STATE OF CONNECTICUT *v.* LORI T.*
(SC 20520)

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

Syllabus

Pursuant to statute (§ 53a-98 (a) (3)), a person is guilty of custodial interference in the second degree when, "knowing that he [or she] has no legal right to do so, he [or she] holds, keeps or otherwise refuses to return a child who is less than sixteen years old to such child's lawful custodian after a request by such custodian for the return of such child."

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

Moreover, in accordance with our policy of protecting the privacy interests of victims of family violence, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

Convicted of three counts of custodial interference in the second degree, the defendant appealed. The defendant's children, who were under the age of sixteen years, were at her home for visitation over a holiday weekend. F, the defendant's former husband and the children's father, had sole physical and legal custody of the children, whereas the defendant had visitation rights. Over the weekend, the children decided that they did not want to go home with F at the end of the long weekend. When F went to the defendant's home to pick up the children in accordance with the visitation schedule, the defendant told F that she wasn't sending the children out. The defendant stated that the children didn't want to come out to F and that she was going to do what the children wanted to do. Thereafter, F summoned a local police officer, who went to the defendant's home. Although the officer did not arrest the defendant, he encouraged her to seek legal counsel and to pursue the matter in family court. After F returned to his home, he contacted the children's school resource officer, N, and informed him of the children's refusal to return to his home. Soon thereafter, N contacted the defendant and asked her why the children had not been returned to F, and she told N that she was not going to make the children return to F. The children had also been absent from school during this time, and N told the defendant that she could be in trouble if she did not get the children back into school. The defendant agreed to return the children to school, and N agreed not to seek a warrant for her arrest. When the children continued to be absent from school, N again contacted the defendant, who said that she would not return the children to school. N then obtained an arrest warrant. After the defendant was convicted, she appealed to the Appellate Court, claiming that § 53a-98 (a) (3) was unconstitutionally vague in its application to her and that there was insufficient evidence to support her conviction. The Appellate Court rejected both claims and affirmed the judgment of conviction. On the granting of certification, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on her unpreserved claim that § 53a-98 (a) (3) was unconstitutionally vague as applied to her, the defendant having failed to demonstrate the existence of a constitutional violation under the third prong of the test set forth in *State* v. *Golding* (213 Conn. 233):

   a. The defendant could not prevail on her claim that § 53a-98 (a) (3) was unconstitutionally vague as applied to her on the ground that it gave her no notice that her inaction in connection with the return of her children to F would satisfy the "refuses to return" element of the statute:

   The "refuses to return" element of § 53a-98 (a) (3) may be satisfied when a person either affirmatively refuses to send or deliver a child back to the child's lawful custodian or declines to take any affirmative action to send or deliver a child back to the child's lawful custodian, after such custodian has requested the return of the child, as the plain meanings

of the words "refuse" and "return," as gleaned from standard dictionaries, clearly impose an affirmative obligation on an individual to take some action to comply with a custodian's request to return a child, and, accordingly, refusing to return a child to the child's custodian may be demonstrated by affirmative action or a passive refusal to act.

Allowing an individual to escape the requirements of § 53a-98 (a) (3) simply by ignoring requests from a child's custodian would plainly lead to an absurd result that the legislature could not have intended.

This court clarified that § 53a-98 (a) (3) does not require an individual to compel a child to return to the child's lawful custodian but, rather, requires an individual to use efforts commensurate with the situation to avoid prosecution under that statute, and the efforts required in any given situation will vary and be dependent on any number of facts and considerations, including, without limitation, the age of the child and the relationship between the child and the individual required to return the child to the child's custodian.

There was no merit to the defendant's claim that, even if § 53a-98 (a) (3) required some form of action, a person of ordinary intelligence in the defendant's position would not reasonably have known that she was engaged in prohibited conduct insofar as § 53a-98 and case law are silent on precisely what action is required to return a child, as any person of ordinary intelligence would understand that failing to take any action upon a request to return is the equivalent of an affirmative refusal to return and, therefore, prohibited by the plain language of § 53a-98 (a) (3).

Accordingly, this court concluded that the defendant's conduct fell within the core meaning of § 53a-98 (a) (3), that the language of that statute provided notice to the defendant that the "refuses to return" element of the statute encompassed the behavior of an individual who, like the defendant, declines to take any action to send a child back to the child's lawful custodian, and that a person of ordinary intelligence would understand that ignoring a request to return is the equivalent of an affirmative refusal to return and is therefore prohibited by the plain language of the statute.

b. The defendant could not prevail on her claim that § 53a-98 (a) (3) is unconstitutionally vague because it is subject to arbitrary and discriminatory enforcement and that it, therefore, impermissibly delegates the resolution of the definition of the phrase "refuses to return" to police officers, judges and juries on an ad hoc and subjective basis:

There was no risk of arbitrary or discriminatory enforcement in the present case insofar as the plain terms of § 53a-98 (a) (3) provided sufficient guidance as to what conduct is prohibited and insofar as the statute has a core meaning within which the defendant's conduct fell.

The fact that F's local police department charged the defendant with violating § 53a-98 (a) (3) but the defendant's local police department declined to do so did not necessarily demonstrate arbitrary or discriminatory enforcement but, rather, the exercise of discretion, and the defendant did not point to anything in the record that would support the conclusion that the police department that declined to charge the defendant believed that § 53a-98 (a) (3) was inapplicable to the defendant.

2. There was sufficient evidence to prove that the defendant "refuse[d] to return" her children to F within the meaning of § 53a-98 (a) (3) and to support her conviction:

The evidence having established that the defendant told F, when he came to pick up the children, that she was not sending the children out of her house, that the children did not want to come out of the house, and that she was going to do what the children wanted to do, and the defendant having testified that she had told N that she did not make the children go outside to F because they did not want to go with him, that she was "supporting whatever [the children] needed," and that the children had "convince[d] [her] of the reasons why they [did not] want to go," the jury reasonably could have inferred that the defendant had refused to take any steps to return the children to F upon his request and, instead, had affirmatively abdicated her parental responsibility by allowing the children to decide whether to comply with the defendant and F's custody and visitation order.

To the extent that the defendant claimed that her testimony reflected that she did not prevent the children from going with F and that she essentially urged them to go with F, the jury was not required to accept the defendant's version of events, and certain of the defendant's other testimony undermined the testimony that could be construed to indicate that she had urged the children to go with F.

Although certain evidence demonstrated that the children had agreed that they were going to refuse to go with F, that evidence focused on the actions of the children and other individuals, rather than the defendant, and the evidence, viewed in the light most favorable to sustaining the verdict, demonstrated that the defendant refused to do anything but follow the will of her children.

Argued April 25—officially released October 18, 2022

Procedural History

Substitute information charging the defendant with three counts of the crime of custodial interference in the second 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, *Prescott*, *Bright* and *Devlin*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

James P. Sexton, assigned counsel, with whom were *Megan L. Wade*, assigned counsel, and, on the brief, *John R. Weikart*, assigned counsel, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Paul J. Ferencek*, state's attorney, and *Justina Moore*, assistant state's attorney, for the appellee (state).

Opinion

McDONALD, J. In this certified appeal, we must examine the meaning of certain language used in General Statutes § 53a-98 (a) (3), a provision that criminalizes custodial interference. Specifically, we must determine whether the actions, or inactions, of the defendant, Lori T., were sufficient to satisfy the "otherwise refuses to return a child" aspect of custodial interference in the second degree. General Statutes § 53a-98 (a) (3). The defendant appeals from the judgment of the Appellate Court, affirming the judgment of conviction, rendered after a jury trial, of three counts of custodial interference in the second degree. See *State* v. *Lori T.*, 197 Conn. App. 675, 677, 696, 232 A.3d 13 (2020). On appeal, the defendant claims that the Appellate Court incorrectly concluded that § 53a-98 (a) (3) is not unconstitutionally vague as applied to her and that the evidence was sufficient to support her conviction. See id., 677. We affirm the judgment of the Appellate Court.

The Appellate Court's opinion, as supplemented by the record, sets forth the facts and procedural history; see id., 677–80; which we summarize in relevant part. The defendant's four children, R, L, T and S, were at the defendant's home in Glastonbury for visitation over the Memorial Day weekend in 2015. At the time, the children ranged in age from nine to thirteen years old. The defendant's ex-husband, the children's father, had sole physical and legal custody of the children, and the defendant had visitation rights.[1] R, however, had been staying with the defendant for several months following a physical incident between him and his father, in which the Norwalk Police Department and the Department of Children and Families had been involved.

Over the Memorial Day weekend, the children decided that they did not want to go home with their father at the end of the long weekend. During the weekend, the father received emails from one of the children telling him that she did not want to return to his home and that she wanted to stay at the defendant's home. Pursuant to the custody and visitation order, the father went to the defendant's house to pick up the children on Memorial Day, but, when he arrived, "[the defendant] came out of her house and told [the father] that she wasn't sending the children out. The children didn't want to come out, and she was going to do what the children wanted to do." The father did not call the children or go inside to speak with them; rather, he went directly to the Glastonbury Police Department. Thereafter, Officer Brian Barao of the Glastonbury Police Department went to the defendant's home to conduct a welfare check of the children. After speaking

[1] After the defendant and the children's father divorced, the two initially shared custody of their four children. The defendant had residential custody, and the father would visit with his children on Wednesday evenings and every other weekend, with holidays divided between the two parents. Thereafter, the defendant's teenage son from a prior marriage was charged with sexual assault, and the four younger children went to live with the father.

with each child, Barao determined that the children were fine. He did not arrest the defendant, but, instead, he encouraged her to seek legal counsel and to pursue these matters with the family court.

