or even the most significant cause of the injury, provided it contributes materially to the production of the injury, and thus is a substantial factor in bringing it about.

" 'Therefore, when a defendant's negligence combines together with one or more other causes to produce an injury, such negligence is a proximate cause of the injury if its contribution to the production of the injury, in comparison to all other causes, is material or substantial.

" 'When, however, some other causal causes contributes so powerfully to the production of an injury, as to make the defendant's negligent contribution to the injury merely trivial or inconsequential, the defendant's negligence must be rejected as a proximate cause of the injury, for it has not been a substantial factor in bringing the injury about.[5]

" 'Or to put it another way, if you find that the injury would have been sustained, whether or not the defendant had been negligent, his negligence would not have been a proximate cause of the accident. It is your responsibility to determine which, if any, of the injuries and damages claimed by the plaintiff were proximately caused by the conduct of the defendant.

[5] This paragraph of the jury charge, along with the four paragraphs of the charge that follow, represents the trial court's instructions on superseding cause, even though the court did not expressly use the term "superseding cause" in those paragraphs.

" 'The defendants have claimed that the theft and operation of the car by [Johnson] and [Bowden], and the resulting accident, constituted such an event, an event that was so overpowering in consequence as to render any possible negligence on the part of defendant Sainval relatively insignificant, and therefore not a proximate cause of the injuries sustained by plaintiff.

" 'Foreseeability of the car being stolen, something you would have considered in connection with determining whether [Sainval] was negligent, also may be considered in this regard. It is for you to decide whether the theft of the car and subsequent manner of operation [were] so overwhelming in significance, or whether they constituted a concurrent proximate cause but not of sufficient magnitude as to render [Sainval's] negligence inconsequential.

" 'To put it another way, if you find that the theft of the car and subsequent driving of the vehicle and resulting accident were intentional acts that were not within the scope of the risk which was created by [Sainval's] conduct, then the defendant[s] could not be found responsible for the injuries to the plaintiff as the conduct of [Johnson] and [Bowden] would have been the proximate cause of the injuries sustained by the plaintiff, thereby relieving the defendant[s] of any liability.

" 'To the extent that you find that the plaintiff has proven, by a preponderance of the evidence, that the negligence of defendant Sainval was a proximate cause of any or all of the injuries and damages claimed to have been sustained by the plaintiff, as I have defined proximate cause to you, you are to proceed to determine the issues as to the amount of damages, following the rules I'm about to give you.'

"Following the jury charge, the court inquired whether the parties had any additional objections to the charge other than those raised at the charge conference.

Neither party raised any additional objections. A written copy of the court's charge was made an exhibit and provided to the jury.

"The following day, the jury returned a verdict in favor of the defendants. The relevant interrogatories submitted to the jury, and the jury's response[s], are as follows: '1. Did [the] plaintiff . . . prove, by a preponderance of the evidence, that . . . Sainval failed to exercise reasonable care when he left the keys to his taxicab in the vehicle, when he went inside the apartment complex at Monterey Village on the evening of December 3, 2009? [Answer] Yes . . . [If the answer is 'YES,' go to interrogatory #2; if the answer is 'NO,' sign and date this form and the defendants' verdict form, and then report that you have reached a verdict.] 2. Did [the] plaintiff prove that it was reasonably foreseeable that a motor vehicle, left in a parking area of Monterey Village with the key in the ignition on the evening of December 3, 2009, might be stolen? [Answer] Yes . . . [If the answer is 'YES,' go to interrogatory #3; if the answer is 'NO,' sign and date this form and the defendants' verdict form, and then report that you have reached a verdict.] 3. Did [the] plaintiff prove that it was reasonably foreseeable that if a motor vehicle were to be stolen from the parking area at Monterey Village, it might be in an accident, causing injury? [Answer] Yes . . . [If the answer is 'YES,' go to interrogatory #4; if the answer is 'NO,' sign and date this form and the defendants' verdict form, and then report that you have reached a verdict.] 4. Did [the] plaintiff . . . prove that some or all of the injuries she sustained on the evening of December 3, 2009, were proximately caused by the negligence of . . . Sainval? [Answer] Yes . . . [If the answer is 'YES,' go to interrogatory #5; if the answer is 'NO,' sign and date this form and the defendants' verdict form, and then report that you have reached a verdict.] 5. Did [the] defendant[s] prove that the acci-

dent that occurred on December 3, 2009 was outside the scope of risk created by [Sainval's] leaving his key in the ignition of a car parked at Monterey Village? [Answer] Yes . . . .'[6] The directions contained in the interrogatories instructed the jury to return a defendants' verdict if it answered interrogatory five in the affirmative, and, therefore, the jury did not respond to the remainder of the interrogatories submitted. The court accepted the jury's verdict.

"The plaintiff filed a postjudgment motion asking the court to set aside the verdict and to order a new trial. The plaintiff argued that, despite the jury having found that the theft of the taxicab and the subsequent accident resulting in injuries were foreseeable and that Sainval's actions were a proximate cause of her injuries, the jury instructions and attendant interrogatories permitted the jury to simultaneously and inconsistently find that her being struck by the taxicab in the manner that occurred nevertheless was outside the scope of the risk created by Sainval's negligence.

"The court issued a detailed and thorough memorandum of decision denying the plaintiff's motion. The court found that there was no basis for concluding that it should not have submitted the doctrine of superseding cause to the jury in this case or that the resulting verdict and interrogatories were fatally inconsistent. The court explained that it saw 'nothing inherently inconsistent with a jury finding a "standard" proximate cause instruction satisfied, while also later finding superseding cause established when viewed from the [alternative] perspective of a charge on that point.' " (Footnotes added; footnotes omitted.) *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 46–54.

On appeal to the Appellate Court, the plaintiff claimed that the doctrine of superseding cause should not have

[6] Although the fifth interrogatory contains no express reference to the term "superseding cause," it is that doctrine that is the subject thereof.

been submitted to the jury because it applies only to superseding acts that were unforeseeable and intended to cause harm, and Bowden's reckless operation of the taxicab satisfied neither of those requirements. Id., 54–55. The plaintiff also argued that, even if the superseding cause doctrine were applicable, the trial court's instructions misled the jury by failing to adequately define the phrase "scope of the risk" in the context of determining whether Bowden's actions were a superseding cause of the plaintiff's injuries. Id., 68–70. Finally, the plaintiff maintained that the trial court improperly had denied her motion to set aside the verdict and for a new trial on the ground that the jury's finding of a superseding cause was irreconcilable with its finding that Sainval's negligence was the proximate cause of some or all of the plaintiff's injuries. Id., 71–73.

The Appellate Court rejected the plaintiff's claims. Id., 41–42. With respect to her contention that the doctrine of superseding cause applies only to intervening acts that were intended to cause harm, the Appellate Court explained that when this court abolished the superseding cause doctrine in cases involving intervening acts of negligence, it expressly exempted from its holding, among other types of intervening forces, unforeseeable "criminal event[s]"; *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 439 n.16; a category that, in the view of the Appellate Court, included the actions of Bowden and Johnson. *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 64–65. With respect to the plaintiff's claim that the doctrine should not have been submitted to the jury because it applies only to superseding acts that were unforeseeable, and Bowden's recklessness represented the kind of risk that made Sainval's conduct negligent in the first place, the Appellate Court responded that, "even in cases in which the risk of a third party's intervention is a generally foreseeable consequence of a defendant's actions, it is

a question of fact whether the third party's intervening actions fall somewhere within the hazard created by the defendant's negligence, i.e., within the scope of the risk. Only if the answer to that question is so abundantly clear as to be determinable as a matter of law should the court decline to give an instruction on superseding cause. Otherwise, the inquiry is a factual issue that should be presented to and decided by a jury." Id., 61.

The Appellate Court also rejected the plaintiff's contention that the trial court's instructions on superseding cause were so misleading as to necessitate a new trial; id., 68; concluding that, "although perhaps not perfect in all respects, the instructions were sufficient to inform the jury of the doctrine of superseding cause as pleaded and to guide the jury through its deliberation to a proper verdict." Id., 71. Finally, the Appellate Court disagreed with the plaintiff that the trial court improperly denied her motion to set aside the verdict and for a new trial on the ground that the jury's response to the fourth interrogatory, that is, that some or all of the plaintiff's injuries were proximately caused by Sainval's negligence, was irreconcilable with its response to the fifth interrogatory, that is, that the accident that occurred was outside the scope of risk created by Sainval's negligence. Id., 71–73. In reaching its determination, the Appellate Court relied on the definition of superseding cause set forth in § 440 of the Restatement (Second) of Torts, which "defines a superseding cause as 'an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another *which his antecedent negligence is a substantial factor in bringing about.*' . . . 2 Restatement (Second), Torts § 440, p. 465 (1965)." (Emphasis in original.) *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 58.

The Appellate Court also relied on § 442 B of the Restatement (Second) of Torts; id., 59–61; which states that, "[if] the negligent conduct of the actor creates or

increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, *except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct*." (Emphasis added.) 2 Restatement (Second), supra, § 442 B, p. 469. Reading §§ 440 and 442 B together, the Appellate Court reasoned that, because the test for proximate cause is whether the defendant's conduct was "a substantial factor" in producing the plaintiff's injury; (internal quotation marks omitted) *Ruiz* v. *Victory Properties, LLC*, 315 Conn. 320, 329, 107 A.3d 381 (2015); the jury properly could have found both that Sainval's negligence was a proximate cause of the plaintiff's injuries, that is, it was a substantial factor in producing them, and that the accident that occurred was outside the scope of the risk created by Sainval's negligence. *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 61; see id. ("even in cases in which the risk of a third party's intervention is a generally foreseeable consequence of a defendant's actions, it is a question of fact whether the third party's intervening actions fall somewhere within the hazard created by the defendant's negligence, i.e., within the scope of the risk").

