CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

NASH STREET, LLC *v.* MAIN STREET AMERICA ASSURANCE COMPANY ET AL.
(SC 20389)

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

Syllabus

The plaintiff sought to recover proceeds allegedly due under a commercial general liability insurance policy issued by the defendant insurer to its insured, B Co. The plaintiff contracted with B Co. to renovate the plaintiff's damaged house, including site grading and foundation work, which involved, inter alia, the lifting of the house off of the foundation. The house collapsed after it was lifted by B Co.'s subcontractor. At the time of the collapse, the only work being performed on the house was related to the lifting. The plaintiff brought a separate action against B Co. for property damage arising from the collapse. B Co. tendered defense of the case to the defendant pursuant to the insurance policy, and the defendant declined to defend. The plaintiff subsequently brought the present action against the defendant, seeking recovery under a default judgment that the plaintiff had secured against B Co. in the separate action. The trial court granted the defendant's motion for summary judgment and rendered judgment thereon, concluding that the defendant had no duty to defend or to indemnify B Co. based on the applicability of two provisions in the insurance policy excluding coverage for property damage to "that particular part of real property" on which the insured or anyone working on the insured's behalf is "performing operations if the property damage arises out of those operations" and for property

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

damage to "that particular part of any property that must be restored, repaired or replaced because" the insured's work "was incorrectly performed on it." The plaintiff thereafter appealed, claiming that the trial court improperly granted the defendant's motion for summary judgment because, at the time B Co. tendered defense of the case to the defendant, there existed at least a possibility that the complaint alleged a liability covered under B Co.'s insurance policy that would have triggered the defendant's duty to defend. More specifically, the plaintiff claimed that the defendant had a duty to defend B Co. because the complaint alleged damage only to the house and interior renovation work, whereas the two relevant policy exclusions precluded coverage only for the defective work to the foundation itself and not for damage to the rest of the house. *Held* that the trial court improperly granted the defendant's motion for summary judgment, that court having incorrectly determined that the two exclusions relieved the defendant of its duty to defend B Co. in the plaintiff's action against B Co., as there was a possibility that the damages the plaintiff alleged in that action were not excluded under the policy; numerous courts, including this court, have recognized that legal uncertainty can give rise to an insurer's duty to defend, there was legal uncertainty in the present case as to the meaning and applicability of the two exclusions, Connecticut law favors a narrow construction of exclusions and requires that ambiguous provisions be construed in favor of the insured, many other courts have interpreted exclusions with the "that particular part" language in a manner favoring coverage, and neither this court nor the Appellate Court has previously interpreted exclusions identical to those at issue in the present case.

Argued January 14—officially released September 9, 2020**

Procedural History

Action to recover proceeds allegedly due under a commercial general liability insurance policy issued by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Tyma*, *J.*, denied the plaintiff's motion for summary judgment and granted the named defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed. *Reversed*; *further proceedings*.

David G. Jordan, with whom, on the brief, was *Samantha M. Oliveira*, for the appellant (plaintiff).

** September 9, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Scott T. Ober, with whom was *Colleen M. Garlick*, for the appellee (named defendant).

Opinion

McDONALD, J. The dispositive issue before us is whether the defendant insurer had a duty to defend an action brought against its insured in an underlying action alleging property damage resulting from a house that collapsed while being lifted off its foundation. The insurance policy under review contained clauses excluding coverage for damage that occurs to "that particular part" of real property on which the insured was working. In this case, brought under the direct action statute; see General Statutes § 38a-321; the plaintiff, Nash Street, LLC, appeals from the judgment of the trial court, which granted the motion for summary judgment filed by the named defendant, Main Street America Assurance Company.[1] The plaintiff claims that the trial court improperly granted the defendant's motion for summary judgment because, at the time the insured, New Beginnings Residential Renovations, LLC, tendered defense of the underlying action to the defendant, there existed at least a possibility that the complaint alleged a liability that was covered under New Beginnings' insurance policy and, thus, triggered the defendant's duty to defend. We agree with the plaintiff and reverse the judgment of the trial court.

The parties stipulated to the following facts in the direct action. The plaintiff's property in Milford needed repairs after being damaged by Hurricanes Sandy and Irene. The plaintiff contracted with New Beginnings to renovate the house, including site grading and founda-

[1] Although the plaintiff's complaint originally named Main Street America Assurance Company and Atlantic Casualty Insurance Company as defendants, the plaintiff subsequently withdrew its claim against Atlantic Casualty Insurance Company, and that entity is not a party to this appeal. We refer to Main Street America Assurance Company as the defendant.

tion work for which the house would be lifted and temporarily placed onto cribbing. A subcontractor was retained to lift the house and to do concrete work on the foundation.

While the subcontractor was lifting the house in preparation for the foundation work, the house "shifted off the supporting cribbing and collapsed." At the time of the collapse, the only work being performed on the house was related to the lifting. New Beginnings and/or its subcontractor caused the collapse by failing to ensure that the cribbing was secure. As a result, the house sustained "extensive physical damage . . . ."

The plaintiff brought an action against, inter alios, New Beginnings for property damage arising out of the collapse. The complaint alleged, in pertinent part, that "New Beginnings was negligent in the performance of its work in the following respects . . . New Beginnings and/or its subcontractors negligently constructed or assembled the cribbing [that] caused the collapse; and . . . New Beginnings and/or its subcontractors failed to ensure that the cribbing properly supported the house. . . . As a result of New Beginnings' negligence, the cribbing failed, causing damage to the house and the renovation work therein." New Beginnings tendered defense of the case to the defendant pursuant to a commercial general liability insurance policy, and the defendant declined to defend. The plaintiff was awarded a default judgment against New Beginnings for its failure to plead in the amount of $558,007.16. No part of the judgment has been paid.

The record reveals the following additional facts. The plaintiff brought the present action against the defendant under the direct action statute, seeking recovery for the judgment against New Beginnings. In response, the defendant filed an answer and five special defenses, each claiming that the alleged damages were not cov-

ered by the insurance policy.[2] Both parties moved for summary judgment. The plaintiff argued that there was no genuine issue of material fact that there is coverage under the policy and that the exclusions are inapplicable. The defendant argued that there is no genuine issue of material fact that two of the policy's "business risk" exclusions—k (5) and (6)—preclude coverage.

Under exclusion k (5), the policy excludes coverage for property damage to "[t]hat particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the 'property damage' arises out of those operations . . . ." Under exclusion k (6), the policy excludes coverage for property damage to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it."

The plaintiff argued that "that particular part" of the property on which New Beginnings and/or its subcontractor were working was "the site grading and foundation work underneath the house . . . [and that] New Beginnings [and/or its subcontractor were] not performing any renovation or other work on the house itself." Thus, the plaintiff contended, it did not seek to recover for the damage to the work being done underneath the house—that work would be excluded under k (5) and (6). Rather, the plaintiff sought to recover for the damage to the house, including renovation work that had allegedly been completed a year before the collapse.

[2] In its special defenses, the defendant alleged that (1) the damages claimed by the plaintiff were not caused by an "occurrence," as defined by the policy, (2) coverage is precluded by the exclusion in § II B 1 k (5) of the policy, (3) coverage is precluded by the exclusion in § II B 1 k (6) of the policy, (4) coverage is precluded by the exclusion in § II B 1 *l* of the policy, and (5) coverage is precluded by the exclusion in § II B 1 m of the policy. For convenience, we hereinafter refer to § II B 1 k (5) and (6) of the policy as k (5) and (6).

The defendant argued that "that particular part" of the property on which the subcontractor was performing operations was the whole house because the whole house was being lifted. It further argued that the possibility that the house might collapse while being raised was a foreseeable risk in undertaking those operations. The defendant reasoned that all damage that occurs to a house under these circumstances is a "business risk" that falls squarely within exclusions k (5) and (6).

In due course, the trial court issued a memorandum of decision, denying the plaintiff's motion for summary judgment and granting the defendant's motion for summary judgment. The court stated that the parties agreed that the only issue was whether exclusions k (5) or (6) "preclude[d] coverage for the property damage to the entire house that occurred as a result of the [house's] shifting [off of] the cribbing and collapsing at the time that grading and foundation work was being performed." The court concluded that exclusions k (5) and (6) were clear and unambiguous, and " 'that particular part of real property' " on which New Beginnings or the subcontractor was performing operations was the entire house. As such, the court concluded that these exclusions precluded coverage, and, thus, the defendant had no duty to defend or to indemnify New Beginnings.

The plaintiff appealed to the Appellate Court from the trial court's judgment in favor of the defendant, and the appeal was transferred to this court.

On appeal, the plaintiff contends that the trial court improperly granted the defendant's motion for summary judgment because the court conflated the duty to defend, which arises when there is a *possibility* of coverage, with the duty to indemnify, which arises when there *actually* is coverage. The plaintiff argues that the defendant had a duty to defend New Beginnings because the plaintiff's

complaint alleged damage to the house and interior renovation work, which, under a correct interpretation of exclusions k (5) and (6), was separate from the foundation work. Specifically, the plaintiff argues that, under Connecticut law, either the exclusions must be read narrowly, so as not to preclude coverage, or, alternatively, the exclusions are ambiguous and must be construed in favor of coverage. Under either interpretation, the plaintiff contends, there was a possibility of coverage because the exclusions preclude coverage only for the defective work to the foundation itself and not for the damage to the rest of the house. For its part, the defendant contends that the trial court's granting of summary judgment in its favor was proper because exclusions k (5) and (6) unambiguously preclude coverage. We conclude that summary judgment was improper because exclusions k (5) and (6) did not relieve the defendant of its duty to defend New Beginnings in the underlying action.[3]

[3] In granting the defendant's motion for summary judgment, the trial court ruled that the defendant had neither a duty to defend *nor a duty to indemnify* New Beginnings in the underlying action. Because we conclude that, with respect to exclusions k (5) and (6), the defendant breached its duty to defend, we need not consider whether it has a duty to indemnify in order to reverse the trial court's judgment as to both duties. Under this court's precedent, an insurer that breaches its duty to defend has breached its contract with the insured, and it may not subsequently argue that the contract absolves it of its duty to indemnify. See, e.g., *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 817, 67 A.3d 961 (2013) (recognizing as "central holding of our cases" principle that insurer that breaches duty to defend is "estop[ped] . . . from seek[ing] the protection of [the] contract in avoidance of its indemnity provisions" (internal quotation marks omitted)); see also *Black* v. *Goodwin, Loomis & Britton, Inc.*, 239 Conn. 144, 149, 156, 681 A.2d 293 (1996) (in action for breach of duty to defend brought under § 38a-321 by plaintiff against insurer, "insurer may not hide behind the language of the policy after the insurer abandons its insured" (internal quotation marks omitted)); *Missionaries of the Co. of Mary, Inc.* v. *Aetna Casualty & Surety Co.*, 155 Conn. 104, 113–14, 230 A.2d 21 (1967) ("[t]he [insurer] having, in effect, waived the opportunity which was open to it to perform its contractual duty to defend under a reservation of its right to contest the obligation to indemnify the plaintiff, reason dictates that the [insurer] should reimburse the [insured] for the full amount of the obligation reasonably incurred by it"). This is true regardless of whether

Whether the trial court properly rendered summary judgment in favor of the defendant is a question of law subject to our plenary review. See *Tannone* v. *Amica Mutual Ins. Co.*, 329 Conn. 665, 671, 189 A.3d 99 (2018). "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 198–99, 931 A.2d 916 (2007).