The father returned to his home in Norwalk and contacted the children's school resource officer, Officer Jermaine Nash of the Norwalk Police Department. He informed Nash of the children's refusal to return to his home. A few days later, Nash called the defendant and asked her why the children had not been returned to their father. The defendant told Nash that she "[was] not going to make" the children return with their father. Nash also testified at trial that the defendant said that "the [children] didn't want to come out to [their father]. And then [Nash] made a comment, from [his] understanding, that . . . if [the defendant is] the adult, why didn't [she] send them out, and [the defendant] stated that she will not do that. She won't make the children come out to [their father]." Because the children had also been absent from school during this time, Nash told the defendant that she could be in trouble if she did not get the children back into school. The defendant agreed to return the children to school, and Nash agreed not to seek a warrant for her arrest. When the children continued to be absent from school for an additional week, Nash again contacted the defendant, who said that she would not return the children to school. Nash then obtained an arrest warrant on one charge of custodial interference in the second degree, and he contacted the Department of Children and Families.

Thereafter, on June 2, 2015, Nash and Officer David Hoover of the Glastonbury Police Department went to the defendant's home to execute the arrest warrant, and the defendant was taken into custody. In addition to the defendant, the defendant's aunt, the father, the four children, and the defendant's son from a prior marriage were also at the scene. L testified that Nash

threatened her and the other children "by telling [them that], if [they] didn't go back to [their] father, [Nash] would . . . pick [them] up and forcibly take [them] outside." T stated that Nash was "yelling" and described him as "kind of harsh . . . ." After placing the defendant into custody, both Hoover and Nash tried to persuade the children to go with their father but were unsuccessful. As a result, Hoover called the Department of Children and Families, explained that he was "having a problem [with the] placement of the children," and arranged a meeting for that day at its Manchester office. Hoover then drove the children to the Manchester office. After the children continued to refuse to go with their father, the Department of Children and Families issued a ninety-six hour hold, and the defendant's aunt was granted temporary custody of the children, who were later placed by the department with their maternal grandmother, with whom they resided for several months, until they reunited with their father.

The state's long form information dated July 5, 2016, charged the defendant with four counts of custodial interference in the second degree, one count for each child. Prior to jury selection, the state dropped the charge as to R, the child who had been staying with the defendant for several months, and proceeded to trial on the three remaining counts. In its operative long form information, the state charged the defendant in count one, in relevant part: "The [s]tate of Connecticut accuses [the defendant] of [c]ustodial [i]nterference in the [s]econd [d]egree and charges that, [in] the city of Glastonbury, on or about May 25, 2015 [Memorial Day], at approximately 7:30 [p.m.] . . . the . . . [defendant] did . . . hold and keep for a protracted period and otherwise refused to return a child, to wit: [L], who was less than sixteen years old, to such child's lawful custodian, to wit: [the father] . . . after a request by such custodian for the return of such child, knowing

that she had no legal right to do so, in violation of . . . § 53a-98 (a) (3)." The remaining counts contained similar allegations regarding T and S. At trial, the state's theory of the case focused on the defendant's alleged refusal to return the children to their father. At the conclusion of trial, the jury found the defendant guilty on all three counts. The trial court sentenced the defendant to a total effective term of three years of imprisonment, execution suspended after ninety days, three years of probation, and a $1500 fine.

From the trial court's judgment of conviction, the defendant appealed to the Appellate Court. The defendant argued that § 53a-98 (a) (3) is unconstitutionally vague in its application to her and that there was insufficient evidence to support her conviction of three counts of custodial interference in the second degree. See *State* v. *Lori T.*, supra, 197 Conn. App. 677. The Appellate Court rejected both claims and affirmed the judgment of conviction. See id., 677, 696. With respect to the vagueness claim, the Appellate Court concluded that "the defendant's conduct falls within the core meaning of § 53a-98 (a) (3) and that the language of the statute provided clear notice to the defendant that 'refuses to return' encompassed the behavior of a person who either affirmatively declines to return a child to his or her lawful custodian or declines to take any affirmative steps to return a child to the lawful custodian upon that custodian's request." Id., 687. As to the insufficiency of the evidence claim, the Appellate Court explained that "both [the father] and Nash testified that the defendant stated to them that she would not make the children go with [their father] and that she was going to do what the children wanted. The defendant similarly testified that she was . . . support[ing] the children's decision and was not . . . mak[ing] the decision for them. Clearly, such statements indicate that the defendant had the ability to take some action to return the children

to [their father] but that she refused to do so. The defendant, herself, testified that, as a [mother], she had a certain amount of power to convince her children to do things but that she decided to 'let their voices be heard . . . .' " (Emphasis omitted.) Id., 696.

Thereafter, the defendant filed a petition for certification to appeal, which we granted, limited to the following two issues: (1) "Did the Appellate Court incorrectly conclude that . . . § 53a-98 (a) (3) was not unconstitutionally vague as applied to the defendant?" And (2) "[d]id the Appellate Court incorrectly conclude that the evidence presented was sufficient to prove that the defendant 'otherwise refuse[d] to return' her children?" *State* v. *Lori T.*, 335 Conn. 956, 239 A.3d 319 (2020).

I

We begin with the defendant's contention that the Appellate Court incorrectly concluded that § 53a-98 (a) (3) is not unconstitutionally vague in its application to her. See *State* v. *Lori T.*, supra, 197 Conn. App. 677, 689–90. Specifically, she argues that the statute fails to define what it means for someone to "otherwise [refuse] to return a child" to his or her lawful custodian, and, as a result, it was impossible, under the facts of this case, for the defendant to know that her failure to force the children to go with their father could amount to a refusal to return under the statute. The defendant also contends that the Appellate Court misapplied the clear core exception to save the statute from the vagueness challenge; see *State* v. *Lori T.*, supra, 687, 689; because, she asserts, the Glastonbury Police Department doubted the statute's application and, thus, the exception does not apply. Additionally, she argues that the vagueness of the statute impermissibly delegates the resolution of the definition of the phrase "refuses to return" to police officers, judges, and juries on an ad

hoc and subjective basis, and, therefore, the statute is subject to arbitrary and discriminatory enforcement.

The defendant concedes that she failed to preserve this claim and seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). We conclude that the defendant's claim is reviewable because the record is adequate for review and the defendant raises a claim that is constitutional in nature insofar as it implicates her due process rights. See *State* v. *Golding*, supra, 239.

"The determination of whether a statutory provision is unconstitutionally vague is a question of law over which we exercise de novo review. . . . In undertaking such review, we are mindful that [a] statute is not void for vagueness unless it clearly and unequivocally is unconstitutional, making every presumption in favor of its validity. . . . To demonstrate that [a statute] is unconstitutionally vague as applied to [her], the [defendant] therefore must . . . demonstrate beyond a reasonable doubt that [she] had inadequate notice of what was prohibited or that [she was] the victim of arbitrary and discriminatory enforcement. . . . [T]he void for vagueness doctrine embodies two central precepts: the right to fair warning of the effect of a governing statute . . . and the guarantee against standardless law enforcement. . . . If the meaning of a statute can be fairly ascertained a statute will not be void for vagueness [because] [m]any statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties." (Citation omitted; internal quotation marks omitted.) *State* v. *Winot*, 294 Conn. 753, 758–59, 988 A.2d 188 (2010).

"The United States Supreme Court has set forth standards for evaluating vagueness. First, because we assume that [people are] free to steer between lawful

and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly. Vague laws may trap the innocent by not providing fair warning. . . . [A] law forbidding or requiring conduct in terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law. . . .

"Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to [police officers], judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. . . . Therefore, a legislature [must] establish minimal guidelines to govern law enforcement." (Internal quotation marks omitted.) *Gonzalez* v. *Surgeon*, 284 Conn. 573, 584, 937 A.2d 24 (2007).

"Tempering the foregoing considerations is the acknowledgment that many statutes proscribing criminal offenses necessarily cannot be drafted with the utmost precision and still effectively reach the targeted behaviors. Consistent with that acknowledgment, the United States Supreme Court has explained: 'The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.' *Colten* v. *Kentucky*, 407 U.S. 104, 110, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972) . . . ." (Citations omitted.) *State* v. *Winot*, supra, 294 Conn. 760. "Simply put, [although] some ambiguous statutes are the result of poor draftsmanship, it is apparent that in many instances

the uncertainty is merely attributable to a desire not to nullify the purpose of the legislation by the use of specific terms which would afford loopholes through which many could escape." (Internal quotation marks omitted.) Id., 760–61.

"Finally, even though a statutory term that is susceptible to a number of differing interpretations may be impermissibly vague as applied to some situations, the term is not necessarily vague as applied in all cases; rather, whether the statute suffers from unconstitutional vagueness is a case-specific question, the resolution of which depends on the particular facts involved. . . . Similarly, a term is not void for vagueness merely because it is not expressly defined in the relevant statutory scheme." (Citation omitted.) *State* v. *DeCiccio*, 315 Conn. 79, 88, 105 A.3d 165 (2014).