In reaching its determination, the Appellate Court recognized the inherent tension between the Restatement's definition of superseding cause, which this court has never formally adopted,[7] and our statement in *Barry* that, "[i]f a third person's [negligence] is found to be the superseding cause of the plaintiff's injuries, that

[7] Although we have never adopted the Restatement's definition of superseding cause, we note that it has appeared as dicta in a handful of this court's opinions. See, e.g., *Levesque* v. *Bristol Hospital, Inc.*, 286 Conn. 234, 243 n.12, 943 A.2d 430 (2008); *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 434; *Board of Education* v. *St. Paul Fire & Marine Ins. Co.*, 261 Conn. 37, 46, 801 A.2d 752 (2002).

[negligence], rather than the negligence of the party attempting to invoke the doctrine of superseding cause, *is said to be the sole proximate cause of the injury*." (Emphasis added; internal quotation marks omitted.) Id., 58–59 and n.15, quoting *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 434–35. The Appellate Court reasoned, however, that, because "[c]omment (b) of § 440 of the Restatement (Second) of Torts clarifies that '[a] superseding cause relieves the actor of liability, irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm' "; (emphasis omitted) *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn App. 59 n.15; it was reasonable to construe the "sole proximate cause" language in *Barry* "not as a repudiation of the Restatement's broader definition but simply as a recognition that, in some cases involving a superseding cause, the superseding event may so diminish the impact of the initial negligence of the defendant that that negligence can no longer be viewed as a substantial factor in bringing about the plaintiff's injury, thus transforming the superseding cause into the sole proximate cause of the harm. This iteration of the doctrine, however, does not expressly preclude that, in certain cases factually distinct from that considered by the court in *Barry*, the impact of the defendant's initial negligence will not be so diminished by the later intervening act as to fully negate the initial negligence as a substantial factor in causing the harm at issue. In such cases, application of the doctrine of superseding cause may nonetheless be justified to prevent an otherwise inequitable determination regarding liability." Id.

On appeal following our grant of certification, the plaintiff contends that the Appellate Court incorrectly held that the doctrine of superseding cause applies to criminally reckless conduct. In support of this contention, the plaintiff asserts that the Appellate Court's

determination conflicts with § 442 B of the Restatement (Second) of Torts, which this court has adopted, and with the Judicial Branch's model civil jury instruction on superseding causes; Connecticut Civil Jury Instructions 3.1-5, available at http://www.jud.ct.gov/JI/Civil/Civil.pdf (last visited August 5, 2019);[8] both of which,

[8] Connecticut Civil Jury Instruction 3.1-5 provides: "The defendant claims that he did not legally cause the plaintiff's alleged injury because that injury was produced, in material part, by a superseding cause. A superseding cause is any intentionally harmful act, force of nature, or criminal event, unforeseeable by the defendant, [that] intervenes in the sequence of events leading from the defendant's alleged negligence to the plaintiff's alleged injury and proximately causes that injury. Under our law, the intervention of such a superseding cause prevents the defendant from being held liable for the plaintiff's injury on the theory that, due to such superseding cause, the defendant did not legally cause the injury even though (his/her) negligence was a substantial factor in bringing the injury about. Therefore, when a claim of superseding cause is made at trial, the plaintiff must disprove at least one essential element of that claim by a fair preponderance of the evidence in order to prove, by that standard, its own conflicting claim of legal causation.

"In this case, the defendant claims, more particularly, that <*describe alleged intervening conduct or event claimed to constitute a superseding cause*> was a superseding cause of the plaintiff's alleged injury, and thus that (his/her) own negligence did not legally cause that injury. Because such intentionally harmful (conduct / force of nature / criminal event), if unforeseeable by the defendant, would constitute a superseding cause of the plaintiff's alleged injury if it occurred as claimed by the defendant and if it proximately caused the plaintiff's injury, the plaintiff must disprove at least one essential element of that claim by a fair preponderance of the evidence in order to prove that the defendant legally caused that injury. The plaintiff can meet this burden by proving either 1) that the conduct claimed to constitute a superseding cause did not occur as claimed by the defendant, either because it did not occur at all or because it was not engaged in with the intent to cause harm; or 2) that such conduct was foreseeable by the defendant, in that the injury in question was within the scope of the risk created by the defendant's conduct; or 3) that such conduct was not a substantial factor in bringing about the plaintiff's alleged injury. These, of course, are questions of fact for you to determine based on the evidence. Keep in mind, however, that the defendant does not have any burden to prove the existence of a superseding cause. The burden at all times rests [on] the plaintiff to disprove the defendant's claim of superseding cause as a necessary part of (his/her) proof that the defendant legally caused the plaintiff's injury." (Emphasis in original.)

the plaintiff maintains, indicate that, for a third party's conduct to qualify as a superseding cause, he or she must have acted with the specific intent to cause injury. The plaintiff further contends that the Appellate Court incorrectly determined that the trial court properly denied the plaintiff's motion to set aside the verdict and for a new trial on the basis of its determination that an intervening force can be foreseeable for purposes of determining proximate cause but not within the scope of the risk for purposes of applying the superseding cause doctrine. The plaintiff argues that, under this state's well established precedent—precedent on which the trial court's jury instructions were predicated—if Sainval's negligence proximately caused some or all of the plaintiff's injuries, then the accident was, by definition, within the scope of the risk created by his negligence. See, e.g., *Sapko* v. *State*, 305 Conn. 360, 373, 44 A.3d 827 (2012) ("[t]he fundamental inquiry of proximate cause is whether the harm that occurred was within the scope of foreseeable risk created by the defendant's negligent conduct" [internal quotation marks omitted]).

The defendants counter that the Appellate Court correctly determined that the jury's interrogatory responses can be reconciled by applying §§ 440 and 442 B of the Restatement (Second) of Torts, pursuant to which the jury reasonably could have found that Sainval's negligence proximately caused the plaintiff's injuries *and* that Bowden's and Johnson's actions were a superseding cause of the accident. The defendants further argue that, because superseding cause is a special defense that admits the allegations of a complaint but seeks to establish that the plaintiff cannot prevail; see *Coughlin* v. *Anderson*, 270 Conn. 487, 501, 853 A.2d 460 (2004) ("[a]s a general rule, facts must be pleaded as a special defense when they are consistent with the allegations of the complaint but demonstrate, nonethe-

less, that the plaintiff has no cause of action" [internal quotation marks omitted]); it makes sense that "a jury must first determine that a defendant's negligence is a proximate cause of a plaintiff's injuries before it can consider whether a superseding cause . . . intervened to absolve that negligent defendant of liability for those injuries." For the reasons set forth hereinafter, we conclude, contrary to the contention of the plaintiff, that the superseding cause doctrine is applicable to the present case. We also conclude, however, that the plaintiff is entitled to a new trial because the interrogatory responses on which the jury verdict was based are inconsistent as a matter of law.

I

Whether the superseding cause doctrine applies to criminally reckless conduct presents a question of law, over which we exercise plenary review. See, e.g., *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 433–46 (reviewing de novo trial court's decision regarding applicability of superseding cause doctrine). To properly analyze this question, it is necessary to review the legal underpinnings of the doctrine. As both the trial court and the Appellate Court observed, few other areas of tort law have consistently proven as challenging for courts to explain and for juries to apply as the principles underlying the doctrines of proximate cause and superseding cause. See, e.g., *Cuneo* v. *Connecticut Co.*, 124 Conn. 647, 651–52, 2 A.2d 220 (1938) ("Few subjects have caused more trouble to courts and legal philosophers than [the question of proximate cause]. The cases on the subject are innumerable and the discussions interminable."); *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 56 ("although the concepts underlying the doctrine of superseding cause may be easy to identify, their application to the specifics of a particular case can be a far more difficult task"). It is well settled that a negligence action consists of four elements: duty, breach, causation, and actual injury. See, e.g., *Murdock*

v. *Croughwell*, 268 Conn. 559, 566, 848 A.2d 363 (2004) (identifying essential elements of negligence action). For purposes of this appeal, the defendants do not dispute that Sainval owed a duty to the plaintiff, that he breached that duty, and that the plaintiff was seriously injured. They do dispute, however, that Sainval's negligence caused the plaintiff's injuries.[9] Causation in a negligence action has two components, both of which must be satisfied for the plaintiff to prevail. The first, "[c]ause in fact, occasionally referred to as actual cause, asks whether the defendant's conduct 'caused' the plaintiff's injury. Thus, if the plaintiff's injury would not have occurred 'but for' the defendant's conduct, then the defendant's conduct is a cause in fact of the plaintiff's injury. Conversely, if the plaintiff's injury would have occurred regardless of the defendant's conduct, then the defendant's conduct was not a cause in fact of the plaintiff's injury. [W. Keeton et al., Prosser and

[9] Although the legal question of whether Sainval owed a duty to the plaintiff is not before us, we previously have stated that, when a defendant claims that an independent intervening force superseded his own negligence, "the question of legal causation is practically indistinguishable from an analysis of the extent of the tortfeasor's duty to the plaintiff." (Internal quotation marks omitted.) *Ruiz* v. *Victory Properties, LLC*, supra, 315 Conn. 345. This is so because, in determining whether a duty exists, "our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant"; (internal quotation marks omitted) *Mirjavadi* v. *Vakilzadeh*, 310 Conn. 176, 191, 74 A.3d 1278 (2013); which is the same inquiry a jury makes in deciding whether a defendant's actions were the proximate cause of the harm. Id., 192. As this court, quoting Prosser and Keeton on the Law of Torts, has explained: " '[T]he question whether there is a duty has most often seemed helpful in cases [in which] the only issue is in reality whether the defendant stands in any such relation to the plaintiff as to create any legally recognized obligation of conduct for the plaintiff's benefit. Or, reverting again to the starting point, whether the interests of the plaintiff are entitled to legal protection at the defendant's hands against the invasion [that] has in fact occurred. Or, again reverting, whether the conduct is the "proximate cause" of the result. The circumlocution is unavoidable, since all of these questions are, in reality, one and the same.' [W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984)] § 42, p. 274; see also id., § 53, p. 358." *RK Constructors, Inc.* v. *Fusco Corp.*, 231 Conn. 381, 388 n.4, 650 A.2d 153 (1994).

