BOARDWALK REALTY ASSOCIATES, LLC *v.* M & S GATEWAY ASSOCIATES, LLC, ET AL.
(SC 20395)

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

Syllabus

Pursuant to statute (§ 12-163a (a)), a municipality may request that the Superior Court appoint a receiver of rents or use and occupancy payments for any property for which the owner is delinquent in the payment of real property taxes, and the "receiver appointed by the court shall collect all rents or payments for use and occupancy forthcoming from the occupants of the [property] in question in place of the owner . . . ."

The plaintiff, which had been appointed, pursuant to § 12-163a (a), to serve as the receiver of rents for certain real property owned by C Co., sought to recover unpaid rent and use and occupancy fees from the defendants, M Co. and V Co., which have operated an automobile dealership on that property since 2001 without paying rent. C Co. leased the property to M Co. for a three year term, and M Co. thereafter exercised its option to renew the lease for another three year term, which expired in 2001. V Co., which is owned by M Co., subleased the property from M Co. pursuant to an agreement that incorporated the terms and rent obligations of the lease. Shortly before the lease expired, C Co. effectively abandoned the property, which was allegedly contaminated and the subject of an ongoing enforcement action by the Department of Environmental Protection. The defendants thereafter continued to operate the dealership on the property, but, since 2001, they have failed to pay rent or to make use and occupancy payments to C Co., or to pay property taxes to the town in which the property is located. The parties filed separate motions for summary judgment. The defendants claimed that a receiver of rents appointed under § 12-163a has no authority to seek rent or use and occupancy payments with respect to an abandoned property, whereas the plaintiff claimed that it was entitled to seek rent and use and occupancy payments because, even though the lease with C Co. had expired, the defendants remained in possession as tenants,

either at will or at sufferance. The trial court denied the plaintiff's motion and granted the defendants' motion, concluding that C Co., by abandoning the property and failing to pursue any of its rights against the defendants, had allowed the defendants to occupy the property without a rental obligation and that there was no rent for the plaintiff receiver to collect. On the plaintiff's appeal, *held* that the trial court correctly concluded that § 12-163a did not authorize the plaintiff to collect rent or use and occupancy payments from the defendants, as the remedy provided by that statute does not extend to situations in which a tax delinquent property owner is absent and not pursuing such rent or payments from the occupant, and, accordingly, the trial court properly granted the defendants' motion for summary judgment: because the language in § 12-163 (a) was ambiguous as to whether a receiver is limited to collecting rent or use and occupancy payments that are the product of an existing landlord-tenant relationship or whether a receiver has the authority to establish those payments in the first instance, this court considered extratextual sources, including case law interpreting the statute, and concluded that, under the circumstances of the present case, the narrow authority conferred on the receiver by § 12-163a did not permit the plaintiff to establish rent or use and occupancy payments in the first instance; moreover, that conclusion was supported by the legislative history, which indicated that the statute was viewed as a remedy that would avert the abandonment of properties, rather than being intended to apply to abandoned property or to authorize receivers to impose rent or use and occupancy payments in the place of a property owner who has abandoned the property; furthermore, the legislature, as the governmental body primarily responsible for formulating public policy, was best situated to address the unusual circumstances presented in this case, in which the town in which C Co.'s property was located sought to recoup unpaid property taxes on an abandoned property utilized by an apparently successful commercial enterprise.

Argued November 23, 2020—officially released August 13, 2021*

Procedural History

Action to recover damages for, inter alia, unpaid rent, and for other relief, brought to the Superior Court in the judicial district of Hartford, Housing Session, where the court, *Miller*, *J.*, denied the plaintiff's motion for summary judgment as to liability, granted the defendants' motion for summary judgment and rendered

* August 13, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

judgment for the defendants, from which the plaintiff appealed. *Affirmed.*

Kenneth R. Slater, Jr., with whom was *Logan A. Carducci*, for the appellant (plaintiff).

Eric H. Rothauser, with whom were *Jay B. Weintraub* and, on the brief, *John L. Bonee III*, for the appellees (defendants).

Opinion

ROBINSON, C. J. This appeal is the most recent battle in the efforts of the town of Canton (town) to collect unpaid property taxes on a parcel of commercial real property (property) that was effectively abandoned in 2001 by its owner, Cadle Properties of Connecticut, Inc. (Cadle), and on which the defendants, M & S Gateway Associates, LLC (Gateway) and Mitchell Volkswagen, LLC (Mitchell),[1] have operated an automobile dealership since 1995. The plaintiff, Boardwalk Realty Associates, LLC, which is the court-appointed receiver of rents pursuant to General Statutes § 12-163a,[2]

[1] We refer to the defendants individually when appropriate for purposes of clarity.

[2] General Statutes § 12-163a (a) provides in relevant part: "Any municipality may petition the Superior Court or a judge thereof, for appointment of a receiver of the rents or payments for use and occupancy for any property for which the owner, agent, lessor or manager is delinquent in the payment of real property taxes. . . . The court shall make a determination of any amount due and owing and any amount so determined shall constitute a lien upon the real property of such owner. . . . *The receiver appointed by the court shall collect all rents or payments for use and occupancy forthcoming from the occupants of the building in question in place of the owner, agent, lessor or manager.* The receiver shall make payments from such rents or payments for use and occupancy, first for taxes due on and after the date of his appointment and then for electric, gas, telephone, water or heating oil supplied on and after such date. The owner, agent, lessor or manager shall be liable for such reasonable fees and costs determined by the court to be due the receiver, which fees and costs may be recovered from the rents or payments for use and occupancy under the control of the receiver, provided no such fees or costs shall be recovered until after payment for current taxes, electric, gas, telephone and water service and heating oil deliveries has been made. The owner, agent, lessor or manager shall be liable to the petitioner for reasonable attorney's fees and costs incurred by

appeals[3] from the trial court's judgment, rendered in accordance with the court's granting of the defendants' motion for summary judgment with respect to the plaintiff's complaint seeking rent, as well as use and occupancy payments, from the defendants. On appeal, the plaintiff contends that the trial court incorrectly concluded that the plaintiff lacked authority under § 12-163a to impose and collect rent or use and occupancy payments in the place of Cadle, the tax delinquent owner that effectively abandoned the property in 2001. We conclude that a receiver appointed under § 12-163a is not statutorily authorized to impose and collect rent or use and occupancy payments under the circumstances of this case, when the property has been abandoned by the owner prior to the appointment of the receiver and there is no existing obligation for the receiver to enforce. Accordingly, we affirm the judgment of the trial court.

The record reveals the following undisputed facts and procedural history, much of which is set forth in previous decisions of this court and the Appellate Court in prior appeals considering other aspects of this long running dispute. Cadle owns the property, which is located at 51 Albany Turnpike in Canton. In October, 1995, Cadle leased the property to Gateway for a three year term from November 1, 1995, through October 31, 1998, with Gateway having an option to renew for a second

the petitioner, provided no such fees or costs shall be recovered until after payment for current taxes, electric, gas, telephone and water service and heating oil deliveries has been made and after payments of reasonable fees and costs to the receiver. Any moneys remaining thereafter shall be used to pay the delinquent real property taxes and any money remaining thereafter shall be paid to such parties as the court may direct after notice to the parties with an interest in the rent or payment for use and occupancy of the property and after a hearing. The court may order an accounting to be made at such times as it determines to be just, reasonable and necessary."

[3] The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

three year period. Gateway exercised its renewal rights, which extended the lease for a second three year term that terminated on October 31, 2001. In addition to rent payments, the lease required that Gateway pay the town all property taxes levied and assessed against the property during the lease term.[4]

In December, 1995, Mitchell, which is owned by Gateway, entered into a sublease agreement with Gateway for the rental of the property. That sublease incorporated the initial term, the renewal/second term, the rent structure, and the taxation obligations of the lease between Gateway and Cadle. Mitchell has operated an automobile dealership on the property since October, 1995, despite the expiration of the Gateway lease in 2001.

During the late 1990s, Cadle was subject to an enforcement action brought in the Superior Court by the Department of Environmental Protection (department) involving the property's contaminated soil and groundwater. On December 4, 2000, the Superior Court ordered Cadle to comply with the department's pollution abatement order and assessed a civil penalty of $2,143,000 against Cadle. See *Canton* v. *Cadle Properties of Connecticut, Inc.*, 188 Conn. App. 36, 40 n.4, 204 A.3d 62 (2019), citing *Holbrook* v. *Cadle Properties of Connecticut, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-97-0567429-S (December 4, 2000) (29 Conn. L. Rptr. 167). That order also prohibited Cadle "from conveying any interest in the . . . property . . . until all contaminated soil and . . . groundwater . . . ha[d] been fully remediated," and required Cadle to turn over to the state of Connecticut all rent payments (1) that had been received from Gateway and held in

[4] The parties acknowledged in the lease that "substantial delinquent taxes were due on the property" and that, although Gateway's current tax payments would be applied to delinquent taxes first, Gateway "was not in any way liable for delinquent taxes."

escrow pursuant to a prejudgment remedy, and (2) forthcoming from Gateway for the remainder of the extended lease term. *Holbrook* v. *Cadle Properties of Connecticut, Inc.*, supra, 29 Conn. L. Rptr. 177. After the entry of that order, "Cadle took no further steps to manage the property" and, since the termination date of the lease on October 31, 2001, has not (1) demanded any payments from Gateway under the lease, (2) demanded or requested use or occupancy payments from Gateway or any other party, (3) advertised the property for a new tenancy, (4) commenced an eviction action against Gateway or any other party, or (5) paid for "any repairs, maintenance or improvements to the property." Mitchell continues to occupy the property and operate its automobile dealership to date; Gateway has not made any rent or use and occupancy payments to Cadle, or paid any real property taxes to the town on the property.[5]

"After Cadle effectively abandoned the property . . . the town . . . filed a petition [in April, 2011], seeking the appointment of a receiver of rents pursuant to § 12-163a. The petition alleged that Cadle had failed to pay real property taxes due to the town in the amount of $362,788.59, plus interest and lien penalties, for a total amount due of $884,263.04.[6] The petition further alleged that, during all relevant periods, the property was occupied by a Volkswagen dealership owned by [the defendants], which had a legal obligation to pay rent to Cadle. The court, having found that Cadle owed the town taxes

[5] Gateway and Mitchell have paid their own independent property tax obligations to the town since that time, along with utility payments in excess of $439,000.

[6] "The petition was filed on April 26, 2011. On May 12, 2017, the town filed a report with the trial court indicating that the amount of real estate taxes due and owing for the period from June 23, 2011, the date the receiver was appointed, to April 25, 2017, including interest and lien fees, was $208,731.43." *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 188 Conn. App. 41 n.5.

. . . granted the petition to appoint the [plaintiff as] receiver [in June, 2011], and issued orders authorizing the receiver to collect all rents or use and occupancy payments due with respect to the property." (Footnote in original; footnote omitted; internal quotation marks omitted.) *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 188 Conn. App. 40–41.

Subsequently, the plaintiff served Gateway "with a notice to quit possession of the property on the ground of nonpayment of rent, [and Gateway] filed a motion to intervene in the town's action against Cadle in order to challenge the [plaintiff's] authority to take legal action against it. Shortly thereafter, the [plaintiff] filed a motion to modify the receivership order to authorize it to pursue an eviction of [Gateway] in the event of nonpayment of rent, to lease the property to a new tenant, and to use all legal process to collect back rent. Prior to acting on [Gateway's] pending motion to intervene, the court granted the [plaintiff's] motion to modify without objection.

"Subsequently, the trial court granted [Gateway's] motion to intervene in the action. [Gateway] then filed a motion to remove the [plaintiff as] receiver, asserting, inter alia, that the [plaintiff] had exceeded its authority under § 12-163a by serving it with a notice to quit and by bringing an action to collect back taxes and prior rents. The court denied the motion for removal . . . ." (Internal quotation marks omitted.) Id., 41. In a subsequent appeal, we upheld the denial of Gateway's motion to remove the plaintiff as receiver but concluded that the plaintiff's authority under § 12-163a was limited to the "use [of] legal process to collect [past due] rent"; it did not have the authority to evict a tenant from the property or to lease the property to a new tenant.[7]

[7] In a subsequent appeal challenging the plaintiff's failure to pay utility bills for dates subsequent to its appointment, the Appellate Court rejected Gateway's argument that "§ 12-163a (a) requires the receiver to pay the costs for utilities due on and after its appointment"; *Canton* v. *Cadle Properties*

Canton v. *Cadle Properties of Connecticut, Inc.*, 316 Conn. 851, 853, 114 A.3d 1191 (2015).

In August, 2016, the plaintiff filed an amended complaint, seeking rent or use and occupancy payments[8] from the defendants in the amount of $1,349,648, plus attorney's fees. After the defendants answered the amended complaint by denying that they owed rent or use and occupancy payments to Cadle at any point since 2001,[9] the parties filed separate motions for summary

of Connecticut, Inc., supra, 188 Conn. App. 43; concluding that, under "§ 12-163a, the receiver is mandated to pay only utility bills that are the obligation of the owner, not those incurred by tenants of the subject property." Id., 52.

[8] By way of background, we note that use and occupancy payments are the "reasonable rental value" of the property and are paid to a landlord by a tenant at sufferance who occupies the land in the absence of a lease agreement. *Sproviero* v. *J.M. Scott Associates, Inc.*, 108 Conn. App. 454, 463, 948 A.2d 379, cert. denied, 289 Conn. 906, 957 A.2d 873 (2008). They are most frequently associated with summary process proceedings to evict a tenant because, "after a notice to quit possession has been served, a tenant's fixed tenancy is converted into a tenancy at sufferance. . . . A tenant at sufferance is released from his obligations under a lease. . . . His only obligations are to pay the reasonable rental value of the property [that] he occupied in the form of use and occupancy payments . . . and to fulfill all statutory obligations." (Citations omitted; footnote omitted.) Id., 462–63. Although use and occupancy payments are provided by statute, they are also an obligation that is enforceable independently of a summary process action. See *A1Z7, LLC* v. *Dombek*, 188 Conn. App. 714, 716, 205 A.3d 740 (2019) (summary process was not exclusive remedy, and property owner could seek use and occupancy via unjust enrichment action); see also General Statutes § 47a-3c ("[i]n the absence of agreement, the tenant shall pay the fair rental value for the use and occupancy of the dwelling unit"); General Statutes § 47a-26b (providing for use and occupancy payments during pendency of summary process action).

[9] In their answer, the defendants alleged that, at no time since 2001 has Cadle, as the owner of the property, (1) managed, repaired or remediated the property, or (2) demanded rent or use and occupancy payments from the defendants. The defendants then raised numerous special defenses and a counterclaim that Gateway had suffered damages by making some limited rent and use and occupancy payments to the plaintiff under threat of eviction because the plaintiff (1) had exceeded its authority under § 12-163a by threatening them with eviction, and (2) had failed to follow the plain language of the statute in distributing some proceeds that it had collected to itself first and then to the town for the back taxes.

judgment. The defendants contended that the plaintiff, as a receiver of rents appointed under § 12-163a, has no authority to seek rent or use and occupancy payments with respect to an abandoned property. The plaintiff argued that, to the contrary, despite the expiration of the lease with Cadle, the defendants remained in possession as "tenants" of the property, either at will or at sufferance, and the plaintiff was therefore entitled to seek use and occupancy payments.

The trial court granted the defendants' motion for summary judgment and denied the plaintiff's motion. The trial court agreed with the defendants' argument that our decision in *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 316 Conn. 851, which held that a receiver of rents under § 12-163a was not authorized to evict a tenant based on nonpayment of rent, placed "very strict limits on what a receiver of rents appointed pursuant to that statute may do to collect rents." The trial court concluded that "Cadle's conduct in abandoning the property—thereby not pursuing any of its rights as against these defendants—inadvertently allowed these defendants to live on the property without payment. Under these unusual circumstances, there is no 'rent' for the receiver to collect." The trial court emphasized that the plaintiff was bound by "the consequences of Cadle's abandonment of the property in 2001," insofar as the defendants' lease with Cadle lacked "holdover provisions, which, after the lease expired, would (1) have defined the defendants' status on the property, and (2) have set forth the tenants' payment obligations while in this status." Accordingly, the trial court rendered judgment for the defendants as to the entire amended complaint. This appeal followed.

On appeal, the plaintiff contends that the trial court incorrectly concluded that § 12-163a does not permit a receiver of rents to collect rent or use and occupancy payments if the tax delinquent property owner is absent

and not pursuing those payments from the occupant. The plaintiff relies on the plain language of § 12-163a providing that the receiver collects such payments "in place of the owner" as evincing "the legislature's clear intent to allow receivers to step into the shoes of an otherwise absent property owner and [to] collect rent and/or use and occupancy payments to recoup the owner's delinquent tax obligation." The plaintiff argues that a construction to the contrary—requiring the presence or participation of the owner—creates an "absurd or unworkable result" by "permit[ting] a delinquent tenant or occupant to frustrate a town's ability to recoup delinquent taxes" and by placing "the receiver . . . at the mercy of the property owner whose failure to diligently pay taxes is the basis for granting the receiver the power to collect in the first place." (Internal quotation marks omitted.) Citing the Appellate Court's recent decision in *A1Z7, LLC* v. *Dombek*, 188 Conn. App. 714, 205 A.3d 740 (2019), the plaintiff emphasizes that it stands in the shoes of Cadle, which, as the owner of the property, remains entitled to use and occupancy payments, even outside the scope of a summary process action, because Mitchell's occupancy constitutes a tenancy at sufferance. Finally, quoting *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 316 Conn. 862, the plaintiff contends that the legislative history of § 12-163a supports its construction of the statute, in furtherance of the legislature's intent to " 'provide a less drastic, expensive and time-consuming mechanism than foreclosure to recover delinquent taxes, as it already had afforded to utility companies to collect delinquent utility payments' " via the enactment of General Statutes § 16-262f.[10]

[10] General Statutes § 16-262f provides in relevant part: "(a) (1) Upon default of the owner, agent, lessor or manager of a residential dwelling who is billed directly by an electric distribution, gas or telephone company or by a municipal utility for electric or gas utility service furnished to such building, such company or municipal utility or electric supplier providing electric generation services may petition the Superior Court or a judge thereof, for

In response, the defendants urge a strict construction of § 12-163a and contend that the trial court properly construed its plain language in holding that a receiver of rents appointed pursuant to that statute lacks the authority to establish rent or use and occupancy payments. In the event we deem § 12-163a ambiguous, the defendants also rely heavily on the legislative history of the statute, along with authority limiting rent receivers' authority under § 16-262f in unpaid utility cases; see, e.g., *Connecticut Light & Power Co.* v. *DaSilva*, 231 Conn. 441, 446, 650 A.2d 551 (1994); and contend that, under the statute, "the receiver is not the owner, and, in the absence of rent imposed by the owner, the receiver cannot establish rent or payments for a property that it does not own." The defendants further argue that the receiver's authority under § 12-163a to collect due and owing rent, as clarified in *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 316 Conn. 859–60, is not implicated in the present case because Cadle, as the owner of the property, never established rent or use and occupancy payments, with the plaintiff lacking the authority to do so "retroactively for the last nineteen years."[11] Comparing § 12-163a with the expansive pow-

appointment of a receiver of the rents or payments for use and occupancy or common expenses, as defined in section 47-202, for any dwelling for which the owner, agent, lessor or manager is in default. . . .

* * *

"(3) The receiver appointed by the court shall collect all rents or payments for use and occupancy or common expenses forthcoming from or paid on behalf of the occupants or residents of the building or facility in question in place of the owner, agent, lessor, manager or administrator. . . . "

[11] To this end, the defendants argue that, as a factual matter, there simply is no established landlord-tenant relationship between the defendants and Cadle after 2001 for which the plaintiff can assert rights to collect use and occupancy payments, given that "Cadle has not undertaken any responsibilities of landlord [or] made any effort to establish such a relationship with any of the defendants since 2001," insofar as it "clearly and undisputedly abandoned the property," including by not making any "efforts at remediating the environmental contamination" or paying its property taxes to the town. The defendants contend that mere occupation is not sufficient to establish a tenancy for which a receiver can charge rent.

ers provided by the recently enacted blight receivership statute, General Statutes § 8-169aa,[12] the defendants posit that § 12-163a is simply inapplicable to "the situation of a landlord that has abandoned property and has chosen not to charge for use and occupancy," with the plaintiff, as receiver, "lack[ing] standing to assert Cadle's potential right of action that has never been brought by the owner, much less adjudicated." We agree with the defendants and conclude that § 12-163a does not authorize the plaintiff to collect use and occupancy payments under the circumstances of this case.

"The scope of a receiver's authority under § 12-163a is a question of statutory construction subject to plenary review and well established principles." *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 316 Conn. 856. It is well settled that we follow the plain meaning rule pursuant to General Statutes § 1-2z in construing statutes "to ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 45, 213 A.3d 1110 (2019); see id., 45–46 (stating plain meaning rule). In construing § 12-163a, "we do not write on a clean slate, but are bound by our previous judicial interpretations of this language and the purpose of the statute." (Internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 527, 93 A.3d 1142 (2014); see, e.g., *Callaghan* v. *Car Parts International, LLC*, 329 Conn. 564, 571, 188 A.3d 691 (2018) ("because we have previously construed [General Statutes] § 31-293 (a), we must consider its meaning in light of our prior cases interpreting the statute").

We begin with the text of § 12-163a, subsection (a) of which "sets forth the circumstances under which a municipality may seek the appointment of a receiver

[12] See footnote 17 of this opinion for the relevant text of § 8-169aa.

of rents and the authority vested in the receiver upon such appointment." *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 316 Conn. 856. Section 12-163a (a) provides in relevant part: "Any municipality may petition the Superior Court or a judge thereof, for *appointment of a receiver of the rents or payments for use and occupancy* for any property for which the owner, agent, lessor or manager is delinquent in the payment of real property taxes. . . . *The receiver appointed by the court shall collect all rents or payments for use and occupancy forthcoming from the occupants of the building in question in place of the owner, agent, lessor or manager.* . . ." (Emphasis added.) Both parties' readings of § 12-163a (a) in context are reasonable, rendering it ambiguous. See, e.g., *Sena* v. *American Medical Response of Connecticut, Inc.*, supra, 333 Conn. 47–48. The statute authorizes the collection of "all" rents or use and occupancy payments "in place of the *owner*, *agent*, *lessor or manager*" but is silent as to whether the receiver may establish those use and occupancy payments in the first instance, or whether such payments are limited to those that are the product of an existing landlord-tenant relationship.[13] The broader construction urged by the plaintiff is reasonable given the expansive word "all," whereas the defendants' construction, relying on the words "owner, agent, lessor, or manager" to suggest inapplicability for abandoned properties, is similarly reasonable. This is particularly so, insofar as the word "forthcoming" suggests an existing obligation as between the property

[13] We acknowledge the plaintiff's reliance on the Appellate Court's recent decision in *A1Z7, LLC* v. *Dombek*, supra, 188 Conn. App. 714, for the proposition that Cadle, as the owner of the land, remains entitled to use and occupancy payments, even outside the scope of a summary process action, because Mitchell's occupancy constitutes a tenancy at sufferance. See footnote 9 of this opinion. This argument does not, however, squarely speak to the scope of the receiver's authority to seek use and occupancy payments when the owner has abandoned the property.

owner and the tenants. See *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 857–62 (deeming § 12-163a ambiguous with respect to whether it authorizes receiver to collect back rents or evict tenants for nonpayment of rent). Thus, we turn to the legislative history and other extratextual sources to aid our construction of § 12-163a.

As we move beyond the text of § 12-163a, we next turn to our interpretation of that statute in *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 316 Conn. 851, in which we considered two issues under the statute, namely, (1) whether a "receiver may . . . collect back rent due," as well as "rent that is due after the receiver's appointment"; id., 857; and (2) whether the statute "confers additional authority on the receiver to evict a defaulting tenant and to lease the premises to a new tenant." Id., 860. Beginning with the scope of the receiver's authority as to back rent, we deemed the statute ambiguous on this point, observing that, although it authorized the collection of "all rents," it also used the word "forthcoming," which suggested future rents. See id., 857. Nevertheless, we concluded that "the more logical and compelling construction is the broader reading of the statute" because "[t]he words 'all' and 'rents' (plural), individually and collectively, support the broadest possible reading" insofar as the word " '[a]ll' does not modify 'occupants.' Therefore, we [could not] reasonably construe it to mean the collection of rent from every occupant. Rather, the term all rents suggests multiple kinds or sources (type or temporal) of rent. The fact that the receiver is to collect all rents 'in place of the owner,' who undoubtedly would be entitled to collect past and presently due rent, lends further support to the broader construction." Id., 857–58. We also relied on legislative history, specifically, the fact that "the sponsor of the bill enacted as § 12-163a referred to the bill as applying to back rent." Id.,

859, citing Conn. Joint Standing Committee Hearings, Planning and Development, Pt. 1, 1995 Sess., p. 50, remarks of Representative Robert D. Godfrey; see also Public Acts 1995, No. 95-353, § 1. "Finally, we observe[d] that § 12-163a (a) authorizes the receiver to collect rents 'in place of the owner,' without indicating or limiting the means by which the receiver may do so. As such, it seems reasonable to infer that the statute authorizes the receiver to use the legal means that otherwise would have been available to the owner to collect such unpaid obligations." *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 859; see id., 859–60 (harmonizing order of priority of payment set forth in § 12-163a with receiver's authority to collect back rent).

We next considered "whether § 12-163a confers additional authority on the receiver to evict a defaulting tenant and to lease the premises to a new tenant." Id., 860. In concluding that § 12-163a did not confer that authority, we observed that a "review of the statute reveals that the only authority expressly conferred on the receiver is to undertake the following actions: (1) collect funds; and (2) make payments. There is no authority to evict a tenant or to enter into a new lease. Although § 12-163a (a) authorizes the receiver to collect use and occupancy payments, which arise after a notice to quit has been served on a tenant . . . the statute does not authorize the receiver to cause such a notice to be served (or reference chapter 830 of the General Statutes addressing landlord remedies), to take possession of the property, or to undertake any other action in the owner's stead with respect to the property except collecting payment from the building's occupants." (Citation omitted; footnote omitted.) Id., 860–61. We further observed that "the authority conferred under § 12-163a is quite narrow in comparison to some other receivership statutes."[14] Id., 861; see *Connecticut Light*

[14] As a practical matter, we observed that, "because there is no indication in § 12-163a that the legislature has conferred the extraordinary authority

& Power Co. v. *DaSilva*, supra, 231 Conn. 446 (noting, with respect to § 16-262f, on which § 12-163a is modeled, that "wide-ranging equitable and discretionary principles that govern rent receiverships in ordinary mortgage foreclosure proceedings" do not apply); see also footnote 14 of this opinion. Finally, we determined that the legislative history did not support an interpretation of § 12-163a authorizing the receiver to evict a defaulting tenant, observing that "history makes clear that the legislature intended to provide a less drastic, expensive and time-consuming mechanism than foreclosure to recover delinquent taxes, as it already had afforded to utility companies to collect delinquent utility payments. See Conn. Joint Standing Committee Hearings, supra, pp. 50–51, 53, remarks of Representative Godfrey; id., pp. 124–26, remarks of Eric Gottschalk, corporation counsel for the city of Danbury. The only authority referenced in that history vis-à-vis the property is the collection of rent. See id., pp. 50–51, 124–26." *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 316 Conn. 862.

Most significant, we relied on our conclusion "that the receiver is authorized to use legal process to collect

on the receiver to enter into a contract with a new tenant that would bind the owner of the property, it would make no sense to construe the reference to use and occupancy payments as implicitly authorizing the receiver to evict the tenant. It is only when both actions may be taken that the receiver would be able to collect payments. That authority must rest with the owner, who has every incentive in the usual case to evict and replace a defaulting tenant in order to remedy the deficiency and regain access to the rental income. *Therefore, the authority to collect use and occupancy payments, reasonably construed, simply ensures that, if a lease has expired or an owner has served a notice to quit on a tenant, either before or after the receiver's appointment, the receiver may collect payments for use and occupancy, just as it may collect rent payments.* Thus, the text of the statute weighs heavily against a construction permitting a receiver appointed under § 12-163a to evict a defaulting tenant and to lease the premises to a new tenant." (Emphasis added; footnote omitted.) *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 316 Conn. 861–62.

past due rent" in rejecting "the town's contention that, in the absence of authority to replace a defaulting tenant with one that will provide a consistent revenue stream to discharge the tax obligations, § 12-163a would be a toothless lion, able to roar, but not bite." (Internal quotation marks omitted.) Id., 862–63. We believed that this argument "erroneously assumes that the *property owner* generally lacks an incentive to regain the income produced from its rental property. *It is doubtful that the legislature had in mind the unusual circumstances of abandoned rental property at issue in this case.* To the extent that the town believes that greater authority is essential to vindicating its interests, especially in cases like the present one, in which the owner has abandoned the property and purported environmental contamination makes foreclosure of the property an impractical alternative . . . its recourse lies with the legislature." (Citations omitted; emphasis added.) Id., 863. It is evident then, that our decision in *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 316 Conn. 851, which relies on the presence and participation of the property owner to establish that the receiver's right to collect back rent is meaningful—despite the lack of an eviction remedy—strongly supports a conclusion that the receiver appointed under § 12-163a cannot establish use and occupancy payments in the first instance with respect to a property that has been abandoned.

Indeed, the legislative history of § 12-163a, beyond that discussed in *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 316 Conn. 851, provides even more compelling evidence that the legislature did not envision the statute applying to abandoned property; instead, it was viewed as a remedy that would avert the abandonment of properties. The proceedings before the Planning and Development Committee are illuminating, given that it "is well established that testimony before

legislative committees may be considered in determining the particular problem or issue that the legislature sought to address by legislation." (Internal quotation marks omitted.) *Republican Party of Connecticut* v. *Merrill*, 307 Conn. 470, 498, 55 A.3d 251 (2012). In an exchange with Representative Lawrence G. Miller about "any negative tax" that would be created should the property owner "[decide] to take a walk" subsequent to the appointment of the receiver, Representative Godfrey, the sponsor of the bill, specifically stated that he did not "foresee a landlord taking a walk." Conn. Joint Standing Committee Hearings, supra, p. 52; see *Connecticut Assn. of Not-for-Profit Providers for the Aging* v. *Dept. of Social Services*, 244 Conn. 378, 395 n.22, 709 A.2d 1116 (1998) ("[w]e pay particular attention to statements of the legislators who sponsored the bill" (internal quotation marks omitted)). Responding to a question from Representative Marie L. Kirkley-Bey about whether the statutory receivership process would increase the abandonment of buildings in cities, Representative Godfrey stated that the statutory receivership proceeding would help avert the abandonment of buildings because "currently the only tool that a municipality has to go after back taxes is to foreclose on the property, which can be much more expensive for all parties involved and literally takes the property away from the landlord. This is something in between. It's a lesser step. It's a finer tool that gives the municipalities the ability to step in and take over the rent, to take over the property in lieu of taking the property and taking the ownership."[15] Conn. Joint Standing Committee Hearings, supra, p. 51.