A

We turn first to the defendant's claim that § 53a-98 (a) (3) is unconstitutionally vague as applied to her because it gave her no notice that her inaction would meet the "refuses to return" element of the statute. Specifically, she claims that the phrase "otherwise refuses to return" in § 53a-98 (a) (3) is ambiguous and leads to unworkable results. The defendant also claims that, because the meaning of "otherwise refuses to return" is not further refined by extratextual sources, the rule of lenity requires reversal. The state argues that, because the term "refuses to return" is not defined in § 53a-98 or elsewhere in the General Statutes, the Appellate Court properly applied the ordinary dictionary definitions in construing the statute. See *State* v. *Lori T.*, supra, 197 Conn. App. 683–84. The state contends that "refuses to return" has a clear meaning when those definitions are applied to that phrase, and, as a result, the defendant cannot prove that she did not have fair notice that her conduct was prohibited by § 53a-98. The state argues that, in this case, the defendant

clearly demonstrated and affirmatively expressed her unwillingness to return the children to their father when she stated, three times, that she would not turn the children over to the father. In short, the state claims that the defendant failed to exercise her parental authority over her children and, instead, allowed the children to make the decision whether to comply with the custody and visitation order, thus abrogating her obligation under that order to share custody with the father. We agree with the state.

We begin our analysis of the defendant's vagueness claim by applying our familiar principles of statutory interpretation to determine the meaning of the phrase "otherwise refuses to return." See, e.g., *Vitti* v. *Milford*, 336 Conn. 654, 660, 249 A.3d 726 (2020). In doing so, we are mindful that, pursuant to General Statutes § 1-1 (a), "[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly." "References to judicial opinions involving the statute, the common law, legal dictionaries, or treatises may be necessary to ascertain a statute's meaning to determine [whether] it gives fair warning." (Internal quotation marks omitted.) *State* v. *Josephs*, 328 Conn. 21, 31–32, 176 A.3d 542 (2018).

Section 53a-98 (a) provides in relevant part: "A person is guilty of custodial interference in the second degree when . . . (3) knowing that he has no legal right to do so, he holds, keeps or otherwise refuses to return a child who is less than sixteen years old to such child's lawful custodian after a request by such custodian for the return of such child." The "refuses to return" aspect of the statute is the only aspect at issue in this case. Because § 53a-98 does not define the phrase "refuses to return," we look to the common meaning of the words used in the statute. See, e.g., *Stone-Krete Con-*

struction, *Inc.* v. *Eder*, 280 Conn. 672, 677–78, 911 A.2d 300 (2006).

As the Appellate Court noted, The American Heritage Dictionary of the English Language defines "refuse" as "[t]o decline to do, accept, give, or allow . . . ." The American Heritage Dictionary of the English Language (5th Ed. 2011) p. 1478. Merriam-Webster's Collegiate Dictionary defines "refuse" as "to express oneself as unwilling to accept" or "to show or express unwillingness to do or comply with . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2014) p. 1047. Black's Law Dictionary defines "refusal" as "[t]he denial or rejection of something offered or demanded . . . ." Black's Law Dictionary (9th Ed. 2014) p. 1472. Because the question of whether a statute provides fair warning may also be ascertained by reference to other provisions in the penal code; see General Statutes § 53a-2; Appellate Court case law interpreting the meaning of the word "refused" in other criminal contexts is also instructive. The Appellate Court has rejected an argument that a statute pertaining to the refusal to submit to a breathalyzer test was unconstitutionally vague as applied because the statute did not adequately define "refused." *State* v. *Corbeil*, 41 Conn. App. 7, 17–19, 674 A.2d 454, cert. granted, 237 Conn. 919, 676 A.2d 1374 (1996) (appeal dismissed, September 18, 1996). The court explained that "[i]t is not necessary to define a word that carries an ordinary, commonly understood meaning, is commonly used and is defined in standard dictionaries. . . . The word 'refuse' is defined as 'to show or express unwillingness to do or comply with . . . .' " (Citation omitted.) Id., 18–19. "Consequently, the dictionary definition makes it clear that 'refusing' to take a breath test may be accomplished by a failure to cooperate as well as by an expressed refusal."[2] Id., 19.

[2] The defendant contends that *State* v. *Corbeil*, supra, 41 Conn. App. 7, and another case we cite to in this opinion, *Rana* v. *Terdjanian*, 136 Conn. App. 99, 46 A.3d 175, cert. denied, 305 Conn. 926, 47 A.3d 886 (2012), are inapposite because "there was no barrier to the defendant's ability to

"Return" is defined as "to pass back to an earlier possessor," "to restore to a former or to a normal state," or "to give back to the owner . . . ." Merriam-Webster's Collegiate Dictionary, supra, p. 1065. The American Heritage Dictionary of the English Language defines "return" as "[t]o revert to a former owner" or "[t]o send, put, or carry back . . . ." The American Heritage Dictionary of the English Language, supra, p. 1500. The verb form of the word "return," in our view, unquestionably denotes some level of action or activity required on the part of the subject: the child must be returned.

We conclude that the "otherwise refuses to return" element of § 53a-98 (a) (3) applies, at its core, to a person who either affirmatively refuses to send or deliver a child back to his or her lawful custodian or who declines to take any affirmative action to send or deliver a child back to his or her lawful custodian, after such custodian has requested the return of the child. Indeed, the plain meanings of the words "refuse" and "return," taken together, clearly impose an affirmative obligation on an individual to take some action to comply with a custodian's request for the return of a child. See, e.g., Merriam-Webster's Collegiate Dictionary, supra,

unilaterally achieve the result required by the statute" in each of those cases and, accordingly, "it was clear how a defendant could avoid criminal liability." In this case, the defendant contends, the statute is silent about what action is required to "return" the children, who have willpower of their own.

We are not persuaded for two reasons. First, these decisions shed light on the meaning of the terms "refusal" and "refused," not "return." See *Rana* v. *Terdjanian*, supra, 136 Conn. App. 121; *State* v. *Corbeil*, supra, 41 Conn. App. 18–19. Second, whether a person is ultimately successful in accomplishing the return of the child is not necessarily dispositive of the "otherwise refuses to return" inquiry. For the purposes of this opinion, we need not decide whether an individual who takes affirmative steps to send a child back to his or her lawful custodian is nevertheless criminally liable if the child does not ultimately return. As we will discuss in this opinion, the defendant in this case took no steps—such as telling the children that they had to go with their father or packing their belongings and bringing them outside—to return the children to their father.

p. 1047 (defining "refuse" as "to show or express *unwillingness to do* or comply with" (emphasis added)); id., p. 1065 (defining "return" as "to *give back* to the owner" (emphasis added)). As a result, refusing to send the child back to his or her lawful custodian may be evinced by either affirmative action or a passive refusal to act. Cf. *State* v. *Corbeil*, supra, 41 Conn. App. 18–19. If a refusal to return could not be evinced by action or inaction, a person could avoid the requirements of § 53a-98 (a) (3) simply by ignoring requests from the child's lawful custodian that the child be returned. Cf. *Rana* v. *Terdjanian*, 136 Conn. App. 99, 121, 46 A.3d 175 (defendant's failure to return funds after demand by plaintiff's agent "evinced [the defendant's] unqualified refusal to comply" and was sufficient to establish common-law conversion), cert. denied, 305 Conn. 926, 47 A.3d 886 (2012). Allowing an individual to escape the requirements of the statute simply by ignoring requests from a child's custodian would plainly lead to an absurd result that the legislature could not have intended. We agree with the Appellate Court that "[a]ny person of ordinary intelligence would understand that ignoring a request to return is the equivalent of an affirmative refusal to return and, therefore, prohibited by the plain language of the statute." *State* v. *Lori T.*, supra, 197 Conn. App. 685.

In one portion of its opinion, however, the Appellate Court explained that the jury could have concluded that, "although the defendant had the ability to *compel* her children to go with their father, she refused to take any steps to comply with the [trial] court's custody and visitation orders by returning the children to him upon his request." (Emphasis added.) Id., 694. To the extent that the Appellate Court suggests that § 53a-98 (a) (3) imposes a requirement that an individual "compel" a child to return to his or her lawful custodian, we disagree. A "compel" requirement is too strong of a charac-

terization of an individual's obligation under the statute. Rather, we conclude that an individual is required to use efforts commensurate with the situation to satisfy the requirements of § 53a-98 (a) (3). The effort required in any given situation, and whether an individual has satisfied the mandates of § 53a-98 (a) (3), will vary and be dependent on any number of facts and considerations, including, without limitation, the age of the child and the relationship between the individual and the child. As the defendant conceded in her brief and at oral argument, parents of a young child may have an obligation to physically pick up their recalcitrant child and carry the child to the car, buckle the child in a car seat, drive the child to a mutual exchange location, or take some other action to physically return the child to his or her lawful custodian.[3] Although parents of an older child may not have the same ability to physically move their child, the acknowledgment that parents of a young child may need to physically return the child highlights the obligation of a parent to do *something* to effectuate the return of the child, regardless of the

[3] Our statutory scheme allows for parents to have physical control over their children. For example, there is a parental justification defense to the use of force. General Statutes § 53a-16 provides in relevant part that, "[i]n any prosecution for an offense, justification, as defined in sections 53a-17 to 53a-23, inclusive, shall be a defense. . . ."

General Statutes § 53a-18, in turn, provides in relevant part: "(a) The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:

"(1) A parent, guardian or other person entrusted with the care and supervision of a minor or an incompetent person, except a person entrusted with the care and supervision of a minor for school purposes as described in subdivision (6) of this section, may use reasonable physical force upon such minor or incompetent person when and to the extent that he or she reasonably believes such to be necessary to maintain discipline or to promote the welfare of such minor or incompetent person. . . ." See also, e.g., *State* v. *Mark T.*, 339 Conn. 225, 242, 260 A.3d 402 (2021) ("[the parental justification] defense provides that such force is not criminal, as long as it is reasonable" (internal quotation marks omitted)).

child's age.[4] For parents of an older child, there may be fewer coercive measures at their disposal, beyond verbal commands, but there is still an obligation to do something to effectuate the return of the child. However, the successful return of the child to his or her lawful custodian may not be necessary to satisfy the requirements of § 53a-98 (a) (3).[5] See footnote 2 of this opinion. Because, as we will explain, the defendant took no steps to return the children to their father, we need not decide, in this case, the more difficult question of what additional steps an individual may be required to take when he or she has taken some action to return the children but the children do not comply.