Keeton on the Law of Torts] (5th Ed. 1984) § 41, p. 266." *Stewart* v. *Federated Dept. Stores, Inc.*, 234 Conn. 597, 605, 662 A.2d 753 (1995). In the present case, it is undisputed that Sainval's conduct was a cause in fact of the plaintiff's injuries because, if he had not left the taxicab unattended with the key in the ignition, the vehicle would not have been stolen and the plaintiff would not have been injured.

The second component of causation is proximate cause. "Philosophically, cause in fact is limitless; but for the creation of this world, no crime or injury would ever have occurred. [W. Keeton, supra, § 41] p. 264. The philosophical sense of causation includes the great number of events without which any happening [of an injury] would not have occurred . . . yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes. 2 Restatement (Second), [supra] § 431, comment (a) [p. 429]." (Internal quotation marks omitted.) *Stewart* v. *Federated Dept. Stores, Inc.*, supra, 234 Conn. 605. "Because actual causation . . . is virtually limitless, the legal construct of proximate cause serves to establish how far down the causal continuum tortfeasors will be held liable for the consequences of their actions. . . . The test for proximate cause is whether the defendant's conduct was a substantial factor in producing the plaintiff's injury. . . . This substantial factor test reflects the inquiry fundamental to all proximate cause questions, namely, whether the harm [that] occurred was of the same general nature as the foreseeable risk created by the defendant's negligence." (Citation omitted; internal quotation marks omitted.) *Ruiz* v. *Victory Properties*, LLC, supra, 315 Conn. 329.

We often have observed that "[p]roximate cause results from a sequence of events unbroken by a superseding cause, so that its causal viability continued until the moment of injury or at least until the advent of the

immediate injurious force. . . . The terms 'intervening cause' and 'superseding cause' have been used interchangeably. . . . The Restatement [Second] of Torts makes clear that the doctrine is properly referred to as 'superseding cause,' and that it embodies within it the concept of an 'intervening force.' 2 Restatement (Second), [supra] §§ 440 through 453 [pp. 465–91]." (Citations omitted; internal quotation marks omitted.) *Wagner* v. *Clark Equipment Co.*, 243 Conn. 168, 178–79, 700 A.2d 38 (1997). As we also have explained previously, "[c]auses traced clear to the end [that] become of trivial consequences, mere incidents of the operating cause, may be, in a sense, factors, but are so insignificant that the law cannot fasten responsibility [on] one who may have set them in motion. They are not substantial factors as operative causes. To be factors of this degree they must have continued down to the moment of the damage, or, at least, down to the setting in motion of the final active injurious force [that] immediately produced (or preceded) the damage." (Internal quotation marks omitted.) *Birnie* v. *Electric Boat Corp.*, 288 Conn. 392, 411 953 A.2d 28 (2008); see also *Paige* v. *St. Andrew's Roman Catholic Church Corp.*, 250 Conn. 14, 25, 734 A.2d 85 (1999) ("[r]emote or trivial [actual] causes are generally rejected because the determination of the responsibility for another's injury is much too important to be distracted by explorations for obscure consequences or inconsequential causes" [internal quotation marks omitted]).

Thus, "[p]roximate cause establishes a reasonable connection between an act or omission of a defendant and the harm suffered by a plaintiff. . . . Proximate cause serves to [temper] the expansive view of causation [in fact] . . . by the pragmatic . . . shaping [of] rules [that] are feasible to administer, and yield a workable degree of certainty." (Citation omitted; internal quotation marks omitted.) *Stewart* v. *Federated Dept. Stores, Inc.*, supra, 234 Conn. 606.

"[A]lthough nearly every treatise involving the law of torts acknowledges the existence of the doctrine of superseding cause, it is defined differently by various scholars. For example, one treatise notes that the problem of superseding cause is not primarily one of causation but, rather, 'one of policy as to imposing legal responsibility.' [W. Keeton, supra] § 44, p. 301. . . . [O]ther treatises support the view that the doctrine of superseding cause is merely a more complicated analysis of whether the defendant's actions were the proximate cause of the plaintiff's injuries. For example, one treatise states: '[Superseding] cause is merely proximate cause flowing from a source not connected with the party sought to be charged. While the term may have some descriptive value, unduly elaborate discussion of [superseding] cause as such tends to becloud rather than clarify the relatively simple idea of causal connection. When it is determined that a defendant is relieved of liability by reason of [a superseding] cause, it would appear to mean simply that the negligent conduct of someone else—and not that of the defendant—is the proximate cause of the event.' . . . 1 T. Shearman & A. Redfield, Negligence (Rev. Ed. 1941) § 37, pp. 99–100." (Emphasis omitted.) *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 439–40.

Accordingly, "[i]f the third person's negligence is determined to be a superseding cause of the plaintiff's injury, that negligence, rather than the negligence of the party attempting to invoke the doctrine of superseding cause, is said to be the sole proximate cause of the injury. . . . The circumstances under which this shifting may take place have been well-defined in our case law. Even if a plaintiff's injuries are in fact caused by a defendant's negligence, a superseding cause may break that causal connection if it so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in any

degree, produces the injury; or it must be the non-concurring culpable act of a human being who is legally responsible for such act. . . . If a defendant's negligence was a substantial factor in producing the plaintiff's injuries, the defendant would not be relieved from liability for those injuries even though another force concurred to produce them. . . . Whether a superseding cause was of such a character as to prevent an act of negligence of the defendant from being a substantial factor in producing a plaintiff's injury is ordinarily a question of fact [for the jury]." (Citations omitted; internal quotation marks omitted.) *Wagner* v. *Clark Equipment Co.*, supra, 243 Conn. 179–80.

In *Barry*, this court determined that the doctrine of superseding cause had outlived its usefulness in cases in which "a defendant claims that a subsequent negligent act by a third party cuts off its own liability for the plaintiff's injuries." *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 436. *Barry* was decided after the legislature's enactment of No. 86-338 of the 1986 Public Acts (Tort Reform I) and No. 87-227 of the 1987 Public Acts (Tort Reform II), prior to which "this state followed the rules of joint and several liability with no contribution among joint tortfeasors. [Under that system, if] the illegal conduct of each of the defendants was a proximate cause of [an injury], they would be liable jointly and severally, the plaintiff would have a right to recover the entire amount of damages awarded from either, and, if he did so, the defendant paying them would have no right of contribution against the other [defendants] . . . .

"Under the common law of joint and several liability, therefore, even a defendant whose degree of fault was comparatively small could be held responsible for the entire amount of damages, [as] long as his negligence was a proximate cause of the plaintiff's injuries. Thus, the plaintiff could collect the entire amount of his judg-

ment from the richest defendant, or from the defendant with the deepest pocket. . . .

"In response largely to these concerns, the legislature undertook to reform the tort recovery provisions of our civil system, by enacting [Tort Reform I], which took effect October 1, 1986. Tort Reform I replaced the common-law rule of joint and several liability with a system of apportioned liability, holding each defendant liable for only his or her proportionate share of damages." (Citations omitted; internal quotation marks omitted.) *Collins* v. *Colonial Penn Ins. Co.*, 257 Conn. 718, 729–30, 778 A.2d 899 (2001).

Prior to *Barry*, the superseding cause doctrine was applied to any intervening force—be it of nature, man or beast—that a defendant claimed had superseded his own tortious conduct to such a degree that it alone was the sole proximate cause of the plaintiff's injuries. See, e.g., *Lombardi* v. *Wallad*, 98 Conn. 510, 518, 120 A. 291 (1923) ("the intervening cause either must be a cause, whether intelligent or not, [that] so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in any degree, produces the injury"); *Mahoney* v. *Beatman*, 110 Conn. 184, 205, 147 A. 762 (1929) (*Maltbie, J.*, dissenting) ("the circumstances [that] intervene may be natural phenomena, or the involuntary and unlawful act of a third person, or his negligent conduct, or his voluntary but lawful act, or his voluntary and wilfully wrong act; or some act of the injured party himself may intervene and it may be a negligent act on his part or a wilfully wrong act").

In light of the significant changes to our tort system implemented by tort reform, however, this court determined in *Barry* "that the doctrine of superseding cause no longer serves a useful purpose in our jurisprudence when a defendant claims that a subsequent negligent

act by a third party cuts off its own liability for the plaintiff's injuries. [In such] circumstances, superseding cause instructions serve to complicate what is fundamentally a proximate cause analysis. . . . [B]ecause our statutes allow for apportionment among negligent defendants; see General Statutes § 52-572h; and because Connecticut is a comparative negligence jurisdiction; General Statutes § 52-572o; the simpler and less confusing approach to cases . . . [in which] the jury must determine which, among many, causes contributed to the [plaintiff's] injury, is to couch the analysis in proximate cause rather than allowing the defendants to raise a defense of superseding cause." (Footnote omitted.) *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 436–39; see also id., 443 n.18 ("[T]he doctrine of superseding cause is already incorporated into the test for proximate cause. Repeating the test for superseding cause, then, merely adds confusion to an already confusing subject, and serves no meaningful purpose in a jurisdiction, such as ours, [in which] a defendant will be liable only for his or her proportion of the plaintiff's damages.")