[15] Another question illuminating the limited role of the receiver and the anticipated presence of the property owner came from Representative Janet K. Lockton, who asked: "If you're collecting the rent instead of the owner, say something goes wrong in the building and you, for all intents and purposes, would be the owner—would you be the owner responsible for a broken pipe if you were collecting the rent?" Conn. Joint Standing Committee Hearings, supra, p. 125. Responding to that question, Attorney Gottschalk, corporation counsel for Danbury, stated that the "statute provides that the

Similarly, in responding to a question from Representative Janet K. Lockton, Attorney Gottschalk stated that he did not believe that the statutory receivership process would increase the abandonment of buildings because it is "a mechanism that you would use earlier in the process than you would use a foreclosure where you're divesting the property owner, when things haven't gotten so out of hand that there really is no solution short of taking that property. These are cases where something could be done to fix the problem. And if we pick them up earlier than we're picking them up now with foreclosures after eight and ten years of delinquency, then perhaps we can begin to turn this around. If all you have in your quiver are foreclosures and [nonjudicial] tax sales, then you're beyond the point where you're worried about '[w]hat's going to happen to those poor people . . . [w]hat's going to happen to the properties?' " Id., p. 127; see id., pp. 52–53, remarks of Representative Godfrey (suggesting that abandonment by landlord would not "muddy the waters in any way" because receivership served as "a conventional weapon instead of a [thermonuclear] device" by averting need for tax foreclosure proceedings that could lead to abandonment). This legislative history strongly suggests, then, that the legislature did not intend for § 12-163a to apply to abandoned property or to autho-

receiver is responsible only for collection of the rent and payment of the bills in accordance with a ranking. The other responsibilities that are attendant to home ownership remain with the landlord." Id. Acknowledging that landlords generally rely on the rent to fund the maintenance of the property and to pay for utilities, Attorney Gottschalk emphasized that "one of the most effective elements of this program is that by virtue of its surety and its certainty and its speed a landlord doesn't indulge in the process of waiting to see whether something else will happen. A landlord comes in and makes an arrangement and pays the delinquency pursuant to some kind of schedule. That is usually the way it happens. And we attempt to work with every property owner that has a delinquency." Id., p. 126. He emphasized that, "if a court order is established appointing a receiver, the receiver will collect the rents and the property owner will be left to deal with all the other issues attendant to home ownership or property ownership." Id.

rize receivers appointed pursuant to that statute to impose rent or use and occupancy payments in the place of a property owner who has abandoned the property.

Finally, as we stated in *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 316 Conn. 858–59, the legislature is able to give receivers broader powers when it desires to do so. In addition to the statutes discussed in that case,[16] the legislature recently enacted § 8-169aa,[17]

[16] "General Statutes § 42-110f (receiver shall have power to take property into his possession and to sell, convey and assign same); General Statutes § 52-505 (receiver shall be vested with property to manage and use for benefit and support of members of certain associations, communities or corporations); General Statutes § 52-509 (receiver to hold business and all property, real and personal, belonging to partnership) . . . ." (Citation omitted; footnote omitted.) *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 316 Conn. 861.

[17] General Statutes § 8-169aa provides in relevant part: "(b) (1) In any municipality with a population of thirty-five thousand or more, a party in interest may file a petition for the appointment of a receiver to take possession and undertake rehabilitation of a building within such municipality, which petition shall be filed in the superior court for the judicial district in which such building is located. The proceeding on the petition shall constitute an action in rem.

* * *

"(d) (1) A receiver appointed pursuant to this section shall have all powers necessary and appropriate, as approved by the court, for the efficient operation, management and improvement of the abandoned property in order to bring the same into compliance with municipal code requirements and fulfill all duties described in this subsection. *Subject to approval of the court, the powers and duties shall include, but not be limited to*:

"(A) *Taking possession and control of the abandoned property and any personal property of the owner used with respect to the abandoned property*;

"(B) Collecting outstanding accounts receivable;

"(C) *Pursuing all claims or causes of action of the owner with respect to the property described in subparagraph (A) of this subdivision*;

"(D) Contracting for the repair and maintenance of the abandoned property, provided the receiver shall make a reasonable effort to solicit three bids for any contract valued at more than twenty-five thousand dollars unless the contractor or developer provides or obtains financing for the receivership, and each of which contract shall be appropriately documented and included in the reports and accounting required to be submitted or filed by the receiver pursuant to this section;

* * *

"(H) Entering into a rental contract or lease for a period of time not to exceed twelve months, provided the court shall approve any such contract or lease;

which allows for the appointment of receivers to manage and undertake the rehabilitation of abandoned buildings in an attempt to combat urban blight—the propagation of which was a concern expressly raised by legislators during hearings on the bill that was enacted as § 12-163a. Unlike § 12-163a, though, § 8-169aa expressly gives receivers appointed pursuant thereto a vast array of powers, including "[t]aking possession and control of the abandoned property" and "[p]ursuing all claims or causes of action of the owner with respect to the" abandoned property. General Statutes § 8-169aa (d) (1) (A) and (C). That statute specifically envisions abandoned real property, like the land at issue in this case, insofar as it provides for receivership

* * *

"(N) Exercising any right a property owner would have to improve, maintain and otherwise manage such property, including to the extent necessary to carry out the purposes of this section.

* * *

"(e) (1) The receiver appointed pursuant to subdivision (2) of subsection (c) of this section shall be deemed to have powers and authority equivalent to ownership and legal control of the abandoned property for the purposes of filing plans with any public agency or board, seeking or obtaining construction permits or other approvals and submitting applications for financing or other assistance to public or private entities.

"(2) Notwithstanding the provisions of subdivision (1) of this subsection, nothing in this section shall be construed to relieve the owner of a building that has been determined to be an abandoned property pursuant to subdivision (2) of subsection (c) of this section of any civil or criminal liability or of any obligation to pay any tax, municipal lien or charge, mortgage, private lien or other fee or charge incurred before or after the appointment of the receiver, and no such liability shall transfer to the receiver.

"(3) *Notwithstanding any provision of the general statutes, the receiver shall not be liable for any environmental damage to a building* that has been determined to be an abandoned property pursuant to subdivision (2) of subsection (c) of this section, which environmental damage existed prior to such determination and the appointment of such receiver. The owner of the building shall be held liable for the environmental damage. . . ." (Emphasis added.) See also General Statutes § 8-169aa (a) (13) (defining "receiver" as "any person or entity that takes possession of a building pursuant to the provisions of this section for the purpose of rehabilitating such building or otherwise disposing of such building"); General Statutes § 8-169aa (c) (2) (establishing elements for proof of blight and abandonment).

without saddling the receiver with the owner's obligation to remediate any environmental contamination. See General Statutes § 8-169aa (e) (3). Section 8-169aa demonstrates, therefore, that the legislature, as the governmental body with primary responsibility for formulating public policy, is capable of addressing the situation presented by the present case. See, e.g., *Shannon* v. *Commissioner of Housing*, 322 Conn. 191, 200 n.14, 140 A.3d 903 (2016); *Commissioner of Public Safety* v. *Freedom of Information Commission*, supra, 312 Conn. 550–51 and n.35. Although the town's desire to use a receiver of rents to recoup unpaid property taxes from an apparently successful commercial property is certainly understandable, the narrow remedy provided by § 12-163a simply does not extend to the situation presented in this case. As we stated previously, "[t]o the extent that the town believes that greater authority is essential to vindicating its interests, especially in cases like the present one, in which the owner has abandoned the property and purported environmental contamination makes foreclosure of the property an impractical alternative . . . its recourse lies with the legislature." (Citations omitted.) *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 863. The trial court, therefore, properly granted the defendants' motion for summary judgment.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* ANDRE DAWSON
(SC 20361)

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

Syllabus

Convicted of criminal possession of a pistol or revolver and criminal trespass in the third degree, the defendant appealed to the Appellate Court, claiming, inter alia, that there was insufficient evidence to support his

conviction of criminal possession of a pistol or revolver. Police officers had been patrolling a housing complex when they entered a courtyard and saw six individuals, including the defendant. While two officers spoke with the defendant and three others, S, J and E, who were seated at a picnic table near a corner formed by cement walls, a third officer, L, stepped onto the wall behind the defendant and immediately saw in plain view a gun lying in the corner by some bushes. S and J were closest to the gun, and the defendant was approximately four to five feet away from it. A few days later, the defendant, S, J and E each voluntarily provided the police with a DNA sample, and, thereafter, the police used swabs to collect DNA from the gun and ammunition that was removed from the gun. The swabs and the DNA samples were delivered to the state forensics laboratory, where R, a forensic science examiner, generated a partial DNA profile from a small, partially degraded touch DNA sample extracted from the swabs and compared it with the DNA samples provided by the defendant, S, J and E. R's analysis produced scientifically viable and accurate results that eliminated S, J and E as possible contributors to the DNA profile but could not eliminate the defendant as a contributor. On appeal to the Appellate Court, the defendant specifically contended that there was insufficient evidence of his knowledge of the gun and no evidence to prove his dominion or control over it. The Appellate Court affirmed the judgment of conviction, concluding, inter alia, that there was sufficient circumstantial evidence from which the jury reasonably could have inferred that the defendant was in possession of the gun when he entered the courtyard, that he put it near the bushes when the police arrived so that it would not be found on his person, and that he intended to retrieve it when the police left the courtyard. On the granting of certification, the defendant appealed to this court. *Held* that the Appellate Court incorrectly concluded that the state had adduced sufficient evidence at trial to support the defendant's conviction of criminal possession of a pistol or revolver: the fact that the gun was in plain view and appeared to have been placed there just before the police arrived did not support a reasonable inference that the defendant placed it there or had knowledge of it and the intent to exercise dominion or control over it, it was not reasonable to infer from the evidence that it was the defendant rather than one of the other individuals seated at the picnic table who, when alerted to the presence of the police, stashed the gun nearby to avoid being found with it, and mere proximity to contraband, in the absence of other incriminating conduct, statements, or circumstances, is insufficient to support a finding of constructive possession, and it was undisputed that the defendant did not display any incriminating conduct; moreover, the DNA evidence presented by the state, standing alone or in combination with other evidence, was insufficient to support the defendant's conviction insofar as there were too many unknowns for the jury to have found beyond a reasonable doubt that the defendant

had even touched the gun, much less that he was aware of its presence near where he was seated or that he intended to exercise dominion or control over it, R having indicated during her testimony that she was unable to determine how or when the defendant's DNA was deposited on the gun, that the DNA sample established that at least one other person's DNA was on the gun, that, although S, J and E had been excluded as contributors to the DNA sample, that did not mean that their DNA was not on the gun, but, rather, that it was not detected, that two individuals who were present in the courtyard were not DNA tested, and that she could not definitively say that the DNA profile found on the gun was that of the defendant, only that he could not be excluded as a contributor.

(*One justice dissenting*)

Argued February 17—officially released August 13, 2021*

Procedural History

Substitute information charging the defendant with the crimes of criminal possession of a pistol or revolver and criminal trespass in the third degree, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, and tried to the jury before *Hernandez*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Lavine*, *Bright* and *Harper*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Reversed in part*; *judgment directed.*

Erica A. Barber, assigned counsel, for the appellant (defendant).

Nancy L. Walker, assistant state's attorney, with whom, on the brief, were *Paul J. Ferencek*, state's attorney, and *Nadia Prinz*, former assistant state's attorney, for the appellee (state).

* August 13, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

KELLER, J. The defendant, Andre Dawson, appeals[1] from the judgment of the Appellate Court affirming his conviction, rendered following a jury trial, of criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c.[2] The defendant claims that the Appellate Court incorrectly concluded that the state had adduced sufficient evidence at trial to support his conviction. We agree and, accordingly, reverse in part the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following relevant facts and procedural history. "At approximately 9:35 p.m. on August 10, 2014, Police Officers Kyle Lipeika, Stephen Cowf, and Michael Pugliese (officers) were patrolling Washington Village, a housing complex in Norwalk. The officers were members of the Street Crimes Task Force within the Special Services Division (task force) of the Norwalk Police Department (department).[3] They had entered Washington Village

[1] This court granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that the evidence was sufficient to support the defendant's conviction of criminal possession of a pistol or revolver?" *State* v. *Dawson*, 333 Conn. 906, 215 A.3d 731 (2019).

[2] Although § 53a-217c has been the subject of certain technical amendments since 2014; see, e.g., Public Acts 2016, No. 16-34, §16; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of § 53a-217c.

The defendant was also convicted of criminal trespass in the third degree in violation of General Statutes § 53a-109 (a) (1). He did not challenge that conviction on appeal to the Appellate Court; nor does he do so here.

[3] "The task force's objective was to deter street level crime by providing 'high visibility police patrol in high crime areas throughout' . . . Norwalk. The department had an agreement with the Norwalk Housing Authority to deter trespassing in housing complexes. The task force undertook foot patrols in housing complexes to put the residents at ease, to let them know that there was a police presence and to fulfill the department's agreement with the housing authority. According to Lipeika, the majority of problems within housing complexes were created by people who did not live there and were trespassing." *State* v. *Dawson*, 118 Conn. App. 532, 536 n.3, 205 A.3d 662 (2019).

from Day Street and walked through an alley that led to a courtyard between buildings 104 and 304. Lipeika was shining a flashlight in order for people in the courtyard to see the officers approaching. Lipeika and Cowf were wearing uniforms with yellow letters identifying them[selves] as police. When the officers entered the courtyard, they saw benches, a picnic table, a cement retaining wall,[4] bushes, a playground, and six individuals.[5]

"The defendant, Kason Sumpter, and Altolane Jackson were seated at the picnic table near a corner formed by the cement walls of a planter. The defendant was seated with his back to the cement wall without bushes. . . . Brian Elmore first walked away from the officers but turned back and sat at the picnic table.[6] To establish rapport with the individuals sitting at the table, the officers engaged them in conversation. As was their practice, the officers scanned the area for firearms and narcotics that the individuals may have tried to con-

[4] "Lipeika described a 'cement retaining wall with bushes in . . . the retaining wall area.' Photographs of the courtyard were placed into evidence and published to the jury. The photographs depict a courtyard surrounded by large concrete planters. One of the planters consists of two arms of a right angle bounding two sides of the courtyard. A long bench is set next to one arm of the planter, and a picnic table is situated close to the corner of the angle. A shrubbery hedge is planted in the arm of the planter behind the bench and one side of the picnic table." *State* v. *Dawson*, 188 Conn. App. 532, 537 n.4, 215 A.3d 731 (2019).

[5] "The individuals in the courtyard were the defendant, Kason Sumpter, Altolane Jackson, Brian Elmore, Jefferson Sumpter, and Janet Cruz. Lipeika's subsequent investigation disclosed that none of the individuals was a resident of Washington Village." *State* v. *Dawson*, 188 Conn. App. 532, 537 n.5, 215 A.3d 731 (2019).

[6] "Jefferson Sumpter and Janet Cruz were [seated on a] bench in a different part of the courtyard. According to Lipeika, they appeared to be highly intoxicated and did not approach the picnic table." (Internal quotation marks omitted.) *State* v. *Dawson*, 188 Conn. App. 532, 537 n.6, 215 A.3d 731 (2019).

ceal.[7] As Cowf and Pugliese conversed with the individuals at the picnic table, Lipeika stepped onto the wall behind the defendant and immediately saw in plain view a gun lying in the corner by the bushes.

"According to Lipeika, the gun looked like it had been placed there just before he discovered it because the gun was resting on top of leaves, was not covered with dirt or debris, except a twig, and appeared to be free of rust and dust. Jackson and Kason Sumpter were seated closest to the gun, two or three feet away from it. The defendant was seated four to five feet away from the gun.[8] None of the officers who testified [at trial] had seen the defendant touch the gun.

"When Lipeika discovered the gun, he drew his weapon and ordered the six individuals in the courtyard to show their hands. Pugliese and Cowf detained the individuals and moved them away from the gun. Lipeika radioed for more officers and guarded the gun until the scene was secured. The additional officers photographed the scene and the gun. Then, Lipeika put on a new pair of rubber gloves and seized the loaded gun in accordance with department procedures. He removed the ammunition from the gun, a revolver with a two

[7] "Lipeika testified on the basis of his training and experience that, when armed subjects are approached by police, they 'usually try to discard . . . or stash' a firearm so that it is not detected on their person. Depending on the circumstances, a subject usually places the gun close enough to access it." *State* v. *Dawson*, 188 Conn. App. 532, 537 n.7, 215 A.3d 731 (2019).

[8] At trial, Officer Lipeika testified to the seating arrangement of the individuals at the picnic table and the approximate distance each individual was from the location where the gun was found. Kason Sumpter was sitting on the side of the picnic table running parallel to the retaining wall bordered by the bushes, with the gun to his right, approximately two to three feet away. Jackson was sitting on the other side of the picnic table, which ran parallel to the retaining wall without bushes. The gun was to his left, approximately two to three feet away. The defendant was seated directly next to Jackson, approximately four to five feet from the gun. It is unclear from the record where Elmore was sitting before the officers arrived, and he walked away from the picnic table.

inch barrel, and took the ammunition and the gun to the police station.

"Days later, at Lipeika's request, the defendant, Kason Sumpter, Jackson, and Elmore went to the police station; each of them voluntarily provided a [DNA] sample . . . . None of them claimed the gun was his. The defendant also provided a written statement in which he stated that he 'walked through Washington Village to Water Street, stopped to talk when officers came through and [they] found a handgun in the bushes in the area [where he] was talking.'

"Jackson, too, provided a written statement and testified at trial that he was in the Washington Village courtyard when the defendant walked through and stopped to talk. He also stated that, ten minutes later, someone said 'police,' and everyone looked up. Jackson did not see the defendant with a gun, and he did not see the defendant walk toward the bushes where the gun was found. Jackson confirmed that the gun did not belong to him.

"On August 28, 2014, Arthur Weisgerber, a lieutenant in the department, tested the gun for latent fingerprints but did not find any suitable for identification. Thereafter, he used swabs to collect DNA from the gun and the ammunition that Lipeika had removed from the gun. He placed the swabs in an envelope. In addition, Weisgerber fired the gun and determined that it was operable. The swabs and the DNA samples provided by the defendant, Kason Sumpter, Jackson, and Elmore were delivered to the state forensics laboratory (laboratory), where Melanie Russell, a forensic science examiner, conducted DNA analyses of the materials. Russell provided expert testimony at trial.

"The laboratory has procedures to protect DNA samples and evidence from contamination. It also prescribes how laboratory analysis of DNA is to be conducted.

The DNA that Weisgerber swabbed from the gun and ammunition is touch DNA because it was deposited on the gun or ammunition when someone [either] touched them directly, [or his DNA became present on them] through a secondary transfer or . . . aerosolization, that is, coughing or sneezing. Touch DNA comes from skin cells left behind when a person touches an object. The quantity and quality of touch DNA vary according to the character of the object's surface, i.e., rough or smooth, and the length of time the DNA has been on the object. DNA degrades with time due to environmental factors, such as heat and moisture. Degradation makes it difficult to amplify the DNA and, in some cases, even to detect DNA.

"The quantity of DNA on the swabs was small, and the DNA was partially degraded. Nonetheless, Russell was able to extract a DNA solution of 7.16 picograms per microliter from the swabs. Although she was able to amplify a sample of about seventy picograms of DNA, 1000 picograms is the ideal amount for DNA analysis. A low yield sample will provide a DNA profile but usually not a full profile. Russell was able to generate a partial profile and obtained results at seven out of fifteen loci tested. The profile Russell obtained from the gun and ammunition consisted of a mixture of DNA, signifying the presence of more than one person's DNA. She was able to compare the DNA from the swabs with the samples provided by the defendant, Kason Sumpter, Elmore and Jackson in a scientifically accurate way and to obtain scientifically viable and accurate results. Her analysis eliminated Kason Sumpter, Elmore and Jackson as possible contributors to the DNA profile she developed from the swabs. The defendant, however, could not be eliminated as a contributor. The expected frequency of individuals who could not be eliminated as a contributor to the DNA profile is approximately one in 1.5 million in the African-American population,

one in 3.5 million in the Caucasian population, and one in 930,000 in the Hispanic population.[9] The defendant is African-American.

"A warrant was issued for the defendant's arrest on September 25, 2014. . . . Subsequently, the state filed an amended long form information charging the defendant with criminal possession of a pistol or revolver in violation of § 53a-217c and criminal trespass in violation of General Statutes § 53a-109 (a) (1). . . . [Following a trial] [t]he jury found the defendant guilty of both charges." (Citation omitted; footnote added; footnotes in original; footnote omitted.) *State* v. *Dawson*, 188 Conn. App. 532, 536–41, 205 A.3d 662 (2019). The court sentenced the defendant to a term of ten years of imprisonment, two years of which were a mandatory minimum, on the conviction of criminal possession of a pistol or revolver, and a term of three months of imprisonment on the conviction of criminal trespass in the third degree, with the sentences to run consecutively, for a total effective sentence of ten years and three months of imprisonment. Id., 541. Thereafter, the defendant appealed to the Appellate Court.

On appeal to the Appellate Court, the defendant claimed, inter alia, that "there was insufficient evidence to convict him of criminal possession of a pistol or revolver because there was insufficient evidence of his knowledge of the gun and no evidence to prove his dominion or control over it." Id. The Appellate Court rejected the defendant's claim, concluding that "there was sufficient circumstantial evidence [from] which the jury reasonably could have inferred that the defendant was in possession of the gun when he entered the courtyard, that he put it near the bushes when the police

[9] "Russell's work was reviewed for accuracy by a technical reviewer at the laboratory." *State* v. *Dawson*, 188 Conn. App. 532, 540 n.8, 215 A.3d 731 (2019).

arrived so that it would not be found on his person, and that he intended to retrieve the gun when the police left." Id., 555–56. Specifically, the court reasoned that, because "the gun was found in plain view and appeared to have been placed near the bushes recently," the jury reasonably could have "inferred that the person who put the gun near the bushes did not abandon it and leave the courtyard but, instead, was one of the six individuals in the courtyard when the officers arrived." Id., 546. The court further reasoned that the jury reasonably could have found, on the basis of Lipeika's testimony, that "the defendant quickly put the gun on the wall near the bushes to avoid being found with it" when the police arrived because, "when individuals who have a gun in their possession become aware of a police presence, they try to 'discard . . . or stash' the gun so that they will not be detected with it," and they will typically "put the gun in a place close enough to be 'accessible' to them." Id., 547. Finally, the court reasoned that, because "the defendant was the only person at the picnic table who could not be eliminated as a contributor to the DNA profile found on the gun and ammunition"; id.; it was reasonable to infer that "the defendant once had the gun on his person and intended to do so again when the police left the courtyard." Id., 548.

Although the Appellate Court acknowledged that "none of the [aforementioned] factors alone is direct evidence of the defendant's knowledge of the gun's presence or his intent to possess it"; id., 547; it concluded that "the cumulative force of the circumstantial evidence was sufficient for the jury reasonably to infer that the defendant knew of the gun and was in constructive possession of it." Id., 547–48.

On appeal, the defendant claims that the Appellate Court incorrectly determined that the evidence was sufficient to support his conviction. Specifically, the

defendant argues that the Appellate Court incorrectly reasoned that, merely because he was in a place where the gun was present and trace amounts of DNA consistent with his DNA profile came into contact with the gun at an unknown time and in an unknown manner, a rational jury reasonably could have found beyond a reasonable doubt that he constructively possessed the gun. In so arguing, the defendant asserts that, without further corroborative proof, the DNA evidence was insufficient as a matter of law to establish his guilt because DNA evidence, standing alone, does not establish that he knowingly exercised dominion or control over the gun. The state counters that the Appellate Court correctly concluded that the cumulative evidence and inferences logically flowing therefrom support the jury's conclusion that the defendant constructively possessed the gun beyond a reasonable doubt. We agree with the defendant.

In reviewing criminal convictions for the sufficiency of the evidence, we apply a well established two part test. "First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *James E.*, 327 Conn. 212, 218, 173 A.3d 380 (2017). "On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [jury's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Taupier*, 330 Conn. 149, 187, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019). Although "proof beyond a reasonable doubt does not mean proof beyond all possible doubt

. . . [or] require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the trier [of fact], would have resulted in an acquittal"; (internal quotation marks omitted) *State* v. *Fagan*, 280 Conn. 69, 80, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007); it does not "satisfy the [c]onstitution to have a jury determine that the defendant is *probably* guilty." (Emphasis in original; internal quotation marks omitted.) *United States* v. *Valle*, 807 F.3d 508, 515 (2d Cir. 2015). "[When] the evidence is in equipoise or equal, the [s]tate has not sustained its burden [of proof] . . . ." (Internal quotation marks omitted.) *State* v. *Stovall*, 316 Conn. 514, 527, 115 A.3d 1071 (2015).

Section 53a-217c provides in relevant part that a defendant is guilty of criminal possession of a pistol or revolver if the defendant "possesses" a pistol or revolver, and he has had a prior felony conviction. On appeal, the defendant challenges only the jury's finding that he possessed a pistol or revolver within the meaning of § 53a-217c.[10]

The term " '[p]ossess' means to have physical possession or otherwise to exercise dominion or control over tangible property . . . ." General Statutes § 53a-3 (2). We have previously explained that there are two kinds of possession, actual and constructive. Actual possession "requires the defendant to have had direct physical contact with the [contraband]." (Internal quotation marks omitted.) *State* v. *Johnson*, 137 Conn. App. 733, 740, 49 A.3d 1046 (2012), rev'd in part on other grounds, 316 Conn. 34, 111 A.3d 447 (2015), and aff'd, 316 Conn. 45, 111 A.3d 436 (2015). Alternatively, "constructive possession is possession without direct physical contact. . . . It can mean an appreciable ability to guide

[10] The parties stipulated to the fact that the defendant had a prior felony conviction for purposes of § 53a-217c.

the destiny of the [contraband] . . . and contemplates a continuing relationship between the controlling entity and the object being controlled." (Citations omitted; internal quotation marks omitted.) *State* v. *Rhodes*, 335 Conn. 226, 233–34, 249 A.3d 683 (2020). To establish constructive possession, the control "must be exercised intentionally and with knowledge of the character of the controlled object." *State* v. *Hill*, 201 Conn. 505, 516, 523 A.2d 1252 (1986). "A person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ." General Statutes § 53a-3 (11).

Moreover, "[when] the defendant is not in exclusive possession of the premises where the [contraband is] found, it may not be inferred that [the defendant] knew of the presence of the [contraband] and had control of [it], unless there are other incriminating statements or circumstances tending to buttress such an inference." (Internal quotation marks omitted.) *State* v. *Winfrey*, 302 Conn. 195, 210–11, 24 A.3d 1218 (2011). Such evidence may include, for example, "connection with a gun, proof of motive, a gesture implying control, evasive conduct, or a statement indicating involvement in an enterprise . . . ." (Internal quotation marks omitted.) *State* v. *Bowens*, 118 Conn. App. 112, 125, 982 A.2d 1089 (2009), cert. denied, 295 Conn. 902, 988 A.2d 878 (2010). Accordingly, although "mere presence is not enough to support an inference of dominion or control, [when] there are other pieces of evidence tying the defendant to dominion [or] control, the [finder of fact is] entitled to consider the fact of [the defendant's] presence and to draw inferences from that presence and the other circumstances linking [the defendant] to the crime." (Internal quotation marks omitted.) *State* v. *Martin*, 285 Conn. 135, 150, 939 A.2d 524, cert. denied, 555 U.S. 859, 129 S. Ct. 133, 172 L. Ed. 2d 101 (2008); see also *State*

v. *Rhodes*, supra, 335 Conn. 241 ("some connection or nexus individually linking the defendant to the contraband is required" (internal quotation marks omitted)); *State* v. *Delossantos*, 211 Conn. 258, 278, 559 A.2d 164 ("[p]resence alone, unilluminated by other facts is insufficient proof of possession" (internal quotation marks omitted)), cert. denied, 493 U.S. 866, 110 S. Ct. 188, 107 L. Ed. 2d 142 (1989).

In the present case, there was no direct evidence that the defendant *actually* possessed the gun, and, accordingly, the state proceeded at trial under a theory of constructive possession. Thus, to convict the defendant under § 53a-217c, the state had the burden of proving beyond a reasonable doubt that the defendant knew that the gun was on the retaining wall and that he intended to exercise dominion or control over it. See, e.g., *State* v. *Hill*, supra, 201 Conn. 516–17. Further, because the defendant was not in exclusive possession of the location where the gun was found,[11] the state was required to present other evidence from which the jury reasonably could have inferred knowledge of and intent to exercise dominion or control over the gun. See, e.g., *State* v. *Winfrey*, supra, 302 Conn. 210–11.

As we have previously explained, "[a] case for constructive possession of a firearm often is necessarily built on inferences, and a jury may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Rhodes*, supra, 335 Conn. 237. Although "[p]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis . . . it must suffice to produce in the mind of the trier a

[11] Of course, there can be no serious argument that the defendant was in exclusive possession of the courtyard in Washington Village. After all, he was charged with and convicted of trespassing as a result of his presence there on the night in question.

reasonable belief in the probability of the existence of the material fact." (Internal quotation marks omitted.) Id., 238. "[I]f the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation." (Internal quotation marks omitted.) *State* v. *Lewis*, 303 Conn. 760, 768–69, 36 A.3d 670 (2012). Therefore, "[b]ecause [t]he only kind of an inference recognized by the law is a reasonable one . . . any such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic . . . that [a]ny [inference] drawn must be rational and founded upon the evidence." (Internal quotation marks omitted.) Id., 768. In sum, although we do not "sit as the 'seventh juror' when we review the sufficiency of the evidence"; *State* v. *Ford*, 230 Conn. 686, 693, 646 A.2d 147 (1994); we also must "be faithful to the constitutional requirement that no person be convicted unless the [g]overnment has proven guilt beyond a reasonable doubt [and] take seriously our obligation to assess the record to determine . . . whether a jury could *reasonably* find guilt beyond a reasonable doubt." (Emphasis in original; internal quotation marks omitted.) *United States* v. *Valle*, supra, 807 F.3d 515.

Our review of the cumulative force of the evidence leads us to the conclusion that the jury could not reasonably have concluded beyond a reasonable doubt that the defendant had knowledge of the gun and, with intent, exercised dominion or control over it. Therefore, the jury could not reasonably have found, beyond a reasonable doubt, that he constructively possessed the gun for purposes of a conviction under § 53a-217c.

The state claims, and the Appellate Court concluded, that the following three circumstances supported the

jury's finding that the defendant constructively possessed the gun: Lipeika's testimony that the gun was found in plain view and appeared to have been placed near the bushes recently; Lipeika's testimony that, when individuals who have an illegal gun in their possession become aware of a police presence, they try to discard or stash the gun so that they are not found with it; and Lipeika's testimony that, when individuals with a gun seek to discard or stash it, they put it in a place close enough to be accessible to them. None of these circumstances, alone or in combination with the others, supports the conclusion that the defendant constructively possessed the gun.

The record indicates that the defendant was seated at a picnic table with two other individuals, Kason Sumpter and Jackson. A third individual, Elmore, was originally seated at the picnic table, walked away when the police officers approached, and then returned. Notably, the defendant was seated approximately four to five feet from the gun, whereas Jackson and Kason Sumpter were seated approximately two to three feet from it. Moreover, there were two other individuals, Jefferson Sumpter and Janet Cruz, who were seated nearby on a bench. The fact that the gun was "in plain view" and appeared to have been placed there recently does not support a reasonable inference that the *defendant* placed it there or had knowledge of it and the power and intent to exercise dominion or control over it.

The second and third circumstances similarly do not implicate the defendant more than any of the other five individuals present in the courtyard that night. As mentioned, the defendant was seated furthest away from the gun, with Jackson seated between him and the retaining wall where the gun was located and Kason Sumpter seated with his back to the bushes, approximately two to three feet from where the gun was

located. Lipeika conceded that the defendant was not within arm's reach of the gun, stating, "I believe [he was] like four to five feet away. . . . So, I don't think that that would be within an arm's reach . . . ." Further, when asked if it was his testimony that the defendant was *not* close enough to reach out and grab the gun, Lipeika responded, "[y]eah." On the other hand, both Jackson and Kason Sumpter were, according to Lipeika, "within arm's reach of [the gun]," approximately two to three feet away. Accordingly, there is simply no reason to think, on the basis of Lipeika's testimony, that it was the defendant rather than one of the other individuals seated at the picnic table who had stashed the gun nearby to avoid being found with it, as the state argued at trial. In fact, to the extent that Lipeika's testimony is probative of who placed the gun near the bushes, it would seem to suggest Jackson or Kason Sumpter, given their closer proximity to the retaining wall.