We begin that review by noting that the plaintiff brought this action under our direct action statute, § 38a-321, which places the plaintiff in the shoes of the insured, subject to all the same rights and protections as the insured. See *Samelko* v. *Kingstone Ins. Co.*, 329 Conn. 249, 262, 184 A.3d 741 (2018); *Black* v. *Goodwin, Loomis & Britton, Inc.*, 239 Conn. 144, 149 n.7, 681 A.2d 293 (1996). The plaintiff's claim, then, turns only on whether there

the insured brings an action for recovery against the insurer or whether the judgment creditor brings an action against the insurer under § 38a-321. See *Samelko* v. *Kingstone Ins. Co.*, 329 Conn. 249, 262, 184 A.3d 741 (2018) (pursuant to § 38a-321, "the plaintiffs ultimately suffered the actual harm and are thus subrogated to all the rights of the insured"). For the same reason, we do not reach the two other issues presented on appeal, namely, whether the trial court correctly concluded that (1) the phrase "that particular part" in the policy exclusions is unambiguous, and (2) the plaintiff's property damage is excluded from coverage under exclusions k (5) and (6).

was a possibility of coverage that triggered the insurer's duty to defend. See *R.T. Vanderbilt Co.* v. *Continental Casualty Co.*, 273 Conn. 448, 470–71, 870 A.2d 1048 (2005) ("[A]n insurer's duty to defend its insured is triggered without regard to the merits of its duty to indemnify. . . . [So, when] an insurer is guilty of a breach of its contract to defend, it is liable to pay to the insured not only his reasonable expenses in conducting his own defense but, in the absence of fraud or collusion, the amount of a judgment [or settlement] obtained against the insured up to the limit of liability fixed by its policy." (Citation omitted; internal quotation marks omitted.)); *Wentland* v. *American Equity Ins. Co.*, 267 Conn. 592, 600, 840 A.2d 1158 (2004) (in action brought by plaintiff against insurer after settling with insured, plaintiff need not establish insured's liability or resolve coverage dispute if there was possibility of coverage); *Black* v. *Goodwin, Loomis & Britton, Inc.*, supra, 156, 160 (explaining, in action for breach of duty to defend brought under § 38a-321, that, "to recover the amount of the settlement from the insurer, the insured need not establish actual liability to the party with whom it has settled so long as . . . a potential liability on the facts known to the [insured is] shown to exist" and that "insurer may not hide behind the language of the policy after the insurer abandons its insured" (internal quotation marks omitted)).

This is because "the duty to defend is broader than the duty to indemnify. . . . An insurer's duty to defend is triggered if at least one allegation of the complaint falls even possibly within the coverage." (Internal quotation marks omitted.) *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, 312 Conn. 714, 739, 95 A.3d 1031 (2014). "The obligation of the insurer to defend does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether he has, in his complaint, stated facts [that] bring the injury within the coverage. . . . If an allegation

of the complaint falls even possibly within the coverage, then the [insurer] must defend the insured." (Citation omitted; internal quotation marks omitted.) *Wentland* v. *American Equity Ins. Co.*, supra, 267 Conn. 600. "In contrast to the duty to defend, the duty to indemnify is narrower: while the duty to defend depends only on the allegations made against the insured, the duty to indemnify depends [on] the facts established at trial and the theory under which judgment is actually [rendered] in the case. . . . Thus, the duty to defend is triggered whenever a complaint alleges facts that potentially could fall within the scope of coverage . . . ." (Internal quotation marks omitted.) *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, supra, 739.

Because all that is necessary to trigger an insurer's duty to defend is a possibility of coverage, any uncertainty as to whether an alleged injury is covered works in favor of providing a defense to an insured, and uncertainty may be either factual or legal. See, e.g., *Hugo Boss Fashions, Inc.* v. *Federal Ins. Co.*, 252 F.3d 608, 620 (2d Cir. 2001); see also, e.g., *Wentland* v. *American Equity Ins. Co.*, supra, 267 Conn. 601. Factual uncertainty arises when it is unclear from the face of the complaint whether an alleged injury occurred in a manner that is covered by the policy. See *Hugo Boss Fashions, Inc.* v. *Federal Ins. Co.*, supra, 620–22. For example, if a policy was active only for the 2019 calendar year and a complaint did not specify when the alleged injury took place, there would be factual uncertainty as to whether the injury was covered because it is impossible to know from the face of the complaint whether the alleged injury took place during the coverage period. This factual uncertainty would give rise to a duty to defend, lasting at least until a court determined when the injury occurred. See, e.g., id., 621–22.

Legal uncertainty arises when it is unclear how a court might interpret the policy language at issue, and, as a result, it is unclear whether the alleged injury falls within

coverage. See id. Legal uncertainty can arise in at least two ways. First, as this court has recognized, ambiguous policy language can give rise to the duty to defend. See, e.g., *Wentland* v. *American Equity Ins. Co.*, supra, 267 Conn. 601. Second, a duty to defend may arise if there is a question as to whether "the cases governing the insurance policy [will] be read to impose coverage in a given situation . . . ." *Hugo Boss Fashions, Inc.* v. *Federal Ins. Co.*, supra, 252 F.3d 620. That is, when there is a split of authority in other jurisdictions as to the meaning of a particular policy provision, and no appellate authority in the relevant jurisdiction has opined on the matter, the uncertainty as to how a court might interpret the policy gives rise to the duty to defend. See *American Best Food, Inc.* v. *Alea London, Ltd.*, 168 Wn. 2d 398, 410, 229 P.3d 693 (2010).

Numerous courts, including this one, have recognized that legal uncertainty can give rise to an insurer's duty to defend. See, e.g., *Hugo Boss Fashions, Inc.* v. *Federal Ins. Co.*, supra, 252 F.3d 620 (under New York law, duty to defend is triggered by uncertainty as to whether "cases governing the insurance policy [will] be read to impose coverage in a given situation"); *Blackhawk-Central City Sanitation District* v. *American Guarantee & Liability Ins. Co.*, 214 F.3d 1183, 1193 (10th Cir. 2000) (under Colorado law, insurer had duty to defend because it could not show that its interpretation of policy exclusion was "only reasonable interpretation"); *Interstate Fire & Casualty Co.* v. *1218 Wisconsin, Inc.*, 136 F.3d 830, 835 (D.C. Cir. 1998) (under District of Columbia law, doubt giving rise to duty to defend "may be legal as well as factual"); *Monarch Greenback, LLC* v. *Monticello Ins. Co.*, 118 F. Supp. 2d 1068, 1078 (D. Idaho 1999) (under Idaho law, duty to defend arises when "the application of an exclusion involves a fairly debatable question of law"); *Makarka* v. *Great American Ins. Co.*, 14 P.3d 964, 969 (Alaska 2000) ("duty to defend may . . . exist [when] the resolution of

a contested legal question may lead to covered liability"); *Scottsdale Ins. Co.* v. *Morrow Land Valley Co., LLC*, 411 S.W.3d 184, 193–94 (Ark. 2012) (insurer had duty to defend when word " 'pollutants' " in policy exclusion was ambiguous); *Wentland* v. *American Equity Ins. Co.*, supra, 267 Conn. 601 (word "intoxication" in policy exclusion was "sufficiently ambiguous" to trigger duty to defend); *Sentinel Ins. Co., Ltd.* v. *First Ins. Co. of Hawai'i, Ltd.*, 76 Haw. 277, 289–90, 875 P.2d 894 (1994) (insurer had duty to defend when there was "notable dispute nationwide" on legal coverage question and no appellate court ruling in jurisdiction); *Soto* v. *Country Mutual Ins. Co.*, Docket No. 2-14-1166, 2015 WL 5307297, *10 (Ill. App. September 9, 2015) (holding that insurer had breached its duty to defend when insurer's argument against coverage "require[d] the reconciliation and cross-referencing of several seemingly contradictory provisions" and "coverage dispute [could not] be resolved short of [an] interpretation akin to that which would occur in a declaratory judgment action"), appeal denied, 48 N.E.3d 677 (Ill. 2016); *American Best Food, Inc.* v. *Alea London, Ltd.*, supra, 168 Wn. 2d 407–11 (insurer had duty to defend when cases from other jurisdictions suggested that exclusion did not apply, and there was no controlling case from Washington courts); *Red Arrow Products Co.* v. *Employers Ins. of Wausau*, 233 Wis. 2d 114, 124, 607 N.W.2d 294 (App.) (duty to defend arises from "genuine dispute over the status of the law or the facts . . . at the time of the tender of defense"), review denied, 234 Wis. 2d 177, 612 N.W.2d 733 (2000). But see *Republic Western Ins. Co.* v. *International Ins. Co.*, Docket No. 96-16254, 1997 WL 414566, *2 (9th Cir. July 23, 1997) (decision without published opinion, 121 F.3d 716) (under California law, when "the only potential for coverage . . . turns on the resolution of a purely legal question of policy interpretation, the insurer does not have a duty to defend").

This court has recognized the first type of legal uncertainty, caused by ambiguous policy language. See *Went-*

land v. *American Equity Ins. Co.*, supra, 267 Conn. 601. We have not had occasion, however, to consider the second. We find instructive the following cases from the United States Court of Appeals for the Second Circuit and the Washington Supreme Court, in which the courts concluded that, when no appellate authority of a jurisdiction has interpreted particular policy language, but courts in other jurisdictions have interpreted the same language in a manner that could result in coverage, the legal uncertainty as to how a court might interpret the language may give rise to a duty to defend.[4]

In *Hugo Boss Fashions, Inc.* v. *Federal Ins. Co.*, supra, 252 F.3d 608, the plaintiff clothing companies and their parent company, which were referred to collectively as Hugo Boss in the Second Circuit's decision, were sued for, inter alia, trademark infringement for using the word "BOSS" on certain products, allegedly violating a concurrent use agreement they had with a competitor, and the plaintiffs tendered defense of the case to their insurer, the defendant. See id., 610–12. The insurer

[4] We do not suggest that the absence of a controlling decision is, in and of itself, sufficient to give rise to the duty to defend. There must also be sufficient reason to conclude that the court could construe the policy language in favor of coverage. As the Second Circuit explained, "[t]here are, of course, cases in which the policy is so clear that there is no uncertainty in fact or law, and hence no duty to defend. . . . Under some circumstances, the allegations contained in the complaint against the insured will by themselves eliminate all potential doubt and relieve the insurer of any duty to defend. [When], for example, a complaint alleges an intentional tort, and the insurance contract provides coverage only for harms caused by negligence, there would be no uncertainty as to the applicability of the policy exclusion, and hence, no duty to defend the particular [action] brought." (Footnote omitted.) *Hugo Boss Fashions, Inc.* v. *Federal Ins. Co.*, supra, 252 F.3d 620–21; see also *Makarka* v. *Great American Ins. Co.*, supra, 14 P.3d 969–70 ("A duty to defend may . . . exist [when] the resolution of a contested legal question may lead to covered liability against the insured. . . . [Nevertheless, when] coverage turns solely on the interpretation of policy language that has never been reviewed by [the Supreme Court of Alaska], that fact alone is not enough to create a possibility of coverage that require[s] a defense." (Footnotes omitted.)).

declined to defend on the ground that an exclusion precluded coverage because "BOSS" did not fall under the term "trademarked slogans," within the meaning of the policy. (Internal quotation marks omitted.) Id., 612–13. Whether there was coverage, therefore, depended on the meaning of the words "trademarked slogan." Looking to federal case law, the Second Circuit determined that the overwhelming majority of courts had concluded that "trademarked slogan" was unambiguous, which would preclude coverage under the facts of the case. Id., 618–20. The court noted, however, that one United States District Court decision from the Southern District of New York had concluded that "trademarked slogan" was ambiguous. Id., 620–21 and n.11. The Second Circuit concluded that this contrary decision "rendered uncertain the question of whether the courts would deem the term 'trademarked slogan' to be unambiguous."[5] (Emphasis omitted.) Id., 621 n.11.

The court explained that the question of whether "the cases governing the insurance policy [would] be read to impose coverage . . . [would] ultimately be resolved by [the] courts . . . [perhaps] in favor of the insurer, thereby precluding coverage and the duty to indemnify. But until they are, the insurer cannot avoid its duty to defend." Id., 620. The court continued: "It was, therefore, incumbent upon [the insurer] to undertake a defense of Hugo Boss until the uncertainty sur-

[5] We express no opinion as to whether we agree with the Second Circuit that, when a "vast majority" of courts agree as to the meaning of a policy provision, one contrary decision creates uncertainty sufficient to trigger an insurer's duty to defend. *Hugo Boss Fashions, Inc.* v. *Federal Ins. Co.*, supra, 252 F.3d 618–20, 620–21 n.11. As we explain subsequently in this opinion, exclusions k (5) and (6) are standard provisions that are common in insurance policies across the country, and there is a significant split of authority as to the meaning of the exclusions, which creates a greater degree of uncertainty here than was present in *Hugo Boss Fashions, Inc.* Accordingly, we need not decide whether one contrary case gives rise to the duty to defend.

rounding the term [trademarked slogan] was resolved. Had [the insurer] sought a declaratory judgment immediately upon Hugo [Boss'] filing of its insurance claim, a court might have eliminated this uncertainty by reading the term as [the insurer] has claimed it should be read . . . . Moreover, it might have done so before [the insurer] expended a great deal of money putting up a defense for Hugo Boss. But until such a ruling issued, the question of whether [the insurer] might be held liable to indemnify Hugo Boss was in doubt. And, given this doubt, [the insurer's] failure to provide a defense . . . was a violation of its contractual duties." Id., 622–23.