Under this approach, "the fact finder need only determine whether the allegedly negligent conduct of any actor was a proximate cause, specifically, whether the conduct was a substantial factor in contributing to the plaintiff's injuries. If such conduct is found to be a proximate cause of the plaintiff's foreseeable injury, each actor will pay his or her proportionate share pursuant to our apportionment statute, regardless of whether another's conduct also contributed to the plaintiff's injury. Put differently, the term superseding cause merely describes more fully the concept of proximate cause when there is more than one alleged act of negligence, and is not functionally distinct from the determination of whether an act is a proximate cause of the injury suffered by the plaintiff." Id., 440.

In reaching our determination in *Barry*, we expressly limited our holding to cases in which "a defendant claims that its tortious conduct is superseded by a subsequent negligent act or there are multiple acts of negligence," stating that our decision did "not necessarily affect those cases [in which] the defendant claims that an unforeseeable intentional tort, force of nature, or criminal event supersedes its tortious conduct." Id., 439 n.16. Later, we made clear that our holding in *Barry* did not affect those types of cases. E.g., *Sapko* v. *State*, supra, 305 Conn. 377 ("the superseding cause doctrine was largely abandoned in *Barry* in favor of comparative and contributory negligence . . . subject . . . to certain narrow exceptions, namely, situations in which an unforeseeable intentional tort, force of nature or criminal event supersedes the defendant's tortious conduct" [citation omitted; internal quotation marks omitted]); *Sullivan* v. *Metro-North Commuter Railroad Co.*, supra, 292 Conn. 167 (*Barry* "specifically limited our abolishment of the doctrine to the situation in cases . . . [in which] a defendant claims that its tortious conduct is superseded by a subsequent negligent act or there are multiple acts of negligence" [internal quotation marks omitted]).

Although we did not expressly say so at the time, we exempted unforeseeable intentional torts, forces of nature and criminal events from our holding in *Barry* because, even under our modern tort system, apportionment of liability is not available between parties liable for negligence and parties liable on any other basis. See General Statutes § 52-572h (o) ("there shall be no apportionment of liability or damages between parties liable for negligence and parties liable on any basis other than negligence including, but not limited to, intentional, wanton or reckless misconduct"); *Sapko* v. *State*, supra, 305 Conn. 377 (*Barry* "abrogated the superseding cause doctrine for negligence cases only

because, in those cases, a jury is tasked with apportioning liability in accordance with our comparative fault and apportionment statutes"); *Sapko* v. *State*, supra, 378 ("we abrogated the superseding cause doctrine in *Barry* not because the concept of superseding cause is inherently incompatible with our proximate cause jurisprudence but out of concern that a separate instruction concerning the doctrine might confuse jurors by causing them to ignore or discount the comparative fault and apportionment principles underlying §§ 52-572h and 52-572o"). In *Sapko*, we expanded the exceptions enumerated in *Barry* to include certain workers' compensation cases in which apportionment is unavailable and an employer claims that an intervening force—in that case, an employee's accidental overdose on prescription pain medicine—broke the chain of proximate causation between an employee's compensable work injury and his death.[10] Id., 364–65, 386;

[10] We note that several years before we decided *Sapko*, in *Archambault* v. *Soneco/Northeastern, Inc.*, 287 Conn. 20, 37, 946 A.2d 839 (2008), we rejected a nearly identical claim to that which we found persuasive in *Sapko*, namely, that the trial court improperly had denied the defendant's request to charge the jury on the doctrine of superseding cause, when the defendant had argued that the negligence of the plaintiff's employer was the sole proximate cause of the plaintiff's injuries. In that case, the exclusivity provision of the Workers' Compensation Act had prevented the defendant from citing in the plaintiff's employer as an apportionment defendant. See id., 26. In support of its claim that the trial court improperly had denied its request to charge the jury on the superseding cause doctrine, the defendant argued "that our holding in *Barry* is restricted to cases in which the jury is charged with apportioning liability between multiple defendants and that . . . the doctrine remains viable when, as in the present case, contributory negligence and apportionment of liability between two or more defendants are not at issue." Id., 44. In rejecting this claim, we relied solely on the fact that the doctrine had been abandoned in *Barry*, "subject only to certain narrow exceptions," which did not include intervening acts of negligence. Id. We agreed with the defendant, however, that the trial court improperly had precluded it from presenting evidence and argument to the jury that the plaintiff's employer was the sole proximate cause of the plaintiff's injuries. See id., 33 ("[t]his court has determined that a defendant has the right, under a general denial, to introduce evidence that the negligence of another was the sole proximate cause of the plaintiff's injury"). Specifically, we

see id., 377 ("[W]e simply did not consider [in *Barry*] whether the doctrine should be abolished in workers' compensation cases. Upon consideration of that question in the present case, we agree with the [Compensation Review Board] that the concerns that caused us to abrogate the doctrine in *Barry* simply are not implicated in our workers' compensation scheme, which, in contrast to our comparative negligence tort scheme, is a no-fault compensation system that imposes a form of strict liability on employers.").

In light of the foregoing, the plaintiff cannot prevail on her claim that the doctrine of superseding cause applies only to intervening acts that were intended to cause harm. As our discussion of the relevant case law

concluded that, "if the [nonparty] employer's actions are the sole proximate cause of the [plaintiff's] injuries, then it follows that the defendant's conduct is not a proximate cause, and the defendant should be entitled to argue and have the jury instructed accordingly . . . ." (Internal quotation marks omitted.) Id., 38, quoting *Steele* v. *Encore Manufacturing Co.*, 7 Neb. App. 1, 8, 579 N.W.2d 563 (1998). Of course, it was a legal distinction without a difference to conclude, on the one hand, that the defendant was prohibited from arguing that the plaintiff's employer was a superseding cause of the plaintiff's injuries and, on the other hand, that the defendant properly could argue that the employer was the sole proximate cause of the plaintiff's injuries and was entitled to an instruction with respect to this claim. This is so because, as our discussion of the case law makes clear, when a defendant is relieved of liability on the basis of a superseding cause, "it . . . mean[s] simply that the negligent conduct of someone else—and not that of the defendant—is the proximate cause of the event." (Emphasis omitted; internal quotation marks omitted.) *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 440; see also, e.g., *Craig* v. *Driscoll*, 262 Conn. 312, 333, 813 A.2d 1003 (2003) ("[t]o act as an intervening cause, the conduct must entirely [break] the causal connection between the defendant's conduct and the plaintiff's injuries so as to be the sole proximate cause of those injuries" [internal quotation marks omitted]); *Wagner* v. *Clark Equipment Co.*, supra, 243 Conn. 182 (same); *Oberempt* v. *Egri*, 176 Conn. 652, 655, 410 A.2d 482 (1979) (trial court's instruction that intervening negligence "would discharge the defendants [of liability] only if [it] was found to have been the sole proximate cause of the . . . accident . . . was entirely proper" [emphasis omitted]); *Virelli* v. *Benhattie, Inc.*, 146 Conn. 203, 209–10, 148 A.2d 760 (1959) (explaining that superseding cause and sole proximate cause are indistinguishable concepts).

makes clear, the superseding cause doctrine has been applied historically to any independent, intervening force that a defendant claims was the sole proximate cause of a plaintiff's injury. Following tort reform, this court prohibited the use of the doctrine in cases in which apportionment of liability is available, not because it was incompatible with the causation principles applicable to such cases; see *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 443 n.18 ("the doctrine of superseding cause is already incorporated into the test for proximate cause"); but because we deemed it unnecessary in light of the statutory apportionment scheme adopted some fifteen years earlier. See id. ("[r]epeating the test for superseding cause . . . merely adds confusion to an already confusing subject, and serves no meaningful purpose in a jurisdiction, such as ours, wherein a defendant will be liable only for his or her proportion of the plaintiff's damages"). As we have explained, because apportionment was unavailable prior to tort reform, ameliorative principles such as the superseding cause doctrine were developed to mitigate the harshness of a tort system that would hold a defendant liable for all of a plaintiff's damages even though his or her degree of fault may have been relatively small in comparison to other defendants. See id., 441 (superseding cause doctrine "was . . . shaped in response to the harshness of contributory negligence and joint and several liability").

When applicable, the doctrine merely allows a defendant to argue, and to have the jury instructed, that it is the defendant's position that some other actor is the sole legal cause of the plaintiff's injury such that, even though the defendant's conduct may have been a cause in fact of the injury in a "but for" sense, its conduct did not contribute to the production of the injury in any meaningful sense—that is, the defendant's conduct was not a substantial factor in producing the injury

and, thus, it was not a proximate cause of that injury. Furthermore, under our precedent, to say that the defendant's conduct was not a substantial factor in producing an injury is simply another way of saying that the injury was not within the scope of the risk created by the defendant's conduct.[11] E.g., *Sapko* v. *State*, supra, 305 Conn. 373 ("'[t]he fundamental inquiry of proximate cause is whether the harm that occurred was within the scope of foreseeable risk created by the defendant's negligent conduct'"). We agree with the Appellate Court that, as long as apportionment of liability is unavailable in cases in which a defendant claims that an intervening force is the sole legal cause of the plaintiff's injuries, the doctrine of superseding cause will continue to play a legitimate ameliorative role in our tort system.[12] In such cases, a request to charge on

[11] Thus, in light of our precedent and the trial court's instructions predicated on that precedent, we disagree with the Appellate Court that the jury properly could find simultaneously that Sainval's actions were a proximate cause of the plaintiff's injuries and that Bowden's and Johnson's actions were a superseding cause of those same injuries. As we explain more fully in part II of this opinion, under our case law, a finding that conduct constitutes a superseding cause renders the original negligence so insignificant in relation to that superseding cause that the original negligence cannot be deemed to be a proximate cause of the injuries and, therefore, cannot be deemed to be a substantial factor in producing the injuries.