Indeed, what the state's argument essentially boils down to, at least insofar as it rests on Lipeika's testimony, is that, because the defendant was in close proximity to the gun, it was reasonable for the jury to infer that he constructively possessed it. We repeatedly have stated, however, that mere proximity to contraband, in the absence of other incriminating conduct, statements, or circumstances, is insufficient to support a finding of constructive possession. See, e.g., *State* v. *Martin*, supra, 285 Conn. 150. In the present case, it is undisputed that the defendant did not display any kind of incriminating conduct. To the contrary, the police, as they approached the courtyard, observed no furtive movements by the defendant toward the location of the gun. The defendant, moreover, did not distinguish himself from others by attempting to flee, cooperated with the police when they detained him, did not provide any incriminating statements, and voluntarily provided

a DNA sample. Accordingly, we conclude that the jury could not reasonably have found, without resort to impermissible surmise or conjecture, that the defendant had knowledge of the gun and the intent to exercise dominion or control over it merely because, according to Lipeika, individuals in possession of an illegal firearm will often seek to "discard . . . or stash" it nearby when alerted to the presence of the police.

The state contends, however, and the Appellate Court concluded, that, because "the defendant was the only person at the picnic table who could not be eliminated as a contributor to the DNA profile found on the gun and ammunition"; *State* v. *Dawson*, supra, 188 Conn. App. 547; it was reasonable for the jury to infer that the defendant constructively possessed the gun. On appeal, the defendant argues that the DNA evidence, standing alone or in combination with any other evidence, does not establish that he constructively possessed the gun. We agree with the defendant.

The following additional facts are relevant to our analysis. The DNA evidence presented by the state at trial is classified as "touch DNA," which the state's DNA expert, Russell, testified is a term "used to describe DNA that is left behind just by touching an object . . . ." Notwithstanding its name, however, touch DNA does not necessarily indicate a person's direct contact with the object. Rather, according to Russell, abandoned skin cells, which make up touch DNA, can be left behind through primary transfer, secondary transfer, or aerosolization. Primary or "touch" transfer occurs, for example, when you directly touch or pick up an object. Secondary transfer, alternatively, occurs when, for example, person A bleeds onto a table and, subsequently, person B walks by the table, accidentally brushes against it, and then sits in a chair. Person A's blood can potentially be on that chair via secondary transfer, although person A personally never came into

contact with the chair. Finally, skin cells can be deposited on an object through aerosolization, which, Russell explained, occurs when, for example, a person speaks, breathes, coughs, or sneezes on or near an item. Importantly, Russell testified that, when analyzing a sample, there is no way to determine whether DNA was deposited through primary transfer, secondary transfer, or aerosolization. Moreover, DNA is not always detectable, meaning that it is possible to have someone touch an object but not leave behind detectable DNA because, Russell testified, some people leave more of their skin cells behind than others, i.e., some people are better "shedders" of their DNA than others. There are also other factors that affect the amount of DNA left on an object, such as the length of contact, the roughness or smoothness of the surface, the type of contact, the existence or nonexistence of fluids, such as sweat, and degradation on the object. Russell testified that the DNA sample taken from the gun in this case was partially degraded. Degradation, Russell testified, is the process of material breaking down over time. Russell explained that, if a gun is properly handled by the police once seized and is not exposed to sunlight or warm temperatures, degradation would not be expected. If degradation is occurring under such circumstances, that could be an indication that the DNA had been on the object for some period of time, although there is no way to determine how long. In the present case, the DNA sample was consistent with experiencing degradation over time because there was no evidence that the gun was improperly handled by the police or was exposed to sunlight or heat after being seized.

Russell further testified that there was a very low quantity of touch DNA retrieved from the gun.[12] She

[12] We note that Lieutenant Weisgerber, who swabbed the gun for DNA, testified that he took two swabs and swabbed the portions of the gun that are typically swabbed for DNA, such as the cylinder, handle, barrel, and trigger area, and subsequently swabbed the ammunition found in the gun using the same two swabs. He explained that, because he swabbed the gun

explained that, to properly analyze touch DNA, a very small amount of genetic material is amplified to create a usable DNA profile. Then, employing a polymerase chain reaction process, the forensic examiner will identify and copy a specific DNA sequence at particular locations (loci), repeating the cycle to create a larger quantity of DNA. Russell testified that the optimal amount of DNA to amplify during the testing process is approximately 1000 picograms; however, in this case, she could test only seventy picograms of DNA, a low yielding sample, which she stated was common for touch DNA testing. Nonetheless, Russell was able to develop a partial DNA profile out of this low yield sample. She testified that it is "pretty rare" to obtain a full profile from a sample containing less than 100 picograms of DNA. Russell explained that, in most cases, and, specifically, in this case, contributors can still be eliminated from a low yield sample.

Russell also testified that the sample in the present case was consistent with being a mixture, meaning that there is DNA from more than one person on the object. Russell was able to determine that the mixture definitely included at least two people but could have included as many as four or more. Russell explained that mixtures are very common with forensic samples and that they can occur for a variety of reasons. Notably, Russell testified that, "if it's an object that multiple people have touched, especially if it's something that is found in a public place, a lot of times, there'll be

and ammunition using the same swabs, it would be impossible to know whether the DNA recovered from the gun came from the outside of the gun or from the ammunition. Russell similarly testified that she could not say if the DNA found on the gun came solely from the exterior of the gun or whether it came from the ammunition found in the gun. Of course, if there were evidence that the defendant's DNA could not be excluded from DNA found on the *ammunition*, a more reasonable inference could be drawn that he possessed the gun.

mixtures of many people's DNA on a single sample . . . ."

Russell further testified that, based on her analysis, the defendant's DNA profile could not be eliminated as a contributor to the DNA mixture found on the gun. Conversely, the other three individuals at the picnic table—Kason Sumpter, Jackson, and Elmore—were able to be eliminated as contributors.[13] Russell explained that the conclusion that the sample was a mixed sample was based on the fact that there were alleles present at certain loci that matched the evidentiary profile but did not match the defendant's known profile. Therefore, Russell explained, "there would have to be someone else contributing . . . to the evidentiary profile . . . ." Moreover, Russell conceded that, although Kason Sumpter, Jackson, and Elmore were eliminated as contributors, she could not say definitively that none of their DNA was on the gun; just that there was none detected.

On the basis of the foregoing forensic testimony, we agree with the defendant that the DNA evidence presented by the state was insufficient to support his conviction, even when combined with Lipeika's testimony. Indeed, the sheer lack of conclusiveness regarding the DNA evidence in this case as it relates to the charged crime is troubling for many reasons. First, Russell was not able to determine how the defendant's DNA ended up on the gun; she could not say whether it was via primary transfer, secondary transfer, or aerosolization. In other words, she could not determine whether the defendant's DNA ended up on the gun because he touched the gun, because he touched something that

[13] The two individuals who were seated nearby on a bench, Jefferson Sumpter and Cruz, were not DNA tested. It is unclear whether they refused to be tested, or whether the police failed to request a DNA sample from them. They were, however, detained on the night in question when the police seized the gun.

subsequently came into contact with the gun, or because he breathed, sneezed, or coughed near the gun. Second, Russell was unable to determine when the defendant's DNA was deposited on the gun; she could not say if it was deposited on or about August 10, 2014, or at some other undetermined time. Third, Russell was clear that the DNA sample was consistent with being a mixture, meaning that at least one other person's DNA was on the gun and possibly as many as three or four other people's DNA. Fourth, Russell conceded that, although the other three individuals at the picnic table were able to be excluded as contributors to the sample, that did not mean that their DNA was not on the gun; rather, it simply meant that it was not detected. Fifth, two individuals also present in the courtyard that night were not DNA tested. See footnote 13 of this opinion. Finally, Russell testified that she could not definitively say that the DNA profile developed was that of the defendant; she could determine only that he could not be excluded as a contributor. Accordingly, there were simply too many unknowns for the jury to find beyond a reasonable doubt that the defendant had even touched the gun, much less that he was aware of its presence near where he was seated on the night in question and intended to exercise dominion or control over it.[14]

[14] The dissenting justice disagrees with our conclusion that the evidence was insufficient to support a finding that the defendant intended to exercise dominion or control over the gun. He asserts that, in reviewing the defendant's sufficiency claim, we have violated the cardinal rule that a reviewing court "not sit as a 'seventh juror' . . . ." To the contrary, we have viewed the evidence in the light most favorable to the state, as we must, and simply have concluded that no rational trier of fact could have found proven beyond a reasonable doubt the essential elements of the crime of criminal possession of a pistol or revolver.

The dissenting justice's disagreement with us appears to be rooted in a fundamental misapprehension as to the state's theory at trial and the inferences that reasonably could be drawn from the evidence. Specifically, he argues, quoting *State* v. *Rhodes*, supra, 335 Conn. 236, that our resolution of the defendant's claim "is wholly inconsistent with our recent emphasis in *Rhodes* of 'the deference we must afford to the jury and the practical

The state nonetheless argues, citing *State* v. *Rhodes*, supra, 335 Conn. 226, and *State* v. *Bowens*, supra, 118 Conn. App. 112, that "[t]he circumstances here are at least as compelling as those in [which] our courts have found sufficient evidence of possession." We disagree that either case is remotely factually similar to the present case.

In *Rhodes*, the defendant was convicted of criminal possession of a firearm on the basis of evidence that she had driven "an armed passenger . . . around Bridgeport for ninety minutes [in her vehicle], including to and from the place where [the passenger] discharged [the] weapon." *State* v. *Rhodes*, supra, 335 Conn. 228. Although there was no evidence that the defendant physically touched the gun, we noted that there was "no serious argument at trial" that the defendant was unaware that the gun was in the vehicle. Id., 239. Indeed,

problems of proof in the nonexclusive possession context . . . when the accused's relationship to the premises is shared with others, and consequently the problems of knowledge and control intensify.' " Unlike *Rhodes*, this is a not a nonexclusive possession or shared premises case, in which the issue is whether the defendant's control over or relationship to the location where contraband was found was such as to support a reasonable inference that the contraband was under the defendant's dominion or control, even if nonexclusively. In *Rhodes*, we concluded that the defendant's ownership and operation of the vehicle in which the gun was transported, together with her knowledge that the gun was in the vehicle, in plain view and within arm's reach, supported a reasonable inference that she constructively possessed the gun, albeit nonexclusively. *State* v. *Rhodes*, supra, 335 Conn. 254–58. In the present case, the defendant had no such relationship to or control over the housing complex where the gun was found on the night in question such that the jury reasonably could infer dominion or control over the gun on the basis of that relationship. Cf. *United States* v. *Staten*, 581 F.2d 878, 883–84 (D.C. Cir. 1978) (defendant's constructive possession of drugs and drug paraphernalia was proven when defendant was found inside apartment where drugs were found, with key to apartment in his pocket). Nor was the state's theory of guilt premised on nonexclusive possession. Contrary to the dissenting justice's assertion, therefore, there were no "practical problems of proof in the nonexclusive possession [or shared premises] context" confronting the jury in this case. (Internal quotation marks omitted.)

the passenger had fired it in her presence. Id. We concluded that the jury reasonably could have found that the defendant had exercised dominion or control over the gun because, among other things, she had control over the vehicle in which the gun was located and attempted to evade the police both in the vehicle and on foot following the shooting. Id., 241–42.

Similarly, in *Bowens*, the evidence revealed that, "immediately after gunshots had been fired in two separate locations just a few blocks away from each other, witnesses saw a white car leaving the area of one of the shootings, the defendant was driving a white Ford Taurus, and he ran from the police after being stopped. Subsequently, a revolver was found along the route [along which] the police had chased the defendant as he fled from them, and the shell casing in the backseat of the Taurus was from a bullet fired from the revolver . . . ." *State* v. *Bowens*, supra, 118 Conn. App. 122. On the basis of that evidence, the Appellate Court held that "it [was] reasonable to infer from the evidence that the . . . revolver found along the chase route was in the Taurus that the defendant had been driving on the night in question"; id.; and, further, that "the evidence support[ed] a conclusion that the defendant knew of the revolver's presence in the Taurus and was aware of its character." Id., 122–23.

Unlike in *Rhodes* and *Bowens*, the state here failed to produce any evidence of the defendant's conduct or statements from which the jury reasonably could have found that he was aware of the gun's presence in the courtyard and that he intended to exercise dominion or control over it. Indeed, in both of those cases, the evidence established beyond any doubt that the guns had been in vehicles operated by the defendants shortly before their arrests. See *State* v. *Rhodes*, supra, 335 Conn. 241 ("the defendant's control of the car, at least in part, supported the jury's conclusion that she also

controlled the firearm"); see also *State* v. *Delossantos*, supra, 211 Conn. 277–78 ("[o]ne who owns or exercises dominion or control over a motor vehicle in which . . . contraband . . . is concealed may be deemed to possess the contraband" (internal quotation marks omitted)); *State* v. *Bischoff*, 182 Conn. App. 563, 572, 190 A.3d 137 ("[k]nowledge that [contraband is] present and under a defendant's control when found in a defendant's home or car is more easily shown, of course, if the defendant has exclusive possession of the area in which the [contraband is] found" (internal quotation marks omitted)), cert. denied, 330 Conn. 912, 193 A.3d 48 (2018).

In addition, in both *Rhodes* and *Bowens*, the defendants also exhibited highly incriminating behavior by exiting their vehicles and fleeing when the police approached them, leading the juries in those cases reasonably to conclude that the defendants both knew of the presence of the guns in their vehicles and had the requisite intent to possess and control them. See *State* v. *Scott*, 270 Conn. 92, 104–105, 851 A.2d 291 (2004) ("[f]light, when unexplained, tends to prove a consciousness of guilt . . . [and] is a form of circumstantial evidence" (internal quotation marks omitted)), cert. denied, 544 U.S. 987, 125 S. Ct. 1861, 161 L. Ed. 2d 746 (2005). Suffice it to say that the present case is wholly lacking the kind of evidence that courts have found sufficient to establish constructive possession of contraband. See, e.g., *State* v. *Butler*, 296 Conn. 62, 78–79, 993 A.2d 970 (2010) (evidence sufficient to support finding that defendant driver exercised dominion and control over narcotics found in center console of vehicle when defendant moved toward and closed console after being detained by police, coupled with evidence that defendant was drug dealer); *State* v. *Bruno*, 293 Conn. 127, 137–38, 975 A.2d 1253 (2009) (jury reasonably could have found that defendant had dominion and control

over narcotics when defendant possessed key to trunk where narcotics were found and twice opened trunk in response to requests to purchase narcotics); *State* v. *Crewe*, 193 Conn. App. 564, 572–73, 219 A.3d 886 (evidence supported inference that defendant constructively possessed narcotics found in vehicle when vehicle was parked in vacant parking lot behind cluster of bushes, in area known for narcotics trafficking, and defendant moved furtively when he was approached by police), cert. denied, 334 Conn. 901, 219 A.3d 800 (2019).

We further disagree with the Appellate Court and the state that the decision by the United States Court of Appeals for the Sixth Circuit in *United States* v. *Beverly*, 750 F.2d 34 (6th Cir. 1984)[15] is inapposite to this case. The defendant argued to the Appellate Court that *Beverly* supports his claim that the DNA evidence, alone or in combination with other evidence, was insufficient to prove his constructive possession of the gun. The Appellate Court determined that *Beverly* was distinguishable because, "[i]n the present case, a police officer found the gun in plain sight in a public space in close proximity to the defendant"; *State* v. *Dawson*, supra, 188 Conn. App. 551; whereas, in *Beverly*, a police officer, when executing a search warrant at the apartment of a third party, found the defendant and another man standing on either side of a waste basket that contained two guns, one of which had the defendant's fingerprint on it. Id. The state argues that the Appellate

[15] In *Beverly*, a police officer executed a search warrant on the apartment of a third person and, in so doing, found the defendant and another man in the kitchen. *United States* v. *Beverly*, supra, 750 F.2d 35. Between the two men was a waste basket containing two guns, one of which had the defendant's fingerprint on it. Id. The court determined that this evidence was insufficient to support a finding of constructive possession, stating that the evidence "establishes only that [the defendant] was in the kitchen of [the third party's] residence, that [the defendant] was standing close to a waste basket [that] contained two guns, and that [the defendant] had at some point touched one of the guns," which fell short of establishing constructive possession. Id., 37.

Court properly distinguished *Beverly* from the present case because *Beverly* is a " 'proximity-only' "[16] case, and "the defendant's conviction [in the present case] does not rest on DNA evidence alone . . . ."

We disagree. Indeed, in our view, the evidence in the present case is considerably *weaker* than that which was found insufficient to support the defendant's conviction in *Beverly*. Notably, the defendant here was in a public place, whereas the defendant in *Beverly* was in a private residence (albeit not his own). Moreover, the defendant here was four to five feet from the gun, with others sitting closer, whereas the defendant in *Beverly* was within arm's reach of the gun and one of only two people in the room. Finally, in the present case, only trace amounts of DNA from which the defendant's DNA profile could not be excluded was found on the gun, and it could not be established that he actually touched the gun, whereas the defendant in *Beverly* left a definitive latent fingerprint on the gun in question.

Moreover, we are not persuaded by the Appellate Court's conclusion that *United States* v. *Lynch*, 459 Fed. Appx. 147 (3d Cir. 2012),[17] an unreported decision

[16] The state, in arguing that *Beverly* is distinguishable, relies primarily on the fact that *Beverly* was later limited by the Sixth Circuit in *United States* v. *Vichitvongsa*, 819 F.3d 260, 276 (6th Cir.), cert. denied, U.S. , 137 S. Ct. 79, 196 L. Ed. 2d 70 (2016), in which the court clarified that *Beverly* is "a proximity-only case without any evidence connect[ing] the gun to the defendant," and, thus, *Beverly* is inapposite when the government fills the evidentiary gap by connecting the gun to the defendant. (Internal quotation marks omitted.) Id.

[17] In *Lynch*, police officers recovered a pistol during a permissible warrantless search of the defendant's home. *United States* v. *Lynch*, supra, 459 Fed. Appx. 149. Subsequent forensic testing revealed a mixture of DNA on the pistol from which the defendant's profile could not be excluded. Id. After the defendant argued, citing *Beverly*, that there was insufficient evidence to support his conviction of possession of a firearm and ammunition, the Third Circuit held that, although *Beverly* "might mitigate the importance of the DNA evidence, it does little to change our view of the other evidence tending to show that [the defendant] constructively possessed the firearm . . . ." Id., 151.

by the United States Court of Appeals for the Third Circuit, is analogous to the present case. Rather, we find *Lynch* readily distinguishable because, in addition to evidence of the defendant's DNA on the gun, there was evidence in *Lynch* that the gun and ammunition were found *in the defendant's own home*, specifically concealed under his clothing in a dresser drawer in his bedroom. Id., 151–52. There is no such comparable evidence in the present case.

In sum, we are unpersuaded that, even taking the cumulative force of all the evidence together and construing it in the light most favorable to sustaining the verdict, it establishes anything more than a temporal and spatial nexus between the defendant and the gun found in a public area. See *State* v. *Rhodes*, supra, 335 Conn. 241. Therefore, we conclude that the evidence was insufficient to establish beyond a reasonable doubt that the defendant had knowledge of the gun and the intent to exercise dominion or control over it.

The judgment of the Appellate Court is reversed in part and the case is remanded to that court with direction to reverse the judgment of the trial court as to the conviction of criminal possession of a pistol or revolver and to remand the case to that court with direction to render judgment of acquittal on that charge; the judgment of the Appellate Court is affirmed in all other respects.

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

ROBINSON, C. J., dissenting. I respectfully disagree with the majority's conclusion that insufficient evidence existed to support the conviction of the defendant, Andre Dawson, for criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c (a). I believe that the majority's painstaking dissection of

the jury verdict in this case is wholly inconsistent with the analysis in our very recent decision in *State* v. *Rhodes*, 335 Conn. 226, 249 A.3d 683 (2020), which emphasized in no uncertain terms that, in cases concerning constructive possession, this court does not sit as a "seventh juror"; (internal quotation marks omitted) id., 251; given our obligation to "construe the evidence in the light most favorable to sustaining the verdict and then determine whether, on the basis of those facts and the inferences reasonably drawn from them, the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [jury's] verdict of guilty." (Citation omitted; internal quotation marks omitted.) Id., 229. Because I would affirm the well reasoned opinion of the Appellate Court, which is consistent with these cardinal principles of appellate review; see *State* v. *Dawson*, 188 Conn. App. 532, 205 A.3d 662 (2019); I respectfully dissent.

The majority's opinion is wholly inconsistent with our recent emphasis in *Rhodes* of "the deference we must afford to the jury and the practical problems of proof in the nonexclusive possession context: [W]e would adhere to that concept in preference to artificial rules restricting evidence-sufficiency rules that would inevitably invade the traditional province of the jury . . . . The judge's task intensifies . . . when the accused's relationship to the premises is shared with others, and consequently the problems of knowledge and control intensify. . . . [I]n full recognition of the increased difficulties that the [g]overnment then faces, we reiterate that the sufficiency of the evidence for jury consideration depends [on] its capability plausibly to

suggest the likelihood that in some discernible fashion the accused had a *substantial voice vis-à-vis* the [contraband]." (Emphasis in original; internal quotation marks omitted.) *State* v. *Rhodes*, supra, 335 Conn. 236–37, quoting *United States* v. *Staten*, 581 F.2d 878, 884 (D.C. Cir. 1978).

As we recognized in *Rhodes*, a "case for constructive possession of a firearm often is necessarily built on inferences, and a jury may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . A jury also may draw factual inferences on the basis of already inferred facts." (Citation omitted; internal quotation marks omitted.) *State* v. *Rhodes*, supra, 335 Conn. 237–38. As in *Rhodes*, my "review of the evidence finds several circumstances tending to buttress . . . an inference . . . that the defendant had the knowledge of and intent to control the firearm that our law requires for a finding of constructive possession, including facts and inferences that reasonably permitted the jury to conclude that, in all probability, [he] had the ability to go and get the gun." (Citation omitted; internal quotation marks omitted.) Id., 238–39. In my view, the touch DNA evidence found on the gun, coupled with the defendant's proximity to it and the testimony of a Norwalk police officer, Kyle Lipeika, that (1) it is a common practice for individuals to discard weapons when they believe that police officers are approaching, and (2) the gun appeared to have been freshly placed in the courtyard planter because it was clean, with a surface that lacked rust or dust, provided sufficient circumstantial evidence of constructive possession to support the defendant's conviction.

The majority, however, engages in a detailed analysis discounting this evidence and concluding that "there were simply too many unknowns for the jury to find beyond a reasonable doubt that the defendant had even

touched the gun, much less that he was aware of its presence near where he was seated on the night in question and intended to exercise dominion or control over it." These aspects of the majority's opinion, which (1) discount the weight of the touch DNA evidence, (2) highlight the defendant's cooperation and lack of flight or incriminating statements, and (3) observe that the individuals who accompanied the defendant sat slightly closer to the planter, provide a well reasoned closing argument for the defense, but ultimately are inconsistent with our long settled approach to appellate review of sufficiency of the evidence issues.

Beyond these observations, "[o]rdinarily, I would write a comprehensive dissenting opinion with a thorough discussion of the applicable law and a detailed review of the record. The Appellate Court has, however, issued a comprehensive and well reasoned opinion, authored by Judge [Lavine], which provides a full explication of the . . . record and governing legal principles in this case. . . . In the interest of aiding in the discharge of this court's institutional obligation to provide timely decisions to litigants and the public, I adopt Judge [Lavine's] excellent opinion as a complete statement of my reasoning for respectfully dissenting from the judgment of this court." (Citation omitted.) *Dept. of Transportation* v. *White Oak Corp.*, 319 Conn. 582, 622, 125 A.3d 988 (2015) (*Robinson*, *J.*, dissenting); see, e.g., *Brenmor Properties*, *LLC* v. *Planning & Zoning Commission*, 326 Conn. 55, 62, 161 A.3d 545 (2017).

Because I would affirm the judgment of the Appellate Court, I respectfully dissent.

STATE OF CONNECTICUT *v.* JESSE CULBREATH (SC 20276)

McDonald, D'Auria, Mullins, Kahn, Ecker and Keller, Js.

Syllabus

In *State* v. *Purcell* (331 Conn. 318), this court determined, as a matter of state constitutional law, that, if a suspect makes an equivocal statement that arguably could be construed as a request for counsel, interrogation must cease except for narrow questions designed to clarify the equivocal statement and the suspect's desire for counsel, or, alternatively, the officers conducting the interrogation may inform the suspect that they understand the suspect's statement to mean that he does not wish to speak with them without counsel and that they will terminate the interrogation, and, in either case, if the suspect thereafter clearly and unequivocally expresses a desire to continue without counsel present, the interrogation may resume.

Convicted of manslaughter in the first degree with a firearm, criminal possession of a firearm, and carrying a pistol without a permit, among other crimes, the defendant appealed, claiming, inter alia, that certain statements he made during a custodial interrogation were improperly admitted into evidence because they were elicited by a detective, R, after he invoked his right to counsel, in violation of his state and federal constitutional rights. In response to a tip that that defendant was in possession of a firearm that had been used in a homicide earlier in the evening, the police stopped a vehicle in which the defendant and his girlfriend, T, were passengers. The driver consented to a search of the vehicle, and the police found a revolver in a box underneath the seat of the defendant, who was prohibited from possessing firearms or contacting T pursuant to a protective order. The police arrested the defendant and transported him to the police station, where R advised him of his rights under *Miranda* v. *Arizona* (384 U.S. 436). Before signing a written waiver form, the defendant asked R why the form stated "that I'm wavering . . . how I don't want the presence of an attorney or anything . . . ." R explained that signing the form meant that the defendant agreed to speak to R but that he could stop answering questions whenever he wanted, and the defendant signed the form. Approximately three hours into the interview, during which the defendant denied possessing the revolver or being involved in the shooting, the defendant asked R whether "there [was] anybody I can talk to . . . [l]ike an attorney or something . . . ." R responded that, if the defendant wanted an attorney, they would have to stop the interview. R also stated that, because attorneys "have to make their money," an attorney would probably prevent the defendant from speaking to R and giving his side of the story. R left the interview room for approximately twenty minutes to

give the defendant time to consider. When R returned, the defendant inquired about T, who was being interviewed in another room, and R then resumed questioning the defendant. The defendant thereafter confessed to shooting the victim but claimed that he had acted in self-defense, and he signed a statement to that effect. At trial, the state sought to have the video recording of the interrogation and the defendant's written statement admitted into evidence, to which defense counsel replied he had no objection. The defendant subsequently testified that he had shot the victim but continued to maintain that he acted in self-defense. From the judgment of conviction, the defendant appealed. *Held*:

1. Defense counsel waived the defendant's unpreserved claim that his federal constitutional rights safeguarded by *Miranda* were violated by virtue of the admission of his written statement and the video recording of the interrogation, but did not waive the defendant's unpreserved claim under the state constitution: because the defendant's federal constitutional rights under *Miranda* and its progeny were well established at the time of his trial, defense counsel was presumed to have made a strategic decision when he waived the defendant's claim under the federal constitution by stating that he had no objection to the admission of the defendant's written statement and the video recording, and, accordingly, the defendant's claim under the federal constitution failed under the third prong of *State* v. *Golding* (213 Conn. 233), as this court was unable to conclude that the alleged constitutional violation existed and deprived the defendant of a fair trial; nevertheless, because the binding precedent in effect at the time of the defendant's trial required his invocation of the right to counsel to be clear and unequivocal, and because this court's decision in *Purcell*, which held for the first time that the Connecticut constitution (art. I, § 8) provides greater protection with respect to a criminal defendant's *Miranda* rights than the federal constitution, was not released until nearly six months after the jury returned its verdict in the defendant's case, this court could not presume that defense counsel knew that the state constitution would subsequently be interpreted to provide an additional layer of prophylaxis, and defense counsel, therefore, did not make a knowing and intelligent waiver of the defendant's claim involving the state constitutional rule announced in *Purcell*.

2. The defendant's written statement and the latter portion of the video-recorded interview, after the defendant asked if there was "an attorney or something" he could speak to, should have been suppressed under article first, § 8, but the initial portion of the video recording, in which the defendant denied any involvement in the shooting, properly was admitted into evidence:

   a. With respect to the defendant's initial inquiry about why the waiver form stated that he was "wavering," R sought clarification from the defendant, consistent with *Purcell*, and explained the meaning of the contents of the form before beginning the interview; accordingly, regard-

less of whether that inquiry could arguably be construed as a request for counsel, the defendant's express waiver of his *Miranda* rights following R's explanation of the form's contents manifested the defendant's clear and unequivocal desire to proceed with the interview without counsel present.

b. The defendant's question regarding whether "there [was] anybody [he could] talk to . . . [l]ike an attorney" was a conditional and equivocal inquiry that reasonably could be construed as a request for counsel, and R failed to stop the interview and to clarify whether the defendant desired the presence of counsel, in violation of the defendant's rights under article first, § 8: although R asked some questions to clarify the defendant's intent with respect to invoking his right to counsel, R went beyond the limited inquiry permissible after an equivocal request for counsel is made, as he plainly attempted to convince the defendant that it was against his interests not to continue the interview by stating that an attorney probably would not let him talk to R or tell his side of the story and by suggesting that an attorney's financial interest would induce the attorney to advise the defendant, contrary to the defendant's interests, to stop answering questions; moreover, after the twenty minute break, R did not limit his questions to narrow inquiries designed to clarify the defendant's desire for counsel but, rather, proceeded as if the equivocal request had never been made and simply resumed his questioning of the defendant, even though the defendant never clearly and unequivocally expressed a desire to continue without counsel present.

3. The state failed to satisfy its burden of establishing that the improper admission of the written statement and the inadmissible portion of the video-recorded interview, in which the defendant confessed to the shooting, was harmless beyond a reasonable doubt with respect to the defendant's conviction of manslaughter in the first degree with a firearm, and, accordingly, this court reversed the defendant's manslaughter conviction and remanded for a new trial on that charge: although the defendant testified at trial that he shot the victim, and that testimony was untainted by the state constitutional violation, the scope and content of the defendant's in-court testimony were not coextensive with his out-of-court statements, and the prosecutor relied substantially on the out-of-court statements, and discrepancies between them and the in-court testimony, to discredit the defendant's claim of self-defense, pointing to certain statements the defendant made to R to establish that he did not reasonably believe that the victim was using or about to use deadly physical force, or inflicting or about to inflict great bodily harm, and that he knew that he could avoid the use of deadly physical force with complete safety by retreating; moreover, the defendant's interview contained a significant amount of new material not heard from any other witness, and the prosecutor used that information in her closing and rebuttal arguments to urge the jury to find that the defendant had fabricated his self-defense claim in response to certain suggestions made

by R and to highlight an instance in which the defendant berated himself and called himself a "killer" while alone in the interrogation room, which, according to the the prosecutor, reflected the defendant's consciousness of guilt and undermined his claim of self-defense; furthermore, the prosecutor relied on the inadmissible out-of-court statements to undermine the defendant's credibility, emphasizing inconsistencies between those statements and his in-court testimony and urging the jury to find the defendant's testimony regarding justification unworthy of belief, and, because the defendant's credibility was critical to his self-defense claim in light of the absence of any eyewitness testimony or physical evidence to corroborate or contradict the defendant's account of the shooting, this court could not conclude that the defendant's in-court testimony obviated the harm caused by the improper admission of the inadmissible out-of-court statements; nevertheless, this court upheld the defendant's conviction of criminal possession of a firearm and carrying a pistol without a permit because the jury's verdict, as it related to those offenses, was not affected by the violation of the defendant's state constitutional rights, insofar as the inadmissible out-of-court statements were cumulative of the defendant's in-court testimony, in which he admitted to the essential elements of those offenses.

Argued December 8, 2020—officially released August 18, 2021*

Procedural History

Substitute information charging the defendant with the crimes of murder, criminal violation of a protective order, criminal possession of a firearm, carrying a pistol without a permit, and illegal possession of a firearm in a motor vehicle, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Gold*, *J.*; verdict and judgment of guilty of the lesser included offense of manslaughter in the first degree with a firearm, criminal violation of a protective order, criminal possession of a firearm, carrying a pistol without a permit, and illegal possession of a firearm in a motor vehicle, from which the defendant appealed to this court. *Reversed in part*; *new trial.*

Julia K. Conlin, assigned counsel, with whom was *Emily Graner Sexton*, assigned counsel, for the appellant (defendant).