We note that other states have similar statutes that criminalize the failure to return a child because it amounts to custodial interference. See, e.g., *State* v. *Petruccelli*, 170 Vt. 51, 60, 743 A.2d 1062 (1999) ("[c]ustodial interference, by comparison, generally occurs when a parent takes his or her child, or *fails to return the child* following a court-ordered visitation period, in

[4] The defendant seemed to acknowledge that she had an obligation to take some action to return the children to their father when she testified regarding the limits of what she could do to effectuate that return. Specifically, she testified that the children planned not to go and "[t]hey weren't [small children] that [she] could pick up and buckle into their car seat and make them go."

[5] At least one court has held, in a related context, that a parent who takes affirmative steps to facilitate visitation has satisfied her obligation, even if a child refuses to comply. See, e.g., *Hancock* v. *Hancock*, 122 N.C. App. 518, 525, 471 S.E.2d 415 (1996) ("Nowhere in the record do we find evidence that [the] plaintiff acted purposefully and deliberately or with knowledge and stubborn resistance to prevent [the] defendant's visitation with the child. *The evidence shows* [*that the*] *plaintiff prepared the child to go, encouraged him to visit with his father, and told him he had to go. The child simply refused.* [*The*] [*p*]*laintiff did everything possible short of using physical force or a threat of punishment to make the child go with his father.* [Although] perhaps the plaintiff could have used some method to physically force the child to visit his father, even if she improperly did not force the visitation, her actions do not rise to a [wilful] contempt of the consent judgment." (Emphasis added.)).

a manner that prevents the other custodial parent from having contact with the child" (emphasis added)); see also, e.g., Ariz. Rev. Stat. Ann. § 13-1302 (A) (2020) ("[a] person commits custodial interference if, knowing or having reason to know that the person has no legal right to do so, the person . . . [4] [a]t the expiration of access rights outside this state, *intentionally fails or refuses to return or impedes the return of a child to the lawful custodian*" (emphasis added)); Minn. Stat. Ann. § 609.26 (1) (West Cum. Supp. 2021) ("[w]hoever intentionally does any of the following acts may be charged with a felony and, upon conviction, may be sentenced as provided in subdivision 6 . . . takes, obtains, retains, or *fails to return a minor child* from or to the parent in violation of a court order, where the action manifests an intent substantially to deprive that parent of rights to parenting time or custody" (emphasis added)); N.M. Stat. Ann. § 30-4-4 (B) (2015) ("[c]ustodial interference consists of any person, having a right to custody of a child, maliciously taking, detaining, concealing or enticing away or *failing to return that child* without good cause and with the intent to deprive permanently or for a protracted time another person also having a right to custody of that child of his right to custody" (emphasis added)).

Although the appellate courts of Connecticut have not previously addressed a parent's failure to act in the custodial interference context, we find the rationale of certain out-of-state courts, in related contexts, instructive. For example, the Colorado Court of Appeals has explained that the "[d]efendant was under a duty, recognized by the laws of [Colorado], to return the children at the time prescribed in the custody determination. [In the absence of] consent from the custodial parent, *his failure to so act is conduct for which he may be prosecuted* . . . ." (Emphasis added.) *People* v. *Haynie*, 826 P.2d 371, 374 (Colo. App. 1991). Similarly, the Supreme

Court of Vermont has explained that, "[a]lthough most crimes are committed by an affirmative act, under some circumstances a failure to act can result in criminal liability. . . . To face criminal liability for a failure to act, however, a person must have been bound by a legal duty to act. . . . Here, [the] defendant had a legal duty under a court order to return the child to her lawful custodian in Vermont. . . . [When] there is a legal duty to act, failure to perform that duty is, for the purpose of jurisdiction, tantamount to an act." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Doyen*, 165 Vt. 43, 47–48, 676 A.2d 345 (1996).

Similarly, in the contempt context, courts have concluded that a parent's refusal to take any steps to facilitate visitation supports a finding of contempt. For example, the North Dakota Supreme Court reviewed a father's appeal from the trial court's order for structured visitation and finding that he deliberately and persistently interfered with the mother's visitation. See *Sisk* v. *Sisk*, 711 N.W.2d 203, 206 (N.D. 2006). The initial custody stipulation gave the father physical custody of the children and provided the mother with reasonable and liberal visitation as agreed on. Id., 205. The mother had little contact for some time and, when the mother attempted to reinstitute contact, the children often refused to speak with her. Id. The father did not require or encourage the children to talk with their mother. Id. When the mother requested visitation, the children declined, and the father did not require their participation. Id. The father claimed that he made the children available to the mother, but he did not encourage or require them to cooperate when they resisted or refused visitation. Id. The North Dakota Supreme Court held: "We believe [that] the evidence supports the trial court's finding that [the father] has deliberately and intentionally interfered with visitation through his delay tactics, *failure to cooperate, and refusal to in any way facili-*

tate visitation between his children and their mother." (Emphasis added.) Id., 210. The court went on to note that, "[b]y [the father's] own admission, his conduct is deliberate and intentional. He does not feel he needs to do anything to facilitate visitation." Id., 212; see also, e.g., *Ware* v. *Ware*, Docket No. CA2001-10-089, 2002 WL 336957, *2 (Ohio App. March 4, 2002) (when court establishes visitation schedule concerning parties' minor children, in absence of proof that visitation with noncustodial parent would cause physical or mental harm to children, or showing of some justification for preventing visitation, custodial parent must do more than merely encourage minor children to visit noncustodial parent). Similarly, the Nebraska Supreme Court has held that a parent cannot abdicate her parental obligation by transferring responsibility for deciding whether to attend visitation to her child. See *Martin* v. *Martin*, 294 Neb. 106, 119, 881 N.W.2d 174 (2016) (upholding trial court's decision to hold custodial parent in contempt when parent consistently transferred responsibility of deciding whether to attend visitation to children and noncustodial parent was unable to exercise his court-ordered visitation).

These out-of-state cases lend further support to our conclusion that the "otherwise refuses to return" aspect of § 53a-98 (a) (3) includes, at its core, a person who declines to take any action to send or deliver a child back to his or her lawful custodian, after such custodian has requested the return of the child.

In this case, the evidence, including from the defendant herself, established that the defendant refused to send the children out of her home to the father or to take any action whatsoever to facilitate the return of the children to their father. Specifically, when the father went to pick up the children on Memorial Day, pursuant to the custody and visitation order, "[the defendant] came out of her house and told [the father] that *she*

wasn't sending the children out. The children didn't want to come out, and *she was going to do what the children wanted to do*."[6] (Emphasis added.) Later, the defendant also told Officer Nash that "[she wasn't] sending the [children] to [their father] and [she was] not going to make them [go]." Officer Nash further testified that the defendant said that "the [children] didn't want to come out to [their father]. And then [Nash] made a comment . . . that . . . if [the defendant is] the adult, why didn't [she] send them out, and [the defendant] stated that she will not do that. She won't make the children come out to [their father]." The father testified that he "didn't learn that [the children] didn't want to go with [him] until [he] arrived at [the defendant's] house that evening, and [the defendant] came out of [her] house to tell [him] that [the children] weren't coming out, and [she wasn't] bringing them out." The defendant testified that she "wasn't making decisions for [her] children. [She] was supporting whatever they needed," and the children "were convincing [her] of the reasons why they didn't want to go." In short, the defendant abdicated her parental responsibility and allowed the children to decide whether to comply with the custody and visitation order.

The defendant nevertheless contends that, even if some action was required by § 53a-98 (a) (3), "because

[6] The defendant claims that relying on her statements is impermissible because it punishes her for her speech or inaction, which is antithetical to first amendment jurisprudence. We are not persuaded.

The defendant was punished for her conduct in refusing to return her children to their father, not for the content of her speech alone. See, e.g., *State* v. *Taupier*, 330 Conn. 149, 178 n.19, 193 A.3d 1 (2018) ("statute criminalizing threats directed at public servants was constitutional because 'the statute punishes conduct rather than the content of speech alone and bears a rational relationship to the [s]tate's legitimate and compelling interest in protecting public servants from harm' " (quoting *Ex parte Eribarne*, 525 S.W.3d 784, 785 (Tex. App. 2017, pet. ref'd))), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019). The defendant's speech merely evidenced her mens rea.

the statute and our case law are silent on precisely *what* action is required [to return the children], a person of ordinary intelligence in the defendant's position would not reasonably have known that she was engaged in [conduct that was] statutorily prohibited . . . ." (Emphasis in original.) We are not persuaded. As we explained, the defendant took no action to facilitate the return of the children. This is not a situation in which the defendant instructed her children to go with their father and they simply refused. Rather, the defendant repeatedly and affirmatively refused to do anything except follow the will of her children. Moreover, "[d]ue process does not require statutes to provide a laundry list of prohibited conduct. [L]aws may be general in nature so as to include a wide range of prohibited conduct. The constitution requires no more than a reasonable degree of certainty." (Internal quotation marks omitted.) *State* v. *Courchesne*, 296 Conn. 622, 725, 998 A.2d 1 (2010). Indeed, "[t]he proscription of the activity . . . need not be definite as to all aspects of its scope. A statute is not unconstitutional merely because a person must inquire further as to the precise reach of its prohibitions." (Internal quotation marks omitted.) *State* v. *Panek*, 328 Conn. 219, 244, 177 A.3d 1113 (2018). In this case, the defendant was not required to "inquire further" because her failure to take any action fell squarely within the core meaning of § 53a-98 (a) (3). Any person of ordinary intelligence would understand that failing to take any action upon a request to return is the equivalent of an affirmative refusal to return and, therefore, prohibited by the plain language of the statute.