[12] We note that the plaintiff urges us to adopt § 34 of the Restatement (Third) of Torts, published in 2010, which she asserts "merges the viable concepts related to superseding cause (foreseeability and proximate cause) officially into a [single] proximate cause (or scope of liability) analysis without the confusion and prejudice related to use of the superseding cause doctrine." Section 34 of the Restatement (Third) provides: "When a force of nature or an independent act is also a factual cause of harm, an actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." 1 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 34, p. 569 (2010). Because the plaintiff did not raise this claim in either the trial court or the Appellate Court, it is not properly before us. Even if it were, however, as the Appellate Court noted, our recent case law "reflects a jurisprudential move toward embracing" the more modern approach to superseding cause prescribed in § 34 of the Restatement (Third) of Torts. *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 57 n.13. Indeed, the reporters' notes to that section cite this court as one of several courts that *have* embraced the modern approach. See, e.g., 1

the doctrine "that is relevant to the issues in [the] case and . . . accurately states the applicable law must be honored . . . ." (Internal quotation marks omitted.) *State* v. *Devalda*, 306 Conn. 494, 506, 50 A.3d 882 (2012).

The plaintiff asserts, nonetheless, that our conclusion that the doctrine retains vitality in such cases is inconsonant with our past adoption of the negligence principles contained in § 442 B of the Restatement (Second) of Torts, which, as we previously indicated, states that, "[if] the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct." 2 Restatement (Second), supra, § 442 B, p. 469. Specifically, the plaintiff argues that, "under § 442 B, in order for another force to relieve the defendant of liability, that force must be both (1) intentionally caused by a third person and (2) not within the scope of the risk." To be sure, this court has applied § 442 B in cases in which a defendant has claimed that his

Restatement (Third), supra, § 34, reporters' note to comment (c), p. 579. For the reasons previously set forth, however, we are not prepared to abandon the superseding cause doctrine even in cases in which apportionment of liability is statutorily prohibited, and we do not read the Restatement (Third) as advocating its abandonment in such circumstances. To the contrary, comment (c) to § 34 provides that "the advent of comparative principles has *reduced the role for superseding cause*" such that "when third persons . . . are negligent or commit intentional torts, the need for aggressive use of superseding cause to absolve a tortfeasor from liability has subsided *in light of the modification of joint and several liability and of the trend toward permitting comparative responsibility to be apportioned among negligent and intentional tortfeasors*. Comparative responsibility permits liability to be apportioned among multiple tortfeasors and to take account of the causal relationship between each tortfeasor's conduct and the harm as well as the culpability of each tortfeasor." (Emphasis added.) 1 Restatement (Third), supra, § 34, comment (c), pp. 571–72.

or her negligence was superseded by the intentionally harmful acts of a third party. In all of the cases in which we have applied § 442 B, however, we relied on it solely for the proposition that the plaintiff could still prevail if he or she were able to establish that the intentionally harmful act was within the scope of the risk created by the defendant's negligence. See, e.g., *Stewart* v. *Federated Dept. Stores, Inc.*, supra, 234 Conn. 608 ("the plaintiff must show, by a fair preponderance of the evidence, that harm intentionally caused by a third person is within the scope of the risk created by the defendant's negligent conduct"); *Doe* v. *Manheimer*, 212 Conn. 748, 759–60, 563 A.2d 699 (1989) (same), overruled in part on other grounds by *Stewart* v. *Federated Dept. Stores, Inc.*, 234 Conn. 597, 608, 662 A.2d 753 (1995); *Tetro* v. *Stratford*, 189 Conn. 601, 605–606, 458 A.2d 5 (1983) ("[our cases applying § 442 B] make it clear that the [intervening acts] of [a third party do] not [necessarily] relieve the [defendant] of liability because the trier of fact may find that the plaintiff's injury falls within the scope of the risk created by [the defendant's] negligent conduct"). As the Appellate Court explained in rejecting the plaintiff's argument predicated on § 442 B, however, "[none of these cases supports] the proposition that a superseding cause 'can only exist' in the face of conduct by a third party intended to cause harm . . . [because none of them] considered or held that a specific intent to cause harm is a necessary prerequisite to raising the doctrine of superseding cause. The cases merely recited the standard contained in § 442 B of the Restatement (Second) of Torts."[13] *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 65–66.

[13] We note that the plaintiff's argument also founders on *Kiniry* v. *Danbury Hospital*, 183 Conn. 448, 439 A.2d 408 (1981), in which we rejected a claim that the trial court, by instructing the jury in accordance with § 442 B, had misled the jury into believing "that only intentional conduct on the part of [a third party] would discharge the defendants [of liability for their own negligent conduct]." Id., 456; see id. ("[t]hose portions of the court's charge . . . rebut the defendants' claim that the court charged that only intentional conduct on the part of [the third party] would discharge the defendants");

We note, moreover, that, although § 442 B is the Restatement section most often cited in cases involving intentionally harmful intervening acts, it does not itself govern when such acts constitute superseding causes. Sections 302 B,[14] 448[15] and 449[16] of the Restatement

---

see also id., 455 ("[t]he court's charge does not, as the defendants argue, make the intervenor's intentional conduct the sole determinant of the liability of the defendants"). We rejected the defendant's claim because the trial court, in addition to instructing the jury in accordance with § 442 B, also had instructed the jury that "[*a*]*ny intervening negligence by* [*the third party*] *would discharge* [*the defendant of liability*] *if you were to find that* [*the third party's*] *negligence was the sole proximate cause of* [*the decedent's*] *death*. . . . Therefore, even though you might find that the defendant . . . was negligent in one or more of the particulars alleged in the complaint, if you find that [the defendant's] negligence ceased to be a substantial factor in producing [the decedent's] death and that the negligence of [the third party] had so superseded that of [the defendant], that [the third party], without the negligence of [the defendant] contributing to any material degree, was the real cause for [the decedent's] death, then the negligence of [the defendant] would not be a proximate cause of [the decedent's] death . . . ." (Emphasis added; internal quotation marks omitted.) Id., 455–56 n.2. Thus, because the trial court's instructions made clear to the jury that a superseding cause could be *either* an intentional *or* a negligent act under the defendants' theory of defense, we affirmed the judgment in favor of the plaintiff.

[14] Section 302 B of the Restatement (Second) of Torts provides: "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal." 2 Restatement (Second), supra, § 302 B, p. 88.

[15] Section 448 of the Restatement (Second) of Torts provides: "The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime." 2 Restatement (Second), supra, § 448, p. 480.

[16] Section 449 of the Restatement (Second) of Torts provides: "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." 2 Restatement (Second), supra, § 449, p. 482.

(Second) do. Comment (a) to § 442 B provides that the "rule stated in this [s]ection is a special application of the principle stated in § 435 (1),[17] [namely] that the fact that the actor neither foresaw nor could have foreseen the manner in which a particular harm is brought about does not prevent his liability where the other conditions necessary to it exist." (Footnote added.) 2 Restatement (Second), supra, § 442 B, comment (a), p. 469. Comment (c) to § 442 B, however, provides that "[t]he rule stated in this [s]ection *does not apply* where the harm of which the risk has been created or increased by the actor's conduct is brought about by the intervening act of a third person which is intentionally tortious or criminal, and is not within the scope of the risk created by the original negligence. Such tortious or criminal acts may in themselves be foreseeable, and so within the scope of the created risk, in which case the actor may still be liable for the harm, *under the rules stated in §§ 448 and 449*." (Emphasis added.) Id., comment (c), p. 471.

Thus, contrary to the plaintiff's contentions, § 442 B establishes that a defendant is liable "if the plaintiff's harm results from a hazard because of which the defendant's conduct was negligent"; *Cuneo* v. *Connecticut Co.*, supra, 124 Conn. 651; even if the harm is brought about through the intervention of a third party. As the commentary to § 442 B makes clear, however, this principle is merely an extension of the rule contained in § 435 (1) of the Restatement (Second) of Torts, namely, that, as long as the defendant's conduct was a substantial factor in producing the harm, the fact that the defendant neither foresaw nor could have foreseen the extent of the harm, or the manner in which it occurred, does

[17] Section 435 of the Restatement (Second) of Torts, entitled "Foreseeability of Harm or Manner of Its Occurrence," provides in relevant part: "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." 2 Restatement (Second), supra, § 435 (1), p. 449.

not prevent him from being liable.[18] 2 Restatement (Second), supra, § 442 B, comment (a), p. 469; see also *Pisel* v. *Stamford Hospital*, 180 Conn. 314, 333, 430 A.2d 1 (1980) ("[as] long as harm of the general nature as that which occurred is foreseeable there is a basis for liability even though the manner in which the accident happens is unusual, bizarre or unforeseeable"); see also

[18] *Ruiz* v. *Victory Properties, LLC*, supra, 315 Conn. 320, presents an apt example of the principle set forth in § 442 B. In *Ruiz*, a small child was injured when an older child unintentionally dropped a piece of concrete on her head from the third floor landing of the apartment building where the children resided. Id., 323. The older child had obtained the concrete from the backyard of that apartment building, where he and the victim had been playing. Id. The trial court granted the defendant landlord's motion for summary judgment, concluding that the defendant owed the victim no duty of care "because no reasonable juror could find that her injuries were a foreseeable consequence of the defendant's [failure to maintain the property in a clean and safe condition by leaving loose pieces of concrete in the backyard] and because imposing liability on the defendant would be contrary to overriding public policy considerations." Id. The Appellate Court reversed the judgment of the trial court, and we affirmed the Appellate Court's judgment; id., 323–24; explaining that the defendant "does not dispute that the risk of harm created by its failure to remove the buckets, trash, broken concrete pieces and other debris from the backyard was that children playing in the area might trip on them or throw them at other children. The types of injuries one would expect to result from this type of behavior run the gamut from cuts and bruises to broken bones, concussions and even fractured skulls. [The child's] injuries, although severe, fall squarely along this continuum of harm. That they occurred in an unusual manner, namely, by a child dropping a piece of concrete into the backyard playground from a third floor balcony instead of throwing it while in the backyard, does not alter this fundamental fact. We therefore agree with the Appellate Court that [the child's] injuries were sufficiently foreseeable that it was inappropriate for the trial court to foreclose the foreseeability question as a matter of law." Id., 336.