* August 18, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Samantha L. Oden, deputy assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, former state's attorney, and *Debra Collins*, senior assistant state's attorney, for the appellee (state).

Opinion

ECKER, J. A jury found the defendant, Jesse Culbreath, guilty of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a, criminal violation of a protective order in violation of General Statutes § 53a-223 (a), criminal possession of a firearm in violation of General Statutes (Rev. to 2015) § 53a-217 (a) (4) (A), carrying a pistol without a permit in violation of General Statutes § 29-35 (a), and illegal possession of a firearm in a motor vehicle in violation of General Statutes § 29-38 (a). The defendant appeals from the judgment of conviction on the ground that his federal and state constitutional rights were violated when the police continued to question him after he invoked his right to counsel pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and, therefore, claims that his statements to the police improperly were admitted into evidence. The defendant further claims that the prosecutor committed improprieties during closing argument that deprived him of his due process right to a fair trial. We reverse in part the judgment of the trial court.

The record reflects the following facts and procedural history. On the evening of December 7, 2015, the defendant was selling marijuana on Judson Street in Hartford, when he encountered the victim, Richard Holloway, Jr. The defendant recognized the victim because they had been in an altercation when they were children. The victim began walking toward the defendant and "talking trash . . . ." A physical fight between the two men ensued, but nearby bystanders intervened and broke it up. Someone told the defendant "not to . . . pay too

much" attention to the victim because he was drunk.[1] The victim quickly renewed the confrontation. He put on his jacket and "started coming back towards [the defendant] . . . ." The victim told the defendant "not to run" and that "he was going to get [him]." The defendant noticed "some fast hand movement" between the victim and "some other gentleman." Although the defendant did not see the victim with a weapon, he became worried that the victim might be armed. The defendant backed up, withdrew a revolver from his pocket, and shot the victim twice, once in the chest and once in the shoulder. The defendant fled the scene immediately after the shooting. The victim was transported to the hospital, where he died from the gunshot wounds inflicted by the defendant.

Later that night, a confidential informant, D,[2] called in a tip that someone named Pops, who subsequently was identified as the defendant, was in possession of a firearm that may have been used in a homicide earlier that evening. D reported that Pops could be found in a particular motor vehicle in the north end of Hartford. Around midnight, Hartford police officers spotted the vehicle near Weston Street. The police stopped the vehicle and found D in the driver's seat, the defendant in the passenger seat, and the defendant's girlfriend, T, in the backseat. D consented to a search of the vehicle, during which the police found a revolver hidden in an ice cream box underneath the defendant's seat. The revolver contained four live rounds of ammunition and two empty shell casings. Upon further investigation, the police discovered that the defendant was in violation of a protective order, which prohibited him from con-

[1] An autopsy revealed that the victim's blood alcohol content was .252 at the time of his death.

[2] In accordance with federal law, we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained. See 18 U.S.C. § 2265 (d) (3) (2018).

tacting T and possessing firearms. The police arrested the defendant and transported him to the police station for further investigation.

At the police station, Detective Anthony Rykowski informed the defendant of his *Miranda* rights and asked him to sign a written waiver form.[3] Prior to signing the form, the defendant asked, "but why does it say that I'm wavering . . . um . . . saying how I don't want the presence of an attorney or anything?" Rykowski responded: "What this means is, right now, if you sign this, it just means you are agreeing to talk to us. Okay? Right now. Um, you know, again, what each one of these is is what your rights are, okay? This is the important one here: number five, you can stop answering questions or you don't have to answer questions if you don't want to. It's just, you know, there's a lot of things we need to get through about what happened tonight, but we can't talk unless you agree to talk to us right now." The defendant asked if he had to sign the waiver form "if [he] was agreeing to talk to [Rykowski] right now . . . ." Rykowski responded: "Right, right. But you have to understand that, if you sign it, you can stop answering questions whenever you want. That's what number five means. You know what I mean? . . . If you sign this, it doesn't mean you have to talk to me, you know? But it means we can talk." The defendant replied "[a]lright" and signed the waiver form. Rykowski began the interview, which lasted approximately eight hours.

At the beginning of the interview, the defendant denied possessing the revolver or being involved in the shooting on Judson Street. Instead, the defendant told Rykowski that, earlier in the evening, he had been shopping with T, who was pregnant with their child. The

[3] Rykowski's interview with the defendant was video-recorded.

defendant continued to deny any involvement in the shooting incident over the next three hours.

Approximately three hours into the interview, the following exchange took place between the defendant and Rykowski:

"[The Defendant]: Is there anybody I can talk to?

"[Rykowski]: What do you mean?

"[The Defendant]: Like an attorney or something? Whatever the case may be. I know you guys gotta do your jobs.

"[Rykowski]: We do, yeah. Is that what you want?

"[The Defendant]: You know, I am not trying to add on more or anything.

"[Rykowski]: It doesn't add anything on, man. If that's what you want, that's fine, but we gotta shut this thing down if that's the case, you know. . . . If you want an attorney, then we can't talk right now anymore.

"[The Defendant]: Then what?

"[Rykowski]: Then we let the cards fall the way they will, you know. Like I said, the evidence is gonna tell a story. It's gonna tell what happened . . . . It's not gonna tell me the why or the who or the what reason. . . .

"[The Defendant]: [Indiscernible] know why you guys can't talk to me no more about what happened.

"[Rykowski]: I mean, I can ask your attorney to talk to you. He probably won't let me talk to you, you know.

"[The Defendant]: Why is that?

"[Rykowski]: It's that they have to make their money, do their thing. You know what I mean?

"[The Defendant]: I'm just trying to get this straight . . . .

"[Rykowski]: I understand, I understand. Do you want me to give you a few minutes?

"[The Defendant]: I guess.

"[Rykowski]: Well it's up to you man. If you want to keep talking, we'll keep talking. If you want an attorney, that's fine, we'll stop now.

"[The Defendant]: I'll take a few minutes."

Rykowski offered the defendant a drink and a cigarette, and then left the room. Approximately two minutes later, Rykowski's partner returned with a cigarette for the defendant. The defendant asked about T, who was being questioned in another interview room, and Rykowski's partner left to check on her. About twenty minutes later, Rykowski returned. The defendant again asked about T and what the police were "going to do with her . . . ." Rykowski stated: "[I]f she decides I wanna lie for you, then things can go one way . . . . If she does the right thing, they can go another way. . . . It's what I've been trying to explain to you this whole time, you know. Only one thing's going to work, and it's the truth . . . ." Rykowski left the interview room again, and, when he returned, the interview resumed. Rykowski told the defendant that "the clean get cleaner, and the dirty get dirtier," and that they were at a point where the defendant had to "decide . . . how [he] want[s] to move forward here . . . ." The defendant soon thereafter confessed to shooting the victim, but he explained that he had acted in self-defense because he was afraid the victim was going to pull a gun on him. The defendant's confession was memorialized in a written statement, which the defendant signed.

The defendant was charged in an amended, five count information with murder, criminal violation of a protective order, criminal possession of a firearm, carrying a pistol without a permit, and illegal possession of a weapon in a motor vehicle. At the defendant's jury trial, the state offered into evidence the video recording of the defendant's interview and his written statement. Defense counsel stated that he had "[n]o objection" to the offer, and the video recording and written statement were admitted into evidence as full exhibits. The state also adduced ballistics evidence matching the revolver found underneath the defendant's seat with one of the bullets recovered from the victim's body, as well as forensic evidence matching the defendant's DNA profile to the DNA found on the handle grip of the revolver.

Following the state's case-in-chief, the defendant took the stand and testified in his own defense. His testimony, which we review in greater detail subsequently in this opinion, was largely consistent with what he told the police when he confessed to shooting the victim. The jury found the defendant not guilty of the crime of murder but guilty of the lesser included offense of manslaughter in the first degree with a firearm in violation of § 53a-55a. Additionally, the jury found the defendant guilty of criminal violation of a protective order, criminal possession of a firearm, carrying a pistol without a permit, and illegal possession of a weapon in a motor vehicle. The trial court rendered judgment in accordance with the jury's verdict and sentenced the defendant to a total effective sentence of thirty years' incarceration.[4] This appeal followed.[5]

[4] The trial court sentenced the defendant to thirty years' incarceration on the manslaughter count, five years of which was a mandatory minimum, and five years of incarceration for each of the remaining counts, all to run concurrently. Additionally, the court imposed a fine of $5000 in connection with the criminal possession of a firearm count, which was remitted.

[5] The defendant appealed directly to this court pursuant to General Statutes § 51-199 (b) (3).

On appeal, the defendant claims that his statements to Rykowski should have been suppressed because they were obtained in violation of his *Miranda* rights, which are guaranteed by the fifth amendment to the United States constitution and article first, § 8, of the Connecticut constitution. The defendant contends that he invoked his right to counsel at two separate points in the interview: first, when he questioned Rykowski about the waiver form at the outset and, second, when he asked if there was "an attorney or something" he could speak with approximately three hours later. Additionally, the defendant claims that the prosecutor made improper statements during closing argument in violation of his due process right to a fair trial.

The state responds that the defendant waived his federal and state constitutional claims when defense counsel explicitly stated that he had no objection to the admission of the video recording of the defendant's interview or his written statement. Alternatively, the state claims that no fifth amendment violation occurred because the defendant did not clearly and unequivocally request counsel under *Miranda* and its federal progeny. With respect to the defendant's state constitutional claim, the state acknowledges that, pursuant to our recent decision in *State* v. *Purcell*, 331 Conn. 318, 203 A.3d 542 (2019), article first, § 8, of the Connecticut constitution "requires that, if a suspect makes an equivocal statement that arguably can be construed as a request for counsel, interrogation must cease except for narrow questions designed to clarify the earlier statement and the suspect's desire for counsel." (Internal quotation marks omitted.) Id., 362. Nonetheless, the state contends that the defendant's state constitutional rights were not violated because the defendant's first statement regarding the waiver form was not an equivocal invocation of the right to counsel, and, to the extent that his second statement asking about an attorney was

equivocal, Rykowski complied with *Purcell* by stopping the interview and seeking clarification. In any event, the state contends that any constitutional violation was harmless beyond a reasonable doubt because there was overwhelming independent evidence of the defendant's guilt. Lastly, the state claims that the prosecutor's statements during closing argument were not improper and did not deprive the defendant of a fair trial.

I

The threshold question is whether the defendant waived his federal and state constitutional claims regarding the alleged violation of his *Miranda* rights. It is undisputed that the defendant failed to preserve these claims, and, therefore, he seeks review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). The state maintains that the defendant cannot prevail under *Golding* because defense counsel affirmatively waived the defendant's constitutional claims by stating that he had "[n]o objection" to the admission of the video recording of the defendant's interview and his written statement. We conclude that the defendant waived his federal constitutional claim but that the waiver of his state constitutional claim was not knowing and intelligent due to the recency of our decision in *State* v. *Purcell*, supra, 331 Conn. 318, which adopted a more protective prophylactic standard for *Miranda* rights under the Connecticut constitution.

In *State* v. *Golding*, supra, 213 Conn. 233, we held that "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis,

the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) Id., 239–40; see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*). We conclude that the defendant has satisfied the first two prongs of *Golding* because the record is adequate for our review and the defendant's claims are of constitutional magnitude alleging the violation of a fundamental right.

A waived claim, as opposed to an unpreserved claim, "does not satisfy the third prong of the *Golding* test because, in such circumstances, we simply cannot conclude that injustice [has been] done to either party . . . or that the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial . . . ." (Internal quotation marks omitted.) *State* v. *Holness*, 289 Conn. 535, 543, 958 A.2d 754 (2008). It is well established that "[a] defendant in a criminal prosecution may waive one or more of his or her fundamental rights." (Internal quotation marks omitted.) *State* v. *Fabricatore*, 281 Conn. 469, 478, 915 A.2d 872 (2007). "The mechanism by which a right may be waived . . . varies according to the right at stake. . . . For certain fundamental rights, the defendant must personally make an informed waiver. . . . For other rights, however, waiver may be effected by action of counsel." (Internal quotation marks omitted.) *State* v. *Kitchens*, 299 Conn. 447, 467, 10 A.3d 942 (2011). "The fundamental rights that a defendant personally must waive typically are identified as the rights to plead guilty, waive a jury, testify [on] his or her own behalf, and take an appeal." *State* v. *Gore*, 288 Conn. 770, 779 n.9, 955 A.2d 1 (2008). In contrast, defense counsel may waive certain "tactical trial rights that are not personal to the defendant . . . as part of trial strategy"; id., 778–79; such as "the statutory protection of a probable cause hearing . . . the

right to call witnesses . . . and the composition of a jury charge." (Citations omitted.) Id., 779 n.9; see also *State* v. *Kitchens*, supra, 467 (defense counsel may waive on defendant's behalf "the right . . . to proper jury instructions").

The decision to admit or exclude evidence on constitutional, statutory, or evidentiary grounds is the type of tactical trial decision that "appropriately may be waived by counsel acting alone . . . ." *State* v. *Gore*, supra, 288 Conn. 779 n.10; see *McCoy* v. *Louisiana*, U.S. , 138 S. Ct. 1500, 1508, 200 L. Ed. 2d 821 (2018) ("[t]rial management is the lawyer's province: [c]ounsel provides his or her assistance by making decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence' "), quoting *Gonzalez* v. *United States*, 553 U.S. 242, 248, 128 S. Ct. 1765, 170 L. Ed. 2d 616 (2008); *United States* v. *Small*, 988 F.3d 241, 256 (6th Cir. 2021) (suppression of evidence for alleged constitutional violations is "the type of trial management [decision] that can be determined and thus . . . waived by the lawyer"), petition for cert. filed (6th Cir. June 15, 2021) (No. 20-8361); *State* v. *Castro*, 200 Conn. App. 450, 458, 462, 238 A.3d 813 ("defense counsel knowingly and intentionally abandoned the defendant's sixth amendment right [of confrontation]" by expressly stating he had no objection to admission of ballistics report under *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)), cert. denied, 335 Conn. 983, 242 A.3d 105 (2020). As the United States Supreme Court explained in *Gonzalez*, "[g]iving the attorney control of trial management matters is a practical necessity. The adversary process could not function effectively if every tactical decision required client approval. . . . The presentation of a criminal defense can be a mystifying process even for well-informed laypersons. This is one of the reasons for the right to

counsel. . . . Numerous choices affecting conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance, depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial. These matters can be difficult to explain to a layperson; and to require in all instances that they be approved by the client could risk compromising the efficiencies and fairness that the trial process is designed to promote. In exercising professional judgment, moreover, the attorney draws upon the expertise and experience that members of the bar should bring to the trial process. In most instances the attorney will have a better understanding of the procedural choices than the client; or at least the law should so assume." (Citations omitted; internal quotation marks omitted.) *Gonzalez* v. *United States*, supra, 249–50.

To be effective, of course, defense counsel's waiver must be knowing and intelligent. See *State* v. *Bellamy*, 323 Conn. 400, 443, 147 A.3d 655 (2016) (observing that "waiver involves the intentional relinquishment or abandonment of a known right or privilege" in context of waiver by actions of counsel (internal quotation marks omitted)). This requirement ordinarily is met easily because it is presumed "that, in our adversary system, counsel was familiar with the relevant constitutional principles and had acted competently in determining that . . . the defendant's [constitutional] rights" were protected. Id., 418. Consequently, to demonstrate knowing and intelligent waiver, the state ordinarily is "not required to establish that defense counsel was aware of a possible constitutional claim in the factual scenario presented . . . ." Id. To demand more " 'would require the trial court to canvass defense counsel with respect to counsel's understanding of the relevant constitutional principles before accepting counsel's

agreement on how to proceed . . . [and] there is nothing in our criminal law that supports such a requirement.' "[6] Id., 419, quoting *State* v. *Holness*, supra, 289 Conn. 544.

In the present case, the defendant's federal constitutional rights under *Miranda* and its progeny were well established at the time of trial, and we must presume that defense counsel was aware of the defendant's federal constitutional claim and made a strategic decision to waive it. Defense counsel affirmatively waived the defendant's federal constitutional claim when he explicitly informed the trial court and the state that he had "[n]o objection" to the admission of the video recording of the defendant's interview and his written statement. See *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 71, 967 A.2d 41 (2009) ("[w]hen a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal" (internal quotation marks omitted)); *State* v. *Fabricatore*, supra, 281 Conn. 481 (defense counsel waived constitutional challenge to jury instruction by "clearly express[ing] his satisfaction with that instruction, and in fact subsequently argu[ing] that the instruction as given was proper"). We therefore conclude that the defendant's federal constitutional claim fails under the third prong of *Golding*.

We arrive at a different conclusion, however, with respect to the defendant's state constitutional claim because the law governing that claim changed after the

[6] " '[I]n circumstances in which defense counsel's waiver of a constitutional claim cannot be justified, that is, when the waiver constitutes a violation of the defendant's right to the effective assistance of counsel, the defendant may seek recourse through habeas corpus proceedings. Such proceedings are available to safeguard the constitutional rights of any defendant who has been prejudiced by the ineffective assistance of his or her attorney.' " *State* v. *Bellamy*, supra, 323 Conn. 419 n.14, quoting *State* v. *Holness*, supra, 289 Conn. 544 n.8.

defendant's trial. The defendant's trial took place in mid-2018; the jury returned its verdict on September 14, 2018. It was not until March 29, 2019, that we released our decision in *State* v. *Purcell*, supra, 331 Conn. 318, in which we held for the first time that article first, § 8, of the Connecticut constitution provides greater protection for a criminal defendant's *Miranda* rights than the federal constitution. See id., 359. *Purcell* explains the federal rule that governed prior to its issuance: "In *Davis* v. *United States*, 512 U.S. 452, 459–60, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), the United States Supreme Court determined that, after a defendant has been informed of his *Miranda* rights, the police officers conducting a custodial interrogation have no obligation to stop and clarify an ambiguous invocation by the defendant of his right to have counsel present. Instead, they must cease interrogation only upon an objectively unambiguous, unequivocal invocation of that right. See id." (Footnote omitted.) *State* v. *Purcell*, supra, 320–21. In *Purcell*, we held that *Davis*' clear and unequivocal standard fails to satisfy the state constitution and that, "to adequately safeguard the right against compelled self-incrimination under article first, § 8, of the Connecticut constitution, police officers are required to clarify an ambiguous request for counsel before they can continue the interrogation." (Footnote omitted.) Id., 321. Thus, "our state constitution requires that, if a suspect makes an equivocal statement that arguably can be construed as a request for counsel, interrogation must cease except for narrow questions designed to clarify the earlier statement and the suspect's desire for counsel. . . . Interrogators confronted with such a situation alternatively may inform the defendant that they understand his statement(s) to mean that he does not wish to speak with them without counsel present and that they will terminate the interrogation. In either case, if the defendant thereafter clearly

and unequivocally expresses a desire to continue without counsel present, the interrogation may resume." (Citation omitted; internal quotation marks omitted.) Id., 362.

Because *Purcell* was released after the defendant's trial, we cannot presume that defense counsel knew that the state constitution would subsequently be interpreted to provide "an additional layer of prophylaxis to prevent a significant risk of deprivation of those vital constitutional rights protected under *Miranda*." Id., 342. Indeed, at the time defense counsel stated that he had no objection to the admission of the video recording of the interview and the defendant's written statement, the Appellate Court affirmatively had held that "our state constitution does not provide greater protection than the federal constitution in this context," and, "[a]s a matter of state constitutional law, interrogating officers are not required to clarify ambiguous or equivocal references to an attorney." *State* v. *Purcell*, 174 Conn. App. 401, 428, 166 A.3d 883 (2017), rev'd, 331 Conn. 318, 203 A.3d 542 (2019); see also id., 431 (The Appellate Court observed that this court "has consistently held that our self-incrimination and due process clauses do not afford greater protection than the federal due process and self-incrimination clauses. . . . As a result, our courts have previously declined to utilize our state constitution to afford suspects greater protections during custodial interrogations than the federal constitution affords." (Citation omitted.)). Given that the binding precedent in effect at the time of the defendant's trial required the invocation of the right to counsel to be clear and unequivocal, we conclude that defense counsel did not make a knowing and intelligent waiver of the "more protective prophylactic rule . . . required under the Connecticut constitution."[7] *State* v. *Purcell*,

[7] Although federal waiver law is in some respects "inconsistent with our jurisprudence, thus making a comparison of federal and Connecticut law extremely difficult, if not impossible"; *State* v. *Bellamy*, supra, 323 Conn.

supra, 331 Conn. 321. Accordingly, the defendant's state constitutional claim was not waived.

II

We next address whether the defendant's rights under article first, § 8, of the state constitution were violated when Rykowski continued to question the defendant after he allegedly invoked his right to counsel. As we explained in part I of this opinion, in *Purcell*, we determined that the federal constitutional standard set forth in *Davis* v. *United States*, supra, 512 U.S. 459–60, requiring a suspect's invocation of the right to counsel to be clear and unequivocal, "does not adequately safeguard *Miranda*'s right to the advice of counsel during a custodial interrogation." *State* v. *Purcell*, supra, 331 Conn. 361–62. We therefore adopted a more protective standard under article first, § 8, of the Connecticut constitution, which requires questioning to cease after the advise-

435; we note that the federal courts of appeals also review claims affirmatively waived in the trial court when defense counsel's waiver was predicated on "then-binding precedent" that changed between the time of trial and direct appeal. *United States* v. *Johnson*, 981 F.3d 1171, 1178 (11th Cir. 2020); see id. (reviewing defendant's sufficiency of evidence claim for plain error because his "acknowledgement that the evidence he stipulated to was sufficient to satisfy the elements of the crime as laid out by then-binding precedent does not preclude him from asserting that the stipulation is not sufficient in light of the [United States] Supreme Court's subsequent issuance of *Rehaif* [v. *United States*, U.S. , 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019)]"); see also, e.g., *United States* v. *Nasir*, 982 F.3d 144, 173 n.35 (3d Cir. 2020) ("the [invited error] doctrine does not apply [when] the law changes between trial and appeal"); *United States* v. *Titties*, 852 F.3d 1257, 1264 n.5 (10th Cir. 2017) (agreeing with defendant that "the [invited error] doctrine does not apply when a party relied on settled law that changed while the case was on appeal"); *United States* v. *Coffelt*, 529 Fed. Appx. 636, 639 (6th Cir. 2013) ("[T]he [invited error] doctrine presupposes that the defendant has knowledge of the right that he or she is giving up. . . . Here, [the defendant] could not have known that he was relinquishing his right to be sentenced without consideration of his need for rehabilitation. It would be unreasonable, and perhaps unjust, to say this was an invited error when this precise action became prohibited under *Tapia* [v. *United States*, 564 U.S. 319, 131 S. Ct. 2382, 180 L. Ed. 2d 357 (2011)] two months *after* [the defendant] was sentenced." (Citation omitted; emphasis in original.)).

ment of *Miranda* rights "if a suspect makes an equivocal statement that arguably can be construed as a request for counsel . . . ." (Internal quotation marks omitted.) Id., 362. *Purcell* states that questioning may not resume once a defendant expresses such a request, "except for narrow questions designed to clarify the earlier statement and the suspect's desire for counsel." (Internal quotation marks omitted.) Id. Alternatively, "[i]nterrogators confronted with such a situation . . . may inform the defendant that they understand his statement(s) to mean that he does not wish to speak with them without counsel present and that they will terminate the interrogation." Id. In either scenario, questioning may not resume until "the defendant thereafter clearly and unequivocally expresses a desire to continue without counsel present . . . ." Id.

Purcell identified three categories of statements that are equivocal and arguably can be construed as an invocation of a suspect's right to counsel: (1) "statements regarding the assistance or presence of counsel [that] include one or more conditional or hedging terms, such as if, should, probably, or maybe"; id., 335; (2) "[s]tatements referring to counsel's advice that the defendant not speak to the police, if made after the defendant has agreed to waive his right to counsel"; id., 337; and (3) "[s]tatements that could be interpreted as an expression of the defendant's reservation about whether speaking to the police without counsel is in his best interest . . . ." Id., 338–39.

With these principles in mind, we address whether the defendant invoked his right to counsel under the state constitution during his custodial interview. See *State* v. *Anonymous*, 240 Conn. 708, 723, 694 A.2d 766 (1997) (whether defendant invoked right to counsel is question of law, reviewed de novo). First, the defendant contends that, prior to the commencement of the interview, he invoked his right to counsel when he asked

Rykowski why the *Miranda* rights waiver form provided "that I'm wavering . . . um . . . saying how I don't want the presence of an attorney or anything . . . ." The state responds that the defendant's question was not an equivocal inquiry that arguably could be construed as a request for counsel but, instead, was a request for clarification of the *Miranda* rights waiver form.

We need not decide whether the defendant's first inquiry arguably could be construed as a request for counsel because the record reflects that Rykowski complied with the dictates of *Purcell* by seeking clarification from the defendant before beginning the interview. In response to the defendant's question regarding "wavering," Rykowski explained that, "[w]hat this means is, right now, if you sign this, it just means you are agreeing to talk to us," and "you can stop answering questions or you don't have to answer questions if you don't want to . . . but we can't talk unless you agree to talk to us right now." When the defendant asked whether he had to sign the waiver form to talk to Rykowski, Rykowski responded in the affirmative but explained that the defendant could "stop answering questions whenever [he] want[ed]" and that "it doesn't mean [that he had] to talk," it just "means [that they could] talk." The defendant replied "[a]lright" and signed the waiver form. The defendant's express waiver of his *Miranda* rights following Rykowski's explanation manifested the defendant's clear and unequivocal desire to proceed with the interview without the presence of counsel. Importantly, the defendant does not claim that his waiver of his *Miranda* rights was not knowing, intelligent, and voluntary under the totality of the circumstances. On the present record, we conclude that the defendant's state constitutional rights were not violated and that the initial portion of the video recording of the interview, in which the defendant denied any

involvement in the shooting, properly was admitted into evidence.

The defendant next claims that he invoked his right to counsel approximately three hours later in the interview, when he asked, "[i]s there anybody I can talk to . . . [l]ike an attorney or something?" The defendant's question about the availability of "an attorney" or someone else to "talk to" is precisely the type of conditional and equivocal inquiry that reasonably can be construed as a request for counsel. See *State* v. *Purcell*, supra, 331 Conn. 335–37; see also *People* v. *Sauceda-Contreras*, 55 Cal. 4th 203, 219, 282 P.3d 279, 145 Cal. Rptr. 3d 271 (2012) (defendant's statement " '[i]f you can bring me a lawyer' " was conditional and equivocal invocation of right of counsel, among other reasons, because "it began with an inquiry as to whether a lawyer could be brought to [the] defendant" (emphasis omitted)); *People* v. *Kutlak*, 364 P.3d 199, 206 (Colo. 2016) (defendant's inquiry whether he could " 'get [his lawyer] down here now' " was equivocal invocation of right to counsel because it was "unclear . . . whether he was actually requesting his lawyer or whether he was simply exploring the logistics and timing of possibly securing counsel's presence during the interrogation" (emphasis omitted)); *State* v. *Sanelle*, 287 Or. App. 611, 627, 404 P.3d 992 (2017) (defendant's question " '[w]here's the lawyer' " after he had been advised of his *Miranda* rights was equivocal because "a reasonable officer would have understood that [the] defendant may have been invoking his right to counsel"), review denied, 362 Or. 482, 412 P.3d 199 (2018). Accordingly, Rykowski had an obligation under article first, § 8, of the Connecticut constitution to stop the interview and to clarify whether the defendant desired the presence of counsel or, alternatively, to terminate the interview altogether.

The state contends that Rykowski complied with *Purcell*'s "stop and clarify" rule by asking clarifying ques-

tions, such as "[i]s that what you want," and stopping the interview for approximately twenty minutes. We disagree for two reasons. First, although some of Rykowski's responses sought clarification of the defendant's intent to invoke his right to counsel, other responses plainly "attempted to convince the defendant that it was against his interests not to continue the interview." *State* v. *Purcell*, supra, 331 Conn. 362. Rykowski informed the defendant that, if he had an attorney present, the attorney "probably won't let me talk to you," and "the cards [will] fall the way they will" without the defendant telling the "story" of "the why or the who or the what reason."[8] See id., 327, 362 (The police officers attempted to convince the defendant that it was against his interests not to continue the interview by stating, among other things, " 'after today, you're never gonna be able to, to give me or any other cop your story. You're gonna let, a judge is gonna look

[8] The state relies on *Restrepo-Duque* v. *State*, Docket No. 63, 2015, 2015 WL 9268145 (Del. December 17, 2015) (decision without published opinion, 130 A.3d 340), cert. denied, 578 U.S. 1023, 136 S. Ct. 2413, 195 L. Ed. 2d 781 (2016), to support its contention that Rykowski's questions did not exceed the permissible bounds of clarification. We are not persuaded. In *Purcell*, we held that an officer's clarifying questions must be "narrow" and "designed to clarify the earlier statement and the suspect's desire for counsel." (Internal quotation marks omitted.) *State* v. *Purcell*, supra, 331 Conn. 362. We emphasized that questions that "[attempt] to convince the defendant that it was against his interests not to continue the interview" are not clarifying. Id. In contrast, in *Crawford* v. *State*, 580 A.2d 571 (Del. 1990), the Supreme Court of Delaware held that clarifying questions are impermissible only if they "coerce or intimidate the suspect or otherwise discourage his effort to secure counsel, if that is his intention. Nor may the police tender any legal advice or attempt to dissuade the suspect from pursuing an intended course." Id., 577. Pursuant to this standard, the court in *Restrepo-Duque* held that an officer's statement "importuning of [the defendant] to give his side of the story rather than invoke his right to counsel [was] troublesome," but not impermissible, because it was "not intimidating or coercive." *Restrepo-Duque* v. *State*, supra, *5. Although Rykowski's responses were not intimidating or coercive, they nonetheless attempted to convince the defendant that it was against his interest to continue the interview and, therefore, violated the more stringent standard that article first, § 8, of the Connecticut constitution imposes on the content of clarifying questions.

at ya and say, some serious charges against you. You could go to jail for the rest of your life.' "). Furthermore, Rykowski's suggestion that an attorney's financial interest would induce the attorney to advise the defendant, contrary to the defendant's interests, to stop answering questions was entirely inappropriate.[9] We conclude that these statements exceeded the "limited inquiry permissible after an equivocal request for legal counsel . . . ." (Internal quotation marks omitted.) Id., 363.

Second, after pausing the interview to give the defendant some time to decide how he wished to proceed, Rykowski resumed questioning the defendant without clarifying the ambiguity in the defendant's prior inquiry regarding the availability of an attorney. We reject the state's contention that the defendant clarified his equivocal request for counsel by continuing with the interview after a twenty minute break. Rykowski stopped the interview to provide the defendant with time to decide whether he wished to have counsel present. When Rykowski returned, he did not limit his questions to "narrow" inquiries "designed to clarify" the defendant's "desire for counsel." (Internal quotation marks omitted.) Id., 362. Instead, after discussing the defendant's pregnant girlfriend, T, Rykowski proceeded as if the equivocal request had never been made and simply resumed questioning the defendant.[10] Because Rykow-

[9] The relevant portion of the colloquy proceeded as follows:

"[Rykowski]: I mean, I can ask your attorney to talk to you. He probably won't let me talk to you, you know.

"[The Defendant]: Why is that?

"[Rykowski]: It's that they have to make their money, do their thing. You know what I mean?"

[10] The state contends that the defendant reinitiated the interview by asking about T and, therefore, clearly and unequivocally expressed a desire to continue without the presence of counsel. See *Edwards* v. *Arizona*, 451 U.S. 477, 484–85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) (after invocation of counsel, interrogation must cease "until counsel has been made available" or "the accused himself initiates further communication, exchanges, or conversations with the police"); see also *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1045, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983) (suspect initiates further

ski continued to question the defendant even though the defendant never "clearly and unequivocally expresse[d] a desire to continue without counsel present"; id.; we conclude that he failed to comply with *Purcell*'s "stop and clarify" rule. Accordingly, the defendant's rights under article first, § 8, of the Connecticut constitution were violated, and the defendant's written statement and the latter portion of the video recording of the interview, in which the defendant admitted that he shot and killed the victim, should have been suppressed.