We agree with the Appellate Court that the defendant's conduct falls within the core meaning of § 53a-98 (a) (3) and that the language of the statute provided notice to the defendant that the "refuses to return" element of the statute encompassed the behavior of an

individual who either affirmatively refuses to send a child back to his or her lawful custodian or declines to take any action to send a child back to his or her lawful custodian after such a request. See *State* v. *Lori T.*, supra, 197 Conn. App. 687. It would be clear to a person of ordinary intelligence in the defendant's circumstances that her abdication of parental responsibility to return the children to their father violated the core meaning of the statute, and, consequently, the defendant's claim that § 53a-98 (a) (3) is unconstitutionally vague, as applied to her, fails.

B

The defendant next claims that § 53a-98 (a) (3) is unconstitutionally vague because it is subject to arbitrary and discriminatory enforcement and that it, therefore, impermissibly delegates the resolution of the definition of the phrase "refuses to return" to police officers, judges and juries on an ad hoc and subjective basis. The defendant further claims that the facts of this case highlight the arbitrary and discriminatory enforcement. Specifically, she contends that the contradictory enforcement of the statute by the Glastonbury Police Department and the Norwalk Police Department evidences the arbitrary enforcement. The state contends that "there is no risk of arbitrary or discriminatory enforcement in this case because the plain terms of § 53a-98 [a] [3] provide sufficient guidance as to what is prohibited, and because the statute has a core meaning within which the defendant's conduct fell." (Internal quotation marks omitted.) We agree with the state.

To prevent arbitrary and discriminatory enforcement, "laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to [police officers], judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory

application." (Footnote omitted.) *Grayned* v. *Rockford*, 408 U.S. 104, 108–109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). "[A] legislature [must] establish minimal guidelines to govern law enforcement. . . . [When] the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows [police officers], prosecutors, and juries to pursue their personal predilections." (Citation omitted; internal quotation marks omitted.) *Kolender* v. *Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983).

"As a practical matter, a court analyzing an as-applied vagueness challenge may determine that the statute generally provides sufficient guidance to eliminate the threat of arbitrary enforcement without analyzing more specifically whether the particular enforcement was guided by adequate standards. In fact, it is the better (and perhaps more logical) practice to determine first whether the statute provides such general guidance, given that the [United States] Supreme Court has indicated that the more important aspect of the vagueness doctrine is the requirement that a legislature establish minimal guidelines to govern law enforcement. . . . If a court determines that a statute provides sufficient guidelines to eliminate generally the risk of arbitrary enforcement, that finding concludes the inquiry.

"[When] a statute provides insufficient general guidance, an as-applied vagueness challenge may nonetheless fail if the statute's meaning has a clear core. . . . In that case the inquiry will involve determining whether the conduct at issue falls so squarely in the core of what is prohibited by the law that there is no substantial concern about arbitrary enforcement because no reasonable enforcing officer could doubt the law's application in the circumstances." (Internal quotation marks omitted.) *State* v. *Stephens*, 301 Conn. 791, 805–806, 22 A.3d 1262 (2011).

Given our conclusion in part I A of this opinion that § 53a-98 (a) (3) has a clear core meaning and that the defendant's conduct fell within this core, we agree with the Appellate Court that we need not address the particular enforcement of the statute in this case. See *State* v. *Lori T.*, supra, 197 Conn. App. 689; see also, e.g., *State* v. *Stephens*, supra, 301 Conn. 806.

We do, however, briefly address one misconception underlying the defendant's contention, namely, that she was the victim of arbitrary and discriminatory enforcement because the Norwalk Police Department charged her under the statute and the Glastonbury Police Department declined to do so. The different approaches taken by the two police departments do not necessarily demonstrate arbitrary or discriminatory enforcement but, rather, the exercise of discretion. Cf. 4 W. LaFave et al., Criminal Procedure (4th Ed. 2015) § 13.2 (b), p. 144 ("it is clear beyond question that discretion is regularly exercised by the police in deciding when to arrest"). Specifically, Barao, of the Glastonbury Police Department, exercised discretion in declining to press charges against the defendant, despite the fact that the Glastonbury Police Department has made arrests for custodial interference in other circumstances, instead suggesting that the parties first try to resolve their custody dispute in family court.[7] Similarly, Nash, of the Norwalk Police Department, also exercised discretion when he initially declined to pursue an arrest warrant after the defendant promised to return her children to school. The defendant does not point to anything in the record that supports the conclusion that the Glaston-

[7] The defendant similarly claims that the clear core exception does not apply to her case because Barao doubted the application of § 53a-98 (a) (3) when he declined to arrest the defendant. Although it is true that Barao declined to arrest the defendant, there is nothing in the record to suggest that this was the result of uncertainty as to the statute's application. Rather, the record reflects that, as a matter of discretion, the Glastonbury Police Department often refers such cases to family court.

bury Police Department or Nash, when he initially declined to pursue an arrest warrant, believed § 53a-98 (a) (3) was inapplicable to the defendant.

The defendant has not established that § 53a-98 (a) (3) is unconstitutionally vague as applied such that it deprived her of adequate notice or that she was subject to arbitrary and discriminatory enforcement. Accordingly, we conclude that the defendant's claim fails under the third prong of *Golding* because she failed to demonstrate the existence of a constitutional violation. See *State* v. *Golding*, supra, 213 Conn. 240; see also *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of *Golding*).

II

We next turn to the defendant's contention that there was insufficient evidence to prove that she "otherwise refuse[d] to return" her children. General Statutes § 53a-98 (a) (3). The defendant argues that, by concluding that the defendant's statements and inaction "indicate that [she] had the ability to take some action to return the children to [their father] but that she refused to do so"; *State* v. *Lori T.*, supra, 197 Conn. App. 696; the Appellate Court improperly added a judicial gloss to § 53a-98 (a) (3), requiring that the state prove that the defendant had the ability to return the children but refused to do so. The defendant further argues that, even under this standard, the state failed to prove beyond a reasonable doubt that she had the ability to return the children and failed to do so.

The state contends that the Appellate Court correctly concluded that the evidence was sufficient to prove that the defendant refused to return her children to their lawful custodian, as required by § 53a-98 (a) (3). See id. The state contends that the defendant's "repeated refusal to send the children out to their father, evidenced both in word and deed, was specific action on

her part that satisfied the 'otherwise refuses to return' element of [§ 53a-98 (a) (3)]." The state also contends that the Appellate Court did not apply a judicial gloss to the statute. Rather, it followed the rules of statutory construction and applied dictionary definitions to ascertain the meanings of the terms "refuse" and "return." The state also claims that "it is the defendant, not the Appellate Court, who adds to the statute, [by] claiming that it requires the state to prove that [the defendant] not only refused to return her children to their lawful custodian, but [also] that she had the actual ability to force them to go with their father." We agree with the state.

We begin with the standard of review. "In [a defendant's] challenge to the sufficiency of the evidence . . . [w]hether we review the findings of a trial court or the verdict of a jury, our underlying task is the same. . . . We first review the evidence presented at trial, construing it in the light most favorable to sustaining the facts expressly found by the trial court or impliedly found by the jury. We then decide whether, [on] the facts thus established and the inferences reasonably drawn therefrom, the trial court or the jury could reasonably have concluded that the cumulative effect of the evidence established the defendant's guilt beyond a reasonable doubt. . . . [W]e give great deference to the [verdict] of the [jury] because of its function to weigh and interpret the evidence before it and to pass [on] the credibility of witnesses." (Citation omitted; internal quotation marks omitted.) *State* v. *Adams*, 327 Conn. 297, 304–305, 173 A.3d 943 (2017).

"In evaluating evidence that could yield contrary inferences, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier [of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable

and logical. . . . As we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt 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. . . . 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. *Drupals*, 306 Conn. 149, 158, 49 A.3d 962 (2012).

The evidence at trial, relevant to whether the state met its burden of proving the "otherwise refuses to return" element of § 53a-98 (a) (3), viewed in the light most favorable to sustaining the verdict, established that the father "went to pick . . . up [the children] on Memorial Day . . . according to [the] visitation schedule . . . and [the defendant] came out of her house and told [him] that *she wasn't sending the children out*. The children didn't want to come out, and *she was going to do what the children wanted to do*." (Emphasis added.) The defendant also told Nash that she did not make the children go outside to their father because they did not want to go with him. The defendant testified that she "wasn't making decisions for [her] children" and that she was "supporting whatever they needed." She also testified that the children "were convincing [her] of the reasons why they didn't want to go." The jury reasonably could have inferred that, far from using efforts commensurate with the situation to return the children in accordance with the trial court's custody and visitation order, the defendant refused to take any steps to return the children to their father upon his request and, instead, affirmatively abdicated her paren-

tal responsibility by allowing her children to decide whether to comply with the order.