As § 442 B of the Restatement (Second) of Torts indicates, however, if all of the facts were the same except that an adult intentionally had dropped the concrete on the child's head, the defendant's liability would turn on whether an adult committing such an act was within the scope of the risk created by the defendant's failure to remove the accumulated debris from its property. Such a case undoubtedly would be resolved in the defendant's favor on a motion for summary judgment because it seems clear that a jury reasonably could not find that such an act was a foreseeable risk of the defendant's negligence.

Lodge v. *Arett Sales Corp.*, 246 Conn. 563, 587, 717 A.2d 215 (1998) (*Berdon, J.*, dissenting) (focus of foreseeability inquiry should be "on the general nature of the harm and not the specific manner in which the injury occurred or the conduct of a third party"). As the commentary also makes clear, however, the manner in which a particular harm occurred matters greatly when the harm results from the intentionally harmful act of a third party. In those circumstances, under the rules set forth in §§ 302 B, 448 and 449 of the Restatement (Second), the defendant will be liable only if the risk created by the defendant's negligence included the hazard that the defendant's conduct would induce a third party to commit such an act.[19]

[19] Section 442 B provides a good illustration of this principle. "A negligently leaves an excavation in a public sidewalk, creating the risk that a traveler on the sidewalk will fall into it. B, passing C on the sidewalk, negligently bumps into him, and knocks him into the excavation. A is subject to liability to C." 2 Restatement (Second), supra, § 442 B, illustration (5), p. 471. If, however, all of the facts are the same except that B intentionally pushes C into the hole, A would not be liable. Id., illustration (7), p. 471. This is true even though the injuries sustained by C in the second example are identical to the injuries sustained in the first. A is not liable in the second instance because the hazard that made A's conduct negligent did not include the risk that a third party would be induced to push someone into the excavated area. Cf. *Stewart* v. *Federated Dept. Stores, Inc.*, supra, 234 Conn. 600–601, 612–13 (when department store negligently failed to provide adequate lighting and security in store parking garage located in high crime area, store may be held liable for murder of customer during botched robbery because risk that made store's conduct negligent was opportunity that it presented to criminals to commit such crimes); *Doe* v. *Manheimer*, supra, 212 Conn. 750, 762 (private landowner was not liable for sexual assault that occurred behind overgrown vegetation on landowner's property because it was not reasonably foreseeable that such vegetation would provide incentive and shield for commission of such assault when "there was no evidence tending to demonstrate that the [landowner] had had any past experience that might reasonably have led him to perceive and act on the atypical association between 'natural shields' such as overgrown vegetation and violent criminal activity"); *Burns* v. *Gleason Plant Security, Inc.*, 10 Conn. App. 480, 486, 523 A.2d 940 (1987) ("When [the driver] left the keys in the unlocked car in a high crime area, it may well have been a foreseeable risk that the car would be stolen by a third party and negligently operated so as to cause harm to an innocent party. . . . It was not also foreseeable, however, that

Finally, although §§ 302 B, 448 and 449 of the Restatement (Second) delineate when a defendant may be liable for a third party's intentionally harmful acts, those sections merely reiterate the principle set forth in §§ 442 B and 435 (1), which is the same principle that governs every section of the Restatement (Second) of Torts relating to proximate causation: liability will attach if the defendant knew or should have known that his conduct created or increased the risk that the third party would act in such a manner. See, e.g., *Doe* v. *Saint Francis Hospital & Medical Center*, 309 Conn. 146, 190–91 n.37, 72 A.3d 929 (2013) ("[Section] 302 B of the Restatement (Second) of Torts does not establish a foreseeability standard that is . . . different from the standard of foreseeability applicable to [other] general negligence claims. That standard does not differ from negligence case to negligence case, and there is no difference in the nature of that test for purposes of a general negligence claim, on the one hand, and a claim under § 302 B, on the other. . . . Like all negligence claims, § 302 B is predicated on the same general principles that govern other negligence actions, with liability in such cases depending on the foreseeability of the third party's criminal misconduct." [Internal quotation marks omitted.]).

We also disagree with the plaintiff that the Judicial Branch's model civil jury instructions on superseding cause support the conclusion that the doctrine applies only to acts that were intended to cause harm. As the Appellate Court stated in rejecting this contention, "[t]he model instructions are not intended to be authoritative. As provided on their title page, the model instruc-

a third party would steal the car, drive elsewhere, leave the car, enter a store, commit an armed robbery, and assault an innocent person in the course of that robbery. To hold otherwise would be to convert the imperfect vision of reasonable foreseeability into the perfect vision of hindsight." [Citation omitted.])

tions are only meant to provide guidance; their legal sufficiency is not guaranteed. See Connecticut Civil Jury Instructions [supra] ('This collection of Civil Jury Instructions is intended as a guide for judges and attorneys in constructing charges and requests to charge. The use of these instructions is entirely discretionary and their publication by the Judicial Branch is not a guarantee of their legal sufficiency.' . . .) Rather than adhering to any particular format, jury instructions must be appropriately tailored to reflect the circumstances of the particular case and to adequately guide the jury. See *Sullivan* v. *Norwalk*, 28 Conn. App. 449, 457, 612 A.2d 114 (1992). The language used in the model jury instructions, although instructive in considering the adequacy of a jury instruction; see *State* v. *Sanchez*, 84 Conn. App. 583, 592 n.10, 854 A.2d 778, cert. denied, 271 Conn. 929, 859 A.2d 585 (2004); is not binding on this court." (Emphasis omitted.) *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 66–67.

We note, moreover, that the model jury instructions on superseding cause found on the Judicial Branch website are revised only to 2008 and, consequently, do not reflect our subsequent cases clarifying that the superseding cause doctrine remains a viable defense in any case in which apportionment is unavailable, and that even an act of negligence can constitute a superseding cause in such a case. It is for reasons like these that we previously have cautioned that the civil jury instructions found on the Judicial Branch website are intended as a guide only, and that their publication is no guarantee of their adequacy. See, e.g., *State* v. *Reyes*, 325 Conn. 815, 821–22 n.3, 160 A.3d 323 (2017) ("The Judicial Branch website expressly cautions that the jury instructions contained therein '[are] intended as a guide for judges and attorneys in constructing charges and requests to charge. The use of these instructions is entirely discretionary and their publication by the Judi-

cial Branch is not a guarantee of their legal sufficiency.' " [Emphasis omitted.]) We therefore reiterate that litigants and trial courts alike should review the relevant case law when fashioning a jury charge, whether on the basis of the instructions set forth on the Judicial Branch website or otherwise, to ensure that it conforms to any recent changes in the law.

II

Having concluded that the Appellate Court correctly determined that the doctrine of superseding cause applies to criminally reckless conduct, we now must consider whether that court also was correct in concluding that the jury's responses to the fourth and fifth interrogatories are legally consistent and, therefore, that the trial court properly denied the plaintiff's motion to set aside the verdict and for a new trial. Although we ordinarily review the denial of a motion to set aside a verdict under an abuse of discretion standard; e.g., *Label Systems Corp.* v. *Aghamohammadi*, 270 Conn. 291, 303, 852 A.2d 703 (2004); our review is plenary when, as in the present case, the trial court's decision turned on a question of law. *Klein* v. *Norwalk Hospital*, 299 Conn. 241, 250–51 and n.9, 9 A.3d 364 (2010). Furthermore, it is axiomatic that, when a party claims that the verdict should have been set aside due to the jury's inconsistent answers to interrogatories, "the court has the duty to attempt to harmonize the answers." *Norrie* v. *Heil Co.*, 203 Conn. 594, 606, 525 A.2d 1332 (1987).

As we previously indicated, in concluding that the jury's interrogatory responses were reconcilable, the Appellate Court relied primarily on §§ 440 and 442 B of the Restatement (Second) of Torts, which it interpreted as establishing that an injury could be proximately caused by an actor's negligent conduct but not be within the scope of the risk created by that conduct. Although the Appellate Court acknowledged that its interpreta-

tion of these provisions of the Restatement (Second) was at odds with this court's statement in *Barry* that "superseding cause" is simply another way of saying "sole proximate cause," the court ultimately concluded that the "sole proximate cause" language in *Barry* was not intended "as a repudiation of the Restatement's broader definition" of the term and that *Barry's* "iteration of the doctrine . . . does not expressly preclude that in certain cases factually distinct from that considered by the court in *Barry*, the impact of the defendant's initial negligence will not be so diminished by the later intervening act as to fully negate the initial negligence as a substantial factor in causing the harm at issue." *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. 59 n.15.

We do not disagree with the Appellate Court that the fundamental policy underlying the superseding cause doctrine is essentially the same under the Restatement's explication of the doctrine and under the exposition of the doctrine found in the governing precedent of this court. As we explained, however, the terminology employed by the Restatement (Second) and by this court in explaining the doctrine are materially different. In particular, under the Restatement (Second), negligent conduct that is *found to be a proximate cause of the injuries sustained* may nevertheless be rendered so relatively inconsequential in light of a later superseding cause that that superseding cause is deemed to relieve the original tortfeasor of liability. Under our precedent, by contrast, a finding that conduct constitutes a superseding cause renders the original negligence so insignificant in relation to that superseding cause that the original negligence cannot be deemed to be a proximate cause of the injuries. Thus, our precedent simply does not contemplate a situation in which the original negligence may be found to be a substantial factor in producing the injuries if there is a finding of a superseding

cause. Indeed, we consistently have described a superseding cause as an intervening force that "*prevent*[*s*] *an act of negligence of the defendant from being a substantial factor in producing a plaintiff's injury* . . . ." (Emphasis added; internal quotation marks omitted.) *Craig* v. *Driscoll*, 262 Conn. 312, 335, 813 A.2d 1003 (2003); see also *Virelli* v. *Benhattie, Inc.*, 146 Conn. 203, 209, 148 A.2d 760 (1959) ("the determination whether negligence of [a third party] was such a superseding cause *as to prevent the antecedent negligence of the defendant from being a substantial factor in producing the plaintiff's injuries* was essential to a finding [of superseding cause]" [emphasis added]); *Colligan* v. *Reilly*, 129 Conn. 26, 30, 26 A.2d 231 (1942) (same). Accordingly, we consistently have held that, "[i]f a defendant's negligence was a substantial factor . . . in producing the plaintiff's injuries, the defendant would not be relieved from liability for those injuries even though another force concurred to produce them." (Emphasis omitted; internal quotation marks omitted.) *Craig* v. *Driscoll*, supra, 335; accord *Wagner* v. *Clark Equipment Co.*, supra, 243 Conn. 180.