Similarly, in *American Best Food, Inc.* v. *Alea London, Ltd.*, supra, 168 Wn. 2d 398, the Washington Supreme Court considered "whether an insurer breached its duty to defend as a matter of law when, relying [on] an equivocal interpretation of case law, it gave itself the benefit of the doubt rather than give that benefit to its insured." Id., 402. After a man was shot nine times by another patron at the plaintiff's nightclub, club security guards "dumped him on the sidewalk." (Internal quotation marks omitted.) Id., 402–403. The defendant, the club's insurer, declined to defend the injured man's action against the club on the ground that an "assault and battery" exclusion in the policy precluded coverage for the incident. Id., 403. Washington courts had never before interpreted the exclusion, but many other courts had, finding a distinction between preassault and postassault negligence. See id., 407–408. Because the complaint in the injured man's underlying action against the club alleged both preassault and postassault negligence, if Washington were to adopt the same distinction, the exclusion would not apply to all of the alleged injuries. The Washington Supreme Court concluded that "[t]he lack of any Washington case directly on point and a recognized distinction between preassault and

postassault negligence in other states presented a legal uncertainty with regard to [the insurer's] duty. Because any uncertainty works in favor of providing a defense to an insured, [the insurer's] duty to defend arose when [the injured man] brought [the action] against [the nightclub]." Id., 408.

Applying these principles to the present case, we are mindful that our inquiry is not whether exclusions k (5) and (6) *actually* preclude coverage; nor does this case require us to determine conclusively what those exclusions mean. The only question we must answer is whether there was any *possibility* of coverage at the time New Beginnings tendered defense to the defendant.[6] See, e.g., *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, supra, 312 Conn. 739 ("[a]n insurer's duty to defend is triggered if at least one allegation of the complaint falls *even possibly* within the coverage" (emphasis added; internal quotation marks omitted)); *Capstone Building Corp.* v. *American*

[6] This approach incentivizes insurers to honor the contractual duty to defend insureds in cases in which there is a genuine dispute as to coverage arising from legal uncertainty. If the inquiry in this procedural posture were whether there was *actually* coverage, insurers could decline to defend, wait for judgment or settlement in the underlying action between the plaintiff and the insured, and then litigate the question of indemnity, thereby effectively avoiding the duty to defend. This would deprive insureds of a bargained for contractual right for which insureds pay a premium. It would also be inconsistent with our well established rule that an insurer that breaches its duty to defend cannot then use the contract to escape its indemnity obligations. See *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 813 n.58, 67 A.3d 961 (2013).

Nevertheless, we note that, although an insurer who breaches its duty to defend may not litigate indemnity, the insurer may defend against a claim of breach of the duty to defend, in an action brought by either the insured or the injured party under the direct action statute, by establishing that there is no possibility that coverage existed and no legal uncertainty regarding the existence of such coverage. See, e.g., *Tiedemann* v. *Nationwide Mutual Fire Ins. Co.*, 164 Conn. 439, 444, 324 A.2d 263 (1973) (under predecessor to § 38a-321, insurer was able to argue that there was no possibility of coverage as defense to breach of duty to defend).

Motorists Ins. Co., 308 Conn. 760, 817, 67 A.3d 961 (2013) ("the insured is not required to prove actual liability, only potential liability on the facts known to the [insured]" (internal quotation marks omitted)); *Soto* v. *Country Mutual Ins. Co.*, supra, 2015 WL 5307297, *8 ("[W]e are not determining the ultimate question of coverage. Instead, we are asked to consider whether, when the complaint was presented, there was clearly no potential for coverage under the liability policy." (Emphasis omitted.)); see also *R.T. Vanderbilt Co.* v. *Continental Casualty Co.*, supra, 273 Conn. 470–71; *Wentland* v. *American Equity Ins. Co.*, supra, 267 Conn. 601; *Black* v. *Goodwin, Loomis & Britton, Inc.*, supra, 239 Conn. 160; cf. *Missionaries of the Co. of Mary, Inc.* v. *Aetna Casualty & Surety Co.*, 155 Conn. 104, 113, 230 A.2d 21 (1967) (because court found insurer breached duty to defend, court found it "unnecessary to reach [the] issue" of whether insurer also had breached its duty to indemnify). More specifically, because the plaintiff alleged damage to "the house and the renovation work therein," we must consider whether legal uncertainty existed regarding the coverage issue in dispute. That is, was it possible, at the time New Beginnings tendered defense to the defendant, that this court, if presented with the issue, could construe "that particular part" in exclusions k (5) and (6) to mean that any portion of the alleged damage would fall outside the scope of the exclusions?

The plaintiff contends that, under Connecticut law, either the exclusions must be construed narrowly, so as not to preclude coverage, or, alternatively, the exclusions are ambiguous and must be construed in favor of coverage. Under either construction, the plaintiff argues, there was a possibility of coverage because the exclusions cover only the defective work on the foundation and do not exclude coverage for the damage to the house or interior renovations caused by the defec-

tive work done underneath the house. The defendant contends that, under the facts of this case—in which the insured was required to lift the entire house—exclusions k (5) and (6) unambiguously exclude coverage for all damage to the house caused by the collapse, which was a foreseeable business risk for a business that lifts houses.[7]

Exclusions k (5) and (6) are not unique to the insurance policy in the present case; they are standard exclusions used in policies across the country, and there has been considerable litigation as to the exclusions' meaning and applicability. Courts have generally interpreted the "that particular part" language in one of three ways, adopting either a broad or narrow construction, or concluding that the language is ambiguous. Under the broad interpretation, "that particular part" excludes all damage to the insured's work product caused by the insured's defective work, even if the scope of the damage far exceeds the portion of the property on which the defective work was actually performed. See, e.g., *Jet Line Services, Inc.* v. *American Employers Ins. Co.*, 404 Mass. 706, 711, 537 N.E.2d 107 (1989) (all damage to tank caused by explosion was excluded from coverage, even though contractor was cleaning only

[7] The defendant also argues that the purpose of a commercial general liability policy is to provide coverage for unforeseeable business risks, not to protect against foreseeable risks. Because the possibility that the insured might drop a house while lifting it was a foreseeable risk, the defendant contends that it would be contrary to the purpose of a commercial general liability insurance policy to conclude that exclusions k (5) and (6) do not apply to all damage to the house. We are not persuaded. The general purpose of a commercial general liability policy does not render other interpretations of the policy unreasonable. See *Cogswell Farm Condominium Assn.* v. *Tower Group, Inc.*, 167 N.H. 245, 251, 110 A.3d 822 (2015); see also *Mid-Continent Casualty Co.* v. *JHP Development, Inc.*, 557 F.3d 207, 217 n.3 (5th Cir. 2009) ("[i]f insurers believe that this interpretation expands coverage beyond that which commercial general liability insurance policies are supposed to provide, the . . . exclusion can of course be rewritten to make clear that it excludes this sort of property damage from coverage").

bottom of tank at time of explosion). Under the narrow interpretation, "that particular part" applies only to the specific components on which the insured performed defective work and not to wider damage to the insured's work product caused by the defective work. See, e.g., *Mid-Continent Casualty Co.* v. *JHP Development, Inc.*, 557 F.3d 207, 215, 217 (5th Cir. 2009) (under Texas law, exclusion applied only to exterior portions of building that contractor did not properly water seal, not to interior portions that sustained water damage as result). Finally, courts that determine that both, or other, interpretations are reasonable conclude that the language is ambiguous and, as a result, construe the language in favor of the insured. See, e.g., *Cogswell Farm Condominium Assn.* v. *Tower Group, Inc.*, 167 N.H. 245, 249, 252, 110 A.3d 822 (2015).

Consistent with our precedent favoring a narrow interpretation of insurance policy exclusions; see, e.g., *Nationwide Mutual Ins. Co.* v. *Pasiak*, 327 Conn. 225, 239, 173 A.3d 888 (2017) ("[w]hen construing exclusion clauses, the language should be construed in favor of the insured unless [the court] has a high degree of certainty that the policy language clearly and unambiguously excludes the claim" (internal quotation marks omitted)); several courts, including the federal Courts of Appeals for the Fifth and Sixth Circuits, have adopted the narrow interpretation of "that particular part." See, e.g., *Fortney & Weygandt, Inc.* v. *American Manufacturers Mutual Ins. Co.*, 595 F.3d 308, 311 (6th Cir. 2010) (adopting reasoning and conclusion of Fifth Circuit's decision in *Mid-Continent Casualty Co.* v. *JHP Development, Inc.*, supra, 557 F.3d 215, 217, with respect to k (6)[8] and noting that words " '[t]hat particular part'

[8] In many insurance policies containing identical or very similar exclusions, the exclusions are not lettered and numbered the same as the policy in this case. To avoid confusion, in discussing other cases construing these exclusions, we refer to all of these identical or similar exclusions as k (5) or (6), even if they were not so identified in the cases we discuss.

. . . are trebly restrictive, straining to the point of awkwardness to make clear that the exclusion applies only to building parts on which defective work was performed, and not to the building generally"); *Mid-Continent Casualty Co.* v. *JHP Development, Inc.*, supra, 218 (under plain reading of policy, exclusions k (5) and (6) apply only to property damage to particular part of property that was subject of defective work). These decisions from federal courts of appeals, combined with Connecticut's preference for interpreting exclusions narrowly and the lack of a Connecticut appellate authority on point, demonstrate that it was possible that this court could adopt a narrow interpretation of exclusions k (5) and (6). In doing so, we might have concluded that "that particular part" of the house on which the defective work was performed was only that portion underneath the house that was not properly supported, leading to the collapse of and damage to the entire house.

Numerous other courts, including the Supreme Courts of New Hampshire and Missouri, have concluded that the exclusions are ambiguous and, therefore, must be construed in favor of coverage. See *Columbia Mutual Ins. Co.* v. *Schauf*, 967 S.W.2d 74, 80 (Mo. 1998) ("applying the exclusion to real property . . . is far from easy . . . [because] [h]ouses and buildings can be divided into so many parts that attempting to determine which part or parts are the subject of the insured's operations can produce several reasonable conclusions"); *Cogswell Farm Condominium Assn.* v. *Tower Group, Inc.*, supra, 167 N.H. 251–52 (exclusion k (6) was ambiguous because both broad and narrow interpretations were reasonable). Connecticut law also requires that ambiguous insurance policy provisions be construed in favor of coverage. See, e.g., *Nationwide Mutual Ins. Co.* v. *Pasiak*, supra, 327 Conn. 238–39 ("[W]hen the words of an insurance contract are, without violence, suscepti-

ble of two [equally responsible] interpretations, that which will sustain the claim and cover the loss must, in preference, be adopted. . . . [T]his rule of construction favorable to the insured extends to exclusion clauses." (Internal quotation marks omitted.)); see also *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, supra, 312 Conn. 740 ("if an ambiguity arises that cannot be resolved by examining the parties' intentions . . . [c]ourts . . . often apply the contra proferentem rule and interpret a policy against the insurer" (internal quotation marks omitted)). These decisions from sister state supreme courts, combined with Connecticut's rule regarding the interpretation of ambiguous policy provisions and the lack of a Connecticut appellate decision on point, suggest that it is also possible that this court might have concluded that exclusions k (5) and (6) are ambiguous and, thus, must be construed against the defendant. In doing so, we might have concluded that the exclusions do not cover the full extent of the damages alleged in the complaint.

Faced with a lack of any Connecticut appellate authority on point and with numerous state supreme and federal appellate court cases that have adopted interpretations of exclusions k (5) and (6) that are consistent with Connecticut law and would favor the plaintiff, the defendant was presented with a legal uncertainty with regard to its duty to defend.[9] Because such an uncertainty works in favor of providing a defense to an insured, exclusions k (5) and (6) did not relieve the defendant of its duty to defend New Beginnings.

[9] We recognize that these cases do not involve identical factual situations to the present case. We nevertheless find them instructive because, as we explained, there need only have been a mere possibility of coverage for the plaintiff to prevail. Additionally, the insurer bears the burden of proving that an exclusion applies. E.g., *Nationwide Mutual Ins. Co.* v. *Pasiak*, supra, 327 Conn. 239. Because the burden lies with the insurer, the plaintiff need only sufficiently rebut the defendant's argument.