The defendant contends, however, that she did not "refuse to return" the children because her testimony reflected that she did not prevent the children from going with their father,[8] and she essentially urged the children to go with their father. We disagree.

At trial, the defendant testified that, when the father arrived to pick the children up, "they refused to go. And, as a [mother], you have a certain amount of power to convince your children to do things. And, as I was like, you know, come on, they just kept giving me reasons why they didn't want to go. And it just [got] to the point where I felt that I had an obligation to let their voices be heard, to let them talk to some people. I didn't refuse to let them go. They refused to go." To the extent that the defendant's telling the children "come on" could be construed as her urging the children to go, the jury was not required to accept the defendant's version of events. "[I]t is the jury's role as the sole trier of the facts to weigh the conflicting evidence and to determine the credibility of witnesses. . . . It is the right and duty of the jury to determine whether to accept or to reject the testimony of a witness . . . and what weight, if any, to lend to the testimony of a witness and the evidence presented at trial." (Citations omitted.) *State* v. *Morgan*, 274 Conn. 790, 802, 877 A.2d 739 (2005). Moreover, the defendant's other testimony—namely, that she "wasn't making decisions for [her] children," that "[she] was supporting whatever

[8] We note that not *preventing* the children from leaving with their father says nothing about whether the defendant refused to *return* the children. Whether an individual prevents a child from leaving with his or her lawful custodian is more appropriately encompassed by the "holds" and "keeps" aspects of § 53a-98 (a) (3). As we explained, the "refuses to return" aspect includes, at its core, an individual who declines to take any action to send a child back to his or her lawful custodian.

they needed," and that the children "were convincing [her] of the reasons why they didn't want to go"—undermines her testimony that she essentially urged the children to go with their father.

We acknowledge that certain evidence demonstrated that the children had agreed that they were going to refuse to go with their father, that one of the children emailed the father, telling him she did not want to return to his home, and that the children refused to go with their father when he arrived to pick them up on Memorial Day. When the prosecutor asked L what prompted the children to make this decision, she responded that they had "been wanting to not go for a while, so, eventually, [they] just decided not to go with [their father]." We also recognize that Nash, members of the Glastonbury Police Department, and the Department of Children and Families could not persuade the children to go with their father. The father also did not persuade the children to return home with him. Nevertheless, this evidence focuses on the actions of the children, their father and law enforcement, not the defendant. As we explained, had the defendant taken any steps to return the children to their father, but the children nonetheless refused, then we would have to address the more difficult question of what additional steps, if any, the defendant would have been required to take. We need not, however, resolve that question in the present case because the evidence, viewed in the light most favorable to sustaining the verdict, demonstrated that the defendant refused to do anything but follow the will of her children. We agree with the Appellate Court that the evidence was sufficient to support the defendant's conviction of three counts of custodial interference in the second degree. See *State* v. *Lori T.*, supra, 197 Conn. App. 696.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

SERAMONTE ASSOCIATES, LLC *v.* TOWN OF HAMDEN (SC 20571)

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

Syllabus

Pursuant to statute (§ 12-63c (a)), an owner of real property used primarily for the purpose of producing rental income may be required to "annually submit to the assessor not later than the first day of June" certain income and expense information for such property.

Pursuant further to statute (§ 12-63c (d)), an owner who fails to submit the information required by § 12-63c (a) "shall be subject to a penalty equal to a ten per cent increase in the assessed value of such property for such assessment year."

The plaintiff, who owns certain real property in the town of Hamden, appealed to the trial court from the decision of the defendant town's board of assessment appeals, which upheld the assessment, pursuant to § 12-63c (d), of a 10 percent penalty against the plaintiff's property for the plaintiff's purportedly late submission of certain 2015 income and expense information pursuant to § 12-63c (a). The plaintiff had mailed the information on May 31, 2016, but the assessor did not receive it until June 2, 2016, one day after the June 1 deadline set forth in § 12-63c (a). The trial court upheld the board's decision, granted the town's motion for summary judgment, and rendered judgment for the town, concluding that the penalty was not improperly imposed because the word "submit," as used in § 12-63c (a), required that the assessor receive the information by June 1. The Appellate Court affirmed the trial court's judgment, concluding that, when viewed in the context of other tax statutes, the use of the word "submit" in § 12-63c (a) unambiguously required delivery of the information to the assessor by June 1. On the granting of certification, the plaintiff appealed to this court, claiming, inter alia, that the term "submit" in § 12-63c (a) means "to send" and that the Appellate Court, therefore, incorrectly had concluded that the term "submit" required that the assessor receive the income and expense information by June 1.

Held that the Appellate Court correctly concluded that the word "submit," as used in § 12-63c (a), required that the assessor receive the plaintiff's income and expense information by June 1, and, accordingly, the assessor's imposition of the 10 percent penalty under § 12-63c (d) was not improper:

Because the word "submit" was not defined in § 12-63c (a) or in the broader statutory scheme, this court looked to dictionary definitions in order to understand its ordinary meaning, and those definitions indicated that the process of submission is not considered complete in many contexts until the information is delivered to the recipient, and a reading of § 12-63c as a whole confirmed that the legislature's use of "submit" in the context of that statute unambiguously required the receipt, rather than the mere sending, of the income and expense information by June 1.

Although the plaintiff claimed that the fact that subsection (c) of § 12-63c used the word "receipt" and subsections (a) and (d) of that statute used "submit" suggested that the legislature must have intended those two words to have different meanings, a closer reading of § 12-63c (c) supported the opposite conclusion, as the phrase "receipt of information" in § 12-63c (c) is followed directly by the phrase "as required under subsection (a)," thus indicating that § 12-63c (a) requires receipt rather than mere sending.

Construing the word "submit" to require receipt of the information produced a more harmonious result with this court's case law suggesting that the common usage of the word "submit" contemplates not only transmission but receipt, as well, and a conclusion that § 12-63c (a) requires only sending or postmarking the information by June 1 could lead to unworkable results insofar as it would place the burden on the assessor to locate any information that is delayed or lost in the mail and would provide no incentive to the property owner to assist in locating or replacing such missing information.

In the present case, the plaintiff did not "submit" its income and expense information to the assessor when it placed that information in the hands of the postal service on May 31, 2016, but, rather, the process of submission was complete only when the assessor received the information on June 2, 2016, one day after the statutory deadline imposed by § 12-63c (a).

(*Two justices concurring separately in one opinion*)

Argued May 4—officially released October 18, 2022

Procedural History

Appeal from the decision of the defendant's board of assessment appeals denying the plaintiff's appeal from a penalty imposed by the defendant's assessor and added to tax assessments on certain of the plaintiff's real properties, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *S. Richards, J.*, granted the defendant's motion for summary judgment and motion to strike,

denied the plaintiff's motion for summary judgment, and rendered judgment for the defendant, from which the plaintiff appealed to the Appellate Court, *Bright*, *C. J.*, and *Alvord* and *Oliver*, *Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

Brenden P. Leydon, for the appellant (plaintiff).

Zachary J. Phillipps, with whom, on the brief, was *Adam J. Blank*, for the appellee (defendant).

Opinion

KAHN, J. The sole question in this certified appeal is whether General Statutes § 12-63c (a), which requires the owners of certain rental property to "submit" income and expense information to their municipal tax assessor "not later than the first day of June," is satisfied when that information is postmarked but not delivered by that date. The plaintiff, Seramonte Associates, LLC, appeals from the judgment of the Appellate Court, which affirmed the judgment of the trial court rendered in favor of the defendant, the town of Hamden. On appeal, the plaintiff claims that the Appellate Court erred in determining that the word "submit" in § 12-63c (a) unambiguously requires that an assessor receive income and expense forms by June 1. We agree with the Appellate Court's construction of the relevant statutory text and, accordingly, affirm its judgment.

The record reveals the following undisputed facts and procedural history relevant to our resolution of this appeal. The plaintiff owns three rental properties located on Mix Avenue in Hamden. The plaintiff used these three properties for the primary purpose of producing rental income during the 2015 calendar year. On February 1, 2016, the assessor for the defendant assessed 520 Mix Avenue at $15,683,080, 609 Mix Avenue at $2,927,890, and 617 Mix Avenue at $10,521,560.

On or before April 15, 2016, the assessor provided the plaintiff with separate forms on which to disclose the plaintiff's income and operating expenses for each of these three properties. Pursuant to § 12-63c (a), the plaintiff was required to complete and "submit" these forms by June 1, 2016. The assessor included a cover letter with each set of forms containing the following statement: "It should be clearly understood that if the attached report is not completed and submitted to the [a]ssessor's [o]ffice by June 1, 2016, it will result in a 10 [percent] penalty being applied to your assessment per [§ 12-63c (d)]." (Emphasis omitted.) The cover letter also stated that "[s]ubmission means this form is physically in the [a]ssessor's office by 4:30 on June 1, 2016, faxes, emails and postmarks WILL NOT BE ACCEPTED."[1] (Emphasis omitted.)

The plaintiff mailed the income and expense forms to the assessor via the United States Postal Service on May 31, 2016. The assessor received the forms on June 2, 2016, one day after the June 1 deadline set forth in § 12-63c (a). The assessor then imposed a 10 percent penalty on the plaintiff pursuant to § 12-63c (d), amounting to $132,145.16.[2]

The plaintiff subsequently commenced the present action pursuant to General Statutes § 12-119, alleging that the assessor's valuation of the three properties and the 10 percent penalty imposed under § 12-63c (d) were excessive. On February 27, 2017, the plaintiff withdrew its excessive valuation claim and, instead, continued to

[1] When the plaintiff did not request an extension by May 1, 2016, to submit the required information, as permitted under § 12-63c (a), the assessor informed the plaintiff in writing that it had not yet received the plaintiff's income and expense forms. In these letters to the plaintiff, dated May 24, 2016, the assessor reiterated that the forms must be physically in the assessor's office by June 1, 2016, and that postmarks would not be accepted.