Although, as the Appellate Court noted, the trial court's jury instructions were imperfect, the jury nevertheless was instructed in accordance with this court's precedent on the doctrine of superseding cause. Thus, the jury was *not* instructed that it could find that Sainval's negligence was a substantial factor in producing the plaintiff's injuries *and* that Bowden's and Johnson's actions were a superseding cause of the injuries. To the contrary, the jury was instructed that only if it found that Sainval's negligence was *not* a substantial factor in producing the plaintiff's injuries could it find that Bowden's and Johnson's actions were a superseding cause of those injuries. See *Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 270–71, 698 A.2d 838 (1997) ("[w]hen a claim is made that the jury's answers to

interrogatories in returning a verdict are inconsistent . . . we do not read the interrogatories in isolation, but, rather, in conjunction with the jury instructions" [citation omitted; footnote omitted; internal quotation marks omitted]); *Norrie* v. *Heil Co.*, supra, 203 Conn. 605 ("interrogatories are not vacuous words, but words which are amplified and defined in the charge"). Specifically, the trial court informed the jury that the "defendants have claimed that the theft and operation of the car by [Johnson] and [Bowden], and the resulting accident, constituted . . . an event . . . that was so overpowering in consequence as to render any possible negligence on the part of . . . Sainval relatively insignificant, *and therefore not a proximate cause of the injuries sustained by the plaintiff.*" (Emphasis added.) The court further explained that, "[w]hen . . . some other causal causes [contribute] so powerfully to the production of an injury as to make the defendant's negligent contribution to the injury merely trivial or inconsequential, *the defendant's negligence must be rejected as a proximate cause of the injury, for it has not been a substantial factor in bringing the injury about.*" (Emphasis added.)

To reinforce the latter point, the court explained that a finding of superseding cause "*precludes a finding that the defendant's conduct was a proximate cause of the plaintiff's injuries*" and that, "[t]o the extent that you find that the plaintiff has proven, by a preponderance of the evidence, that the negligence of . . . Sainval was a proximate cause of any or all of the injuries and damages claimed to have been sustained by the plaintiff, as I have defined proximate cause to you, *you are to proceed to determine the issues as to the amount of damages, following the rules I'm about to give you.*" (Emphasis added.) Notwithstanding these instructions, the jury found *both* that Sainval's negligence was a proximate cause of some or all of the plaintiff's injuries *and* that Bowden's and Johnson's

actions were a superseding cause of the injuries. We cannot say with any confidence, therefore, that the jury followed the trial court's instructions with respect to the issue of causation.[20] For this reason, the judgment cannot stand. See, e.g., *Magnan* v. *Anaconda Industries, Inc.*, 193 Conn. 558, 577, 479 A.2d 781 (1984) (when verdict in civil case "rests [on] a factual finding contradictory to another finding of the same issue by the trier the judgment cannot stand"); *Belchak* v. *New York, New Haven & Hartford Railroad Co.*, 119 Conn. 630, 633, 179 A. 95 (1935) ("The verdict returned by the jury demonstrated conclusively that, in spite of the instructions of the court, [it] had made a mistake in the application of legal principles. Hence it was necessary to set aside [its] verdict." [Internal quotation marks omitted.]). Accordingly, we agree with the plaintiff that she is entitled to a new trial.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to that court for a new trial.

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

[20] No doubt this problem stems, at least in part, from the admonition at the conclusion of the fourth interrogatory, which, in direct contradiction to the court's charge, effectively instructed the jury to consider, in connection with the fifth interrogatory, whether "the accident that occurred . . . was outside the scope of the risk created by [Sainval's] leaving his key in the ignition" only if it had found, in response to the fourth interrogatory, that the plaintiff had proven "that some or all of the injuries she sustained . . . were proximately caused by the negligence of . . . Sainval." In accordance with the court's charge, however, once the jury found that Sainval's negligence was a proximate cause of the accident, there could be no finding of a superseding cause. Thus, the interrogatories merely should have queried the jury whether the plaintiff had proven that Sainval's negligence was a proximate cause of the plaintiff's injuries *or, instead*, whether Bowden's recklessness in driving onto a sidewalk after striking a vehicle in front of him fell outside the scope of the risk created by Sainval's negligence because it was not reasonably foreseeable that someone stealing the taxicab would operate it in such a manner.

ECKER, J., concurring. I agree with the majority's well reasoned opinion and the result it reaches. I write separately for two reasons. First, and most significantly, I am troubled by the unnecessary and unfortunate prolixity of our superseding cause doctrine, or what remains of it. I understand that the majority is unable completely to escape the gravitational pull of existing doctrine, because the court's ability to chart a new course, even with respect to the common law, is constrained by the arguments raised by the parties, who themselves are constrained by the perceived limitations imposed by our own precedent. In my view, the majority opinion nonetheless makes progress, incomplete but not insignificant, toward a more sensible and simplified doctrine. This concurring opinion primarily is intended to highlight the particular aspects of the majority opinion that I believe can be built on in future cases so that the job of doctrinal reconstruction might be completed. The second reason I write is to note my disagreement with two minor points contained in the majority opinion.

I

The confusion generated by the superseding cause doctrine is easier to identify than to resolve. Causation, while a simple everyday word, is by no means a simple concept, in law or elsewhere, and its application to various questions of legal liability and damages has vexed our profession for at least the past one hundred years.[1] That vexation is reflected in an unruly doctrine

[1] See W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984) § 41, pp. 263–64 ("There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion [than the issue of causation]. Nor, despite the manifold attempts [that] have been made to clarify the subject, is there yet any general agreement as to the best approach. Much of this confusion is due to the fact that no one problem is involved, but a number of different problems, which are not distinguished clearly, and that language appropriate to a discussion of one is carried over to cast a shadow upon the others."

marked by a proliferation of varying, partly overlapping, and partly incommensurable verbal formulations, none of which quite satisfies the powerful desire to capture the elusive concept in words.[2] The doctrine of superseding cause is marked by this confusion, and the tradition of stacking one unsatisfactory formulation on top of another has resulted in a jury instruction that requires an advanced degree in logic and linguistics to understand. A jury is subjected to wave after wave of abstractions like foreseeability, scope of the risk, proximate cause, substantial, material, trivial, relatively insignificant, and inconsequential causes, concurrent causes, overpowering events, and so forth, connected by unhelpful transitional phrases such as "[i]n other words," "[t]hat is," and "[t]o put it another way." It does no one any good to perpetuate a doctrine of this character.

The majority has done admirable work clarifying doctrinal connections, resolving doctrinal tensions, sorting through conflicting authorities, and bringing the light of common sense to its subject matter. Yet even after that work has been accomplished, the reader would be forgiven if he or she feels unprepared to submit a model jury instruction to replace Connecticut Civil Jury Instruction 3.1-5. If the doctrine remains challenging for lawyers and judges, moreover, one can only imagine what a lay jury will make of it. Perhaps the guidance

[Footnote omitted.]); id., p. 263 n.1 (citing authorities "attempt[ing] . . . to clarify the subject").

[2] The overwrought treatment of superseding cause contained in the Restatement (Second) of Torts—which devotes no less than fifteen separate sections to the topic—illustrates the point. See 2 Restatement (Second), Torts §§ 440 through 453, pp. 465–91 (1965); see also part I of the majority opinion (discussing relevant provisions of the Restatement [Second]). The Restatement (Third) of Torts contains a far more concise treatment of the topic. See 1 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 34, p. 569 (2010). The question of whether to adopt the principles set forth in the Restatement (Third) of Torts is not presently before us. See footnote 12 of the majority opinion.

provided by the majority opinion will help produce more reliable trial outcomes in the future than the verdict in the present case.[3] As I have indicated, I believe that the majority has laid the groundwork to assist in the reconstruction of a simplified and more coherent doctrine. I wish to identify three principles in particular that may be especially useful in that endeavor.

First, the majority has clarified that the fundamental principle animating the doctrine of superseding cause is that a negligent actor will not be relieved of liability by the intervention of another force—in most cases, the reckless or intentional misconduct of a third party—if the type of harm sustained by the plaintiff is within the scope of the risk that made the actor's conduct negligent. This basic insight, in my opinion, best identifies the critical operative principle underlying the doctrine of superseding cause in terms that can be understood and applied without inordinate difficulty. As the majority notes, the Restatement (Third) of Torts evidently has reached this conclusion in its treatment of superseding cause by abandoning the traditional doctrine in favor of an analysis fundamentally based on a scope of the risk analysis. See footnote 12 of the majority opinion; see also 1 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 34, p. 569 (2010).[4]

[3] I intend no criticism of the trial court or the jury in this case. The record demonstrates that the trial court did its best under difficult conditions to fashion a coherent jury instruction and useful jury interrogatories from the assorted pieces of the doctrinal jigsaw puzzle remaining in disarray on the table since tort reform was enacted; see Public Acts 1987, No. 87-227; Public Acts 1986, No. 86-338; and *Barry* v. *Quality Steel Products, Inc.*, 263 Conn. 424, 820 A.2d 258 (2003), was decided.