Although our case law does not require it, the prudent, if not ordinary, course would have been for the defendant to defend its insured under a reservation of rights and separately pursue a declaratory judgment action to resolve the legal uncertainty at issue. See, e.g., *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, supra, 312 Conn. 726–27 ("The purpose of a declaratory judgment action . . . is to secure an adjudication of rights [when] there is a substantial question in dispute or a substantial uncertainty of legal relations between the parties. . . . [O]ur declaratory judgment statute provides a valuable tool by which litigants may resolve uncertainty of legal obligations." (Internal quotation marks omitted.)); see also General Statutes § 52-29; Practice Book § 17-55. When an insurer declines to defend, it must accept the risk that a court may conclude that, by doing so, the insurer breached its duty to defend. See *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, supra, 739–40 n.25. As the Appellate Court of Illinois has explained: "[The] [d]efendant [insurer] . . . unilaterally determined that there was no possibility of coverage for the damages alleged by the [plaintiff's action] . . . . [The] [d]efendant's unilateral decision . . . was simply a calculated gamble; however, under these circumstances, we conclude that, even if there existed an exclusion that [the] defendant determined barred coverage, it improvidently chose to sit back and do nothing. . . . [When] there [is] a serious dispute . . . regarding whether [a] claim might possibly fall within policy coverage and give rise to a duty to defend, the insurer . . . should . . . seek a declaratory judgment as to its rights and obligations before or pending trial or defend the insured under [a] reservation of rights . . . ." (Citation omitted; internal quotation marks omitted.) *Soto* v. *Country Mutual Ins. Co.*, supra, 2015 WL 5307297, *10.

The defendant relies on four cases—one from a state supreme court and three from trial courts—that, it

claims, involve facts and exclusions identical to those in this case. In each case, the court determined that "that particular part" excluded coverage for damage to the entire house. See *Lafayette Ins. Co.* v. *Peerboom*, 813 F. Supp. 2d 823, 834 (S.D. Miss. 2011) ("[u]nlike the insureds in [other cases], [the insured] performed work, not on the foundation only, but on the entire house . . . and this fact distinguishes the present case from . . . cases [in which] a contractor undertakes to work on a discrete part of a structure and defects in his work cause damage to other property"); *Auto-Owners Ins. Co.* v. *Chorak & Sons, Inc.*, Docket No. 07 C 4454, 2008 WL 3286986, *3 (N.D. Ill. August 8, 2008) ("[T]he structure on which [the insured] was working was the entire house . . . that is, [the insured] had to raise the entire house in order to complete the assigned task. . . . [Its] work was allegedly incorrectly performed, and that incorrect performance caused damage to the house. Thus, the damage to the house caused by the operations is excluded from coverage . . . ." (Citations omitted.)); *Grinnell Mutual Reinsurance Co.* v. *Lynne*, 686 N.W.2d 118, 125–26 (N.D. 2004) ("We construe ambiguous contract provisions narrowly; however, this case fits within even a narrow interpretation of the business risk exclusion. . . . The particular part of real property on which [the insured] was working was the house. Thus, damage to the house resulting from [the insured's] work will not be covered by the policy due to the exclusions included in the policy." (Citations omitted.)); see also *Barber* v. *Berthiaume*, Superior Court, judicial district of New Haven, Docket No. CV-05-4009532-S (October 19, 2009) (48 Conn. L. Rptr. 662, 663) (following *Grinnell Mutual Reinsurance Co.* v. *Lynne*, supra, 126, because it involved "an identical fact pattern and issue"). The defendant argues that, consistent with these cases, exclusions k (5) and (6) clearly and unambiguously exclude coverage for all of

the damages alleged in the plaintiff's complaint against New Beginnings and, thus, relieve the defendant of its duty to defend. We are not persuaded.

Although the cases the defendant cites involve similar facts and identical exclusions to those in the present case, the cases are procedurally distinguishable, and the distinction is crucial because the different procedural postures require fundamentally different inquiries with respect to the duty to defend. In this case, the defendant declined to defend the underlying case, and the plaintiff thereafter won a judgment, which it seeks to collect from the defendant. On appeal, our inquiry into whether there was a duty to defend involves a retrospective examination of whether there was *any possibility* of coverage when New Beginnings tendered defense to the defendant. In contrast, in three of the four cases that the defendant cites, the insurers did not decline to defend their insureds; they agreed to defend under a reservation of rights and then brought declaratory judgment actions to determine whether they were required to defend cases that were then pending. See *Lafayette Ins. Co.* v. *Peerboom*, supra, 813 F. Supp. 2d 824; *Auto-Owners Ins. Co.* v. *Chorak & Sons, Inc.*, supra, 2008 WL 3286986, *1; *Grinnell Mutual Reinsurance Co.* v. *Lynne,* supra, 686 N.W.2d 120–21. In those cases, the courts did not consider whether there was a *possibility* of coverage; they considered whether there *actually* was coverage.[10] To determine if there is a duty to defend, a court considers *whether there was* uncertainty as to coverage at the relevant time. To determine if there is a duty to indemnify, as in the cases cited by the defendant, a court *resolves* any uncertainty as to coverage. See, e.g., *DaCruz* v. *State Farm Fire & Casu-*

[10] The fourth case the defendant cites did not involve a declaratory judgment action, but that case dealt with indemnity, not the duty to defend. Indeed, that case makes no reference to the duty to defend. See *Barber* v. *Berthiaume*, supra, 48 Conn. L. Rptr. 662–63.

alty Co., 268 Conn. 675, 688, 846 A.2d 849 (2004) ("the duty to defend is triggered whenever a complaint alleges facts that *potentially* could fall within the scope of coverage, whereas the duty to indemnify arises only if the evidence adduced at trial establishes that the conduct *actually* was covered by the policy" (emphasis in original)). The insurer's use of the declaratory judgment action allows the court directly to address the duty to indemnify rather than only the duty to defend. But, as we have explained, the duty to defend is broader than the duty to indemnify, such that it is possible that, in a given case, if the duty to indemnify has not been resolved, an insurer will have a duty to defend, even if it ultimately has no duty to indemnify. See id. The cases the defendant cites are unpersuasive because they provide an analysis—whether there was actually coverage—distinct from that which we undertake in this case, namely, whether there was any possibility of coverage.[11] Cf. *American Best Food, Inc.* v. *Alea London, Ltd.*, supra, 168 Wn. 2d 411 ("[The insurer] relies [on] *Leingang* v. *Pierce County Medical Bureau, Inc.*, 131 Wn. 2d 133, 930 P.2d 288 (1997), which involved . . . the duty to indemnify, not the duty to defend. We do not find *Leingang* helpful because the duties to defend and indemnify are quite different.").

In sum, we conclude that the trial court incorrectly determined that exclusions k (5) and (6) relieved the defendant of its duty to defend New Beginnings in the underlying action that the plaintiff brought against New Beginnings. At the time New Beginnings tendered

[11] We note that, in the present case, the trial court's memorandum of decision suffers from this same deficiency. See *Nash Street, LLC* v. *Main Street America Assurance Co.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-16-6022149-S (December 13, 2018) ("the sole issue to be decided is whether one or both policy exclusions preclude coverage for the property damage to the entire house that occurred as a result of the house shifting [off its] cribbing and collapsing at the time that grading and foundation work was being performed").

defense of the underlying action to the defendant, there was a possibility that the damages the plaintiff alleged were covered by the policy. This possibility existed because of legal uncertainty as to the meaning and applicability of exclusions k (5) and (6), which arose from a combination of the following factors: Connecticut law favors a narrow construction of exclusions and requires that ambiguous provisions be construed in favor of the insured, multiple state supreme court and federal court of appeals decisions have interpreted exclusions identical to those in the present case in a manner favorable to the insured, and no Connecticut appellate authority has interpreted exclusions k (5) and (6). The defendant was not entitled to summary judgment because exclusions k (5) and (6) do not relieve the defendant of its duty to defend. Because the defendant's summary judgment motion concerned only two of its special defenses; see footnote 2 of this opinion; we do not have occasion to consider the merits of the defendant's three remaining special defenses. We leave it to the trial court to evaluate the remaining special defenses, should the defendant pursue them on remand. Cf. W. Horton & K. Bartschi, Connecticut Practice Series: Connecticut Rules of Appellate Procedure (2019–2020 Ed.) § 61-1, p. 67, authors' comments ("a decision by the Appellate Court reversing summary judgment . . . returns the case to the procedural posture it would have been in if the trial court denied [the motion for] summary judgment").

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other justices concurred.

DANNY DOUGAN *v.* SIKORSKY AIRCRAFT CORPORATION ET AL.
(SC 20271)

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

Syllabus

The plaintiffs sought to recover damages from the defendants, S Co. and its general contractor, C Co., alleging, inter alia, that they had been negligently exposed to asbestos while working for subcontractors on a construction project at S Co.'s facility. Specifically, the plaintiffs sought compensatory and punitive damages, the costs of medical monitoring for asbestos related diseases, and the establishment of a court monitored fund to pay those costs. The defendants moved for summary judgment on the ground that the plaintiffs had not suffered any actual injuries and, instead, were seeking medical monitoring for the risk of future injuries, which the defendants claimed is not cognizable under Connecticut law. The trial court determined that, because the plaintiffs conceded that they had not been diagnosed with an asbestos related disease, they had failed to establish a genuine issue of material fact as to the existence of a physical injury. Addressing an issue of first impression under Connecticut law, the court then concluded that a claim for medical monitoring for an increased risk of future injury, in the absence of any present, physical harm, was not cognizable under Connecticut law. Thereafter, the court granted the defendants' motion for summary judgment and rendered judgment for the defendants. On the plaintiffs' appeal, *held* that the trial court's judgment was affirmed on the alternative ground that, even if this court were to recognize a cause of action for medical monitoring in the absence of the present manifestation of physical injury, the plaintiffs nevertheless failed to establish a genuine issue of material fact as to other elements of a medical monitoring claim, namely, whether medical monitoring was reasonably necessary for each individual plaintiff.

Argued December 18, 2019—officially released September 14, 2020**

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence in exposing the named plaintiff to asbestos, and for other relief, brought to the Superior Court in the judicial district of Tolland and transferred to the judicial district of Hartford, Complex

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

** September 14, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Litigation Docket, where Philip Badorek et al. were added as plaintiffs; thereafter, the court, *Miller*, *J.*, granted in part the motion of the named defendant et al. to strike and granted in part the plaintiffs' motion for class certification; subsequently, the court, *Moll*, *J.*, granted the motions of the named defendant et al. for summary judgment, vacated the order granting class certification, and rendered judgment for the named defendant et al., from which the plaintiffs appealed. *Affirmed.*

Keith Yagaloff, for the appellants (plaintiffs).

John W. Cerreta, with whom was *James H. Rotondo*, for the appellees (named defendant et al.).

Opinion

ROBINSON, C. J. This appeal requires us to consider the proof necessary to establish a claim for medical monitoring, the availability of which is a question of first impression under Connecticut law. The plaintiffs Philip Badorek, Michael Daley, William Grem IV, and Fred Ferrara[1] appeal from the judgment of the trial court rendered in favor of the defendants Sikorsky Aircraft

[1] The named plaintiff, Danny Dougan, was the fifth plaintiff in the proceedings before the trial court. Dougan died in December, 2017, while his appeal was pending before the Appellate Court. Dougan was initially the only plaintiff to appeal, and, after he died, the defendants moved to dismiss the appeal. The defendants argued that Dougan's claims for medical monitoring were moot and that, because he was the only plaintiff on appeal, the case should be dismissed. Carol Ann Slicer, the executor of Dougan's estate, then filed a motion for leave to substitute herself for Dougan. The Appellate Court granted this motion. Dougan's estate then filed an objection to the motion to dismiss, contending that the claims were not moot and that, because of technical difficulties, the other plaintiffs had not been named in the appeal. The Appellate Court granted the defendants' motion to dismiss Dougan's appeal but also permitted the remaining plaintiffs to file a late appeal, which is presently before this court. See footnote 3 of this opinion. As a result, we consider only the claims of the four remaining plaintiffs, and all references herein to the plaintiffs collectively are to them.