[2] The new assessments for each of the plaintiff's properties were $17,251,388 for 520 Mix Avenue, $3,220,679 for 609 Mix Avenue, and $11,573,716 for 617 Mix Avenue.

pursue only its claim that the 10 percent penalty was improper. The plaintiff simultaneously appealed from the assessment of the penalty to the defendant's board of assessment appeals (board), which conducted a hearing on March 2, 2017, and denied the plaintiff's appeal on March 21, 2017.

On May 1, 2017, the plaintiff filed an amended complaint to include a challenge to the board's decision.[3] The defendant filed a motion for summary judgment relating to the validity of the 10 percent penalty on December 21, 2017. In support of that motion, the defendant argued that the penalty was properly imposed on the plaintiff because the assessor did not receive the income and expense forms by June 1, 2016, as required under § 12-63c (a). The plaintiff, in its motion for summary judgment, argued that the penalty was improper because the statute only requires it to "submit" the materials, which, according to the plaintiff, means "to send" the materials. Thus, the plaintiff argued that its timely mailing was sufficient under the statute.

On February 5, 2019, the trial court granted the defendant's motion for summary judgment and denied the plaintiff's motion for summary judgment. In its memorandum of decision on those motions, the trial court determined that the word "submit," as it is utilized in

[3] The plaintiff's amended complaint also alleged that the 10 percent penalty violated the prohibitions on excessive fines set forth in the eighth amendment to the United States constitution and article first, § 8, of the Connecticut constitution. The trial court subsequently granted the defendant's motion to strike those allegations from the complaint. The plaintiff appealed from the trial court's ruling on the motion to strike. *Seramonte Associates, LLC* v. *Hamden*, 202 Conn. App. 467, 480, 246 A.3d 513 (2021). The Appellate Court upheld the trial court's ruling, concluding that the eighth amendment to the United States constitution and article first, § 8, of the Connecticut constitution did not apply. Id., 483; see id., 486. The plaintiff sought, but was not granted, certification from this court to appeal from the judgment of the Appellate Court with respect to its claim that the 10 percent penalty imposed under § 12-63c (d) was excessive under the federal and state constitutions.

§ 12-63c (a), "is susceptible to two reasonable interpretations." Looking to various dictionary definitions of that term, the trial court concluded that the word "submit" "could mean the [assessor] must receive the forms by June 1 or that the forms must be mailed to the [assessor] by June 1." The trial court then looked to extratextual evidence of the word's meaning and resolved the ambiguity in favor of the defendant. Specifically, the trial court noted that, although the legislative history does not make it clear what the word "submit" means, it was clear that the purpose of the penalty was to "ensure that municipal assessors could accurately and equitably assess the value of commercial properties . . . ." The trial court also looked to this court's decision in *PJM & Associates, LC* v. *Bridgeport*, 292 Conn. 125, 971 A.2d 24 (2009), a case in which this court held that the purpose of the 10 percent penalty under § 12-63c (d) "is to compel the submission of information to assist the assessor in performing his duties." Id., 145. The trial court further held that construing the word "submit" to require receipt would ensure uniformity in the tax process and consistency in enforcing the tax code, whereas the plaintiff's interpretation would frustrate the statute's fundamental purpose. The trial court also relied on a prior Superior Court decision that interpreted the language of § 12-63c to mean that an assessor must receive the tax forms by June 1. See *MSK Properties, LLC* v. *Hartford*, Superior Court, judicial district of New Britain, Docket No. CV-15-6029158-S (July 3, 2017) (64 Conn. L. Rptr. 747, 753). Ultimately, the trial court rendered judgment in the defendant's favor, concluding that the word "submit," as used in § 12-63c (a) "means that the [assessor] must receive the tax forms by June 1 of each year."

The plaintiff subsequently appealed from the trial court's judgment to the Appellate Court. *Seramonte Associates, LLC* v. *Hamden*, 202 Conn. App. 467, 468,

246 A.3d 513 (2021). In that appeal, the plaintiff claimed that the trial court erred in its interpretation of § 12-63c by reading the word "submit" to require receipt of the income and expense forms by the assessor. Id., 469. The plaintiff renewed its assertion that the ordinary meaning of the word "submit" in § 12-63c means "to send . . . ." (Internal quotation marks omitted.) Id., 474–75.

The Appellate Court affirmed the trial court's judgment on a different basis. The Appellate Court noted that the trial court, in concluding that the word "submit" was ambiguous based on its dictionary definition alone, failed to consider, as required under General Statutes § 1-2z, both the text of the statute and its relationship to other statutes. Id., 477. On the basis of its own examination of tax statutes, the Appellate Court concluded that, when the legislature intends for the date of mailing or postmarking to be the date of submission, it includes the phrase "or postmarked . . . ." (Internal quotation marks omitted.) Id. The court held that, viewed in the context of other tax statutes, the word "submit," as used in § 12-63c (a), unambiguously requires delivery of the forms by June 1. (Internal quotation marks omitted.) Id., 479–80. Because there was no dispute that the plaintiff's forms were not delivered to the assessor by June 1, 2016, the court concluded that the trial court properly granted the defendant's motion for summary judgment. Id., 480. This court subsequently granted in part the plaintiff's petition for certification to appeal from the judgment of the Appellate Court, limited to the following issue: "Did the Appellate Court properly construe the phrase 'who fails to submit such information,' as it is used in . . . § 12-63c (d)?" *Seramonte Associates, LLC* v. *Hamden*, 336 Conn. 923, 246 A.3d 492 (2021).[4]

[4] The plaintiff argues that, notwithstanding this court's denial of certification on the issue, we must still consider its excessive fines claims under the doctrine of constitutional avoidance. We disagree. It is well settled in

In the present appeal, the plaintiff claims that the Appellate Court erred in concluding that the phrase "submit . . . not later than the first day of June" in § 12-63c (a) requires the assessor's receipt of the income and expense forms by that date, and not simply mailing or postmarking. The plaintiff urges that the word "submit" means "to send" and requests that the Appellate Court's judgment be reversed. The defendant, in response, claims that the Appellate Court properly interpreted the word "submit" to require that the assessor receive the income and expense forms by June 1, and urges affirmance. For the reasons that follow, we agree with the Appellate Court that § 12-63c requires receipt of the income and expense information by June 1.

Because our review of the Appellate Court's legal determination turns on a question of statutory interpretation, we exercise plenary review. See, e.g., *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 416, 195 A.3d 664 (2018). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply." (Internal quotation marks omitted.) Id. "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such rela-

our case law that a party may present only those issues for which certification has been granted. See Practice Book § 84-9; see also, e.g., *State* v. *Turner*, 334 Conn. 660, 686 n.13, 224 A.3d 129 (2020). Construing the word "submit" to require sending would not prevent a future property owner from alleging, upon late postmarking, that the 10 percent penalty is excessive. The same would be true under any construction of the word "submit." Accordingly, the plaintiff's reliance on the doctrine of constitutional avoidance in this case is unavailing.

tionship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." General Statutes § 1-2z.

We begin our analysis with the language of § 12-63c. Section 12-63c (d) provides in relevant part: "Any owner of such real property required to submit information to the assessor in accordance with subsection (a) of this section for any assessment year, who *fails to submit such information as required under said subsection* (*a*) . . . shall be subject to a penalty equal to a ten per cent increase in the assessed value of such property for such assessment year. . . ." (Emphasis added.) Section 12-63c (a), in turn, provides in relevant part: "In determining the present true and actual value in any town of real property used primarily for purposes of producing rental income, the assessor . . . may require in the conduct of any appraisal of such property pursuant to the capitalization of net income method, as provided in section 12-63b, *that the owner of such property annually submit to the assessor not later than the first day of June*, on a form provided by the assessor not later than forty-five days before said first day of June, the best available information disclosing the actual rental and rental-related income and operating expenses applicable to such property. . . ." (Emphasis added.)

Because the word "submit" is not defined in § 12-63c (a) or in the broader statutory scheme, we begin by looking to the dictionary definition of the word "submit" in order to understand its ordinary meaning. See, e.g., *Maturo* v. *State Employees Retirement Commission*, 326 Conn. 160, 176, 162 A.3d 706 (2017); see also General Statutes § 1-1 (a) ("[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a

peculiar and appropriate meaning in the law, shall be construed and understood accordingly''). Dictionary definitions contemporaneous with the statute's enactment in 1984 define the word "submit" as "to commit to another" and "to make available . . . ." Webster's New Collegiate Dictionary (1981) p. 1152. See generally *Maturo* v. *State Employees Retirement Commission*, supra, 176 ("[w]hen a term is not defined in a statute, we begin with the assumption that the legislature intended the word to carry its ordinary meaning, as evidenced in dictionaries in print at the time the statute was enacted''). Although the concept of submission undoubtedly requires the holder of information to transmit it, by mail or some other means, the process of submission is not considered complete in many contexts until the information is delivered to the recipient.[5] Modern definitions are concordant and define the word "submit" as "to *present* or *propose* to another for review, consideration, or decision . . . *to deliver formally* . . . ." (Emphasis added.) Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 1244. Presentation, proposal, or delivery for review, consideration, or decision, of course, necessitates receipt in addition to transmission.[6]

The plaintiff, however, also correctly notes that more recent dictionaries have defined the word "submit" as

[5] Although the plaintiff correctly notes that the word "submit" is derived in part from a Latin word, "submittere," which means "to send," it is the present meaning of that word that must govern. See General Statutes § 1-1 (a). Such a reading of the word "submit" is further supported by common parlance. Submitting a job application, for example, requires more than mere transmission. If an applicant's materials never reach the employer, and the employer is therefore unable to use or consider that information, one would not say that the materials had, in fact, been submitted.