III

The question remains whether the admission of the defendant's written statement and the latter portion of the video recording of the interview was harmless. "If statements taken in violation of *Miranda* are admitted into evidence during a trial, their admission must be reviewed in light of the harmless error doctrine. . . . When an [evidentiary] impropriety is of constitutional proportions, the state bears the burden of proving that the error was harmless beyond a reasonable doubt. . . . [W]e must examine the impact of the evidence on

communication under *Edwards* by making statements that "represent a desire . . . to open up a more generalized discussion relating directly or indirectly to the investigation"). The state appears to claim that the defendant's questions about T "evinced a willingness and a desire for a generalized discussion about the investigation . . . ." *Oregon* v. *Bradshaw*, supra, 1045–46. We reject this claim.

Our review of the video recording reveals that the defendant did not summon Rykowski or ask to continue the interview; instead, Rykowski returned to the interview room and asked the defendant how he was doing. The defendant responded by asking whether Rykowski had "hear[d] anything about [T]" and what was "going to [happen] with her . . . ." The defendant explained that "[T] didn't do anything" and that he "want[ed] her to be able to go home." The defendant's questions about T did not invite a generalized discussion about the investigation; rather, they evinced his concern for the health and welfare of his girlfriend, who was pregnant with their child. We therefore conclude that the defendant did not reinitiate the interview. Instead, Rykowski reinitiated the interview by asking the defendant questions about the crimes under investigation without first clarifying whether the defendant desired the presence of counsel.

the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]." (Citations omitted; internal quotation marks omitted.) *State* v. *Mitchell*, 296 Conn. 449, 459–60, 996 A.2d 251 (2010). Whether the error was harmless depends on a number of factors, such as the importance of the evidence to the state's case, whether the evidence was cumulative of properly admitted evidence, the presence or absence of corroborating evidence, and, of course, the overall strength of the state's case. See, e.g., *State* v. *Tony M.*, 332 Conn. 810, 822–23, 213 A.3d 1128 (2019).

The defendant's written statement and the inadmissible portion of the video recording of the interview were of critical importance to the state's case. A confession is powerful evidence, and, without the defendant's admission that he shot the victim, the state's case was weak.[11] The question of harmless error in the present case is not so simply resolved, however, because the defendant's inadmissible oral and written confessions were followed by his testimony at trial, during which he took the stand and told the jury that he shot the victim. The defendant's in-court testimony is untainted by the prior constitutional violation.[12] In light of the

[11] Aside from the evidence linking the defendant to the gun used in the shooting, there was no evidence implicating the defendant in the victim's death other than the defendant's admissions.

[12] The defendant claims that we should disregard his in-court testimony because "it seems unlikely" that he would have testified "but for [the] improper evidence being presented to the jury . . . ." The defendant provides no analysis or authority in his initial brief to support this claim, and, therefore, we are constrained to conclude that it is briefed inadequately to permit meaningful appellate review. See, e.g., *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016) ("Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and

defendant's in-court testimony, it was undisputed at trial that the defendant had shot and killed the victim; the issue to be decided by the jury was whether the defendant's use of deadly physical force was justified by the doctrine of self-defense.

We must decide whether the state has established, beyond a reasonable doubt, that the defendant's properly admitted, in-court testimony removed the harm caused by the improper admission of the video recording of the interview and his written statement. The question, more precisely, is whether the state has met its burden of proving that the jury's verdict would have been the same even if the defendant's inadmissible, out-of-court confessions had not been admitted into evidence. The problem for the state is that the scope and content of the defendant's out-of-court confessions and in-court testimony are not coextensive. Furthermore, at trial, the state relied substantially on the additional information contained in the defendant's out-of-court confessions, as well as the discrepancies between the defendant's out-of-court confessions and his in-court testimony, to discredit the defendant's claim of self-defense. For the reasons that follow, we cannot conclude that the improper admission of the video recording of the defendant's interview and his written statement was harmless beyond a reasonable doubt.

The state may defeat a defendant's claim of self-defense involving deadly physical force, among other ways, by proving, beyond a reasonable doubt, that "(1)

minimal or no citations from the record . . . ." (Internal quotation marks omitted.)). Although the defendant "amplified [his] discussion of the issue considerably in [his] reply brief," it is well established that "we consider an argument inadequately briefed when it is delineated only in the reply brief." *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 378 n.6, 3 A.3d 892 (2010). Because it is inadequately briefed, we cannot consider the defendant's claim that the trial court's failure to suppress the video recording of the interview adversely impacted the subsequent conduct of his defense at trial.

the defendant did not reasonably believe that the victim was using or about to use deadly physical force or inflicting or about to inflict great bodily harm; or (2) the defendant knew that he could avoid the necessity of using deadly physical force with complete safety by retreating . . . .'' (Footnote omitted; internal quotation marks omitted.) *State* v. *Singleton*, 292 Conn. 734, 747, 974 A.2d 679 (2009). The state relied heavily on the defendant's inadmissible statements to Rykowski to fulfill its burden of disproving the defendant's self-defense claim at trial. For example, the state argued that the defendant did not subjectively believe that the victim was about to use deadly physical force or to inflict great bodily harm because the defendant told Rykowski that he '' 'didn't know what [the victim] was gonna do,' '' '' 'wasn't scared per se,' '' and was '' 'not sure what [the victim] was reaching for or what his intentions were.' '' The state further argued that the defendant knew he could have avoided the use of deadly force by retreating safely because the defendant told Rykowski that he '' 'didn't really move,' '' '' 'wasn't trying really to get away,' '' and '' 'wasn't like fleeing from the fight, but . . . wasn't really trying to engage in it.' '' Indeed, the state argued that ''[t]he number one reason [the defendant] didn't retreat'' was because he knew he had a '' 'gun . . . in [his] pocket' '' and he knew he ''wouldn't lose a possible fight with [the victim] . . . .'' None of these statements was elicited as part of the defendant's in-court testimony.

The prosecutor also urged the jury to find that the defendant had fabricated his claim of self-defense in response to a suggestion from Rykowski. Specifically, in closing argument, the prosecutor remarked: ''[T]he defendant wants you to believe that he was justified in using deadly force because he was defending himself. But don't forget this defense was adopted by [the defendant] in his police interview when it was suggested by

. . . Rykowski after three and [one-half] hours of denial. That's why he didn't swing for the fence. He'd adopted this thing of self-defense. So he didn't really know where he was going with it. [At] 4:31 [a.m. during the interview] . . . Rykowski suggests self-defense, that the victim acted like he had a gun. [At] 4:38 [a.m.], [the] defendant says, 'Connecticut doesn't recognize self-defense'; he's corrected by the officer. [At] 5:18 [a.m., he] admits to killing [the victim]. And at the end of the interview, don't forget, he asks at 9:25 [a.m.], 'How does self-defense work?' And [the defendant] continued to embellish on . . . Rykowski's suggestion on self-defense even [at trial] . . . which, again, was more than two and [one-half] years after his initial eight hour interview."

The state further contended that the defendant's statements during the interview were evidence of his consciousness of guilt. Toward the end of the interview, when the defendant was all alone in the room, he berated himself, saying: "I'm the bad guy, I'm a killer. . . . [The victim] didn't deserve that . . . nobody do nothing to me." During its rebuttal argument, the state drew the jury's attention to these inadmissible remarks, arguing that they reflected the defendant's guilt and undermined his claim of self-defense. The state's frequent and repeated emphasis on the defendant's inadmissible statements during its closing and rebuttal arguments indicates that their admission was not harmless. See, e.g., *State* v. *Ayala*, 333 Conn. 225, 235, 215 A.3d 116 (2019) ("in evaluating harm [we] look to see how the state used [the inadmissible] evidence in its closing argument"); *State* v. *Sawyer*, 279 Conn. 331, 360–61, 904 A.2d 101 (2006) (finding harm, among other reasons, because state repeatedly emphasized improperly admitted evidence in its closing argument), overruled in part on other grounds by *State* v. *DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008).

We recognize that the defendant's written statement and the inadmissible portion of his interview contained a good deal of the same information as his in-court testimony, but there were critical differences. Given the brevity of the defendant's in-court testimony and the length of the inadmissible portion of the defendant's interview, which lasted approximately four hours, the defendant's statements to Rykowski contained a significant amount of "*new* material, not heard from any other witness . . . ." (Emphasis in original.) *State* v. *Fernando V.*, 331 Conn. 201, 219, 202 A.3d 350 (2019). As we explained in the preceding paragraphs, this new material included evidence central to the defendant's claim of self-defense, such as the defendant's state of mind at the time of the shooting, the availability of a safe avenue of retreat, the defendant's misunderstanding regarding the validity of self-defense, and his personal belief that he was a "bad guy" and a "killer." "New evidence is not cumulative evidence." Id. The out-of-court statements contained information that was not included in the defendant's in-court testimony, and the state made use of that information in its closing and rebuttal arguments.

The state not only relied on the defendant's inadmissible statements as substantive evidence to disprove the defendant's claim of self-defense but also as impeachment evidence to undermine the defendant's credibility. During closing and rebuttal arguments, the state emphasized various inconsistencies between the defendant's inadmissible statements to Rykowski and his in-court testimony, and urged the jury to find the defendant's testimony regarding justification unworthy of belief. For example, the state pointed out that the defendant had provided conflicting explanations as to what he was doing before the shooting,[13] how he acquired the

[13] At trial, the defendant testified that he was selling marijuana on Judson Street prior to the shooting, but he did not mention this fact to Rykowski.

revolver,[14] what the victim said to him before the shooting,[15] how the revolver ended up in the ice cream box underneath his seat,[16] and whether he confessed to T.[17] Although the defendant's initial statements to Rykowski denying any involvement in the shooting were admissible, and may have affected the jury's assessment of his credibility, the state's focus on these additional discrepancies in the defendant's "story" even after he confessed to the shooting undoubtedly damaged his credibility further, perhaps beyond repair.

The defendant's credibility was critical to his self-defense claim because there was no eyewitness testimony or physical evidence to corroborate or contradict the defendant's account of the shooting. "[When] credibility is an issue and, thus, the jury's assessment of who is telling the truth is critical, an error affecting the jury's ability to assess a [witness'] credibility is not harmless error." (Internal quotation marks omitted.) Id., 223–24. We therefore cannot conclude that the improper admission of the defendant's written statement and the inadmissible portion of the interview was harmless beyond a reasonable doubt with respect to his conviction of manslaughter in the first degree with a firearm.

The state contends that the admission of the defendant's written statement and the latter portion of the interview was harmless because "the jury could have

[14] At trial, the defendant testified that he purchased the revolver approximately one week before the shooting, but he told Rykowski that the revolver " 'basically fell in [his] lap . . . .' "

[15] At trial, the defendant testified that the victim said "don't run," but he told Rykowski that the victim "kept telling [the defendant] to come with him around the corner . . . ."

[16] At trial, the defendant testified that D instructed him to put the revolver in the ice cream box, which D then placed underneath the defendant's seat. The defendant never mentioned this fact to Rykowski.

[17] At trial, the defendant denied telling T that he had killed the victim, but the defendant told Rykowski that he had confessed his involvement in the shooting to T.

fully credited the defendant's testimony and reasonably still could have rejected his claim of self-defense" on the ground that the defendant "(1) did not see the victim with a weapon, and (2) was not even looking at the victim to see what he was doing when he fired his gun not just once, but twice." We agree that the jury could have fully credited the defendant's testimony and nonetheless rejected his self-defense claim by finding his use of deadly physical force to be unreasonable under the circumstances. But it is equally possible that the jury was persuaded by the state's argument that the defendant's testimony was unworthy of belief and that the defendant did not subjectively believe that the victim posed an imminent threat of great bodily harm or death. We do not know the basis for the jury's verdict, and that is the problem. It is unclear whether the jury's verdict rested on a permissible or an impermissible basis, and, under these circumstances, the state has failed to fulfill its burden of establishing that the improper admission of the defendant's out-of-court confession was harmless beyond a reasonable doubt. See *State* v. *Montgomery*, 254 Conn. 694, 718, 759 A.2d 995 (2000) (improper admission of evidence obtained in violation of defendant's *Miranda* rights is harmless only if "it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict without the impermissible [evidence]" (internal quotation marks omitted)); cf. *Griffin* v. *United States*, 502 U.S. 46, 53, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991) ("[when] a provision of the [c]onstitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground"); *State* v. *Cody M.*, 337 Conn. 92, 115–16, 259 A.3d 576 (2020) (in "cases involving multiple theories of guilt," constitutional error in jury instruction may be deemed harmless only "if the jury necessarily found facts to support the conviction on a valid theory"). Accordingly,

we reverse the defendant's manslaughter conviction and remand the case for a new trial on that count. In light of our holding, we need not address the defendant's prosecutorial impropriety claim.[18]

We conclude that the improper admission of the defendant's statements was harmless, however, with respect to the defendant's conviction of criminal possession of a firearm and carrying a pistol without a permit because the defendant testified that he carried and possessed a firearm without a permit and with knowledge that he was subject to a protective order.[19] See General Statutes § 29-35 (a); General Statutes (Rev. to 2015) § 53a-217 (a) (4) (A); see also footnote 14 of this opinion. The defendant's in-court testimony admit-

[18] The defendant claims that the prosecutor made improper remarks (1) misrepresenting the evidence pertaining to the shooting and the defendant's claim of self-defense, (2) mischaracterizing the law of self-defense, and (3) informing the jury that the defendant had a "motive to lie," but Rykowski "had no motivation to lie." The first two categories of alleged prosecutorial improprieties apply only to the defendant's conviction of manslaughter in the first degree with a firearm. Because we reverse the defendant's manslaughter conviction and "do not view [these issues] as likely to arise on remand," we do not address them. *State* v. *Calabrese*, 279 Conn. 393, 413, 902 A.2d 1044 (2006). The third category of alleged prosecutorial impropriety also applies only to the defendant's manslaughter conviction because the defendant's credibility was not at issue with respect to the other crimes of conviction. Indeed, there were no discrepancies between the testimony of Rykowski and the testimony of the defendant with respect to the essential elements of these crimes; the defendant testified that he possessed an operable revolver, without a permit, in a motor vehicle with T, and with knowledge that he was subject to a protective order. It is unclear whether the defendant will elect to testify at his new trial on the manslaughter count; see footnote 12 of this opinion; and, therefore, we cannot conclude that this issue is likely to arise on remand. See, e.g., *State* v. *Lebrick*, 334 Conn. 492, 521 n.16, 223 A.3d 333 (2020) ("[o]rdinarily, we do not decide constitutional issues when resolving those issues is not necessary to dispose of the case before us," unless "an issue with constitutional implications that has been presented and briefed by the parties is likely to arise on remand" (internal quotation marks omitted)).

[19] On appeal, the defendant does not challenge his convictions of criminal violation of a protective order and illegal possession of a firearm in a motor vehicle.

ting to the essential elements of these offenses was cumulative of the statements he made to Rykowski, and, therefore, the jury's verdict as it relates to these offenses was not affected by the violation of the defendant's state constitutional rights. Accordingly, we affirm the judgment of conviction in all other respects.

The judgment is reversed only with respect to the defendant's conviction of manslaughter in the first degree with a firearm and the case is remanded for a new trial on that count; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

RASPBERRY JUNCTION HOLDING, LLC *v.* SOUTHEASTERN CONNECTICUT WATER AUTHORITY
(SC 20454)

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

Syllabus

The plaintiff, the owner of a hotel, sought to recover damages from the defendant municipal water authority for economic losses it incurred in connection with an explosion at the defendant's pumping station, which allegedly was caused by the defendant's negligence and resulted in an extended interruption of water service at the plaintiff's hotel and loss of revenue. The defendant moved for summary judgment, contending, inter alia, that the plaintiff's claim was barred by the economic loss doctrine. The trial court granted the defendant's motion for summary judgment and rendered judgment thereon, concluding that the defendant owed the plaintiff no legal duty of care. In reaching its decision, the court determined that, although the plaintiff's economic losses were reasonably foreseeable, imposing a duty on the defendant was inconsistent with public policy, as determined by the applicable four factor test first articulated in *Jaworski* v. *Kiernan* (241 Conn. 399), which requires a court to consider the normal expectations of the participants in the activity, the public policy of encouraging participation in the activity while weighing the safety of the participants, the avoidance of increased litigation, and the decisions of other jurisdictions. On the plaintiff's

appeal from the judgment in favor of the defendant, *held* that the trial court correctly determined that the defendant owed the plaintiff no legal duty of care because, although it was reasonably foreseeable that an extended interruption of water service would cause economic losses for any of the defendant's customers whose livelihood depended on the constant supply of water, each of the four factors in *Jaworski* militated against imposing a duty on the defendant, as a matter of public policy, under the circumstances of the case: the normal expectations of the parties in the purchase and sale of water militated decisively against the imposition of a duty because the relevant statutory and case law compelled the conclusion that neither party reasonably could have expected that the defendant, a municipal corporation, would be liable in negligence for economic losses incurred by its customers as a result of an interruption in water service; moreover, imposing a duty on the defendant to prevent economic losses from interruptions in water service would result in a predictable increase in litigation without a corresponding increase in the physical safety of the defendant's customers, and, because water is an essential necessity of life, its use requires no encouragement by the law; furthermore, the vast majority of other jurisdictions bar recovery for economic losses in a negligence action arising out of damage to the person or property of another, and this court rejected the plaintiff's contention that this factor weighed in favor of imposing a duty because a number of jurisdictions recognize an exception to the general rule barring recovery when a special relationship exists between the parties, as the plaintiff did not identify any attribute of its relationship with the defendant that would bring the present case into the extremely limited class of negligence cases that do not bar recovery for economic losses.

(*One justice concurring separately*)

Argued January 15—officially released August 18, 2021*

Procedural History

Action to recover damages sustained as a result of the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Vacchelli*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed; thereafter, this court reversed the trial court's judgment and remanded the case for further proceedings; on remand, the court, *Calmar*, *J.*, granted the

* August 18, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed. *Affirmed.*

Santa Mendoza, for the appellant (plaintiff).

Stephanie S. Berry, with whom, on the brief, was *Christopher C. Ring*, for the appellee (defendant).

Opinion

KELLER, J. The plaintiff, Raspberry Junction Holding, LLC, the owner of a 164 room hotel in North Stonington, commenced this negligence action against the defendant, Southeastern Connecticut Water Authority, a municipal corporation that provides water to twenty-one towns and boroughs in southeastern Connecticut, seeking damages for economic losses it incurred when an explosion at the defendant's North Stonington pumping station caused an interruption in the hotel's water service. The defendant moved for summary judgment, contending that (1) it was immune from liability under rules it had adopted pursuant to the rule-making authority conferred on it by the legislature, and (2) the plaintiff's claim was barred by the economic loss doctrine, a common-law rule, which, "generally characterized, reflects the principle that a plaintiff cannot sue in tort for purely monetary loss unaccompanied by physical injury or property damage." *Raspberry Junction Holding, LLC* v. *Southeastern Connecticut Water Authority*, 331 Conn. 364, 368 n.3, 203 A.3d 1224 (2019). The trial court, *Vacchelli, J.*, agreed with the defendant's first contention and granted its motion for summary judgment. Id., 368. The plaintiff appealed, and this court reversed the trial court's judgment and remanded the case for consideration of the defendant's alternative ground for summary judgment. Id., 378. Presently

before us is the plaintiff's appeal[1] from the judgment of the trial court, *Calmar*, *J.*, again granting the defendant's motion for summary judgment, this time on the theory that the defendant owed the plaintiff no legal duty of care. On appeal, the plaintiff claims that the trial court incorrectly determined that the defendant could not be held liable for the plaintiff's losses because public policy does not support the imposition of a duty on the defendant under the circumstances of this case. We disagree and, accordingly, affirm the judgment of that court.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. "The defendant was created in 1967 by a special act of the General Assembly as a body politic and corporate of the state, designated to perform the 'essential government function' of planning, operating, and maintaining a water supply system for the benefit of the southeastern Connecticut planning region. 33 Spec. Acts 478, No. 381 (1967) (special act).[2] Section 14 of [the special] act sets forth the powers and duties conferred on the defendant, including 'the power . . . to make . . . rules for the sale of water and the collection of rents and charges therefor . . . [and] to do all things necessary or convenient to carry out the powers expressly given in [the] act . . . .' 33 Spec. Acts 481, 483–84, No. 381, § 14 (1967)." (Footnote altered.) *Raspberry Junction Holding, LLC* v. *Southeastern Connecticut Water Authority*, supra, 331 Conn. 366–67.

"The [defendant] is a publicly owned agency of government, not a private company. Its function, simply

[1] The plaintiff appealed from the trial court's judgment to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[2] Although the special act has been amended several times since 1967, those amendments are not relevant to this appeal. All references herein are to the 1967 special act.

stated, is to plan, operate and construct water supply systems in Southeastern Connecticut. The underlying consideration in the creation of the [defendant] by the legislature, in response to local initiatives, was that the long range public interest is best served by a collective and cooperative approach to the water supply requirements, present and future." Southeastern Connecticut Water Authority, Rules Governing Water Service, available at https://www.waterauthority.org/rules-governing-service (last visited August 9, 2021).

The defendant consists of seven members appointed by the representative advisory board (advisory board), which is comprised of two members from each of the twenty-one towns and boroughs served by the defendant. Id. Advisory board members are appointed by the board of selectmen or town council from each town or borough for a term of two years and serve without compensation. See 33 Spec. Acts 479, No. 381, §§ 4 and 5 (1967). "The [advisory board], in addition to appointing [the defendant's] members, annually audits the financial records of the [defendant]. It also holds public hearings on proposed changes in rates. Within the [advisory board], there are several standing committees, including [f]inance, [l]egislative, and [c]ustomer [a]ppeals. The [c]ustomer [a]ppeals [c]ommittee's purpose is to resolve misunderstandings between the [defendant] and its customers. [Each] town's [advisory board] members are [the] direct representatives [of the defendant's customers] . . . ." Southeastern Connecticut Water Authority, supra.

"In 2016, the plaintiff commenced the present action against the defendant, seeking damages [for] a loss of water service at [its hotel] . . . . In its one count complaint, the plaintiff alleged that the hotel lost water service for several days in June, 2015, due to the explosion of a hydropneumatic tank at a pumping station operated by the defendant as a result of the defendant's

negligent construction, operation, inspection or maintenance of the tank and its valves. The plaintiff further alleged that the water outage caused the plaintiff to lose revenue due to its inability to rent rooms and the need to give refunds to hotel guests during the water outage.

"The defendant moved for summary judgment on two grounds. First, it contended that rule 5 [of the defendant's 'Rules Governing Water Service'] immunized it from liability for the plaintiff's damages . . . . Second, it contended that, because the plaintiff was seeking damages for monetary loss only, the claim is barred by the common-law economic loss doctrine. The plaintiff opposed the motion, arguing that the defendant, as a municipal corporation engaged in a proprietary function, is not immune from suit and has no authority, express or implied, to promulgate rules that waive liability for negligence. The plaintiff also argued that the economic loss doctrine does not apply under the circumstances presented." (Citation omitted; footnote omitted.) *Raspberry Junction Holding, LLC* v. *Southeastern Connecticut Water Authority*, supra, 331 Conn. 367–68.

The trial court, *Vacchelli, J.*, agreed with the defendant's first contention and rendered summary judgment in the defendant's favor. Id., 368. On appeal, this court reversed the trial court's judgment on the basis of our determination that the legislature did not authorize the defendant to promulgate rules immunizing itself from liability. Id., 370. In light of that determination, we remanded the case to the trial court for consideration of the defendant's alternative ground for summary judgment, namely, that the plaintiff's claim was barred by the economic loss doctrine. Id., 378.

On remand, the parties filed additional briefs in support of their respective positions. Following oral argu-

ment, the trial court, *Calmar*, *J.*, issued a memorandum of decision in which it granted the defendant's motion for summary judgment. The trial court, citing *Lawrence* v. *O & G Industries*, *Inc.*, 319 Conn. 641, 664, 126 A.3d 569 (2015), explained that the economic loss doctrine is a common-law rule intended "to shield a defendant from unlimited liability for all of the economic consequences of a negligent act, particularly in a commercial or professional setting, and thus to keep the risk of liability reasonably calculable." (Internal quotation marks omitted.) The trial court further explained that this court previously has declined to apply the economic loss doctrine as a categorical bar to the recovery of purely economic losses in a tort action, opting instead to apply a traditional duty analysis to the question of whether a defendant's liability should extend to such losses. Applying this analysis, the trial court concluded that the defendant owed the plaintiff no legal duty of care.

In reaching its determination, the court, quoting *Lawrence*, explained that whether a duty exists turns on two considerations, the foreseeability of the harm and "a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case." (Internal quotation marks omitted.), quoting *Lawrence* v. *O & G Industries*, *Inc.*, supra, 319 Conn. 650. The court further explained that, in determining whether public policy supports the imposition of a duty, courts apply the well established test first articulated in *Jaworski* v. *Kiernan*, 241 Conn. 399, 407, 696 A.2d 332 (1997), which requires courts to consider the following four factors: "(1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litiga-

tion; and (4) the decisions of other jurisdictions." (Internal quotation marks omitted.) *Lawrence* v. *O & G Industries, Inc.*, supra, 650. Applying these well established principles, the court determined that, although the plaintiff's economic losses were reasonably foreseeable, imposing a duty on the defendant was inconsistent with public policy, as determined by the applicable four factor test.

Specifically, the trial court concluded that, although the first factor favored the plaintiff "slightly" insofar as water service customers generally expect an interruption in service to be "temporary," lasting hours rather than days, the remaining three factors weighed against the imposition of a duty. With respect to the second factor, the court concluded that using water is not an activity that requires the encouragement of the law, and, because the defendant already may be held liable for personal injury or property damage resulting from its negligence, "[i]mposing a duty on the defendant to hold it liable for economic losses would . . . not positively impact safety because it would not increase [the defendant's] impetus to act with due care." (Internal quotation marks omitted.) With respect to the third factor, the court determined that it too "weigh[ed] heavily against imposing a duty on the defendant," explaining that, "[s]hould the defendant ever need to halt its [water] service . . . in the future, it is possible that all of its affected customers, both residential and commercial, could initiate an action against [it] . . . [potentially] flooding the courts with spurious and fraudulent claims" and exposing the defendant to "endless" litigation. (Internal quotation marks omitted.)

Finally, the trial court concluded that the fourth factor also weighed decisively against the imposition of a duty. Specifically, the court noted that most jurisdictions "bar a plaintiff from recovering purely economic losses in [a] tort [action] in the absence of personal

injury or property damage." The court reasoned that, were it to find that the defendant owed a duty to the plaintiff, it "would expose [the defendant] to potentially limitless liability," the costs of which would be borne by the defendant's other customers in the form of increased rates. The court also noted that, even in those jurisdictions that permit the recovery of purely economic losses in a negligence action, a plaintiff must establish that a special relationship existed between the parties such that the plaintiff's losses were "particularly foreseeable" to the defendant, which the plaintiff in the present case could not do.

On appeal, the plaintiff claims that the trial court incorrectly determined that the defendant owed the plaintiff no duty of care. Specifically, the plaintiff contends that the trial court, in analyzing the second and third factors of the public policy prong of the duty analysis, incorrectly concluded that, because the defendant may be held civilly liable for physical injury and damage to property resulting from its negligence, imposing an additional duty on the defendant for economic losses would not address a valid safety concern. In support of this contention, the plaintiff argues that, because the defendant is not subject to extensive state or federal regulation and knows that "even an extremely dangerous event" such as a "catastrophic explosion at a pumping station" is unlikely to cause bodily injury or damage to the property of another, "the possibility of civil liability for economic harm is perhaps the one and only avenue that would increase [the defendant's] impetus to act with due care." (Internal quotation marks omitted.) The plaintiff further contends that "[t]he ubiquitous need for water, both for basic hygiene and health and also [for] fire safety . . . suggests that . . . Connecticut law . . . should be encouraging every effort to ensure the uninterrupted distribution of [that resource] . . . ." The plaintiff finally contends that the trial court,

in applying the fourth factor of the public policy analysis, failed to consider the "growing list of jurisdictions willing to extend liability in opposition to the economic loss doctrine when a special relationship exists [between the parties]." The plaintiff asserts that a special relationship exists between the parties in the present case as a result of the "imbalance of power" between them, which allows the defendant "to take advantage of or exercise undue influence over" the plaintiff, who, because of the defendant's monopoly over the supply of water in the plaintiff's area, has no choice but to purchase water from the defendant. (Internal quotation marks omitted.)

The defendant responds, inter alia, that the trial court correctly determined that it owed the plaintiff no legal duty of care. The defendant disagrees, however, with the trial court's determination that the plaintiff's economic losses were foreseeable, arguing instead that nonpotable water was restored to the plaintiff within twenty-four hours of the initial outage, while potable drinking water was provided free of charge until a new water system was installed. The defendant contends that the plaintiff's business losses were not the result of a lack of water but, rather, resulted from unforeseeable "restrictions put in place by a fire marshal . . . [who] limited the number of rooms the plaintiff could rent and required the plaintiff to patrol its hotel to accommodate a potential limitation on its ability to operate its sprinkler system." As for the public policy prong of the duty analysis, the defendant argues that the trial court correctly determined that it militates against the imposition of a duty, although the defendant disagrees with that court's determination that the first factor of the analysis favors the plaintiff, even slightly. The defendant contends, rather, that the normal expectations of the parties were met because, although uninterrupted water service may be the expectation, that expectation does

not apply when, as in the present case, there are exigent circumstances such as the explosion at the defendant's pumping station. The defendant further maintains that the parties' expectations were met in any event because the service interruption did not last for several days, as the plaintiff claims but, rather, for less than twenty-four hours, and the parties' contract alerted the plaintiff that service interruptions may occur at any time and for any reason. We conclude that the trial court correctly determined that the defendant owed the plaintiff no legal duty of care.

"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. . . . 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 . . . . A material fact . . . [is] a fact [that] will make a difference in the result of the case." (Internal quotation marks omitted.) *Shoreline Shellfish, LLC* v. *Branford*, 336 Conn. 403, 410, 246 A.3d 470 (2020). The scope of our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. See id.

As we previously have explained, "[a] cause of action in negligence is comprised of four elements: duty; breach of that duty; causation; and actual injury. . . . Whether a duty exists is a question of law for the court, and only if the court finds that such a duty exists does the trier of fact consider whether that duty was breached." (Internal quotation marks omitted.) *Lawrence* v. *O & G Industries, Inc.*, supra, 319 Conn. 649. "If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot

recover in negligence from the defendant. . . . Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual. . . . Foreseeability is a critical factor in the analysis, because no duty exists unless an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result . . . . Our law makes clear that foreseeability alone, however, does not automatically give rise to a duty of care . . . . A further inquiry must be made, for we recognize that duty is not sacrosanct in itself . . . but is only an expression of the sum total of those considerations of policy [that] lead the law to say that the plaintiff is entitled to protection. . . . The final step in the duty inquiry, then, is to make a determination of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results. (Citations omitted; internal quotation marks omitted.) *Demond* v. *Project Service, LLC*, 331 Conn. 816, 834–35, 208 A.3d 626 (2019).

In *Lawrence*, in which a group of construction workers sought to recover lost wages after an explosion destroyed their work site; *Lawrence* v. *O & G Industries, Inc.*, supra, 319 Conn. 644–45; this court rejected a claim that, "independent of a duty analysis, [we] should adopt the economic loss doctrine as a 'categorical bar' to a plaintiff's recovery of 'economic loss . . . in tort absent damage to [the plaintiff's] person or property' " because such a bar was " 'in line' " with more than one century of Connecticut case law. Id., 648 n.8. In so doing, "we agree[d] with the trial court's observation that the '[economic loss] doctrine, as employed in tort cases to preclude a plaintiff's claim, is merely another

way of saying that the defendant[s] owed no duty to the plaintiff because the claimed loss was a remote and indirect consequence of the misconduct of the defendants.' " Id.; see also *Eastwood* v. *Horse Harbor Foundation, Inc.*, 170 Wn. 2d 380, 389, 241 P.3d 1256 (2010) ("A review of [Washington] cases on the economic loss rule shows that ordinary tort principles have always resolved th[e] question [of liability]. An injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract. The court determines whether there is an independent tort duty of care, and [t]he existence of a duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy, and precedent." (Internal quotation marks omitted.)).