Corporation (Sikorsky) and Carrier Corporation (Carrier)[2] on their medical monitoring claims, which stemmed from a workplace asbestos exposure at Sikorsky's cogeneration project in Stratford. On appeal,[3] the plaintiffs claim that the trial court improperly granted the defendants' motion for summary judgment because (1) a genuine issue of material fact exists with respect to the issue of physical injury because the plaintiffs each currently suffer from a subclinical injury as a result of asbestos exposure, and (2) Connecticut law permits a cause of action[4] for medical monitoring. We conclude that the trial court properly granted the defendants' motion for summary judgment, albeit on alternative grounds, because, even if we were to recognize a medical monitoring claim in the absence of any physical manifestation of injury under Connecticut law, the plaintiffs nevertheless failed to establish a genuine issue of material fact as to certain elements of the claim, in particular, whether the provision of medical monitoring is reasonably necessary for them. Accordingly, we affirm the judgment of the trial court.

[2] The plaintiffs withdrew their claims against the third defendant, URS Corporation AES, on July 30, 2019, during the pendency of this appeal. See footnote 6 of this opinion.

[3] After receiving permission to file a late appeal; see footnote 1 of this opinion; the plaintiffs appealed from the judgment of the trial court to the Appellate Court, and we subsequently transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[4] We note that the trial court considered the plaintiffs' position as a request for a medical monitoring remedy rather than an independent cause of action. On appeal, the plaintiffs request either the recognition of a stand-alone cause of action or a remedy. Although there are some differences between the two approaches, the elements of proof for either approach to medical monitoring are the same. See 1 J. McLaughlin, Class Actions (16th Ed. 2019) § 5:18 ("The distinction between recognizing medical monitoring as an independent cause of action and allowing it solely as a remedial measure has practical consequences. If medical monitoring is not an independent cause of action, then the plaintiff must establish all elements of an independent basis of recovery, and the defendants may assert all available affirmative defenses as against individuals. However, the elements of proof for medical monitoring as a cause of action and as a remedy remain the same and must be established by the plaintiffs." (Footnote omitted.)).

The record reveals the following undisputed relevant facts and procedural history. In September, 2009, Sikorsky began work on a cogeneration project at its manufacturing facilities in Stratford. Sikorsky hired Carrier as the general contractor responsible for the project, which involved building a new cogeneration plant and renovating Sikorsky's existing boiler house. Three of the plaintiffs, Badorek, Daley, and Grem, were employed by B-G Mechanical Contractors, Inc. (B-G Mechanical), one of Carrier's subcontractors on the cogeneration project. B-G Mechanical employees were responsible for removing pipe from Sikorsky's boiler house. As a result, these plaintiffs were present at various times at the site from March, 2010, to July, 2010. The fourth plaintiff, Ferrara, was employed by Tucker Mechanical, Inc., another subcontractor, and was present on site for a period of time in March, 2010.[5]

At some point during the project, some workers began to complain of sore throats. Then, on July 7 or 8, 2010, a B-G Mechanical employee discovered what he believed to be asbestos present in the boiler house. Sikorsky then performed testing that confirmed the presence of asbestos in the boiler house and in an exterior dumpster. As a result, Sikorsky halted the project on or about July 23, 2010, in order to remediate the asbestos. The plaintiffs asserted in their complaint that Sikorsky was aware of the presence of asbestos in the boiler house before work on the project began. In response, Sikorsky admitted that, after performing surveys in 2001 and 2008, asbestos had been discovered in a small amount of pipe insulation in the boiler house basement but averred that the Sikorsky employees in

[5] The defendants contend that Ferrara was not involved in pipe demolition or removal and that he never entered the basement where the asbestos was found. Viewing the evidence in the light most favorable to the plaintiffs, we accept their argument that this is irrelevant, as asbestos was also found on the main floor of the boiler house and in an exterior dumpster, areas where Ferrara worked.

charge of the cogeneration project were unaware of this fact.

The named plaintiff, Danny Dougan; see footnote 1 of this opinion; brought a class action complaint in May, 2012, against Sikorsky, Carrier, and URS Corporation AES (URS).[6] The operative complaint, filed on April 1, 2013, includes claims of negligence, battery, recklessness, and strict liability for violations of the federal Clean Air Act, 42 U.S.C. § 7401 et seq., on behalf of Dougan, Grem, Daley, Badorek, and Ferrara individually, as well as "all others similarly situated who were exposed to asbestos while working at the [Sikorsky cogeneration project in Stratford] from the period of approximately March, 2010, to mid-July, 2010, and who are now seeking to pursue remedies for said exposure." The plaintiffs sought compensatory damages, punitive damages, the costs of medical monitoring, and the establishment of a "court monitored fund" for the payment of medical monitoring of asbestos related diseases.[7]

[6] The initial complaint also named A/Z Corporation, Clean Harbors of Connecticut, Inc., and Clean Harbors Environmental Services, Inc., as defendants; the action was later withdrawn as to those parties.

[7] The plaintiffs moved for class certification in July, 2013, and requested that the trial court certify a class of approximately forty persons who were allegedly exposed to asbestos during the Sikorsky cogeneration project. The defendants objected and submitted affidavits from two experts, Charles L. Blake, an industrial hygienist, and Mark Metersky, a pulmonologist. Specifically, the defendants argued, inter alia, that the plaintiffs failed to demonstrate that common questions predominate, and, as such, class certification would be inappropriate. The trial court granted in part and denied in part the plaintiffs' request to certify the class in February, 2016. In its memorandum of decision, the trial court concluded that the plaintiffs had not demonstrated sufficient commonality in their claims for medical monitoring due to certain individual inquiries, such as each "class member's current medical condition . . . ." Nevertheless, the court proceeded to certify the class but excluded certain issues from class treatment, such as a class member's need for medical monitoring. Simultaneously, the court also granted in part and denied in part motions to strike filed by Sikorsky and Carrier, striking the plaintiffs' federal Clean Air Act claims but permitting their other strict liability claims to proceed.

In March, 2016, Carrier and Sikorsky moved for summary judgment on all counts of the plaintiffs' complaint.[8] The defendants contended that the plaintiffs had not suffered actual injuries and, instead, sought medical monitoring for a risk of future injury, which they claimed is not a cognizable claim under Connecticut law. Specifically, they argued that (1) the court should not recognize a remedy for medical monitoring based on exposure alone, (2) even under the plaintiffs' theory of recovery, summary judgment is appropriate because Dougan could not prove that his need for medical monitoring resulted from asbestos exposure, and because the other four plaintiffs failed to produce any expert testimony demonstrating their need for medical monitoring, and (3) certain claims failed as a matter of law, specifically, the plaintiffs' claims for battery, strict liability, and punitive damages. The defendants filed numerous exhibits in support of their motion, including excerpts of deposition transcripts of the plaintiffs' two medical experts, M. Saud Anwar and Oyebode Taiwo, and the defendants' medical expert, Barry W. Levine. Levine's deposition testimony discussed his examination of Dougan and the general effects of asbestos exposure, including the long latency period before asbestos related diseases manifest. In their depositions, both Anwar and Taiwo stated that they had not formed any opinions regarding the claims of Grem, Badorek, Daly, or Ferrara. Additionally, Anwar acknowledged that "a significant percentage of people who are exposed to and inhale asbestos . . . never develop clinical symptoms . . . ."

The plaintiffs filed an objection to the summary judgment motion, contesting the defendants' characteriza-

[8] Shortly thereafter, URS filed its second motion for summary judgment, asserting largely the same claims as Sikorsky and Carrier. URS had filed its first motion for summary judgment in 2014, but the trial court did not decide this motion before granting URS' second motion for summary judgment on March 28, 2017.

tion of their knowledge of the presence of asbestos, the current status of the law of medical monitoring, and the public policy reasons against extending liability. Along with their objection, the plaintiffs included an affidavit from Anwar. Anwar's three page affidavit specifically addressed his treatment of Dougan and concluded that Dougan suffered from a "significantly increased risk of contracting a serious disease," and also discussed generally the risks of asbestos, such as the injuries asbestos fibers cause to a person's lungs when inhaled. Additionally, the affidavit stated that "[o]ther individuals who were exposed to asbestos during the demolition work at Sikorsky should be monitored for the early detection and intervention of an asbestos related disease . . . ." The plaintiffs also submitted other exhibits concerning the presence of asbestos at Sikorsky and the defendants' actions surrounding the incident, but they provided no further expert testimony.

On March 28, 2017, the trial court granted the defendants' motion for summary judgment. See footnote 8 of this opinion. In its memorandum of decision, the trial court reviewed the evidence in the record and determined that no expert had examined or reviewed the medical records of any of the plaintiffs other than Dougan and that all of the plaintiffs admitted that they had not been diagnosed with an asbestos related disease, specifically, "mesothelioma, lung cancer, asbestosis, or pleural effusions." As a result, the trial court determined that the plaintiffs had not presented evidence demonstrating a genuine issue of material fact as to physical injury. The trial court then applied the public policy test outlined in *Lawrence* v. *O & G Industries, Inc.*, 319 Conn. 641, 650–51, 126 A.3d 569 (2015), and declined to recognize a cause of action for medical monitoring under Connecticut law that would allow recovery for an increased risk of future injury rather

than a present injury. Accordingly, the court granted the defendants' motion for summary judgment, vacated the class certification order, and rendered judgment for the defendants on the remaining counts. See footnotes 7 and 8 of this opinion. The trial court later denied the plaintiffs' motion for reargument or reconsideration. This appeal followed. See footnotes 1 and 3 of this opinion.

On appeal, the plaintiffs argue that the trial court incorrectly concluded that medical monitoring claims in the absence of clinical symptoms should not be permitted under Connecticut tort law. The plaintiffs further argue that the trial court incorrectly determined that there was no genuine dispute of material fact as to their injuries because they suffer from subclinical injuries as a result of their asbestos exposure. In response, the defendants counter that the trial court properly declined to create a medical monitoring remedy for asymptomatic plaintiffs exposed to toxic substances in the absence of physical harm. As an alternative ground for affirming the judgment of the trial court, the defendants argue that, even if this court were to recognize medical monitoring as a cause of action, the plaintiffs' claims would still fail because they are not supported by "reliable, scientific evidence . . . ."[9] We agree with the defendants that, even if we were to recognize a remedy in Connecticut for medical monitoring in the absence of the present manifestation of physical harm, the plaintiffs' claims would still fail as a matter of law because

[9] The defendants raised this issue as an alternative ground to affirm the trial court's judgment in their preliminary statement of the issues pursuant to Practice Book § 63-4 (a) (1); they also raised this issue before the trial court in their motion for summary judgment. See, e.g., *Thomas* v. *West Haven*, 249 Conn. 385, 390–91 n.11, 734 A.2d 535 (1999) (discussing procedural requirements for considering alternative grounds), cert. denied, 528 U.S. 1187, 120 S. Ct. 1239, 146 L. Ed. 2d 99 (2000); *Chamerda* v. *Opie*, 185 Conn. App. 627, 645–46, 197 A.3d 982 (same), cert. denied, 330 Conn. 953, 197 A.3d 893 (2018).

the plaintiffs failed to prove that monitoring was medically necessary.

We first set forth the applicable standard of review. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant the plaintiff's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Stuart* v. *Freiberg*, 316 Conn. 809, 820–21, 116 A.3d 1195 (2015).

"When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book [§ 17-45] . . . ." (Internal quotation marks omitted.)

State Farm Fire & Casualty Co. v. *Tully*, 322 Conn. 566, 573, 142 A.3d 1079 (2016).

I

We begin our analysis with a review of the medical monitoring claim. Medical monitoring, either in the form of damages or as a stand-alone cause of action; see footnote 4 of this opinion; allows a plaintiff to recover the cost of diagnostic testing for an injury that may occur in the future as a result of a defendant's tortious conduct.[10] See, e.g., *Metro-North Commuter Railroad Co.* v. *Buckley*, 521 U.S. 424, 438, 117 S. Ct. 2113, 138 L. Ed. 2d 560 (1997) (defining medical monitoring as "the economic cost of the extra medical checkups that [the plaintiff] expects to incur as a result of his exposure to [toxins]"). Given the nature of the relief provided by medical monitoring and the prevalence of these claims in the world of toxic torts,[11] the central issue in such cases is whether to permit medical monitoring in the absence of some present manifestation of a physical injury. Although medical monitoring is no longer a novel theory of recovery in many states, whether such recovery is permitted in Connecticut is still an open question of law. See *Doe* v. *Stamford*, 241 Conn. 692, 699–700 n.8, 699 A.2d 52 (1997) (discussing

[10] Medical monitoring differs doctrinally from a claim for enhanced risk. See A. Schwartz, Annot. "Recovery of Damages for Expense of Medical Monitoring To Detect or Prevent Future Disease or Condition," 17 A.L.R.5th 327, 336, § 2 (a) (1994) ("[m]edical monitoring, as this cause of action has come to be known, has been defined as an action seeking to recover the quantifiable costs of periodic future medical examinations to detect the onset of physical harm . . . as distinguished from an enhanced risk claim which seeks compensation for the anticipated harm itself or for increased apprehension of such harm" (internal quotation marks omitted)).