[4] Section 34 of the Restatement (Third) of Torts addresses the specific topic of superseding cause, but it must be read in conjunction with several other provisions of the Restatement (Third) that establish and explain the relevant principles of causation. See, e.g., 1 Restatement (Third), supra, § 29, p. 493 ("[a]n actor's liability is limited to those harms that result from the risks that made the actor's conduct [negligent]"). To be clear, although I believe that a transition to a "scope of the risk" analysis would simplify and clarify the superseding cause doctrine, such a modification would not eliminate all of the complexities and difficulties that arise in these cases.

My preliminary view, as yet untested in the adjudicatory setting in Connecticut to the best of my knowledge, is that the reformulated approach to causation set forth in the Restatement (Third) may hold promise. Time will tell.

Second, just as under ordinary negligence rules, the defendant is liable for harm as long as his or her negligence was a substantial factor in producing it, even if the defendant did not foresee, nor reasonably could have foreseen, the extent of the harm or the particular manner in which it occurred.[5] Thus, for example, the fact that the harm is brought about by the criminal or reckless act of a third party will not cut off the negligent party's liability if harm of the same general nature is within the scope of the risk that made the party's act or omission negligent. See footnotes 17 and 18 and accompanying text of the majority opinion; see also footnote 3 of this concurring opinion; 2 Restatement (Second), Torts § 442 B, p. 469 (1965). This principle serves as a complement to the one discussed in the preceding paragraph because its application also hinges on the scope of the risk. The principle is important in the present context because intervening intentional or reckless conduct not infrequently results in harm that may be unusual in degree or manner of infliction but nevertheless is within the scope of the risk that made the actor negligent. See 2 Restatement (Second), supra,

The primary remaining challenge is to determine the "appropriate level of generality or specificity to employ in characterizing the type of harm" that is within the scope of the risk or risks that made the actor negligent. Id., comment (i), p. 504 (entitled "Understanding and characterizing the risk of harm"); see also id., § 34, comments (d) and (e), pp. 572–74.

[5] See, e.g., *Ruiz* v. *Victory Properties, LLC*, 315 Conn. 320, 323, 107 A.3d 381 (2015); *Pisel* v. *Stamford Hospital*, 180 Conn. 314, 333, 430 A.2d 1 (1980); 2 Restatement (Second), supra, § 435 (1), p. 449; see also, e.g., Connecticut Civil Jury Instructions 3.1-4, available at http://www.jud.ct.gov/JI/civil/civil.pdf (last visited August 5, 2019) (entitled "Proximate Cause—Foreseeable Risk").

§§ 448 and 449, pp. 480–484; see also 1 Restatement (Third), supra, § 34, comment (d), p. 572.

Third, the possibility remains that the explicit equivalency the majority emphasizes between the doctrines of superseding cause and sole proximate cause may contain the seed for future development of a simplified doctrine. The majority makes a persuasive case that this court's repeated references to superseding cause as equivalent to sole proximate cause is not the result of loose language but actually means what it says: if a third party's conduct amounts to a superseding cause of a plaintiff's harm, then it is the sole proximate cause of that harm, and the negligent defendant is not a proximate cause at all. The question therefore arises why the superseding cause doctrine is needed at all, that is, why not simply ask the jury in such a case whether the intervening force was the sole proximate cause of the harm? It seems to me that this is a question worth asking, although I have no view about how it should be answered because it was neither raised nor briefed by the parties.[6]

II

My disagreement with the majority involves two minor aspects of its opinion. First, I see no reason to engage in the analysis appearing in footnote 10 of the majority opinion, which contains an extensive, and I

[6] In *Barry* v. *Quality Steel Products, Inc.*, 263 Conn. 424, 820 A.2d 258 (2003), this court determined that the superseding cause doctrine no longer serves a useful purpose in cases involving claims of negligence against multiple defendants, because "our system of comparative negligence and apportionment [ensures that] defendants are responsible solely for their proportionate share of the injury suffered by the plaintiff." Id., 446. We concluded that "the [jury] instruction on superseding cause complicates what is essentially a proximate cause analysis and risks jury confusion." Id. Whether an analogous argument could be made in the present context—i.e., that the sole proximate cause doctrine accomplishes the same result as the superseding cause doctrine, but with less confusion—is an open question. See, e.g., 1 Restatement (Third), supra, § 34, comment (f), p. 574 (opining that sole proximate cause is "a term best avoided" in this context).

believe unnecessary, discussion regarding *Archambault* v. *Soneco/Northeastern, Inc.*, 287 Conn. 20, 946 A.2d 839 (2008). *Archambault* involved the unusual situation in which there were two potentially negligent actors responsible for the plaintiff's injuries, but one of them, the plaintiff's employer, could not be brought into the case for apportionment purposes because it enjoyed immunity from liability under the exclusivity provision of the Workers' Compensation Act.[7] Id., 26; see General Statutes § 31-284 (a). This court held that the defendant, although precluded from seeking apportionment against the nonparty employer, was entitled to point to the employer as the sole proximate cause of the plaintiff's harm; *Archambault* v. *Soneco/Northeastern, Inc.*, supra, 37–41; but was not entitled to invoke the doctrine of superseding cause to accomplish the same purpose under this court's holding in *Barry* v. *Quality Steel Products, Inc.*, 263 Conn. 424, 820 A.2d 258 (2003). *Archambault* v. *Soneco/Northeastern, Inc.*, supra, 41–45. The majority criticizes this aspect of *Archambault* on the ground that its holding (1) relies on a misreading of *Barry*, (2) conflicts with this court's subsequent holding in *Sapko* v. *State*, 305 Conn. 360, 377, 44 A.3d 827 (2012), which held that the doctrine of superseding cause was applicable to a claim brought under the Workers' Compensation Act, and (3) creates a doctrinal "distinction without a difference" because the permitted defense of sole proximate cause and the precluded defense of superseding cause essentially

[7] I call the *Archambault* situation unusual because it falls between the cracks of the otherwise comprehensive apportionment scheme set forth in the comparative fault statute, General Statutes § 52-572h. On the one hand, unlike the nonparty intentional tortfeasors in the present case, the potentially at-fault nonparty in the *Archambault* scenario is not expressly excluded from the apportionment scheme pursuant to § 52-572h (o), because the claim against the plaintiff's employer, if it could be brought, would be based on a theory of negligence. On the other hand, the potentially at-fault nonparty in *Archambault* is not subject to apportionment as a "settled or released [person]" pursuant to §§ 52-572h (f) (4) and (n).

mean the same thing. See footnote 10 of the majority opinion.

My concern here is not with the substance of the majority's criticism of the *Archambault* analysis as it relates to *Barry* and the doctrines of sole proximate cause and superseding cause; it seems clear to me that *Archambault* misreads *Barry*. My point, rather, is that the current status of *Archambault* is not before us, and the context of that case is sufficiently unusual that I do not believe that we should suggest any corrections to its holding until we are presented with a live controversy raising the particular issues and considerations implicated by that unusual setting. Perhaps, as the majority appears to suggest, *Archambault* went off course by holding that the defendant was not entitled to raise a defense on the basis of superseding cause. But there are other possibilities as well, and I believe that we should not indicate a view on the subject in the present case because the scenario in *Archambault* is different and may be sui generis; see footnote 6 of this concurring opinion; and because the proper treatment of that scenario has not been briefed by the parties.

Second, although I agree with the majority's conclusion that the existing model civil jury instruction on superseding cause; see Connecticut Civil Jury Instructions 3.1-5, available at http://www.jud.ct.gov/JI/Civil/Civil.pdf (last visited August 5, 2019); provides an erroneous statement of the law and, therefore, does not assist the plaintiff's argument, I wish to add my gloss to ensure that the majority's message is not misunderstood as a wholesale disavowal of the model instructions. Although the model civil jury instructions are "not intended to be authoritative"; *Snell* v. *Norwalk Yellow Cab, Inc.*, 172 Conn. App. 38, 66, 158 A.3d 787 (2017); in the sense that they come with no guarantee of infallibility, we also must acknowledge and embrace the fundamental fact that, as a matter of routine practice

around the state, the model instructions are heavily relied on by trial lawyers and judges in most cases, certainly those garden variety cases being tried every day in virtually every courthouse hosting civil jury trials. In my view, the reminder of fallibility served today should not be understood to convey the view that the model instructions generally are unreliable, or that we lack confidence in them, or that the instructions should not continue to be relied on by trial lawyers and judges as containing an accurate statement of the law. The instructions are promulgated by a distinguished panel of committee members who have undertaken the Sisyphean task of synthesizing and articulating the law governing a broad variety of civil cases in a form readily understandable to a lay jury. They provide commendable guidance. But precisely because the task is so difficult—the law is not always certain, nor is it static, nor is it always produced or pronounced in "one size fits all" formulations—it is fair to suggest that trial lawyers are well advised to "trust but verify" these model instructions to ensure that they are correct, current, and properly crafted to fit the particular case at hand. This case presents one of those highly unusual situations in which one of our model civil jury instructions contains an error and, thus, illustrates why eternal vigilance is the watchword of our sometimes unforgiving profession. Fortunately, the inaccuracy was of no practical consequence here, because the parties did not rely on Connecticut Civil Jury Instruction 3.1-5 governing superseding cause at trial, and the trial court did not issue the inaccurate instruction. Going forward, the bench and bar are on notice of the inaccuracy contained in the existing version of Connecticut Civil Jury Instruction 3.1-5, and, undoubtedly, the Civil Jury Instruction Committee will rectify the inaccuracy by promulgating a new and improved version in due course.

I respectfully concur.