Our reluctance in *Lawrence* to adopt the economic loss doctrine as a categorical bar to recovery also reflected a desire to avoid the confusion that has arisen in jurisdictions that have adopted such a rule even though pure economic loss remained recoverable in those jurisdictions in a variety of tort contexts, including negligence. See, e.g., *Alma* v. *AZCO Construction, Inc.*, 10 P.3d 1256, 1263 (Colo. 2000) ("[S]ome torts are expressly designed to remedy pure economic loss (e.g., professional negligence, fraud, and breach of fiduciary duty). It is here that substantial confusion arises from the use of the term 'economic loss rule.' "); see also Restatement (Third), Torts, Liability for Economic Harm § 1, comment (b), p. 2 (2020) ("[s]tating the absence of a duty as a general rule can create confusion by seeming to threaten [well established] causes of action, by leaving behind an uncertain and unwieldy number of exceptions, and by implying a needless presumption against the existence of a duty on facts not yet considered").

The Restatement (Third) of Torts explains: "Liability for the unintentional infliction of economic loss emerged

only within the last [forty] years as a distinct topic for analysis within the law of torts. . . . References to an economic-loss 'rule' or 'doctrine' began to appear in American case law for the first time in the 1970s. The expression sometimes referred to the idea that a plaintiff cannot collect in tort for economic losses suffered as a result of injury to the person or property of another—a doctrine covered here in § 7 . . . . Other courts treated the economic-loss rule as meaning that plaintiffs cannot collect in tort when they buy products that disappoint their economic expectations . . . . Many courts have extended that principle from cases involving products to other cases [in which] a defendant's breach of contract causes financial losses to the plaintiff. . . . When articulating any of these doctrines, courts sometimes have spoken generally of a rule against recovery in tort for pure economic loss.

" 'Economic loss' thus has become a significant and distinct category within the law of liability for negligence. It has become a potent source of confusion as well. Courts have long assumed, often without much discussion, that no recovery can be had in tort for certain types of economic loss; but they also have long allowed recovery of economic losses in cases of professional malpractice and in certain other settings. . . . When some courts began to say that tort law should not be used to redress pure economic loss, they created uncertainty about whether [well established] causes of action still were valid, and about how one might separate emerging claims that survive the new rule from those that do not." (Citations omitted.) Restatement (Third), supra, § 1, reporter's note (a), pp. 6–7.

We note, finally, that, regardless of whether this court applies a duty analysis to the question of liability in cases such as the present one or applies some iteration of the economic loss doctrine as a categorical bar to recovery, as many courts have done, the outcome is

likely to be the same because, as we have explained, the purpose of a duty analysis is to ascertain the fundamental policy of the law, and the economic loss doctrine is merely an expression of that policy as determined by other courts, in earlier cases.[3] With this background in mind, we turn to an analysis of the question presented, namely, whether the defendant owed the plaintiff a duty of care.

The first prong of that analysis is whether the harm complained of was foreseeable. As previously indicated, the defendant challenges the trial court's determination that, in the present case, it was foreseeable, arguing that the plaintiff's economic losses were the unforeseeable result of a fire marshal's decision to require the plaintiff's hotel to operate at one-half capacity until a new potable water system was installed, even though nonpotable water was restored within twenty-four hours and potable water was provided free of charge while the system was under repair. The plaintiff responds, and our independent review of the record confirms, that the defendant presented no evidence to the trial court to establish the factual predicates of this argument, and, therefore, it is not properly before us. See, e.g., *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 53, 213 A.3d 1110 (2019) ("courts are in entire agreement that the moving party for summary judgment has the burden of [presenting evidence] showing the absence of any genuine issue as to all the material facts" (internal quotation marks omitted)); *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 321, 77 A.3d 726 (2013) ("[i]f the party moving for summary judgment fails to show that there are no genuine issues of material fact, the nonmoving party may rest on

[3] We note that the parties have not asked us to apply a different analysis to the question of whether the defendant should be liable for the plaintiff's economic losses; rather, they have briefed the issue in conformance with the duty analysis adopted in *Jaworski* and applied in *Lawrence*.

mere allegations or denials contained in his pleadings" (internal quotation marks omitted)). For purposes of our analysis, therefore, we will assume that the water outage at the plaintiff's hotel lasted "several days," as the plaintiff alleged in its complaint. Given that assumption, we agree with the trial court that it was reasonably foreseeable that a service interruption of that duration would cause economic losses for any of the defendant's customers whose livelihood depended on a constant supply of water.

Our law makes clear, however, that "[a] simple conclusion that the harm to the plaintiff was foreseeable . . . cannot by itself mandate a determination that a legal duty exists. Many harms are quite literally foreseeable, yet for pragmatic reasons, no recovery is allowed. . . . The final step in the duty inquiry, then, is to make a determination of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results." (Internal quotation marks omitted.) *Demond* v. *Project Service, LLC*, supra, 331 Conn. 834–35. As we have explained, in making that determination, our courts consider the following four factors: "(1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions. . . . [This] totality of the circumstances rule . . . is most consistent with the public policy goals of our legal system, as well as the general tenor of our [tort] jurisprudence." (Internal quotation marks omitted.) *Lawrence* v. *O & G Industries, Inc.*, supra, 319 Conn. 650–51. For the reasons that follow, we conclude that each of these factors militates against the imposition of a duty, and, therefore, imposing a duty on the defendant would be contrary to sound public policy.

We begin with the normal expectations of the participants in the activity under review. In the present case, that activity is the purchase and sale of water, where the seller is a municipal corporation tasked with planning, operating, and maintaining a public water supply system, and the buyer is a member of the public for whose benefit the system and the defendant were created. The trial court concluded that this factor favored the plaintiff—albeit only "slightly"—because "[t]he normal expectation of a water delivery service customer is that, absent exigent circumstances, water will be provided" and that any interruption in service that does occur will be short lived. Although we agree with the trial court's analysis as far as it goes, by failing to take into account the reasonable expectations of the defendant, it did not go far enough. Our case law also establishes that, in applying this factor, courts must consider "Connecticut's existing body of common law and statutory law relating to this issue"; *Lawrence* v. *O & G Industries, Inc.*, supra, 319 Conn. 651; which the trial court failed to do. When these additional considerations are taken into account, we conclude that the first factor militates decisively against the imposition of a duty.

In considering the normal expectations of the parties in *Lawrence*, we explained that, for well over one century and in a variety of factual contexts, this court has denied recovery in negligence for economic losses resulting from injury to the person or property of another, in each instance concluding that the damages were simply too remote or the relationship between the parties too attenuated for a duty to be imposed on the defendant. See, e.g., id., 651–658 (citing and discussing cases); id., 643–44, 667 (plaintiff construction workers could not recover economic losses in form of lost wages from defendant construction companies whose negligence destroyed plaintiffs' work site, causing plaintiffs to lose their jobs); *RK Constructors, Inc.*

v. *Fusco Corp.*, 231 Conn. 381, 382–83, 650 A.2d 153 (1994) (employer could not maintain negligence action against third-party tortfeasor to recover economic losses in form of increased workers' compensation premiums resulting from tortfeasor's injury of employer's employee); *Connecticut Mutual Life Ins. Co.* v. *New York & New Haven Railroad Co.*, 25 Conn. 265, 276 (1856) (life insurance company could not recover life insurance benefits paid on behalf of its insured by bringing direct action against railroad company whose negligence caused insured's death); see also *Gregory* v. *Brooks*, 35 Conn. 437, 446 (1868) ("[when] one is injured by the wrongful act of another, and others are indirectly and consequentially injured, but not by reason of any natural or legal relation, the injuries of the latter are deemed too remote to constitute a cause of action"). Given this body of case law, which spans more than 150 years, we do not believe that the normal expectations of the parties in the present case reasonably could have included an expectation that the defendant would be liable in negligence for the economic losses of its customers under the circumstances of this case.

Our conclusion is reinforced by General Statutes § 52-557n (a) (1), which provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall be liable for *damages to person or property* caused by . . . (B) negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit . . . ." (Emphasis added.) By its express terms, § 52-557n waives a municipal corporation's governmental immunity "for damages to person or property . . . ." It does not waive its immunity with respect to purely economic or commercial losses. E.g., *Williams Ford, Inc.* v. *Hartford Courant Co.*, 232 Conn. 559, 583, 657 A.2d 212 (1995) (interpreting General Statutes § 52-572h (b) and concluding that "the legislature intended the

phrase 'damage to property' to encompass only its usual and traditional meaning in the law of negligence actions, namely, damage to or the loss of use of tangible property" and that, when drafting legislation, "the legislature [is] mindful of a distinction between property damage and commercial losses"); see *Mountain West Helicopter, LLC* v. *Kaman Aerospace Corp.*, 310 F. Supp. 2d 459, 465 (D. Conn. 2004) ("Connecticut [S]upreme [C]ourt has, in the context of other statutes, recognized a categorical distinction between commercial losses and damage to property" and "[when] the legislature has employed the term 'damage to property,' the . . . court has held that it [was] not intend[ed] to [permit the] recover[y] [of] purely [economic] losses unaccompanied by damages to some tangible property"); see also General Statutes § 52-572h (a) (distinguishing, in negligence actions, between economic damages and noneconomic damages such as "physical pain and suffering"); Restatement (Third), supra, § 2, comment (a), p. 10 ("When [the] Restatement [(Third) of Torts] refers to 'property damage,' it generally means damage to tangible property. Usually the distinction between physical injury and pure economic loss is easy to draw, though it occasionally causes confusion when relatively minor damage to person or property leads to monetary losses on a large scale. It may then seem tempting to describe the plaintiff's losses as purely economic in character. They are not. The property damage at the root of such a loss brings the case within the scope of Restatement [(Third)], Torts: Liability for Physical and Emotional Harm, and the rules stated there. Economic loss that accompanies even minor injury to the plaintiff's person or property does not tend to raise the same considerations found when a plaintiff's losses are economic alone."); id, § 1, comment (c), p. 2 ("[a]n economic loss or injury, as the term is used [in the Restatement (Third) of Torts], means a financial loss not arising from injury

to the plaintiff's person or from physical harm to the plaintiff's property").

"Section 52-557n . . . specifically delineates circumstances under which municipalities and its employees can be held liable in tort and those under which they will retain the shield of governmental immunity." (Citation omitted.) *Durrant* v. *Board of Education*, 284 Conn. 91, 105, 931 A.2d 859 (2007); see also *Doe* v. *Petersen*, 279 Conn. 607, 614, 903 A.2d 191 (2006) ("§ 52-557n abandons the common-law principle of municipal sovereign immunity and establishes the circumstances in which a municipality may be liable for damages" (footnote omitted)). It is axiomatic that "[s]tatutes that abrogate or modify governmental immunity are to be strictly construed." *Rawling* v. *New Haven*, 206 Conn. 100, 105, 537 A.2d 439 (1988). "Since the codification of the common law under § 52-557n [in 1986], this court has recognized that it is not free to expand or alter the scope of governmental immunity therein." *Durrant* v. *Board of Education*, supra, 107. In light of the foregoing, we conclude that the law of Connecticut,[4] insofar as it informs our understanding of the parties' normal expectations, compels the conclusion that neither party reasonably could have expected that the defendant, a municipal corporation, would be liable in negligence for economic losses incurred by its customers as a result of an interruption in the defendant's water service.

Because they are analytically related, we consider together the second and third factors, namely, "the public policy of encouraging participation in the activity,

[4] We recognize, as we did in *Raspberry Junction Holding, LLC* v. *Southeastern Connecticut Water Authority*, supra, 331 Conn. 369 n.5, that the defendant did not raise governmental immunity as a special defense in the trial court, and, therefore, that issue is not presently before us. We rely on § 52-557n only insofar as it informs our understanding of the normal expectations of the participants in the activity under review.

while weighing the safety of the participants, and the avoidance of increased litigation . . . .'' (Internal quotation marks omitted.) *Lawrence* v. *O & G Industries, Inc.*, supra, 319 Conn. 658. It is readily conceivable that imposing a duty of care on the defendant under the circumstances of the present case would encourage future plaintiffs to initiate actions of their own in the event of a prolonged interruption in water service. Despite the predictable increase in litigation that would follow such a decision, however, there would be no corresponding increase in public safety. This is so because the receipt of water is an inherently harmless activity, requiring the defendant's customers to do no more than turn a faucet and, periodically, write a check to cover the cost of the water each has used. See id., 658–59 (''It is easy to fathom how affirmatively imposing a duty on the defendants . . . could encourage similarly situated future plaintiffs to litigate on the same grounds; this is true anytime a court establishes a potential ground for recovery. . . . At the same time, the recognition of such a duty fails to provide a corresponding increase in safety . . . .'' (Citation omitted; footnote omitted; internal quotation marks omitted.)); see also id., 660 (''[t]he probability that an increase in litigation will not be offset by an increase in safety gives us particular pause with respect to recognizing a duty'').

In arguing to the contrary, the plaintiff contends that extended interruptions in water service implicate ''a host of safety and sanitary public health problems.'' Relying on this court's statement in *Raspberry Junction Holding, LLC*, that, under § 24 of the special act, ''the defendant is not subject to comprehensive regulation of its rates, services, and facilities by this state's public utilities regulatory authority''; *Raspberry Junction Holding, LLC* v. *Southeastern Connecticut Water Authority*, supra, 331 Conn. 375–76; the plaintiff contends that, because the defendant is not subject to any such regula-

tion, "the possibility of civil liability for economic harm is perhaps the one and only avenue" to ensure that the defendant acts with due care to maintain an uninterrupted supply of water, so as to avoid an array of public health and sanitation problems. The statement in *Raspberry Junction Holding, LLC*, was made in the context of explaining why the trial court's reliance on case law from other jurisdictions, as a basis for concluding that the defendant had the authority to immunize itself from liability, was misplaced, namely, because all of the cited cases "involved water authorities subject to such regulatory restrictions and thus implicated a corresponding public policy justification for the right to limit liability . . . ." *Raspberry Junction Holding, LLC* v. *Southeastern Connecticut Water Authority*, supra, 376. Contrary to the plaintiff's contention, however, the defendant is subject to formidable health and safety regulation by various state agencies, the purpose of which is to ensure a safe and continuous supply of water to the defendant's customers. See, e.g., 33 Spec. Acts 493, No. 381, § 34 (1967) ("[n]othing contained in this act shall be held to alter or abridge the powers and duties of the state [D]epartment of [Public] [H]ealth or of the water resources commissions over water supply matters"). One such regulation requires the defendant to have in place a contingency plan for providing water to its customers in the event of a systemwide failure. Specifically, "[u]nder General Statutes § 25-32d (a), water companies are required to submit a water supply plan to the [Commissioner] of [P]ublic [H]ealth for approval 'with the concurrence of the Commissioner of [Energy and] Environmental Protection.' A water supply plan is required to 'evaluate the water supply needs in the service area of the water company submitting the plan and [to] propose a strategy to meet such needs.' General Statutes § 25-32d (b). The plan must 'include . . . [inter alia] (1) [a] description of existing water supply

systems; (2) an analysis of future water supply demands; (3) an assessment of alternative water supply sources which may include sources receiving sewage and sources located on state land; [and] (4) *contingency procedures for public drinking water supply emergencies, including emergencies concerning the contamination of water, the failure of a water supply system or the shortage of water* . . . .' General Statutes § 25-32d (b)." (Emphasis added; footnotes omitted.) *Miller's Pond Co., LLC* v. *New London*, 273 Conn. 786, 820–22, 873 A.2d 965 (2005).

In light of the foregoing, we are not persuaded that imposing a duty on the defendant to prevent economic loss resulting from interruptions in its water service is required to address the health and sanitation concerns identified by the plaintiff. It is apparent that those concerns have already been addressed by the legislature.[5] See *Lawrence* v. *O & G Industries, Inc.*, supra, 319 Conn. 659 (concluding that imposing duty on defen-

[5] We note in this regard that the plaintiff does not actually dispute the defendant's repeated assertion, throughout its brief to this court, that nonpotable water was restored to all of the defendant's customers within twenty-four hours of the explosion at its pumping station such that "the plaintiff's hotel guests could utilize showers, sinks, and flush toilets . . . ." Nor does the plaintiff dispute that the defendant provided drinking water to all of its customers, including the plaintiff, free of charge throughout the outage. In other words, it would appear that, following the explosion, the defendant implemented the contingency plan required by § 25-32d (b). In its brief, the defendant asserts that it "responded to [the explosion at its pumping station] around 3:30 a.m. and immediately contacted [the] state police, the local fire department, the Connecticut Department of Public Health, the Connecticut Department of Energy and Environmental Protection, and the [federal] Environmental Protection Agency, all of whom responded to and investigated the scene. [It] was not allowed back on the property until it was cleared by these authorities at approximately 7 p.m. Once [it] regained access to the property, it began taking measures to provide water to its customers. It activated an interagency emergency response network, CTWARN, and the Connecticut Water Company responded to [its] request by shipping water to North Stonington from Groton. [It] also immediately began installing a temporary valve in the water main . . . [such that] [n]onpotable water was restored to all North Stonington customers by late evening . . . ."

dants to prevent economic loss would not improve physical safety of plaintiffs "given that companies like the defendants are subject to extensive state and federal regulation, and already may be held civilly liable to a wide variety of parties who may suffer personal injury or property damage as a result of their negligence").

Thus, because improving public safety is a primary reason duties are imposed in the first instance, the fact that no duty we could impose on the defendant in the present case would be likely to increase the physical safety of the defendant's customers is a compelling reason not to impose one. See, e.g., *Rizzuto* v. *Davidson Ladders, Inc.*, 280 Conn. 225, 235–36, 905 A.2d 1165 (2006) ("It is sometimes said that compensation for losses is the primary function of tort law . . . [but it] is perhaps more accurate to describe the primary function as one of determining when compensation [is] required. . . . An equally compelling function of the tort system is the prophylactic factor of preventing future harm . . . ." (Internal quotation marks omitted.)); *Lodge* v. *Arett Sales Corp.*, 246 Conn. 563, 583, 717 A.2d 215 (1998) (declining to impose duty on defendants when doing so "would achieve little in preventing the type of harm suffered by the plaintiffs"); see also, e.g., *Ruiz* v. *Victory Properties, LLC*, 315 Conn. 320, 340, 107 A.3d 381 (2015) ("imposing a duty . . . will likely prompt landlords to act more responsibly toward their tenants in the interest of preventing foreseeable harm caused by unsafe conditions in areas where tenants are known to recreate or otherwise congregate"); *Monk* v. *Temple George Associates, LLC*, 273 Conn. 108, 119–20, 869 A.2d 179 (2005) (imposing duty on parking garage owner to "protect customers by [taking] reasonable care to decrease the likelihood of crime occurring on [its] premises"); *Jagger* v. *Mohawk Mountain Ski Area, Inc.*, 269 Conn. 672, 703, 849 A.2d 813 (2004) (imposing duty on skiers because "requiring [them] to participate

in the reasonable manner prescribed by the rules of the sport . . . will promote participation in the sport of skiing" and "protect the safety" of those who do participate). We note lastly, with respect to the issue of whether the law should be used to encourage participation in the activity under review, the plaintiff concedes, as it must, that water is an essential necessity of life, and, as such, its use requires no encouragement by the law. In light of the foregoing, we conclude that the second and third factors also weigh heavily against the imposition of a duty.

We turn, therefore, to the final factor, the decisions of other jurisdictions. As the trial court noted and the plaintiff does not dispute, the vast majority of jurisdictions bar recovery of economic losses in a negligence action arising out of damage to the person or property of another. See, e.g., *Lawrence* v. *O & G Industries, Inc.*, supra, 319 Conn. 661–64 (discussing majority rule and reasons for it). "Courts that reject claims . . . under the economic loss doctrine reason that the primary purpose of the rule is to shield a defendant from unlimited liability for all of the economic consequences of a negligent act, particularly in a commercial or professional setting, and thus to keep the risk of liability reasonably calculable. . . . They posit that the foreseeability of economic loss, even when modified by other factors, is a standard that sweeps too broadly in a professional or commercial context, portending liability that is socially harmful in its potential scope and uncertainty. . . . [See] *In re Chicago Flood Litigation*, [176 Ill. 2d 179, 198, 680 N.E.2d 265 (1997)] (observing that the economic consequences of any single accident are virtually limitless and that [i]f [the] defendants were held liable for every economic effect of their negligence, they would face virtually uninsurable risks far out of proportion to their culpability, and far greater than is necessary to encourage potential tort defendants to

exercise care in their endeavors . . .)." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Lawrence* v. *O & G Industries, Inc.*, supra, 664; see also *Southern California Gas Leak Cases*, 7 Cal. 5th 391, 403, 441 P.3d 881, 247 Cal. Rptr. 3d 632 (2019) (majority consensus "cuts sharply against imposing a duty of care to avoid causing purely economic losses in negligence cases like this one: where purely economic losses flow not from a financial transaction meant to benefit the plaintiff (and which is later botched by the defendant), but instead from an industrial accident caused by the defendant (and which happens to occur near the plaintiff")).

The majority rule and its rationale are set forth in the Restatement (Third) of Torts, which provides that, "[e]xcept as provided elsewhere in this Restatement, a claimant cannot recover for economic loss caused by: (a) unintentional injury to another person; or (b) unintentional injury to property in which the claimant has no proprietary interest." Restatement (Third), supra, § 7, p. 64. Comment (a) to § 7 explains that "[t]he two limits on recovery stated in this [s]ection are related applications of the same principle, and they apply to facts that usually have certain features in common. The plaintiff and defendant typically are strangers. The defendant commits a negligent act that injures a third party's person or property, and indirectly—though perhaps foreseeably—causes various sorts of economic loss to the plaintiff: lost income or profits, missed business opportunities, expensive delays, or other disruption. The plaintiff may suffer losses, for example, because the defendant injured someone with whom the plaintiff had a contract and from whom the plaintiff had been expecting performance, such as an employee or supplier. . . . Or the plaintiff may be unable to make new contracts with others, such as customers who cannot conveniently reach the plaintiff's business because

the defendant's negligence has damaged property that now blocks the way. . . . The common law of tort does not recognize a plaintiff's claim in such circumstances." (Citations omitted.) Id., comment (a), p. 65.

The Restatement (Third) of Torts further explains that the rule "is justified by several considerations. The first . . . is that economic losses can proliferate long after the physical forces at work in an accident have spent themselves. A collision that sinks a ship will cause a well-defined loss to the ship's owner; but it also may foreseeably cause economic losses to wholesalers who had expected to buy the ship's cargo, then to retailers who had expected to buy from the wholesalers, and then to suppliers, employees, and customers of the retailers, and so on. Recognizing claims for those sorts of losses would greatly increase the number, complexity, and expense of potential lawsuits arising from many accidents. Recognition of such claims might also result in liabilities that are indeterminate and out of proportion to the culpability of the defendant. These costs do not seem likely to be justified by comparable benefits. Courts doubt that threats of open-ended liability would usefully improve the incentives of parties to take precautions against accidents or would make a material contribution to the cause of fairness.

"At the same time, the victims of economic injury often can protect themselves effectively by means other than a tort suit. They may be able to obtain first-party insurance against their losses,[6] or recover in contract

[6] We agree with the trial court's observation that "[t]he economic loss doctrine seeks to maintain the fundamental distinction between tort law and contract law, and encourages the party best situated to assess the risk of economic loss, generally the commercial purchaser, to assume, allocate, or insure against that risk. . . . Here, the plaintiff did exactly that. It assessed the risk of the economic losses it could sustain due to an interruption in its water service, and [insured] against that risk [through the purchase of utility service interruption insurance]." (Citations omitted.) The trial court further observed, and the record reflects, that the plaintiff "was in fact compensated for some of the economic losses it sustained through [that]

from those who do have good claims against the defendant. Those contractual lines of protection against economic loss, where available, are considered preferable to judicial assignments of liability in tort. . . . The rationales just stated are general, and no one of them is conclusive. They prevail by their cumulative force. And while they do not apply equally to every claim that arises under this [s]ection, most courts reject such claims categorically." (Citation omitted; footnote added.) Id., comment (b), p. 66.

The plaintiff contends, nevertheless, that a number of jurisdictions recognize an exception to this general rule when a special relationship exists between the parties. In those cases, the plaintiff argues, courts have permitted recovery when "the plaintiff was an intended beneficiary of a particular transaction but was harmed by the defendant's negligence in carrying it out"; *Southern California Gas Leak Cases*, supra, 7 Cal. 5th 400; or when "a special and narrowly defined relationship can be established between the tortfeasor and a plaintiff who was deprived of an economic benefit . . . . In cases of that nature, the duty exists because of the special relationship. The special class of plaintiffs involved in those cases were particularly foreseeable to the tortfeasor, and the economic losses were proximately caused by the tortfeasor's negligence." *Aikens*

insurance [policy]," only "not enough to cover its losses, which led to the commencement of this action." Finally, the court noted that the defendant's rules governing water service, which are incorporated by reference into the parties' contract, reserve the right of the defendant "at any time, without notice, to shut off the water in its mains for the purpose of making repairs or . . . for other purposes." Southeastern Connecticut Water Authority, supra. As the trial court aptly noted, this provision put "the defendant's customers . . . on notice that they should obtain utility service interruption insurance," and, "[g]iven the number and variety of customers it serves, the defendant has no ability to predict the severity of economic damages that a prolonged interruption in its water services could cause . . . any individual customer," whereas the defendant's customers are perfectly capable of making that determination for themselves.

v. *Debow*, 208 W. Va. 486, 500, 541 S.E.2d 576 (2000); see also *Lips* v. *Scottsdale Healthcare Corp.*, 224 Ariz. 266, 268, 229 P.3d 1008 (2010) ("Courts have not recognized a general duty to exercise reasonable care for the purely economic well-being of others, as distinguished from their physical safety or the physical safety of their property. . . . This reticence reflects concerns to avoid imposing onerous and possibly indeterminate liability on defendants and undesirably burdening courts with litigation. . . . Consequently, commentators have recognized that liability for negligence [in such cases] . . . must depend upon the existence of some special reasons for finding a duty of care." (Citations omitted; internal quotation marks omitted.)).

The plaintiff argues that a special relationship existed between the parties in the present case by virtue of the "imbalance of power" between them, as evidenced by the parties' water service agreement, which the plaintiff argues "[is] really an adhesion contract . . . ." The plaintiff further argues that its losses were particularly foreseeable to the defendant because it is universally understood that hotels require a constant supply of water to provide "comfort and cleanliness" to their guests. We are not persuaded.

Indeed, the plaintiff has not cited a single case in which a special relationship was found to exist on remotely similar facts. As is evident from each of the cases cited in the plaintiff's appellate brief, courts have found a special relationship to exist between the parties when the plaintiff was either the intended beneficiary of a particular transaction or was physically situated within the zone of risk created by the defendant's negligence such as to make the plaintiff's economic losses particularly foreseeable to the defendant. See, e.g., *Mattingly* v. *Sheldon Jackson College*, 743 P.2d 356, 358 (Alaska 1987) (plaintiff's economic losses were particularly foreseeable when defendant excavated and braced

a trench so plaintiff's employees could perform work and trench subsequently collapsed on three employees, causing plaintiff to incur business losses due to injured employees' absence from work); *People Express Airlines, Inc.* v. *Consolidated Rail Corp.*, 100 N.J. 246, 248–49, 495 A.2d 107 (1985) (airline's commercial losses resulting from forced cancellation of flights due to chemical leak in railroad yard adjacent to airport were particularly foreseeable to defendant railroad).

As the California Supreme Court explained in *Southern California Gas Leak Cases*, which also is cited in the plaintiff's brief: "What we mean by special relationship is that the plaintiff was an intended beneficiary of a particular transaction but was harmed by the defendant's negligence in carrying it out. Take, for example, *Biakanja* v. *Irving* [49 Cal. 2d 647, 320 P.2d 16 (1958)]. There, we held that the intended beneficiary of a will could recover for assets she would have received if the notary had not been negligent in preparing the document. . . . A special relationship existed between the intended beneficiary and the notary in *Biakanja*, we emphasized, because the end and aim of the transaction between the nonparty decedent and the notary [were] to ensure that the decedent's estate passed to the intended beneficiary." (Citation omitted; internal quotation marks omitted.) *Southern California Gas Leak Cases*, supra, 7 Cal. 5th 400; see id. (plaintiff business owners could not recover economic losses resulting from forced closure of their businesses due to massive gas leak).

It is clear, moreover, that to be particularly foreseeable within the meaning of the exception means that "the particular plaintiff is affected differently from society in general [and the plaintiff's economic losses were particularly foreseeable to the defendant]. It may be evident from the defendant's knowledge or specific reason to know of the potential consequences of the wrong-

doing, the persons likely to be injured, and the damages likely to be suffered." *Aikens* v. *Debow*, supra, 208 W. Va. 499. Suffice it to say that the plaintiff has not identified any attribute of the relationship between itself and the defendant that would bring the present case into the "extremely limited group of cases [in which] the law of negligence extends its protections to a party's economic interest." (Internal quotation marks omitted.) *Blahd* v. *Richard B. Smith, Inc.*, 141 Idaho 296, 301, 108 P.3d 996 (2005). The plaintiff is simply one of thousands of customers throughout southeastern Connecticut who subscribe to the defendant's water service. The plaintiff's assertions to the contrary notwithstanding, there is nothing to suggest that a water outage affects the plaintiff materially differently from any of the defendant's other customers in the restaurant and hospitality industry, or that, based on the defendant's specific knowledge of the plaintiff's business, the plaintiff's losses, in contrast to those of other customers, were particularly foreseeable and calculable to the defendant. Accordingly, we reject the plaintiff's contention that the fourth factor favors the plaintiff because the present case falls within an exception to the general rule barring recovery of economic losses in cases such as the present one.

In light of the foregoing, we conclude that the trial court correctly determined that public policy does not support the imposition of a duty on the defendant under the circumstances of this case.

The judgment is affirmed.

In this opinion ROBINSON, C. J., and McDONALD, D'AURIA, MULLINS and KAHN, Js., concurred.

ECKER, J., concurring. I concur in the result reached by the majority, but I write separately to express my view that we have started down the wrong road by

deciding economic loss cases using what the majority accurately refers to as "the well established [four factor, duty] test first articulated in *Jaworski* v. *Kiernan*, 241 Conn. 399, 404, 696 A.2d 332 (1997) . . . ." That test may have been helpful for resolving the idiosyncratic issue presented in that case, namely, whether participants in a team contact sport owe each other a duty of care, but it has limited applicability outside of that context. The *Jaworski* test is particularly ill-suited to a case like the present one, which involves economic loss unaccompanied by personal injury or property damage, and raises very different policy and doctrinal issues from those confronted in *Jaworski*. Unfortunately, a formulation that was fabricated for narrow application in one specific and peculiar context nearly twenty-five years ago has since been uncritically adopted by this court as a one-size-fits-all test for deciding the policy prong of the duty analysis in *all* negligence cases, including economic loss cases like the present one. There are far better and more sophisticated tools available for this purpose, and I am hopeful that future cases will provide us with the opportunity to use them.

Before I proceed, I emphasize that I do not fault the majority for applying the *Jaworski* test in this case. The parties did not offer any alternative analysis to address the policy issues underlying the legal question on appeal. And their advocacy choice is understandable because this court has signaled that *Jaworski* provides the proper framework for determining whether a plaintiff may recover damages for purely economic losses caused by a defendant's alleged negligence. See *Lawrence* v. *O & G Industries, Inc.*, 319 Conn. 641, 650–51, 126 A.3d (2015). Nor, when we had the chance to do so, did we redirect the parties or suggest a different approach when this case first appeared before us on appeal. See *Raspberry Junction Holding, LLC* v. *Southeastern Connecticut Water Authority*, 331 Conn. 364,

368 n.3, 378, 203 A.3d 1224 (2019) (stating that we have not yet decided whether to adopt economic loss doctrine, citing *Lawrence*, and remanding case for adjudication of defendant's claim that damages for purely economic loss are barred by that doctrine). So here we are.