[11] See A. Slagel, Note, "Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims," 63 Ind. L.J. 849, 852 (1987–1988) ("In a toxic tort case the significant personal injuries often are not detectable simultaneously upon exposure to the toxic substance, but rather are latent. In fact, most toxic injuries do not manifest themselves as clinically detectable ailments until years after exposure occurs." (Footnote omitted.)).

medical monitoring test outlined in *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829, 852 (3d Cir. 1990), cert. denied sub nom. *General Electric Co.* v. *Knight*, 499 U.S. 961, 111 S. Ct. 1584, 113 L. Ed. 2d 649 (1991), but noting that neither party requested its adoption in workers' compensation law); see also *McCullough* v. *World Wrestling Entertainment, Inc.*, 172 F. Supp. 3d 528, 567 (D. Conn. 2016) (discussing how "[f]ew Connecticut courts" have considered viability of standalone medical monitoring claims), aff'd in part and appeal dismissed in part sub nom. *Haynes* v. *World Wrestling Entertainment, Inc.*, 827 Fed. Appx. 3 (2d Cir. 2020). Given that medical monitoring claims present an issue of first impression in Connecticut, we begin with a detailed review of the federal and sister state precedents considering these claims.

In the 1980s and 1990s, state and federal courts began permitting medical monitoring recovery in toxic exposure cases in the absence of a manifestation of present physical injury, as in the seminal case of *Ayers* v. *Jackson*, 106 N.J. 557, 604–606, 525 A.2d 287 (1987). See, e.g., *In re Paoli Railroad Yard PCB Litigation*, supra, 916 F.2d 850–52; *Burns* v. *Jaquays Mining Corp.*, 156 Ariz. 375, 380, 752 P.2d 28 (App. 1987), review dismissed, 162 Ariz. 186, 781 P.2d 1373 (1989); *Potter* v. *Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1007–1009, 863 P.2d 795, 25 Cal. Rptr. 2d 550 (1993); *Hansen* v. *Mountain Fuel Supply Co.*, 858 P.2d 970, 977–78 (Utah 1993). These cases were often supported by the reasoning of an earlier medical monitoring case, *Friends for All Children, Inc.* v. *Lockheed Aircraft Corp.*, 746 F.2d 816, 819, 822, 838 (D.C. Cir. 1984), in which the United States Court of Appeals for the District of Columbia Circuit upheld the creation of a medical monitoring fund for children who suffered from a "neurological development disorder" after a plane crash.[12]

[12] See also *Sadler* v. *PacifiCare of Nevada, Inc.*, 130 Nev. 990, 998–99, 340 P.3d 1264 (2014) (explaining that *Friends for All Children, Inc.*, was "[o]ne

Subsequently, in 1997, the United States Supreme Court rejected a medical monitoring cause of action under federal law in *Metro-North Commuter Railroad Co.* v. *Buckley*, supra, 521 U.S. 444. In that case, an asymptomatic plaintiff requested lump sum damages under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., after he was exposed to asbestos during his duties as a railroad employee. Id., 426–27. The court considered earlier cases that permitted asymptomatic medical monitoring recovery under state law and noted that those cases imposed certain "integral" restrictions on a plaintiff's case, such as limiting recovery through the establishment of a court administered fund. Id., 440–41, 444. The court then outlined several policy considerations that weighed against the recognition of this claim, namely, the substantial number of potential plaintiffs who have been exposed to toxic substances, along with the high costs of monitoring. Id., 442. But, in light of these conflicting policy concerns and the inadequate support in the common law, the court declined to create "a new, full-blown, tort law cause of action" under the federal statute being considered. Id., 443.

State appellate courts have been divided in the wake of *Buckley* with respect to whether to permit recovery for medical monitoring in the absence of the manifestation of a physical injury under their states' respective laws.[13] See V. Schwartz & C. Silverman, "The Rise of

of the earliest cases to consider a medical monitoring claim" and that several courts subsequently relied on its reasoning to "[conclude] that a physical injury is not required in order to recover the costs of medical monitoring"); H. Zarov et al., "A Medical Monitoring Claim for Asymptomatic Plaintiffs: Should Illinois Take the Plunge?," 12 DePaul J. Health Care L. 1, 3 (2009) ("[c]ourts and commentators generally trace the origins of medical monitoring claims to the . . . decision [of the District of Columbia Circuit] in *Friends [f]or All Children, Inc.*").

[13] For courts rejecting medical monitoring claims in the absence of physical injury after *Buckley*, see *Hinton ex rel. Hinton* v. *Monsanto Co.*, 813 So. 2d 827, 831–32 (Ala. 2001), *Wood* v. *Wyeth-Ayerst Laboratories*, 82 S.W.3d 849, 857 (Ky. 2002), *Paz* v. *Brush Engineered Materials, Inc.*, 949 So. 2d 1, 5–7 (Miss. 2007), *Henry* v. *Dow Chemical Co.*, 473 Mich. 63, 81, 86, 701

'Empty Suit' Litigation:™ Where Should Tort Law Draw the Line?," 80 Brook. L. Rev. 599, 620 (2015) (discussing how, after *Buckley*, courts rejected claims for medical monitoring, but, recently, "the pendulum briefly swung back toward permitting medical monitoring claims"); H. Zarov et al., "A Medical Monitoring Claim for Asymptomatic Plaintiffs: Should Illinois Take the Plunge?," 12 DePaul J. Health Care L. 1, 2 (2009) ("[M]ost courts addressing the issue since *Buckley* have rejected claims for medical monitoring absent physical injury. Nevertheless, a few courts have issued post-*Buckley* decisions adopting claims for medical monitoring, while other courts have continued to implement pre-*Buckley* decisions. Thus, although there is a clear trend against the recognition of medical monitoring claims, the debate is far from over.").

A challenging issue presented by the plaintiffs' claims in this case is determining the nature of the harm, if any, caused by their exposure to asbestos. Past plaintiffs have sought medical monitoring for a variety of

N.W.2d 684 (2005), *Curl* v. *American Multimedia, Inc.*, 187 N.C. App. 649, 657, 654 S.E.2d 76 (2007), *Lowe* v. *Philip Morris USA, Inc.*, 344 Or. 403, 415, 183 P.3d 181 (2008), and *Alsteen* v. *Wauleco, Inc.*, 335 Wis. 2d 473, 488–91, 802 N.W.2d 212, review denied, 338 Wis. 2d 323, 808 N.W.2d 715 (2011). Cf. *Caronia* v. *Philip Morris USA, Inc.*, 22 N.Y.3d 439, 452, 5 N.E.3d 11, 982 N.Y.S.2d 40 (2013) (requiring evidence of "present physical injury or *damage to property*" (emphasis added)).

For courts allowing a claim for medical monitoring to proceed post *Buckley*, see *Petito* v. *A.H. Robins Co.*, 750 So. 2d 103, 104, 108 (Fla. App. 1999), review denied, 780 So. 2d 912 (2001), and review denied sub nom. *Zenith Goldline Pharmaceuticals, Inc.* v. *Petito*, 780 So. 2d 916 (2001), *Berry* v. *Chicago*, 133 N.E.3d 1201, 1209 (Ill. App.), appeal allowed, 132 N.E.3d 284 (Ill. 2019), *Exxon Mobil Corp.* v. *Albright*, 433 Md. 303, 378–80, 71 A.3d 30, cert. denied, 571 U.S. 1045, 134 S. Ct. 648, 187 L. Ed. 2d 449 (2013), *Donovan* v. *Philip Morris USA, Inc.*, 455 Mass. 215, 225–26, 914 N.E.2d 891 (2009), *Meyer ex rel. Coplin* v. *Fluor Corp.*, 220 S.W.3d 712, 717–18 (Mo. 2007), *Sadler* v. *PacifiCare of Nevada*, 130 Nev. 990, 998–99, 340 P.3d 1264 (2014), and *Bower* v. *Westinghouse Electric Corp.*, 206 W. Va. 133, 140, 522 S.E.2d 424 (1999).

injuries, ranging from toxins present in their blood[14] to traumatic brain injuries.[15] The plaintiffs in the present case claim that their asbestos exposure caused them to suffer a subclinical injury, which is one that is "not detectable or [that is] producing effects that are not detectable by the usual clinical tests . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2011) p. 1242; accord Webster's New Complete Medical Dictionary (1995) p. 667. Relying on *Donovan* v. *Philip Morris USA*, *Inc.*, 455 Mass. 215, 914 N.E.2d 891 (2009), the plaintiffs contend specifically that the trial court incorrectly determined that their subclinical injuries were not actual injuries because, once they were exposed to asbestos at the Sikorsky project, the asbestos fibers entered their lungs and damaged their cells, creating a "preclinical stage of disease." They ask us to adopt the legal framework from *Donovan* to govern medical monitoring claims arising from subclinical injuries.

In *Donovan*, the Supreme Judicial Court of Massachusetts considered a certified question from a federal district court asking whether "the plaintiffs' suit for medical monitoring, based on subclinical effects of exposure to cigarette smoke and increased risk of lung cancer, state[d] a cognizable claim and/or permit[ted] a remedy under Massachusetts state law . . . ." (Internal quotation marks omitted.) Id., 215–16. The plaintiffs, a proposed class of Marlboro cigarette smokers, argued that the defendant had "wrongfully designed, marketed, and sold" its cigarettes and requested a "court-supervised program" for medical monitoring, specifically, of "low-dose computed tomography . . . scans of the chest" to screen for lung cancer. Id., 216–17. The plaintiffs alleged that, because they had used the defendant's

[14] See *Rhodes* v. *E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 92 (4th Cir.), cert. denied, 565 U.S. 977, 132 S. Ct. 499, 181 L. Ed. 2d 347 (2011).

[15] See *McCullough* v. *World Wrestling Entertainment, Inc.*, supra, 172 F. Supp. 3d 535.

defective products, they suffered "objectively observable and identifiable damage to the tissues and structures of their lungs" and, as a result, are at a "substantially increased risk of cancer . . . ." Id., 221.

The Massachusetts high court accepted the plaintiffs' theory of harm and recognized a stand-alone medical monitoring cause of action for the plaintiffs' subclinical injuries under Massachusetts law. Id., 226–27. The court reasoned that, just as a shaken baby would be able to recover expenses for diagnostic testing to determine if she had suffered a brain injury, so, too, should the plaintiffs, as they "have produced sufficient proof of 'impact' . . . to safeguard against false claims: they have proffered evidence of physiological changes caused by smoking, and they have proffered expert medical testimony that, because of these physiological changes, they are at a substantially greater risk of cancer due to the negligence of Philip Morris." (Citation omitted.) Id., 224–25. The court discussed the importance of subcellular changes, stating that such "changes may occur which, in themselves, are not symptoms of any illness or disease, but are warning signs to a trained physician that the patient has developed a condition that indicates a substantial increase in risk of contracting a serious illness or disease and thus the patient will require periodic monitoring." Id., 225. The court in *Donovan* distinguished the facts of that case from those in "cases that involve exposure to levels of chemicals or radiation known to cause cancer, for which immediate medical monitoring may be medically necessary although no symptoms or subclinical changes have occurred." (Emphasis omitted.) Id. Because the record in *Donovan* presented evidence of subcellular change indicating an increased risk of cancer, the plaintiffs had adequately demonstrated injury.

The Massachusetts court outlined the following standard for its medical monitoring cause of action, requir-

ing that "each plaintiff" prove that "(1) [t]he defendant's negligence (2) caused (3) the plaintiff to become exposed to a hazardous substance that produced, at least, subcellular changes that substantially increased the risk of serious disease, illness, or injury (4) for which an effective medical test for reliable early detection exists, (5) and early detection, combined with prompt and effective treatment, will significantly decrease the risk of death or the severity of the disease, illness or injury, and (6) such diagnostic medical examinations are reasonably (and periodically) necessary, conformably with the standard of care, and (7) the present value of the reasonable cost of such tests and care, as of the date of the filing of the complaint." Id., 226. In addition, the court stated that proof of these elements "usually will require competent expert testimony." Id., 227.