It is necessary to review *Jaworski* to understand why its four factor test provides a poor framework for deciding whether policy considerations favor or disfavor allowing recovery in negligence for pure economic loss. The plaintiff in *Jaworski* sustained personal injuries playing in a coed recreational soccer league when an opposing player made contact with her during a game. *Jaworski* v. *Kiernan*, supra, 241 Conn. 400. She filed an action in two counts against the player who caused her injuries, alleging negligence and recklessness. Id., 400–401. The jury returned a verdict in the plaintiff's favor on the negligence count and in the defendant's favor on the recklessness count. Id., 401. The issue on appeal was whether the defendant owed the plaintiff a duty of care on the basis of which liability could be imposed for ordinary negligence. See id., 407, 412.

In resolving that issue, we observed that, "[a]lthough it has been said that no universal test for [duty] ever has been formulated; [W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984)] § 53, p. 358; our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant." (Internal quotation marks omitted.) *Jaworski* v. *Kiernan*, supra, 241 Conn. 405. To determine whether the harm is foreseeable, we ask, "would the ordinary [person] in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?" (Internal quotation marks omitted.) Id.

But the law has long recognized that foreseeability is not enough. The court in *Jaworski* explained the

underlying idea: "Many harms are quite literally foreseeable, yet for pragmatic reasons, no recovery is allowed. . . . A further inquiry must be made, for we recognize that duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection. . . . Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree. . . . The final step in the duty inquiry, then, is to make a determination of 'the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results." (Citations omitted; internal quotation marks omitted.) Id., 406.

This brings us to the four part *Jaworski* test, which was formulated "to determine as a matter of policy the extent of the legal duty to be imposed [on] the defendant." Id., 407. The court determined that four "policy" questions were determinative of the duty inquiry: "(1) the normal expectations of participants in the sport in which the plaintiff and the defendant were engaged; (2) the public policy of encouraging continued vigorous participation in recreational sporting activities while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions."[1] Id. Applying these four factors

[1] In my view, insufficient attention has been paid to the fact that the four factor test "first articulated" in *Jaworski* was conjured out of thin air. To the best of my knowledge, the test has no discernable source in any case law from Connecticut or anywhere else. Nor was it drawn from the Restatement of Torts, scholarly commentary, or out-of-state legal authority. Although *Jaworski* cites to one of this court's earlier cases as supporting authority for the four factors, that case does not contain even the rudimentary elements of the *Jaworski* formulation. See *Jaworski* v. *Kiernan*, supra, 241 Conn. 407, citing *Maloney* v. *Conroy*, 208 Conn. 392, 400–401, 545 A.2d 1059 (1988); see also *Maloney* v. *Conroy*, supra, 400–401 (bystander to medical malpractice cannot recover damages for emotional distress caused by witnessing patient's gradual decline). To the contrary, *Maloney* emphasizes the unique nature of cases involving negligence claims for bystander

in the context of team contact sports, we held that participants owe other players a legal duty to refrain from reckless or intentional conduct; "[p]roof of mere negligence is insufficient to create liability." Id., 412.

My problem with the *Jaworski* test can be stated broadly or narrowly. The broad version would question the utility of the test in most negligence cases, even those involving negligence claims for personal injuries. Although the four factors enumerated in *Jaworski* may identify the right considerations for deciding the policy prong of the duty analysis in the unique factual circumstances of that case, I am doubtful that it is the right test for adjudicating the existence or scope of a duty in personal injury cases arising from other contexts.[2] A moment's reflection reveals a host of other or additional policy related considerations that courts and commentators have long consulted as part of the duty analysis in negligence cases generally.[3] To be sure, at the most

emotional distress arising out of medical malpractice and affirmatively *rejects* the argument that the liability rule in that specialized context should be the same "as it is in negligence cases generally . . . ." *Maloney* v. *Conroy*, supra, 400. The court in *Maloney* observed that "[m]ost of the courts and commentators that have considered the matter . . . have recognized the necessity for imposing some rather arbitrary limitations on the right of a bystander to recover for emotional distress that are not applied in other negligence actions." Id., 400–401.

[2] This court has applied the four part *Jaworski* test in a wide range of personal injury cases that have nothing to do with team contact sports. See, e.g., *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 526–27, 544, 51 A.3d 367 (2012) (duty of fraternity to conduct safe events off premises); *Monk* v. *Temple George Associates, LLC*, 273 Conn. 108, 114, 118, 869 A.2d 179 (2005) (duty to provide adequate security in parking garage). Nothing in *Jaworski*, however, indicates that the four part test was intended for general application in other areas of personal injury law. To the contrary, the test, as formulated in *Jaworski*, is not framed as a generic cost-benefit test or a broadly applicable public policy inquiry but, instead, is narrowly couched in specific terms relating only to sports related personal injuries. See *Jaworski* v. *Kiernan*, supra, 241 Conn. 408 (balancing "the relevant public policy considerations surrounding sports injuries arising from team contact sports").

[3] It is hard to know where to begin, and I will not do so here beyond quoting the following observation, written almost sixty years ago, to illustrate

abstract level, policy considerations are relevant in many cases in which courts are asked to limit, expand, or create common-law liability rules; they play a significant role in tort cases generally and negligence actions in particular. See, e.g., *Mueller* v. *Tepler*, 312 Conn. 631, 650, 95 A.3d 1011 (2014) ("[t]he issue of whether to recognize a common-law cause of action . . . is a matter of policy for the court to determine based on the changing attitudes and needs of society" (internal quotation marks omitted)). It also is true that our modern negligence jurisprudence tends[4] to treat policy questions as part of the duty analysis. See, e.g., *Greenwald* v. *Van Handel*, 311 Conn. 370, 375, 88 A.3d 467 (2014) ("this court examines policy questions in negligence cases within the analytic framework of the duty element").

the basic point: "An affirmative declaration of duty simply amounts to a statement that two parties stand in such relationship that the law will impose on one a responsibility for the exercise of care toward the other. Inherent in this simple description are various and sometimes delicate policy judgments. The social utility of the activity out of which the injury arises, compared with the risks involved in its conduct; the kind of person with whom the actor is dealing; the workability of a rule of care, especially in terms of the parties' relative ability to adopt practical means of preventing injury; the relative ability of the parties to bear the financial burden of injury and the availability of means by which the loss may be shifted or spread; the body of statutes and judicial precedents which color the parties' relationship; the prophylactic effect of a rule of liability; in the case of a public agency defendant, the extent of its powers, the role imposed [on] it by law and the limitations imposed [on] it by budget; and finally, the moral imperatives which judges share with their fellow citizens—such are the factors which play a role in the determination of duty." *Raymond* v. *Paradise Unified School District*, 218 Cal. App. 2d 1, 8, 31 Cal. Rptr. 847 (1963)

[4] Policy questions are by no means confined to the duty analysis in negligence law. Examples abound. See, e.g., *Hall* v. *Burns*, 213 Conn. 446, 479, 569 A.2d 10 (1990) ("[c]onstructive notice is premised on the policy determination that under certain circumstances a person should be treated as if he had actual knowledge so that one should not be permitted to deny knowledge when he is acting so as to keep himself ignorant" (internal quotation marks omitted)); *Kowal* v. *Hofher*, 181 Conn. 355, 357–58, 436 A.2d 1 (1980) (policy determination rejecting liability for negligent provision of alcohol as part of proximate causation analysis).

But, when we descend from abstraction to examine the issues at stake in any particular case or class of cases, it is obvious that *different* policy questions are implicated in different contexts within negligence law. A wide array of policy considerations will arise depending on the type of case, and the associated doctrinal variations are correspondingly various.[5] Distinct doctrines—some duty related, some not—implicating distinct policy considerations will apply depending on the status and characteristics of the respective parties (e.g., minor or adult, trespasser or invitee), the relationship between the parties (e.g., fiduciary, custodial, or professional), the character of the alleged negligence (e.g., omission or commission), and the nature of the harm at issue (e.g., physical, emotional, economic, or a combination). The four factor *Jaworski* test does not even begin to address or account for the various policy considerations at play in many cases. Nor was it originally intended to do so.

The narrow version of this critique is confined to cases, like the present case, involving a negligence claim for pure economic loss. Whatever the utility of the *Jaworski* test in other contexts, it is ill-suited to decide whether damages for pure economic loss should be recoverable in a negligence action because the relevant

[5] See, e.g., D. Owen, "Duty Rules," 54 Vand. L. Rev. 767, 773–74 (2001) ("Among the many recurring categories of cases in which courts have come to understand that negligent conduct (negligence-as-breach) should not always give rise to liability, even when the plaintiff and the risk were both entirely foreseeable, are claims involving injuries to third persons (by manufacturers, professionals, employers, social hosts providing guests with alcohol, and probation officers), harm to unborn plaintiffs, nonfeasance (involving the extent of a duty to rescue or otherwise affirmatively to act), landowner liability (to trespassers and other uninvited guests), and damage to nonphysical interests (especially emotional harm and pure economic loss). In contexts such as these, where the appropriateness of allowing recovery under the law of negligence is unclear, twentieth century courts came to recognize the importance of duty's threshold, gatekeeper role." (Footnotes omitted.)).

policy considerations in this particular context are so different. Judge Richard A. Posner, no stranger to cost-benefit analysis in the law, made this point more than three decades ago in a negligence case for purely economic loss involving two commercial parties. See *Rardin* v. *T & D Machine Handling, Inc.*, 890 F.2d 24, 28–29 (7th Cir. 1989) (observing that "there are . . . differences between the [personal injury] case and the [economic loss] case, whether in a stranger or in a contractual setting"). Indeed, the drafters of the Restatement (Third) of Torts viewed the differences between the two contexts as sufficiently meaningful that they chose to write one treatise covering negligence resulting in physical and emotional harm and a separate treatise addressing the legal rules that apply to unintentional conduct resulting in economic harm.[6]

One example relevant to the present case suffices for illustrative purposes. The important issue of physical safety addressed in the second *Jaworski* factor is not present at all in the present case, which involves a claim by a commercial entity seeking lost business profits. The effort to fit the square peg of the claimed economic loss into the round hole of physical health and safety is doomed to fail because the cost-benefit considerations that inform the relevant "policy" analysis in the present case do not relate to health or safety; instead, they relate to commercial concerns involving risk allocation,

[6] Section 1 (1) of the Restatement (Third) of Torts, Liability for Economic Harm, provides that, in general, "[a]n actor has no general duty to avoid the unintentional infliction of economic loss on another." Restatement (Third), Torts, Liability for Economic Harm § 1 (1), p. 1. The Restatement (Third) of Torts, Liability for Economic Harm, further provides that "there is no liability in tort for economic loss caused by negligence in the performance or negotiation of a contract between the parties." Id., § 3, p. 13. There are exceptions to these general rules, however, for, among other torts, professional negligence; see id., § 4, p. 23; negligent misrepresentation; see id., § 5, pp. 35–36; and negligent performance of services. See id., § 6, pp. 62–63.

market alternatives, and whatever other economic consequences may flow from the proposed legal rule. Policy concerns relevant to tort law exist outside of the realm of health and safety in negligence claims for economic loss involving professional malpractice, breach of fiduciary duty, misrepresentation, and so forth. The majority in the present case does its level best—indeed, it skillfully works within the constraints of the *Jaworski* framework—to conform the factors to better address some of the relevant policy considerations, but the fact remains that the factors are ill-suited to the inquiry at hand.[7]

In the end, the demands of *Jaworski* may have caused us to lose sight of the basic facts and legal considerations relevant to this case. The plaintiff, Raspberry Junction Holding, LLC, and the defendant, Southeastern Connecticut Water Authority, have a direct, *contractual* relationship with one another, and breach of contract is the true basis of the plaintiff's claim. The tort claim is a breach of contract case dressed up in negligence garb, and it seems to me that any recovery of lost profits under these particular circumstances should be controlled by contract principles governing consequential damages. See Restatement (Third), Torts, Liability for Economic Harm § 3, p. 13 (2020) (generally, "there is no liability in tort for economic loss caused by negligence in the performance or negotiation of a contract

[7] The first *Jaworski* factor (regarding the reasonable expectations of the parties) could be made relevant to the issues raised in the present case, but only under a substantially reformulated doctrine. Even then, any overlap seems more a matter of fortuity rather than doctrinal consonance. The third *Jaworski* factor (avoidance of increased litigation) appears to be designed to cut only in one direction and fails to ask how to measure the increase or whether the costs imposed may be offset by a countervailing decrease in transaction costs elsewhere in the system. The fourth *Jaworski* factor (the law in other jurisdictions) can and should be included in any analysis of this nature, but as a matter of persuasive authority rather than doctrinal command.

between the parties"). The situation is no different than if the defendant delivered its water by truck instead of pipeline, and its lone delivery vehicle became inoperable due to careless maintenance, with the same consequences for the plaintiff's hotel business. Indeed, "[t]he spirit of *Hadley* v. *Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854), still the leading case on the nonrecoverability of consequential damages in breach of contract suits, broods over this case . . . although the present case is a tort case rather than a contract case." *Rardin* v. *T & D Machine Handling, Inc.*, supra, 890 F.2d 26; cf. 1 Restatement (Third), Torts, Liability for Physical and Emotional Harm, § 7, comment (d), p. 80 (2010) ("one reason the general duty of reasonable care . . . is limited to physical harm is that liability for purely economic harm in commercial cases often raises issues better addressed by contract law or by the tort of misrepresentation").

I hope that we will be presented with a legal and factual record in some future case that will permit us to consider an alternative framework for adjudicating claims of economic loss unaccompanied by personal injury or property damage.[8] In the meantime, I agree with the majority that "public policy does not support the imposition of a duty on the defendant under the circumstances of this case," and, therefore, I respectfully concur.

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[8] I do not suggest any particular solution to the problems that I identify in this opinion because there has been no briefing by the parties and no deliberation among my colleagues regarding alternatives to the *Jaworski* test. I feel obligated to raise the issues (or at least justified in doing so) because, as this very case illustrates, we cannot expect trial courts or lawyers to depart from the course we have charted under *Jaworski*, at least not without an indication from this court that a different approach may be preferable.

MICHAEL ABEL ET AL. *v.* CELESTE M. JOHNSON (SC 20436)

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

Syllabus

The plaintiff property owners sought to enjoin the defendant, who owned abutting property on which she operated a landscaping business, from violating a restrictive covenant that limited the use of the defendant's property to residential purposes only. The restrictive covenant was contained in a 1956 deed by which the original grantors conveyed a tract of real property to a housing developer, E Co. The 1956 deed, which was recorded in the land records of the city in which the property is located, provided that the covenants contained therein "shall run with the land . . . be binding upon the grantee, its successors and assigns," and inure to the benefit of original grantors' "remaining land . . . lying westerly of the premises" conveyed. In 1961, E Co. recorded in the land records a declaration of restrictions, which included prohibitions against the keeping of poultry and the parking of commercial vehicles outside. E Co. thereafter subdivided the property and conveyed two of the lots to the parties' predecessors in title. The deeds in the parties' chains of title contained language providing that the lots were being conveyed "subject to" the restrictive covenants contained in the 1956 deed and the declaration. The plaintiffs alleged that the defendant had violated those restrictive covenants by operating a landscaping business and maintaining chickens on her property. At trial, the deeds to twenty-four homes located in the subdivision were admitted into evidence. The deeds to all of the homes located on the parties' street contained the same "subject to" language, and the remaining deeds in evidence all contained residential use restrictions, although two of them lacked the same "subject to" language. Relying on this evidence, the trial court concluded that the parties' properties were part of a common development scheme, which gave the plaintiffs standing to enforce the deed restrictions against the defendant. The trial court rendered judgment for the plaintiffs and ordered the defendant to cease and desist from violating the restrictive covenants, and the defendant appealed to the Appellate Court. Observing that the restrictive covenants set forth in the 1956 deed were intended to inure to the benefit of the original grantors' remaining, "westerly" land and that there was no language

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

therein indicating that the covenants were meant to benefit the original or subsequent grantees of the 1956 deed, such as the plaintiffs, the Appellate Court concluded that the plaintiffs lacked standing to enforce the residential use covenant because there was no allegation that the plaintiffs were the original grantors or their successors in interest. Accordingly, the Appellate Court reversed the trial court's judgment to the extent that the trial court enforced the residential use restrictive covenant contained in the 1956 deed and vacated that court's orders of injunctive relief related to that covenant. On the granting of certification, the plaintiffs appealed to this court. *Held* that, because the language in the E Co. deeds conveying the properties to the parties and their predecessors in title "subject to" the original grantors' 1956 deed created a general development scheme, the Appellate Court incorrectly concluded that the plaintiffs lacked standing to enforce the residential use restriction, and, accordingly, this court reversed in part the judgment of the Appellate Court and remanded the case with direction to affirm the judgment of the trial court enforcing the restrictive covenant: when a common grantor, under a general development scheme, divides its property into lots that are to be sold and the deeds thereto contain substantially uniform restrictions, any grantee may enforce the restrictions against any other grantee, and whether a common grantor intended to establish a uniform plan of development is determined by the language of the relevant conveyance instruments in light of the surrounding circumstances; in the present case, the language of the deeds by which E Co. subdivided and conveyed its property, as well as the surrounding circumstances, strongly supported the conclusion that E Co. intended to establish a general plan of development limited to residential use through the use of the "subject to" language, as those deeds effectuated a new subdivision, a map of which was contemporaneously recorded in the land records of the city in which the property was located and referenced in the deeds, and the declaration expressly indicated that it was intended to "protect property values" and restricted the use and keeping of commercial vehicles, suggesting that E Co. had intended to eliminate commercial activity on the property; moreover, those restrictions were all recorded in the land records of the city in which the property was located, they were available for any searcher to find, and all of the deeds admitted into evidence contained either the same "subject to" language or another residential use restriction; furthermore, contrary to the conclusion of the Appellate Court, the fact that the 1956 deed, by its express terms, inured to the benefit of the original grantors' land "lying westerly" to the premises they conveyed did not render the residential use restriction unenforceable by subsequent grantees of E Co., such as the plaintiffs, because, even though there was no evidence that the original grantors desired to create a general development scheme, this court was aware of no authority that stood for the proposition that a particular restriction cannot be a grantor retained restriction

enforceable by one party, and part of a common scheme of development enforceable as a matter of equity by another.

Argued March 29—officially released August 20, 2021**

Procedural History

Action for, inter alia, injunctive relief barring the defendant from violating restrictive covenants on certain of the defendant's real property, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment for the plaintiffs, from which the defendant appealed to the Appellate Court, *Keller* and *Moll*, *Js.*, with *Beach*, *J.*, concurring in part and dissenting in part, which reversed in part and vacated in part the trial court's judgment; thereafter, the plaintiffs, on the granting of certification, appealed to this court. *Reversed in part*; *judgment directed.*

John R. Harness, for the appellants (plaintiffs).

Austin S. Brown, with whom was *Heather M. Brown Olsen*, for the appellee (defendant).

Opinion

ROBINSON, C. J. In this certified appeal, we consider whether deed language providing that the grantees took title "subject to" an earlier deed, which established a residential use restriction for the benefit of the original grantor's retained property, rendered that restriction enforceable against those grantees by adjoining property owners whose deeds contain similar "subject to" language, pursuant to a common plan of development theory. The plaintiffs, Michael Abel and Carol Abel,

** August 20, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

appeal, upon our grant of their petition for certification,[1] from the judgment of the Appellate Court reversing in part the judgment of the trial court, rendered after a court trial, granting injunctive relief against the defendant, Celeste M. Johnson, enforcing one restrictive covenant limiting the use of the property to residential use, which was contained in a deed that was executed by the original grantors of the parties' real properties, and two other use restrictions that appeared in a separate declaration that applied to the properties. See *Abel* v. *Johnson*, 194 Conn. App. 120, 142–43, 156, 220 A.3d 843 (2019). On appeal, the plaintiffs claim that the Appellate Court incorrectly concluded that they lacked standing to enforce the residential use restriction. We agree and, accordingly, reverse in part the judgment of the Appellate Court.

The record reveals the following facts and procedural history, much of which are aptly set forth in the opinion of the Appellate Court. The plaintiffs own real property located at 37 Mill Stream Road in Stamford, where they reside, and the defendant owns abutting real property located at 59 Mill Stream Road in Stamford, where she resides with her husband. The parties' properties are in an area of Stamford known as the Saw Mill neighborhood, where some of the properties are served by a

[1] We granted the plaintiffs' petition for certification to appeal, limited to the following issues: (1) "Does the 'subject to' language in the deeds only provide notice of prior restrictions or does it have the substantive effect of creating new obligations on the grantees and their successors?" And (2) "Did the Appellate Court correctly determine that the plaintiffs lacked standing to enforce the restrictive covenant in the original deed that limited the use of the defendant's property for residential purposes only?" *Abel* v. *Johnson*, 334 Conn. 917, 222 A.3d 104 (2020).

We note that the first certified question is encompassed topically within the broader, second certified question. Accordingly, we do not treat them as separate certified issues. See, e.g., *State* v. *Raynor*, 334 Conn. 264, 266 n.1, 221 A.3d 401 (2019) (court may rephrase certified question to more accurately reflect issue).

voluntary neighborhood association known as the Saw Mill Association. See footnote 6 of this opinion.

"In 1956, Horace Havemeyer and Harry Waldron Havemeyer (original grantors) conveyed to a housing developer, Empire Estates, Inc. (Empire Estates), 166.1229 acres of real property in Stamford. The deed related to this conveyance is recorded in volume 792, page 118, of the Stamford land records. In relevant part, the deed provides: 'This deed is *given and accepted* upon the following express covenants and agreements *which shall run with the land herein conveyed and shall be binding upon the grantee, its successors and assigns, and shall* [*i*]*nure to the benefit of the remaining land of the grantors lying westerly of the premises herein conveyed*:

" '(1) *Said premises shall be used for private residential purposes only* (except that a doctor or dentist having a home on said premises may locate his office therein if such use is permitted by the applicable zoning regulations), and *no buildings shall be erected or maintained upon said premises except single-family dwelling houses and appropriate outbuildings.*

" '(2) Said tract shall not be subdivided for building purposes into plots containing less than one (1) acre in area, and not more than one (1) such dwelling house shall be erected or maintained on any such plot.'[2]

[2] "In 1957, an agreement between the original grantors, Empire Estates, and Country Lands, Inc., to whom a portion of the land at issue had been conveyed by Empire Estates, was recorded in volume 808, page 355, of the Stamford land records." *Abel* v. *Johnson*, supra, 194 Conn. App. 132 n.4. "[T]he agreement modified the first restrictive covenant in the 1956 deed, set forth previously, as follows: '[T]hat portion of [the] restrictive covenant . . . which is contained within parentheses shall be of no further force and effect and there shall be substituted in lieu of the language contained within parentheses, effective from the date hereof, the following language: (except that a residence may be used for professional purposes by a member of a profession occupying the same as his home to the extent that such use is permitted from time to time by the applicable zoning regulations of the city of Stamford).' " Id. The Appellate Court's conclusion that the 1957 agreement "does not affect [the] analysis of the present claim" is undisputed. Id.

"In 1961, Empire Estates, through its trustees, Harry E. Terhune and Gordon R. Paterson, executed a declaration of restrictions (declaration) that was recorded in volume 917, page 114, of the Stamford land records. The declaration, which included thirty-five articles and set forth a wide variety of restrictions, *did not contain a provision restricting the applicable tracts to private residential use only*. In relevant part, the declaration states: 'Witnesseth, that said trustees hereby place upon the land records the following restrictions, covenants, agreements, reservations, easements and information which shall govern the use of any tract of land whenever imposed in a deed of conveyance, by reference to this declaration, from any person or corporation authorized by either of the said trustees or their successors, by instrument recorded in the land records, *to impose the terms hereof on portions of land owned by such person or corporation and shall run with the land so conveyed and shall* [*i*]*nure to the benefit of the owners of tracts of land affected by the terms hereof*, to the person or corporation authorized to impose the terms hereof and, where applicable, to the municipality . . . .'

"Article 2 of the declaration provides: 'No animals, poultry or water fowl, except usual pets quartered within the family dwelling at night, shall be kept on a [t]ract.[3] Exceptions to this provision may be made for not over two year periods if consented to in writing by the [p]urchaser[4] of each [t]ract within two hundred (200) feet of the [t]ract where the exception is proposed.' . . .

[3] "The declaration defines a '[t]ract' as '[a] parcel of land shown and delineated on a map filed in the land records of the MUNICIPALITY which has been conveyed by the DEVELOPER to a PURCHASER.' " *Abel* v. *Johnson*, supra, 194 Conn. App. 133 n.5.

[4] "The declaration defines a '[p]urchaser' as '[a]ny [p]urchaser of a TRACT upon which this [d]eclaration has been imposed, and his, her or its successors in title.' " *Abel* v. *Johnson*, supra, 194 Conn. App. 133 n.6.

"Article 8 of the declaration provides: 'Any commercial vehicle used by an occupant of a [t]ract shall be kept within a garage with doors closed, except for brief periods required for loading or unloading.'

"The final article of the declaration, [a]rticle 35, provides in relevant part: '*The intent of this* [*d*]*eclaration is to protect property values*. [The] [d]eveloper[5] intends to enforce the provisions of this [d]eclaration whenever it feels its interest may be threatened. Enforcement action may be taken, with or without [the] [d]eveloper's participation, by any aggrieved [p]urchaser of a [t]ract, or by any group of aggrieved [p]urchasers represented by a [p]roperty [o]wner's [a]ssociation, or otherwise.

" 'Enforcement of this [d]eclaration or any part thereof shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any right herein contained, and said proceedings may be either to restrain any violation thereof, to recover damages therefor, or to require corrective measures to accomplish compliance with the intent of this [d]eclaration.' . . .

"The deed conveying the property known as 37 Mill Stream Road to the plaintiffs, which was recorded on September 26, 1977, in volume 1680, page 100, of the Stamford land records, provides in relevant part: 'Said premises are conveyed *subject to* any restrictions or limitations imposed or to be imposed by governmental authority, including the zoning and planning and wetlands rules and regulations of the [c]ity of Stamford; *restrictive covenants and agreements contained in a certain deed from Harry Waldron Havemeyer et al to Empire Estates, Incorporated dated August 14, 1956*

[5] "The declaration defines a '[d]eveloper' as '[t]he person or corporation authorized by either of the trustees executing this [d]eclaration or their successors to make subject to this [d]eclaration any property conveyed by said person or corporation.' " *Abel* v. *Johnson*, supra, 194 Conn. App. 133 n.7.

and recorded in said records in [*b*]*ook 792 at* [*p*]*age 118*, as modified by an [a]greement dated March 27, 1957 and recorded in said records in [b]ook 808 at [p]age 355; *a declaration made by Harry E. Terhune and Gordon R. Paterson, as trustees, dated March 15, 1961 and recorded in said records in* [*b*]*ook 917 at* [*p*]*age 114 . . . .*'

"Materially similar language appears in the defendant's chain of title, as well.[6] In a deed conveying the property known as 59 Mill Stream Road and recorded on September 30, 1983, in volume 2296, page 146, of the Stamford land records, the following language appears: 'Said premises are conveyed *subject to* planning and zoning rules and regulations of the [c]ity of Stamford and any other [f]ederal, [s]tate or local regulations, taxes and assessments of the [c]ity of Stamford becoming due and payable hereinafter, *restrictive covenants and agreements as contained in a deed from Harry Waldron Havemeyer, et al to Empire Estates, Incorporated dated August 14, 1956 and recorded in the land records of said Stamford in book 792 at page 118*, except as the same are modified by an agreement dated March 27, 1957 and recorded in said records in book 808 at page 355, *the terms of a declaration made by Harry E. Terhune and Gordon R. Paterson, as* [*t*]*rustees, dated March 14, 1961 and recorded in said records in book 917 at page 114*, the rights of others, including the [c]ity of Stamford, in and to any brook, river, stream or water flowage easement crossing and bounding said tract of land.' *This 1983 deed is referred to in the 2006 deed conveying the property to the defendant*, which

[6] As we noted previously, it "does not appear to be in dispute that the parties' properties are located in the Saw Mill Association, a 'neighborhood association' that encompasses 142 properties on eight contiguous streets in Stamford. The plaintiffs presented evidence that the restrictive covenants that appear in the chain of title of the parties' properties are found in the chain of title of several other property owners in the Saw Mill Association." *Abel* v. *Johnson*, supra, 194 Conn. App. 134 n.8.

is recorded in volume 8602, page 54, of the Stamford land records." (Emphasis added; footnote altered; footnotes in original.) *Abel* v. *Johnson*, supra, 194 Conn. App. 131–35.

The plaintiffs brought a one count complaint, alleging that, "by conducting a landscaping business" and "maintaining chickens and chicken coops" on her property, the defendant had violated three restrictive covenants to which both of their properties are subject, and that are "common to all tracts or parcels of land located within the area or subdivision known as the Saw Mill Association." The plaintiffs alleged that the defendant had "not obtained consent from the Saw Mill Association . . . the plaintiffs or any neighboring property owner to maintain chickens . . . or to conduct a landscaping business from the defendant's property." The plaintiffs further "alleged that they had demanded that the defendant cease and desist the activities at issue, but the defendant had failed to comply with their demand. The plaintiffs alleged that they had suffered and would continue to suffer irreparable harm as a result of the activities at issue, and that they lacked an adequate remedy at law. The plaintiffs sought injunctive relief ordering the defendant to immediately cease and desist from violating the restrictive covenants and such other relief as the court deemed equitable and proper." *Abel* v. *Johnson*, supra, 194 Conn. App. 124.

The case was tried to the court over two days. The trial court rejected the defendant's argument that the 1956 "deed restrictions on her property are the result of covenants exacted by the original landowner from the developer of the Saw Mill Association for the benefit and protection of his adjoining land [that] he retains, and, as a result, the [plaintiffs] cannot enforce the [1956] deed restrictions." Relying on the plaintiffs' submission of "multiple deeds from various properties of the Saw Mill Association that contained the restrictive cove-

nant[s] [that] they seek to enforce," the trial court concluded that the parties' properties were part of a common plan or scheme of development, which gave the plaintiffs standing to "enforce the deed restrictions against the defendant." After rejecting the special defenses raised by the defendant,[7] the trial court found that the defendant had violated the restrictive covenants[8] and rendered judgment for the plaintiffs, ordering the defendant, inter alia, to "immediately cease and desist from violating the restrictive covenants . . . ."[9]

The defendant appealed from the judgment of the trial court to the Appellate Court, claiming, inter alia, that the trial court incorrectly "concluded that the plain-

[7] The defendant denied the plaintiffs' allegations and "raised four special defenses sounding in the following legal theories: (1) equitable estoppel and waiver; (2) unclean hands; (3) ripeness, mootness, and frustration of purpose; and (4) a claim that the action was time barred pursuant to General Statutes § 52-575a in that the plaintiffs did not commence the action within three years from the time that they had actual or constructive knowledge of the alleged violations of the restrictive covenants. By way of a reply, the plaintiffs denied all of the special defenses." (Footnote omitted.) *Abel* v. *Johnson*, supra, 194 Conn. App. 124–25.

[8] The trial court determined that the removal of the chickens from the defendant's property had not rendered that claim moot, despite the defendant's testimony that she "does not have plans to return them to her property . . . ." The trial court concluded that the issue was not moot because "an injunction against the defendant regarding the enforcement of the 1961 covenant would provide practical relief to the [plaintiffs] and would resolve any ambiguity about whether the chickens could be returned to the property . . . ." The Appellate Court agreed with this analysis as to mootness, which is not at issue in this certified appeal. See *Abel* v. *Johnson*, supra, 194 Conn. App. 154–55.