II

Having reviewed the background law governing medical monitoring claims, we now turn to the plaintiffs' claims in the present appeal. We begin by setting forth several assumptions that underlie our analysis. First, we will assume, without deciding, that Connecticut law recognizes a claim for subclinical cellular injury that substantially increased the plaintiffs' risk of cancer and other asbestos related diseases.[16] Second, we also

[16] We note that other courts have rejected similar arguments with respect to whether subclinical injuries are in fact physical injuries as a matter of law. See *Rhodes* v. *E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 95 (4th Cir.) (disagreeing with plaintiffs' argument that exposure to toxin that created "[an] alteration in the structure of [the plaintiffs'] blood is an injury" in negligence cause of action (internal quotation marks omitted)), cert. denied, 565 U.S. 977, 132 S. Ct. 499, 181 L. Ed. 2d 347 (2011); *June* v. *Union Carbide Corp.*, 577 F.3d 1234, 1249 (10th Cir. 2009) ("It is true that a number of courts have recognized [medical monitoring] claims . . . premised on subclinical effects of toxic exposure. But, tellingly, these courts *have not reasoned that subclinical injuries from a toxic agent are bodily or physical injuries*." (Emphasis altered.)); *Parker* v. *Wellman*, 230 Fed. Appx. 878, 881–83 (11th Cir. 2007) (rejecting plaintiffs' theory of subcellular harm as physical injury under Georgia law); *Bell* v. *3M Co.*, 344 F. Supp. 3d 1207, 1216 (D. Colo. 2018) (disagreeing with plaintiffs' theory that "the bioaccumu-

assume, without deciding, that the *Donovan* elements govern proof of a medical monitoring claim. Finally, we assume that the plaintiffs raised a genuine dispute of material fact as to whether they were negligently exposed to asbestos during the Sikorsky project. We nevertheless conclude that the trial court properly granted the defendants' motion for summary judgment because the plaintiffs have not established the existence of a genuine issue of material fact as to certain *Donovan* factors.[17] See, e.g., *Stuart* v. *Freiberg*, supra, 316 Conn.

lation of toxins or subclinical damage constitute[s] a present physical injury"); see also J. Grodsky, "Genomics and Toxic Torts: Dismantling the Risk-Injury Divide," 59 Stan. L. Rev. 1671, 1674 (2007) ("Although the case law addressing subcellular damage is limited . . . most courts have treated such damage as benign, de minimis, or otherwise legally inconsequential. Courts greatly prefer to draw bright lines between risk and injury, and continue to place the boundary at proof of classic medical symptoms or overt impairment." (Footnote omitted.)). But see *Sullivan* v. *Saint-Gobain Performance Plastics Corp.*, 431 F. Supp. 3d 448, 454–55 (D. Vt. 2019) ("It is more likely that the Vermont Supreme Court will follow the definition of bodily harm developed in [§ 15 of] the Restatement [(Second) of Torts] and apply it to latent injuries caused by chemical exposure. By defining bodily harm to include any alteration to a person's body, the Restatement [(Second) of Torts] includes changes such as abnormal blood serum results showing the presence of an unusual and potentially harmful chemical.").

One Connecticut trial court has held that a very similar theory of liability in an asbestos exposure case raised a question of fact for the jury to decide. See *Bowerman* v. *United Illuminating*, Superior Court, judicial district of New London at Norwich, Docket No. CV-94-0115436-S (December 15, 1998) (23 Conn. L. Rptr. 589, 592) ("whether . . . the scarring of lung tissue and implantation of asbestos fibers in the lungs constitute a compensable legal harm is an issue of fact if there is evidence showing such conditions to be detrimental and if there is evidence showing the existence of such conditions in the plaintiffs").

[17] We note that other federal and state courts have employed a similar analysis, deeming it unnecessary to determine whether to recognize a claim for medical monitoring because the plaintiffs' proof was inadequate to defeat a motion for summary judgment in any event. See *M.G. ex rel. K.G.* v. *A.I. duPont Hospital for Children*, 393 Fed. Appx. 884, 892–93 (3d Cir. 2010) (declining to consider whether Delaware Supreme Court would permit medical monitoring claim because plaintiff could not state such claim); *In re Marine Asbestos Cases*, 265 F.3d 861, 867 (9th Cir. 2001) (upholding grant of summary judgment because, "even if medical monitoring were available under the Jones Act to a seaman who satisfied the *Paoli* factors, the plaintiffs

823 ("a plaintiff may properly be called upon at the summary judgment stage to demonstrate that he possesses sufficient counterevidence to raise a genuine issue of material fact as to any, or even all, of the essential elements of his [claim]").

Courts, including the one in *Donovan*, generally require competent expert testimony to prove a medical monitoring claim or remedy. See, e.g., *Caronia* v. *Philip Morris USA, Inc.*, 715 F.3d 417, 448 (2d Cir. 2013) ("[a]ll of the [previously discussed] states that recognized a medical monitoring cause of action noted that such a claim cannot be established without reliable expert testimony"); *In re Paoli Railroad Yard PCB Litigation*, supra, 916 F.2d 852 (requiring competent expert testimony to establish medical monitoring cause of action); *Donovan* v. *Philip Morris USA, Inc.*, supra, 455 Mass. 227 ("[p]roof of [the *Donovan*] elements usually will require competent expert testimony"); *Ayers* v. *Jackson*, supra, 106 N.J. 606 (requiring "reliable expert testimony" to recover medical surveillance damages); *Hansen* v. *Mountain Fuel Supply Co.*, supra, 858 P.2d 979 n.10 ("[p]roof of [the *Donovan*] elements will usually require expert testimony"). As a result, if a plaintiff lacks expert testimony to prove a medical monitoring claim, summary judgment should be granted. See *Bozelko* v. *Papastavros*, 323 Conn. 275, 282, 147 A.3d 1023 (2016) ("[s]ummary judgment in favor of a defendant is proper when expert testimony is necessary to prove an essential element of the plaintiff's case and

have failed to present sufficient evidence to raise a genuine issue of material fact as to the reasonableness and necessity of the type of medical monitoring that they seek"); *DeStories* v. *Phoenix*, 154 Ariz. 604, 610, 744 P.2d 705 (App. 1987) (upholding grant of summary judgment after concluding that, even if plaintiffs' medical monitoring theory was legally cognizable, plaintiffs' claim would still fail due to lack of evidence); cf. *Philip Morris, Inc.* v. *Angeletti*, 358 Md. 689, 782, 787, 752 A.2d 200 (2000) (declining to consider whether "medical monitoring is a cognizable claim" under Maryland law because medical monitoring class was improperly certified).

the plaintiff is unable to produce an expert witness to provide such testimony").

The defendants argue that the plaintiffs "have totally failed to provide expert evidence establishing their need for medical monitoring as a result of asbestos exposure at Sikorsky." The plaintiffs do not dispute that Anwar, their expert witness, has not provided any testimony as to any of them specifically, but they argue that they nevertheless have presented sufficient expert evidence to survive summary judgment. According to the plaintiffs, "the court [in *Donovan*] did not state that the plaintiffs needed to offer expert medical evidence that spoke to the plaintiffs' specific conditions; instead, the court accepted general expert evidence that attested to the undifferentiated effects that cigarette smoking [has] on any smoker, including the plaintiffs." Additionally, the plaintiffs assert only that "expert evidence must be used to generally inform lay jurors about the scientific correlation between asbestos exposure and the onset of asbestos related diseases." Finally, "the plaintiffs aver that the experts should not form any opinions about the plaintiffs' exposure and their need for medical monitoring or the likelihood of contracting diseases because that function should be reserved [for] the trier of fact."

We disagree with the plaintiffs that the *Donovan* court's acceptance of "general expert advice" assists this inquiry, as that court was considering whether the parties had stated a claim for medical monitoring on a motion to dismiss, not whether the plaintiffs' claims could ultimately survive summary judgment. See *Donovan* v. *Philip Morris USA, Inc.*, supra, 455 Mass. 217, 221. Accordingly, we will look to the requirements of other courts reviewing this issue, including those cited with approval in *Donovan*.

The third *Donovan* factor requires a plaintiff to demonstrate that he or she suffers from a subcellular change

that substantially increases his or her risk of disease. Id., 226. A Massachusetts federal district court recently considered whether expert testimony sufficiently demonstrated subcellular change on a motion for summary judgment. See *Genereux* v. *Hardric Laboratories, Inc.*, 950 F. Supp. 2d 329 (D. Mass. 2013), aff'd, 754 F.3d 51 (1st Cir. 2014). The defendant in *Genereux* argued that the plaintiffs would be unable to succeed at trial under *Donovan* because the plaintiffs' expert had "testified that he cannot state, with reasonable medical certainty, that any plaintiff has suffered subcellular change." Id., 333. The plaintiffs' expert concluded only that "some number of persons will have cellular changes in the blood or lung cells" and "did not state that any specific plaintiff or plaintiffs have suffered beryllium-related subcellular change." (Internal quotation marks omitted.) Id., 336. The court concluded that "*each plaintiff* must submit sufficient admissible evidence to permit a reasonable fact finder to find that he or she has suffered subcellular change." (Emphasis added.) Id., 340. Because the plaintiffs had failed to do so, the court rendered summary judgment for the defendant. Id., 341; see also *Exxon Mobil Corp.* v. *Albright*, 433 Md. 303, 385, 71 A.3d 30 ("[W]e conclude that quantifiable, reliable indicia that a defendant's actions have so increased significantly the plaintiff's risk of developing a disease are necessary to recover damages for medical monitoring costs. The indicia may be proven by a medical expert's testimony, *particularized to a plaintiff*, and demonstrating a reasonable link to toxic exposure." (Emphasis added.)), cert. denied, 571 U.S. 1045, 134 S. Ct. 648, 187 L. Ed. 2d 449 (2013).[18]

[18] One federal district court recently rejected a defendant's argument that there must be more individualized expert testimony as to causation. See *Sullivan* v. *Saint-Gobain Performance Plastics Corp.*, 431 F. Supp. 3d 448, 467–70 (D. Vt. 2019). After first predicting that the Vermont Supreme Court would recognize a medical monitoring remedy, the court denied the defendant's motion for summary judgment on the medical monitoring claims of a class of plaintiffs who allegedly had been exposed to perfluorooctanoic acid (PFOA) in their groundwater. Id., 452, 469–70. The defendant argued

The expert affidavit in the present case is ambiguous at best about whether each plaintiff actually suffered subcellular harm that substantially increased his risk of injury.[19] Anwar does aver that "[a]sbestos fibers are readily inhaled into the lungs where the fibers cause changes at [the] cellular level." But the affidavit does not state specifically that Grem, Ferrara, Daley, and Badorek have themselves suffered subcellular change that substantially increased their risk of serious disease, illness, or injury. As a result, it is unclear whether Anwar is concluding that all persons necessarily suffer harmful subcellular change as soon as they are exposed to asbestos, as the plaintiffs in *Donovan* established with respect to cigarette smoke after the case returned to the federal court or, instead, that one can inhale asbestos and only possibly suffer subcellular change that

that the plaintiffs lacked expert evidence demonstrating specific causation, specifically, that "that exposure to PFOA from the [defendant's] facility caused [the plaintiffs to be exposed to] an increased risk of adverse health conditions, as opposed to whether it can do so in general." (Emphasis omitted; internal quotation marks omitted.) Id., 467. The court concluded that, although the plaintiffs' experts had not reviewed the "individual plaintiffs' medical records," summary judgment was inappropriate because "proof of causation must . . . be at the population level"; id., 467–68; and declined to grant summary judgment against any specific plaintiff because any individual issues could be resolved at the damages phase. Id., 469–70.

We conclude that *Sullivan* is distinguishable. First, the class in that case was limited to individuals "who actually demonstrate[d] increased levels of PFOA in their bloodstream," whereas the present case provides no such benchmark. Id., 462. Second, although the case before us was a class action when the trial court decided the summary judgment motion, the trial court expressly declined to certify the class on the issue of "the nature and extent of [each class member's] present or future need for medical monitoring . . . ." For these reasons, *Sullivan* is a case more appropriately decided by common proof, and we are not persuaded that it is applicable or persuasive here.

[19] Anwar did examine and treat Dougan as his pulmonary specialist, and, as a result, the affidavit does detail more specifically Dougan's exposure to asbestos and the accompanying harm. Dougan therefore would likely satisfy the subcellular injury requirement under the *Donovan* standard. But, as Dougan is no longer a party to the case; see footnote 1 of this opinion; we do not consider the affidavit's statements as to Dougan.

"substantially increase[s] the risk of serious disease, illness, or injury . . . ." *Donovan* v. *Philip Morris USA, Inc.*, supra, 455 Mass. 226; see also *Donovan* v. *Philip Morris USA, Inc.*, 268 F.R.D. 1, 16 (D. Mass. 2010) ("Indeed, subcellular harm, according to [the] plaintiffs, begins as soon as someone takes a single puff. . . . While the extent of the damage and risk may vary among class members, *allegedly twenty pack-years of smoking necessarily causes subcellular harm.* . . . I find their expert affidavits and depositions . . . sufficient on this point for class certification purposes." (Citations omitted; emphasis altered; footnote omitted.)). This ambiguity alone does not defeat summary judgment, however, because we construe the evidence in the light most favorable to the nonmoving party, and, therefore, we will read Anwar's conclusions about subcellular harm as applicable to all of the plaintiffs.

Nevertheless, we conclude that the plaintiffs have failed to present sufficient evidence as to certain other factors under *Donovan*, specifically, that "early detection, combined with prompt and effective treatment, will significantly decrease the risk of death or the severity of the disease, illness or injury," and that "such diagnostic medical examinations are reasonably (and periodically) necessary, conformably with the standard of care . . . ." *Donovan* v. *Philip Morris USA, Inc.*, supra, 455 Mass. 226; see *In re Marine Asbestos Cases*, 265 F.3d 861, 867–68 (9th Cir. 2001) (upholding summary judgment for defendants because plaintiffs did not "present sufficient evidence to raise a genuine issue of material fact as to the reasonableness and necessity" of medical monitoring, as plaintiffs "submitted no evidence that a single examination would yield any clinical benefit," and their expert affidavit "did not explain how patients would benefit from the single, baseline examination that [the] plaintiffs seek").

When discussing the expert testimony requirement in *Donovan*, the Massachusetts Supreme Judicial Court cited the Utah Supreme Court's decision in *Hansen* v. *Mountain Fuel Supply Co.*, supra, 858 P.2d 970. See *Donovan* v. *Philip Morris USA, Inc.*, supra, 455 Mass. 227. In *Hansen*, the Utah Supreme Court reversed the trial court's grant of summary judgment on the plaintiffs' medical monitoring claims and discussed the elements that a plaintiff must prove to establish such a claim. *Hansen* v. *Mountain Fuel Supply Co.*, supra, 972, 979. Although the *Donovan* elements are not identical to those in *Hansen*, there is significant overlap, and, as such, we look to the explanation in *Hansen* of how to prove medical necessity.[20]

The court in *Hansen* stated: "It also must be shown that administration of the [medical] test *to a specific plaintiff is medically advisable for that plaintiff*. To illustrate, a monitoring regime might be of theoretical value in detecting and treating a particular illness, but if a reasonable physician would not prescribe it for a particular plaintiff because the benefits of the monitoring would be outweighed by the costs, which may include, among other things, the burdensome frequency of the monitoring procedure, its excessive price, or its risk of harm to the patient, then recovery would not be allowed. . . . We emphasize that the advisable medical testing for a *specific plaintiff* must be shown to be 'consistent with contemporary scientific principles' and 'reasonably necessary.' " (Citation omitted; emphasis added.) Id., 980; see also *Ayers* v. *Jackson*, supra, 106 N.J. 606 ("we hold that the cost of medical surveillance is a compensable item of damages [when] the proofs demonstrate, through reliable expert testimony predi-

[20] Medical necessity is demonstrated through the eighth element of *Hansen*, that the "[medical] test has been prescribed by a qualified physician according to contemporary scientific principles." *Hansen* v. *Mountain Fuel Supply Co.*, supra, 858 P.2d 979.

cated upon the significance and extent of exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals is *reasonable and necessary*" (emphasis added)); P. Lin, Note, "Opening the Gates to Scientific Evidence in Toxic Exposure Cases: Medical Monitoring and *Daubert*," 17 Rev. Litig. 551, 582 (1998) ("[a]lthough claims for medical monitoring damages do not require proof of specific causation, the plaintiff's burden includes proof of medical necessity, which is similar to proof of specific causation in that it shows that the individual plaintiff can benefit from a program of medical monitoring").[21] Requiring each plaintiff to prove "reasonable necessity" is vital, as the clinical suitability of medical monitoring must be established because, if such monitoring is unnecessary, recovery would be unwarranted.

The plaintiffs' argument that experts "should not form any opinions about the plaintiffs' exposure and their need for medical monitoring . . . because that function should be reserved to the trier of fact" is against the weight of persuasive authority.[22] This is the

[21] We need not address how the reasonable necessity requirement would operate in the context of a class action involving a claim for future medical monitoring. The plaintiffs were not certified as a class with respect to this issue, and the appropriate treatment of class based claims for medical monitoring is not presented in this appeal. See footnote 7 of this opinion. As a result, we conclude that each plaintiff in the present case must establish that medical monitoring is necessary under the *Donovan* test and leave for another day under what circumstances reasonable necessity may be proven for a class of plaintiffs.

[22] The plaintiffs also argue that experts should not opine as to "the [plaintiffs'] likelihood of contracting diseases . . . ." Certain courts that permit medical monitoring have expressly stated that they do not require a specific assessment or showing of the likelihood of contracting a particular disease in the future. See *Merry* v. *Westinghouse Electric Corp.*, 684 F. Supp. 847, 851 (M.D. Pa. 1988) (concluding that "the plaintiffs . . . proffered sufficient evidence to defeat [the defendant's] summary judgment motion," even

very purpose of expert testimony in medical monitoring cases. "[I]t is for the trier of fact to decide, *on the basis of competent medical testimony*, whether and to what extent the particular plaintiff's exposure to toxic chemicals in a given situation justifies future periodic medical monitoring." (Emphasis added.) *Potter* v. *Firestone Tire & Rubber Co.*, supra, 6 Cal. 4th 1009. Expert testimony limited to "generally inform[ing] lay jurors about the scientific correlation between asbestos exposure and the onset of asbestos related diseases," as the plaintiffs argue, is inadequate proof as a matter of law. In the absence of expert testimony demonstrating the necessity of future testing, a fact finder would be unable to accurately conclude whether a plaintiff should recover for medical monitoring. As the court in *Hansen* noted, exposure alone does not provide a basis for recovery, and proof of these elements, through expert testimony, provides an important check on medical monitoring. See *Hansen* v. *Mountain Fuel Supply Co.*, supra, 858 P.2d 978, 980; see also *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 788 (3d Cir. 1994) (acknowledging necessary limits on medical monitoring claims, such as demonstrating that "a reasonable physician would prescribe for her or him a monitoring regime different [from] the one that would have been prescribed in the absence of that particular exposure" (internal quotation marks omitted)), cert. denied sub

though "[t]he [plaintiffs'] experts have not provided, and in fact state they cannot provide, a scientifically sound conclusion as to the precise degree of risk faced by the plaintiffs"); *Potter* v. *Firestone Tire & Rubber Co.*, supra, 6 Cal. 4th 1008 (concluding that "recovery of medical monitoring damages should not be dependent upon a showing that a particular cancer or disease is reasonably certain to occur in the future"); *Hansen* v. *Mountain Fuel Supply Co.*, supra, 858 P.2d 979 ("[b]ecause the injury in question is the increase in risk that requires one to incur the cost of monitoring, the plaintiff need not prove that he or she has a probability of actually experiencing the toxic consequence of the exposure"). We agree with the plaintiffs that expert testimony on that particular issue is not necessary in this particular context.

nom. *General Electric Co.* v. *Ingram*, 513 U.S. 1190, 115 S. Ct. 1253, 131 L. Ed. 2d 134 (1995).

Attached as an exhibit to their motion for summary judgment, the defendants provided an excerpt of Anwar's deposition testimony, in which he stated that he had not formed an opinion as to the plaintiffs. This admission establishes that there is no genuine issue of material fact as to whether medical monitoring is reasonably necessary for the plaintiffs. The plaintiffs attempted to counter the defendants' evidentiary showing with an affidavit from Anwar, but that affidavit does not offer an opinion as to the plaintiffs, individually or as a group. There is only one statement that may reasonably be construed as relevant to the plaintiffs' claims: "Other individuals who were exposed to asbestos during the demolition work at Sikorsky should be monitored for the early detection and intervention of an asbestos related disease, as asbestos inhalation causes a significantly increased risk of contracting a serious disease . . . ." The only fact that this statement establishes is that persons exposed to asbestos have a significantly higher risk of contracting an asbestos related disease and should be monitored. This statement does not speak to the reasonable need for the medical monitoring of the plaintiffs, and it is insufficient to overcome summary judgment. But see *In re Paoli Railroad Yard PCB Litigation*, supra, 35 F.3d 794–95 (concluding that plaintiffs had presented sufficient evidence to overcome summary judgment after experts testified that plaintiffs should receive medical monitoring due to their increased risk); *Rhodes* v. *E.I. du Pont de Nemours & Co.*, 657 F. Supp. 2d 751, 776 (S.D. W. Va. 2009) (expert opinion stating, inter alia, that "the plaintiffs have a significantly increased risk of disease as a result of their exposure . . . and that the increased risk warrants medical monitoring" raised question of material fact as to reasonable necessity), aff'd in part

and appeal dismissed in part, 636 F.3d 88 (4th Cir.), cert. denied, 565 U.S. 977, 132 S. Ct. 499, 181 L. Ed. 2d 347 (2011). In addition, the affidavit lacks any statement demonstrating that "early detection, combined with prompt and effective treatment, will significantly decrease the risk of death or the severity of the disease, illness or injury," the fifth element required under *Donovan*. *Donovan* v. *Philip Morris USA, Inc.*, supra, 455 Mass. 226; see *In re Marine Asbestos Cases*, supra, 265 F.3d 867 ("the plaintiffs have not shown that a treatment exists for [asbestos related] diseases, or that there is clinical value to administering any such treatment before the onset of symptoms of these diseases").

Even if we were to conclude that Anwar's affidavit was applicable to plaintiffs other than his patient, Dougan, the portions of the affidavit that could apply to the plaintiffs provide only bare assertions of the legal requirements of medical monitoring without providing the factual foundation supporting those assertions. In several places, the affidavit mirrors the language required to prove a medical monitoring claim in *Redland Soccer Club, Inc.* v. *Dept. of the Army*, 548 Pa. 178, 195–96, 696 A.2d 137 (1997). Specifically, the affidavit states that "[o]ther individuals who were exposed to asbestos . . . at Sikorsky should be monitored . . . as asbestos inhalation causes a significantly increased risk of contracting a serious disease . . . . The monitoring regimen would be different from what is normally recommended in the absence of exposure . . . . [It] is reasonably necessary according to contemporary scientific principles, and the monitoring regimen makes early detection and intervention of an asbestos related disease possible." Although the affidavit does include detailed factual statements, those statements apply only to Dougan, who is no longer a plaintiff. Without additional details supporting the plaintiffs' individual needs

for medical monitoring, the plaintiffs have not raised a genuine dispute of material fact.

We have repeatedly held that such conclusory statements included in affidavits are insufficient to defeat a motion for summary judgment. See, e.g., *Stuart* v. *Freiberg*, supra, 316 Conn. 828 (discussing how statements in affidavits relied on by plaintiffs "closely replicate portions of the pleadings" and how "these averments are conclusory, and therefore inadequate to defeat a summary judgment motion"); *Coley* v. *Hartford*, 312 Conn. 150, 166 n.12, 95 A.3d 480 (2014) (concluding that expert's affidavit was conclusory and, therefore, did not demonstrate genuine issue of material fact to defeat summary judgment motion); *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 557, 791 A.2d 489 (2002) ("[a]lthough an affidavit by an expert may be considered in opposition to a motion for summary judgment, conclusory affidavits, even from expert witnesses, do not provide a basis on which to deny such motions" (internal quotation marks omitted)). Anwar's affidavit does not provide any specific explanation as to why the plaintiffs require medical monitoring because of their asbestos exposure at Sikorsky.

As the expert in this case provided no opinion as to the plaintiffs, and in the absence of any other evidence demonstrating the reasonable necessity of medical monitoring, we conclude that the plaintiffs did not demonstrate a genuine issue of material fact. Accordingly, we conclude that the trial court properly granted summary judgment for the defendants.

The judgment is affirmed.

In this opinion the other justices concurred.