[9] The trial court's injunction also ordered the defendant (1) to refrain "from keeping any chickens or roosters [on her] property," (2) to keep a certain Dodge pickup truck "within a garage with the doors closed except for brief periods required for loading or unloading," (3) "not to receive and/or store supplies, such as mulch and sod, at [her] property for resale to customers of the landscaping business," (4) "not to allow parking of employees or independent contractor vehicles [on her] property while the employee or independent contractor is working for the landscaping business," (5) "to stop performing chipping of tree branches from the landscaping business [on her] property"; and (6) "to stop performing repairs of equipment used in connection with the landscaping business [on her] property."

tiffs had standing to enforce the restrictive covenant in the 1956 deed, as modified in 1957, which generally prohibits commercial activity on the property." *Abel* v. *Johnson*, supra, 194 Conn. App. 136. In a divided opinion, the Appellate Court examined the language of the 1956 deed from the original grantors and relied on the "following language [that] precedes reference to the two restrictive covenants: 'This deed is given and accepted upon the following express covenants and agreements which shall run with the land herein conveyed and shall be binding upon the grantee, its successors and assigns, *and shall* [*i*]*nure to the benefit of the remaining land of the grantors lying westerly of the premises herein conveyed* . . . .' " (Emphasis in original.) Id., 141. The Appellate Court concluded that the "emphasized language reflects" that "the restrictive covenants set forth in the 1956 deed were expressly intended to inure to the benefit of the remaining land of the original grantors that lies west of the premises conveyed in the 1956 deed. The premises conveyed included tracts that were subsequently conveyed to the plaintiffs and the defendant. . . . In the present case, the original grantors, for their benefit, extracted covenants from the grantees of the 1956 deed. Nothing in the unequivocal language of the deed either suggests that the restrictive covenant at issue was intended to benefit the original or subsequent *grantees* of the 1956 deed, or that the original grantors were dividing their property into building lots, thus imposing the restrictive covenant upon grantees as part of a general development scheme. Instead, the covenants unmistakably fall within the class of covenants exacted by a grantor from his grantee presumptively or actually for the benefit and protection of his adjoining land which he retains." (Emphasis in original; internal quotation marks omitted.) Id. The Appellate Court majority then concluded that, "[b]ecause there is no allegation or evidence that

the plaintiffs are the original grantors of the 1956 deed, or their successors in interest . . . they lacked standing to enforce the restrictive covenant in the deed that limited the use of the defendant's property to residential purposes." Id., 142.

After addressing the merits of the defendant's remaining claims on appeal,[10] the Appellate Court rendered judgment (1) reversing the judgment of the trial court "enforcing the restrictive covenants . . . to the extent that the [trial] court enforced a restrictive covenant that appears in the 1956 deed and the restrictive covenant that appears in [a]rticle 8 of the declaration," (2) vacating "[t]he orders of injunctive relief related to these restrictive covenants," (3) vacating the order of the trial court "prohibiting the defendant from keeping any chickens or roosters on her property," and (4) remanding the case "to the trial court with direction to order appropriate relief that is consistent with [a]rticle 2 of the declaration."[11] Id., 156. This certified appeal followed. See footnote 1 of this opinion.

[10] With respect to the merits, the Appellate Court concluded that (1) the trial court improperly granted the plaintiffs injunctive relief as to article 8 of the declaration pertaining to the keeping and use of a Dodge pickup truck because they had failed to set forth an applicable claim for relief in their complaint; see *Abel* v. *Johnson*, supra, 194 Conn. App. 146–47; and (2) the trial court properly enforced article 2 of the declaration but granted relief that was overbroad under the terms of the declaration insofar as it imposed a blanket prohibition on the defendant from "keeping *any* chickens or roosters on her property . . . ." (Emphasis in original.) Id., 155–56.

[11] We note that Judge Beach dissented in part from the judgment of the Appellate Court and concluded that the Appellate Court majority had improperly restricted its analysis to "the conveyance from the original grantors . . . ." *Abel* v. *Johnson*, supra, 194 Conn. App. 156 (*Beach*, *J.*, concurring in part and dissenting in part). Judge Beach agreed with the majority "that the plaintiffs have no standing to enforce restrictive covenants in the capacity of successor to any party to the transaction between the original grantors and Empire [Estates]; the covenant between the original grantors and Empire [Estates] restricting the conveyed property to residential use was exacted by a grantor from his grantee presumptively or actually for the benefit and protection of his adjoining land [that] he [retained]." (Internal quotation marks omitted.) Id., 157 (*Beach*, *J.*, concurring in part and dissenting in part). Judge Beach nevertheless relied on Empire Estates' subsequent subdivision of its

On appeal, the plaintiffs claim that the Appellate Court incorrectly concluded that they lacked standing to enforce the 1956 restrictive covenant. They describe as "obtuse" the defendant's position, which was embraced by the Appellate Court, that, although both parties' properties are bound by the restriction against commercial activity, only the owners of the "land lying westerly to the premises" may enforce that restriction. The plaintiffs emphasize that Empire Estates made " 'residential purposes only' a part of its uniform plan of development by agreeing to the restriction with [the original grantors] and then referring to it in all of the deeds to its subsequent purchasers," which was shown by the admission into evidence of twenty-two deeds of homes located in the area served by the Saw Mill Association, each with the same restrictions. Citing well established principles of law concerning restrictive covenants—as explained in, for example, the Appellate Court's decision in *Contegni* v. *Payne*, 18 Conn. App. 47, 51, 557 A.2d 122,

property, with a recorded "map of the subdivision," in which "every newly created lot was *subject to* identical, or substantially identical, restrictions" that "provided that the lots were 'conveyed subject to . . . restrictive covenants and agreements as contained in a deed from . . . [the original grantors] . . . to Empire Estates,' " including that prohibiting commercial use of the properties. (Emphasis added.) Id. (*Beach*, *J.*, concurring in part and dissenting in part). Relying on the discussion of the phrase "subject to" in the commentary to § 2.2 of the Restatement (Third) of Property, Servitudes, as it relates to the creation of new subdivisions, along with consistent restrictions contained in the 1961 declaration, Judge Beach concluded that "Empire [Estates] intended to create a common scheme of development, maintaining the restriction that only residential uses were allowed . . . ." Id., 158–59 (*Beach*, *J.*, concurring in part and dissenting in part); see 1 Restatement (Third), Property, Servitudes § 2, comment (d), pp. 63–64 (2000). Emphasizing the substantial uniformity "as to the lots in the subdivision," with "each lot . . . conveyed subject to the original grantors' restriction," Judge Beach observed that, "[r]egardless of the genesis of the first restrictive covenant, all of the owners in the subdivision were obligated to abide by it, and equity favors their ability to enforce it." *Abel* v. *Johnson*, supra, 160–61 (*Beach*, *J.*, concurring in part and dissenting in part). Accordingly, Judge Beach concluded that "the plaintiffs had standing to enforce the restriction regarding residential use . . . ." Id., 161 (*Beach*, *J.*, concurring in part and dissenting in part).

cert. denied, 211 Conn. 806, 559 A.2d 1140 (1989), and cert. denied, 211 Conn. 806, 559 A.2d 1140 (1989)—and relying heavily on Judge Beach's opinion dissenting in part from the judgment of the Appellate Court; see footnote 11 of this opinion; the plaintiffs argue that this evidence, and the use of the language "subject to" in Empire Estates' deeds to the parties' predecessors in title, demonstrates a common grantor's intention to establish a uniform plan of development, which would afford the plaintiffs standing to enforce the restrictive covenants as a matter of equity. The plaintiffs posit that the "only reasonable way to read the deed from Empire [Estates] into the grantees of Empire [Estates] is to harmonize the other obvious, very specific, multiple residential requirements contained therein with the other reference in the deeds that they are also being subject to only residential development as referenced to . . . the original grantors' deed into Empire [Estates]." Ultimately, the plaintiffs' arguments boil down to the point that, "[j]ust because the restriction as to private residential purposes also [i]nures to the benefit of the owners of the land of the grantors lying westerly, does not make those owners the only people that can enforce the restrictive covenant under Connecticut law."

In response, the defendant contends that the "subject to" language in the Empire Estates deeds was for notice purposes only and "should not have the substantive effect of creating new obligations on grantees and their successors." The defendant posits that the "subject to" language in the Empire Estates deeds is ambiguous and should be construed narrowly in accordance with established law governing the construction of real estate instruments.[12] See, e.g., *Bueno* v. *Firgeleski*, 180

[12] The defendant argues that the plaintiffs' analysis asks us to "enforc[e] deed restrictions by implication, which [is an] equitable analysis [that] inherently requires the use of extrinsic facts, circumstances and evidence outside the four corners of the respective real property instrument . . . ." The defendant criticizes this approach as "detrimental to the general public's ability to rely on explicit notice in the land records," which have served as the "authentic

Conn. App. 384, 411, 183 A.3d 1176 (2018). They rely on the Appellate Court majority's observation that the 1956 restriction is included with a host of other restrictions, such as obligations to pay taxes and to obey Stamford zoning regulations, which "it cannot reasonably be suggested that the plaintiffs have the right to enforce . . . ." *Abel* v. *Johnson*, supra, 194 Conn. App. 140 n.9. As a factual matter, the defendant also argues that there is not a common plan of development because (1) not all of the properties in the Saw Mill neighborhood were developed by Empire Estates, (2) the Saw Mill neighborhood contains numerous "properties that are subject to substantially different encumbrances than" those in the parties' deeds, at least one of which does not include a reference to the 1956 deed, and (3) membership in the Saw Mill Association itself is voluntary. See footnote 6 of this opinion. Ultimately, the defendant argues that the 1956 restriction was nothing more than a grantor retained interest that the plaintiffs lacked standing to enforce, with their standing limited to the "no chickens" clause in article 2 of the declaration. We, however, agree with the plaintiffs and conclude that they had standing to enforce the 1956 deed's restrictive covenant.

We begin our discussion by identifying what is and what is not in dispute. It is undisputed—indeed, the defendant conceded both in her brief and at oral argument before this court—that both of the parties' properties are bound by the residential use restriction contained in the 1956 deed from the Havemeyers, as the original grantors. It is also undisputed that the restriction in the 1956 deed, standing alone, was intended to inure to the exclusive benefit of the original grantors. What *is* in dispute is whether the "subject to" language in the deeds in the parties' chain of title from Empire

oracle of title in Connecticut for hundreds of years." See *Safford* v. *McNeil*, 102 Conn. 684, 687, 129 A. 721 (1925).

Estates,[13] when read in the context of the language of the restrictions in the recorded declaration, rendered the residential use restriction enforceable by the grantees of Empire Estates against each other.

We now turn to the standard of review and well established principles governing the construction of deeds and restrictive covenants. Whether the plaintiffs have the standing to enforce the 1956 deed's restrictive covenant "rests on the intent of the common grantor of the lots, as expressed in the language of the relevant deeds, considered in light of the surrounding circumstances." *DaSilva* v. *Barone*, 83 Conn. App. 365, 370, 849 A.2d 902, cert. denied, 271 Conn. 908, 859 A.2d 560 (2004). "Although in most contexts the issue of intent is a factual question on which our scope of review is limited . . . the determination of the intent behind language in a deed, considered in the light of all the surrounding circumstances, presents a question of law on which our scope of review is plenary. . . . Thus, when faced with a question regarding the construction of language in deeds, the reviewing court does not give the customary deference to the trial court's factual inferences. . . . Intent is determined by the language of the particular conveyance in light of all the circumstances and is a question of law." (Citation omitted; internal quotation marks omitted.) Id.; see, e.g., *Contegni* v. *Payne*, supra, 18 Conn. App. 51.

"Restrictive covenants generally fall into one of three categories: (1) mutual covenants in deeds exchanged by adjoining landowners; (2) uniform covenants con-

[13] We note that the deeds to the parties' properties that are admitted into evidence do not constitute a complete chain of title starting from the initial conveyances by Empire Estates. The defendant does not contend, however, that this apparent gap affects our determination as to Empire Estates' intent, as reflected in the language of the conveyances that are before us. Rather, the defendant contends that the "subject to" language is for notice purposes only, rather than to create a new servitude.

tained in deeds executed by the owner of property who is dividing his property into building lots under a general development scheme; and (3) covenants exacted by a grantor from his grantee presumptively or actually for the benefit and protection of his adjoining land [that] he retains." (Internal quotation marks omitted.) *DaSilva* v. *Barone*, supra, 83 Conn. App. 371–72. In this appeal, we consider whether the language of the Empire Estates deeds; see footnote 13 of this opinion; conveying the properties to the parties and their predecessors in title, "subject to" the original grantors' 1956 deed, which fits into the third category, nevertheless created a general development scheme, which fits into the second category. See *DaSilva* v. *Barone*, supra, 370–71 (noting that "[a] subsidiary question to be resolved first is" which common grantor's "intent . . . is relevant").

With respect to the second category, under which the plaintiffs claim standing, "[r]estrictive covenants should be enforced when they are reflective of a common plan of development. . . . The factors that help to establish the existence of an intent by a grantor to develop a common plan are: (1) a common grantor sells or expresses an intent to put an entire tract on the market subject to the plan; (2) a map of the entire tract exists at the time of the sale of one of the parcels; (3) actual development according to the plan has occurred; and (4) substantial uniformity exists in the restrictions imposed in the deeds executed by the grantor. . . .

"The factors that help to negate the presence of a develop ment scheme are: (1) the grantor retains unrestricted adjoining land; (2) there is no plot of the entire tract with notice on it of the restrictions; and (3) the common grantor did not impose similar restrictions on other lots. . . .

"Early Connecticut case law acknowledges the power of property holders with substantially uniform restric-

tive covenants obtained by deeds in a chain of title from a common grantor to enforce the restrictions against other owners with similar restrictive covenants. When, under a general development scheme, the owner of property divides it into building lots to be sold by deeds containing substantially uniform restrictions, any grantee may enforce the restrictions against any other grantee." (Citations omitted; internal quotation marks omitted.) Id., 372–73; see *Whitton* v. *Clark*, 112 Conn. 28, 36, 151 A. 305 (1930); *Stamford* v. *Vuono*, 108 Conn. 359, 364, 143 A. 245 (1928); *Contegni* v. *Payne*, supra, 18 Conn. App. 53; *Grady* v. *Schmitz*, 16 Conn. App. 292, 296, 547 A.2d 563, cert. denied, 209 Conn. 822, 551 A.2d 755 (1988); *Marion Road Assn.* v. *Harlow*, 1 Conn. App. 329, 333, 472 A.2d 785 (1984).

We begin with the language of the instruments at issue. The deeds at issue provide in relevant part: "Said premises are conveyed *subject to* . . . restrictive covenants and agreements contained in a certain deed from Harry Waldron Havemeyer et al to Empire Estates . . . dated August 14, 1956 . . . [and] a declaration made by Harry E. Terhune and Gordon R. Paterson, as trustees, dated March 15, 1961 . . . ." (Emphasis added.) The dictionary definition of the phrase "subject to," standing by itself, is ambiguous because it defines the term as "affected by or *possibly* affected by (something) . . . ." (Emphasis added.) Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/subject%20to (last visited August 18, 2021). The use of the term "subject to" has been described as language of "qualification and not of contract," which renders it a provision of notice that will not by itself create an encumbrance in the absence of other circumstances. (Internal quotation marks omitted.) *Teal Trading & Development, LP* v. *Champee Springs Ranches Property Owners Assn.*, 432 S.W.3d 381, 390 (Tex. App. 2014), review denied, Texas Supreme Court, Docket

No. 04-12-00623-CV (August 22, 2014). When construing the term to determine whether it evinces an intent to create a common scheme of development, considerations include, for example, the recording of a plat, map or declarations, along with the presence of substantial uniformity as to the restrictions. See *Bon Aventure, LLC* v. *Craig Dyas, LLC*, 3 So. 3d 859, 864–65 (Ala. 2008); *Smith* v. *Second Church of Christ, Scientist, Phoenix*, 87 Ariz. 400, 407–408, 351 P.2d 1104 (1960); *Wahrendorff* v. *Moore*, 93 So. 2d 720, 721–22 (Fla. 1957); *Mayer* v. *BMR Properties, LLC*, 830 N.E.2d 971, 980–81 (Ind. App. 2005); *Patch* v. *Springfield School District*, 187 Vt. 21, 31–32, 989 A.2d 500 (2009); *Armstrong* v. *Stribling*, 192 W. Va. 280, 284, 452 S.E.2d 83 (1994); 23 Am. Jur. 2d 254, Deeds § 247 (2013); cf. *Teal Trading & Development, LP* v. *Champee Springs Ranches Property Owners Assn.*, supra, 392–93 ("subject to" language is "contextual," dependent on placement in deed and may affect warranty if placed in warranty clause, or create restriction, if used in granting clause).

The commentary to § 2.2 of the Restatement (Third) of Property, Servitudes,[14] provides a greater elucidation of how to interpret the term "subject to," as used in deeds. After observing that "[n]o particular verbal formula is required" and that "some formulas . . . may express the intent to create a servitude," the commentary explains in detail that the phrase "subject to" may "be used either to create a servitude or to disclose the fact that land conveyed is already burdened by a servitude. Since the term is ambiguous, courts must look to the surrounding circumstances to determine whether the parties used it with intent to create a servitude. If no previous servitude of the type described burdened the land, the inference

[14] Section 2.2 of the Restatement (Third) of Property, Servitudes, provides: "The intent to create a servitude may be express or implied. No particular form of expression is required." 1 Restatement (Third), Property, Servitudes § 2.2, p. 62 (2000).

is normally justified that the parties used the 'subject to' language to create a servitude. If the land conveyed was already burdened by such a servitude, the 'subject to' language is *often* included to qualify the grantor's covenant against encumbrances, rather than to create a new servitude. *However, the circumstance that the property was already burdened by a servitude of the type described is not determinative. Other circumstances, such as the fact that the language is used in conveyances that effectuate a new subdivision of the land, may justify the inference that the parties intended to create new servitudes for the benefit of the other lot owners in the subdivision.*" (Emphasis altered.) 1 Restatement (Third), Property, Servitudes § 2.2, comment (d), pp. 63–64 (2000).

Illustration (3) to the commentary is particularly instructive.[15] It posits: "Developer acquired a [forty acre] parcel 'subject to' a restriction to residential uses only. The parcel had been burdened with such a servitude restriction [ten] years earlier. In the absence of circumstances indicating a different intent, the conclusion is justified that the conveyance to [d]eveloper was not intended to create a new servitude. *Developer then subdivides the parcel into* [*forty*] *lots, according to a recorded plat map, and conveys each lot 'subject to' a restriction to residential uses only. The circumstances justify the conclusion that the conveyances of the subdivided lots*

[15] By way of comparison, the first two illustrations are: (1) "O, the owner of Blackacre, a parcel of land burdened by an easement created [twenty] years earlier for ingress and egress in favor of Whiteacre, conveys Blackacre to A, 'subject to' an easement of ingress and egress in favor of Whiteacre. In the absence of circumstances indicating a different intent, the conclusion is justified that the conveyance to A was not intended to create a new easement." 1 Restatement (Third), supra, § 2.2, illustration (1), p. 64. And (2) "O, the owner of Blackacre, a lot in a subdivision restricted by the recorded plat map to residential uses only, conveys Blackacre to A, 'subject to' a restriction to residential uses only. In the absence of circumstances indicating a different intent, the conclusion is justified that the conveyance to A was not intended to create a new servitude." Id., § 2.2, illustration (2), p. 64.

are intended to create new servitudes benefiting the other lot owners in the subdivision." (Emphasis added.) Id., § 2.2, illustration (3), p. 64.

We also find persuasive sister state case law that, consistent with the Restatement (Third) of Property, indicates that a residential use restriction that is incorporated into a deed by "subject to" language is rendered enforceable by evidence of a common plan of development. Particularly instructive is the West Virginia Supreme Court's decision in *Armstrong* v. *Stribling*, supra, 192 W. Va. 280. In *Armstrong*, the court held that a property was bound by a restriction that prohibited "the construction of more than one dwelling on any lot"; id., 282; when its deed provided that it was "subject to" certain previously recorded restrictive covenants. Id., 284. The court emphasized that a general plan of development existed because the deeds to the thirty homes in the development contained the reference to the restrictive covenants and were built in compliance with them. Id.; see *Wahrendorff* v. *Moore*, supra, 93 So. 2d 721–22 (conveyance "subject to restrictions of record" means that deed must be read together with plat of subdivision, rendering "whatever properly appears on the plat . . . a part of the deed" (internal quotation marks omitted)); *Mayer* v. *BMR Properties, LLC*, supra, 830 N.E.2d 980 (facts that developer established "particular tracts . . . in a piecemeal fashion and did not prescribe to any common scheme or plan," failed to record "a supplementary declaration subjecting the remaining tracts . . . to the restrictions and covenants," and "never recorded a plat," as well as facts that "no homeowner's association was ever formed, and [that] the various deeds do not reflect the conveyance of tracts within a subdivision or development that has been platted, organized or identified by a common plan or scheme," meant that " 'subject to' " language in deeds did "not constitute an assurance that encumbrances either run with the land or that suc-

cessors or assigns are bound by them"); *Patch* v. *Springfield School District*, supra, 187 Vt. 31–32 ("subject to" language will bind property by reference to other deed if other evidence supports finding of general plan of development, given equivocation of language stating that "*conveyance was made subject to such conditions and restrictions, if any there are which are legally binding*" (emphasis in original; internal quotation marks omitted)).

These authorities, when viewed in the context of the Empire Estates deeds and the 1961 declaration, article 35 of which expresses the intent to "protect property values," strongly support the plaintiffs' reading of the "subject to" language in the Empire Estates deeds as establishing a general plan of development limited to residential use. First, those deeds effectuated a new subdivision of the land, which was contemporaneously written on a map that was recorded in the Stamford land records and referenced in the deeds. Second, article 8 of the contemporaneously executed 1961 declaration strongly restricts the use and keeping of commercial vehicles in a manner that is wholly inconsistent with commercial use of the property. It provides: "Any commercial vehicle used by an occupant of a [t]ract shall be kept within a garage with doors closed, except for brief periods required for loading or unloading." The inclusion of this clause supports a conclusion that Empire Estates intended to eliminate commercial activity, while accommodating those property owners who might keep their commercial vehicles at home for purposes of convenience.[16] These restrictions, all of which were recorded

[16] The defendant argues, however, that article 8 of the declaration, which requires that commercial vehicles kept on the property be garaged, contradicts the plaintiffs' argument that Empire Estates intended to create a residential use restriction because it would be unnecessary to include "if commercial activity was entirely impermissible in the first instance . . . ." We disagree. This clause supports a conclusion that Empire Estates intended to preclude commercial activity because it indicates a desire to preserve aesthetics while accommodating those property owners who might keep commercial vehicles at home for purposes of convenience, along with avoiding the difficult question of whether simply parking a commercial vehicle on a property is an activity

on the land records and available for any searcher to find, ineluctably lead to a conclusion that there was a common scheme of development limited to residential properties, as shown by a review of the twenty-four deeds and property cards admitted into evidence. Specifically, all of the deeds for Mill Stream Road, where the parties reside, were admitted into evidence and contain the "subject to" language at issue in this appeal. Other deeds for properties located elsewhere in the Saw Mill neighborhood contain a residential use restriction, albeit with two of the twenty-four lacking the specific "subject to" language at issue in this appeal and referencing a different declaration to establish that restriction.[17]

that is consistent with a residential use. Cf. *Roberts* v. *Lee*, 289 Ga. App. 714, 716, 658 S.E.2d 258 (2008) ("[The defendant] was using his residential property to advance his business interests by consistently parking a dump truck and other [commercial use] vehicles in his driveway. This finding was supported by photographic evidence demonstrating that [the defendant's] activities directly undermined the residential character of the property intended to be preserved by the [c]ovenants."); *Roberts* v. *Bridges*, Docket No. M2010-01356-COA-R3-CV, 2011 WL 1884614, *9 (Tenn. App. May 17, 2011) (parking of large tour bus and panel trucks on defendant homeowners' property "in the furtherance of [their] music business constituted use of the property for commercial purposes," given frequency and disruptive nature of activity); *Fowler* v. *Loucks*, Docket No. 32845-3-II, 2006 WL 1633708, *4 (Wn. App. June 14, 2006) (decision without published opinion, 133 Wn. App. 1020) (concluding that "parking a work vehicle at a residence does not violate the residential use restriction because it is merely incidental to the use as a residence" when record showed that "[t]he business use for the truck occurs at other locations").

[17] We note that the Appellate Court did not consider the factual underpinnings for the trial court's conclusion that a uniform plan of development was established by the facts of this case, choosing instead to distinguish those cases establishing the existence of such a plan by focusing on the language of the 1956 deed purportedly limiting the benefit of the residential use restriction to the original grantors. See *Abel* v. *Johnson*, supra, 194 Conn. App. 142–43 n.10. In her brief to this court, the defendant argues that "extension by implication is . . . not supported by the record," contending that "the record does not support the conclusion that [Empire Estates] subdivided all of its property and that newly created lots were subject to identical or substantially identical restrictions." The defendant notes language differences in some of the deeds that are part of the record, observing that they have "substantially different encumbrances than [those] of the plaintiffs' deed and the defendant's deed," particularly one, the Hollenberg deed, which does not refer to the 1956 deed restrictions or the declaration restrictions. We disagree with the defendant's assessment of the record. Although there are some

Moreover, although "subject to" requires us to consider the language of the original grantors' 1956 deed to which the Empire Estates deeds refer in order to determine its applicability, this inquiry brings us back to whether the Appellate Court correctly determined that the language of the restrictive covenant in the 1956 deed, which, "by its terms, inured to the benefit of the original grantors," namely, the Havemeyers "and their successors"; (emphasis omitted) *Abel* v. *Johnson*, supra, 194 Conn. App. 136; rendered it unenforceable by a party not a successor to the original grantors as a matter of law, given the apparent lack of evidence that the original grantors desired to create a general development scheme. See id., 141. Contrary to the reading of the Appel-

differences in the deeds, the Hollenberg deed refers to a different declaration of covenants recorded by Empire Estates' trustee, and, as admitted by Julie Hollenberg in her testimony at trial, her property is subject to the same residential use restriction as the other twenty-three properties considered by the trial court. Accordingly, as the trial court found, the record demonstrates the requisite "substantial uniformity" necessary to establish a common plan of development limited to residential use. *Contegni* v. *Payne*, supra, 18 Conn. App. 53; see *Whitton* v. *Clark*, supra, 112 Conn. 37 (twenty of fifty-four lots with restrictions does not show common plan); *DaSilva* v. *Barone*, supra, 83 Conn. App. 367–71 (plaintiff could not enforce restriction on keeping horses against defendant because no uniform plan of development prohibiting keeping of horses was established when twenty-two lot subdivision map "contains no mention of any restrictive covenants, and [the developer] did not record any separate agreement or declaration relating to restrictive covenants that would apply to the lots delineated on the map," restriction was not contained in any deed from original grantor to any subsequent developer, and developer included that restriction in only ten out of fifteen deeds); *Mannweiler* v. *LaFlamme*, 46 Conn. App. 525, 541, 700 A.2d 57 (restriction in developer's first thirty conveyances limiting lots to single private residence was sufficient "substantial uniformity" to create common scheme of development), cert. denied, 243 Conn. 934, 702 A.2d 641 (1997); *Contegni* v. *Payne*, supra, 60–61 (there was no uniform plan of development when map was ambiguous and "[a] thorough search of the record, transcripts and exhibits fails to reveal *a single characteristic* that was both unique to the lots within the claimed area of uniform development *and* applicable to all or substantially all the lots within the area" (emphasis in original)); *Marion Road Assn* v. *Harlow*, supra, 1 Conn. App. 333–34 (grantor did not intend to create general scheme of residential development when first lot conveyed lacked restrictions, and eighteen of forty-two lots were unrestricted, with other deeds having language "absolving her remaining lots from any such restrictions").

late Court, the addition of the phrase that it "*shall* [*i*]*nure to the benefit of the remaining land of the grantors lying westerly of the premises herein conveyed*" does not render the covenant unenforceable by the subsequent grantees of Empire Estates. (Emphasis added.) Although punctuation is not determinative in the construction of a legal instrument, the use of a comma to set off that clause grammatically indicates that the original grantors' land to the west remains a separate and independent beneficiary, which would afford the original grantee—Empire Estates, a developer—and its successors and assigns standing to enforce the residential use restriction. Nothing in that language suggests that the standing of the original grantors, or their successors, operates to the exclusion of the grantee and its successors and assigns, namely, property owners like the plaintiffs in this case.[18]

[18] As we have stated in the construction of other legal instruments, including statutes and contracts, punctuation, although not "immutable," is a "useful tool" for determining the intent of the instrument's drafter. (Internal quotation marks omitted.) *Indian Spring Land Co.* v. *Inland Wetlands & Watercourses Agency*, 322 Conn. 1, 14, 145 A.3d 851 (2016); see, e.g., *Connecticut Ins. Guaranty Assn.* v. *Drown*, 314 Conn. 161, 189–90, 101 A.3d 200 (2014) (applying principles to contract interpretation); *Stop & Shop Supermarket Co.* v. *Urstadt Biddle Properties, Inc.*, 433 Mass. 285, 289–90, 740 N.E.2d 1286 (2001) (punctuation, including placement of commas, is relevant in construction of deed, with phrase after comma serving as limitation). Thus, the "idea that we should entirely ignore punctuation would make English teachers cringe. . . . [S]tuffing punctuation to the bottom of the interpretive toolbox would run the risk of distorting the meaning of statutory language . . . and one component of written language is grammar, including punctuation." (Internal quotation marks omitted.) *Indian Spring Land Co.* v. *Inland Wetlands & Watercourses Agency*, supra, 15.

"Under the recognized precepts of English usage and grammar, a comma is usually employed to separate distinct items in a list. See generally W. Strunk & E. White, The Elements of Style (Pearson 4th Ed. 2000) pp. 2–3." *Indian Spring Land Co.* v. *Inland Wetlands Commission*, supra, 322 Conn. 15; see id., 15–16 (concluding that modifying phrase in General Statutes § 22a-40 (a) (1), "not directly related to farming operation," "applies with equal force to both 'road construction' and 'the erection of buildings' " because, "[h]ad the legislature intended all road construction, and not just that unrelated to agricultural activity, to be regulated, it could have included a comma after 'road construction,' thus setting road construction apart as its own separate category subject to regulation"); *Connecticut Ins. Guaranty Assn.* v. *Drown*,

See, e.g., *Indian Spring Land Co.* v. *Inland Wetlands & Watercourses Agency*, 322 Conn. 1, 14, 145 A.3d 851 (2016). Put differently, the three categories of restrictive covenants are "general" principles, and neither the defendant, the Appellate Court, nor our independent research has located any legal authority standing for the proposition that a particular restriction cannot be a grantor retained restriction enforceable by one party, and part of a common scheme of development enforceable as a matter of equity by another.

Indeed, such a principle would be drastically at odds with the equitable nature of the common plan of development theory. It is well settled that the "doctrine of the enforceability of uniform restrictive covenants is of equitable origin. The equity springs from the presumption that each purchaser has paid a premium for the property in reliance [on] the uniform development plan being carried out. [Although] that purchaser is bound by and observes the covenant, it would be inequitable to allow any other landowner, who is also subject to the same restriction, to violate it." *Contegni* v. *Payne*, supra, 18 Conn. App. 52; see *Whitton* v. *Clark*, supra, 112 Conn. 35.

Accordingly, we conclude that the plaintiffs had standing to enforce the restrictive covenant limiting the use of the properties to residential purposes only. The Appellate Court, therefore, improperly reversed the judgment of the trial court to the extent that it enforced the residential use restriction.

The judgment of the Appellate Court is reversed insofar as that court reversed the trial court's judgment enforcing the restrictive covenant that appears in the 1956 deed and the case is remanded to that court with

supra, 314 Conn. 190–92 (discussing application of last antecedent rule plus use of comma to limit application of vicarious liability exclusion in professional liability insurance policy).

the direction to affirm the judgment of the trial court enforcing that restrictive covenant; the judgment of the Appellate Court is affirmed in all other respects.

In this opinion the other justices concurred.