[6] Dictionary definitions of "present" and "propose," in turn, emphasize that the transmitted information must typically be delivered to the intended recipient. The definition of "present" is "to bring or introduce *into the presence of someone* . . . ." (Emphasis added.) Merriam-Webster's Collegiate Dictionary, supra, p. 982. "Propose" is defined as "to *set before* the mind . . . ." (Emphasis added.) Id., p. 997.

meaning "to send." Webster's Third New International Dictionary (1993) p. 2277 (defining "submit" as "to send or commit for consideration, study, or decision"). Although we acknowledge that the word "submit," based on such dictionary definitions alone, may well mean mere sending in other contexts, a reading of § 12-63c as a whole indicates that the legislature's use of that word in this specific context unambiguously requires receipt. See, e.g., *Planning & Zoning Commission* v. *Freedom of Information Commission*, 316 Conn. 1, 12–13, 110 A.3d 419 (2015) ("[i]t is a basic tenet of statutory construction that [w]e construe a statute as a whole and read its subsections concurrently in order to reach a reasonable overall interpretation" (internal quotation marks omitted)).

Section 12-63c (c) provides in relevant part: "If upon *receipt of information as required under subsection (a) of this section* the assessor finds that such information does not appear to reflect actual rental and rental-related income or operating expenses related to the current use of such property, additional verification concerning such information may be requested by the assessor. . . ." (Emphasis added.) The plaintiff relies on the use of different words in the same statute, "submit" in subsections (a) and (d) of § 12-63c, and "receipt" in § 12-63c (c), as proof that the legislature intended those two words to have different meanings. Although we agree with the general proposition that "[t]he use of . . . different terms . . . within the same statute suggests that the legislature acted with complete awareness of their different meanings . . . and that it intended the terms to have different meanings"; (internal quotation marks omitted) *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic District Commission*, 284 Conn. 838, 850, 937 A.2d 39 (2008); a closer reading of § 12-63c (c), in fact, supports the opposite conclusion. The phrase "receipt of information" in § 12-

63c (c) is followed directly by the phrase "as required under subsection (a) . . . ." General Statutes § 12-63c (c). The verb "required" is tied clearly to the noun "receipt."[7] The introductory phrase in subsection (c), thus, was plainly intended to convey the message that subsection (a) requires receipt. As a result, § 12-63c (c) confirms, rather than undermines, a conclusion that the word "submit," as it was employed by our legislature in § 12-63c (a), was intended to require something more than transmission alone.

Further, we observe that construing the word "submit" in § 12-63c (a) to require receipt of the income and expense reports by the assessor on June 1 produces a more harmonious result with our existing case law. See *PJM & Associates, LC* v. *Bridgeport*, supra, 292 Conn. 142 ("[u]nder . . . [§ 12-63c (d)], a penalty may be imposed if the required information never reaches the assessor because the property owner does not provide the information"); see also, e.g., *State* v. *Jones*, 314 Conn. 410, 418–19, 102 A.3d 694 (2014) (holding that phrase "shall *submit* to the jury . . . [a]ll exhibits received in evidence" not only requires that trial court "send" exhibits to jury but also that jury has "a meaningful opportunity to study and consider an exhibit during its deliberations" (emphasis added; internal quotation marks omitted)).[8] Although *PJM & Associates, LC*, did

[7] The only other noun in the phrase "upon receipt of information as required" is, of course, "information." General Statutes § 12-63 (c). Had the legislature intended "information" to be the object of the verb "required," the introductory phrase in § 12-63c (c) would have read "upon receipt of *the* information required . . . ." The legislature's omission of the definite article "the" before the word "information" compels the grammatical conclusion that the noun "receipt" is the object of the verb "required."

[8] The plaintiff's reliance on *In re Lambirth*, 5 Cal. App. 5th 915, 211 Cal. Rptr. 3d 104 (2016), is likewise unavailing. In that case, the California Court of Appeal for the Sixth District held that the meaning of the word "submit" entailed "sending rather than receipt" because the prison delivery rule at issue provided that "an inmate's delivery of a document to prison authorities is deemed a constructive *filing* of the document." (Emphasis in original.) Id., 923. The court also noted that its construction of the word "submit"

not specifically address the meaning of the word "submit" in § 12-63c (a), the underlying premise of that case is that it is the lack of receipt of the information that triggers the penalty. See *PJM & Associates, LC* v. *Bridgeport*, supra, 142–43. This case law constitutes persuasive authority that the common usage of the word "submit" contemplates not only transmission but also receipt. In the present case, the assessor is not in a position to study and consider income and expense information until it is received, not merely postmarked.

On the basis of our review of the text of § 12-63c, we conclude that the word "submit" unambiguously requires that the income and expense information be received by the assessor by June 1. The plaintiff's citations to various other statues are insufficient to alter our conclusion in this regard. The plaintiff argues that the legislature would have used the phrase "received by" or some other sufficiently clear language if it had intended for the word "submit" under § 12-63c (a) to require something more than mailing or postmarking. The plaintiff also argues that, as in § 12-63c (c), the legislature's use of "submit" and "received by" in other tax statutes indicates that submission and receipt have two inherently different meanings. The plaintiff is, of course, correct to note that certain statutes contain an express requirement that a form must be "received by" a certain date and that still other legislative enactments use both "submit" and "received by" within the same provision. See, e.g., General Statutes § 9-391 (a) ("[i]f such a certificate of a party's endorsement is not *received by* the clerk of the municipality by such time, such certificate shall be invalid" (emphasis added));

was "consistent with the directions on the [California Department of Corrections and Rehabilitation] form 602 (Inmate/Parolee Appeal), which tell the inmate, '[y]ou must *send* this appeal and any supporting documents to the [a]ppeals [c]oordinator . . . within [thirty] calendar days' . . . ." (Emphasis in original.) Id. As a result, *In re Lambirth* is not instructive.

General Statutes § 12-129c (a) ("[s]uch taxpayer may *submit* such application to the assessor by mail, provided it is *received by* the assessor not later than April fifteenth in the assessment year with respect to which such tax relief is claimed" (emphasis added)); General Statutes § 12-170w (a) ("[s]uch taxpayer may *submit* such application to the assessor by mail, provided it is *received by* the assessor not later than April fifteenth in the assessment year with respect to which such tax relief is claimed" (emphasis added)). We are not persuaded.

The plaintiff's reliance on these statutes is undercut by the legislature's explicit use of the terms "postmark" and "postmarked" in other statutes. As the Appellate Court aptly noted, there are numerous statutes in which the legislature also expressly states that postmarking is sufficient to render a filing timely. See, e.g., General Statutes § 12-41 (e) (3) ("any declaration [of personal property] received by the municipality to which it is due that is in an envelope bearing a *postmark* . . . showing a date within the allowed filing period shall not be deemed to be delinquent" (emphasis added)); General Statutes § 12-129 ("Any person, firm or corporation who pays any property tax in excess of the principal of such tax . . . may make application in writing to the collector of taxes for the refund of such amount. Such application shall be delivered *or postmarked* by the later of [three events]." (Emphasis added.)); General Statutes § 12-146 ("[n]o tax or installment thereof shall be construed to be delinquent under the provisions of this section if . . . the envelope containing the amount due as such tax or installment, as received by the tax collector of the municipality to which such tax is payable, bears a *postmark* showing a date within the time allowed by statute for the payment of such tax or installment" (emphasis added)). Thus, the legislature's use of

the phrase "received by" in the statutes cited by the plaintiff is not dispositive.

Indeed, there are also statutes that use both the word "submit" and the word "postmark" in the same statutory section. See, e.g., General Statutes § 22a-449n (e) (1) ("[o]n or after July 1, 2001, an owner shall *submit* to the commissioner an application that is *postmarked* no later than December 31, 2001" (emphasis added)). Accordingly, the plaintiff's reliance on statutes using the term "received by," alone or in conjunction with the word "submit," does not alter our conclusion that the word "submit," as it is used in the specific context of § 12-63c (a), unambiguously requires receipt of information on or before June 1.[9]

A conclusion that the term "submit" in § 12-63c (a) simply requires sending or postmarking has the potential to create unworkable results. See, e.g., *Wilkins* v. *Connecticut Childbirth & Women's Center*, 314 Conn.

[9] The plaintiff also argues that judgment in its favor is compelled as a matter of law because tax statutes must be strictly construed in favor of the taxpayer. Because we conclude that the statute's plain meaning is unambiguous, we do not address the plaintiff's assertion that this court must resolve ambiguities in tax statutes in favor of the taxpayer; nor do we conclude that § 12-63c is, in fact, a tax statute. See, e.g., *Key Air, Inc.* v. *Commissioner of Revenue Services*, 294 Conn. 225, 241, 983 A.2d 1 (2009) (presumption of strict construction in favor of taxpayer does not apply when statute is not ambiguous). Similarly, the plaintiff argues that the statute's penalty provision requires us to strictly construe the statute in its favor under the rule of lenity. Even if we were to assume that the rule of lenity applies to the imposition of the penalty authorized by § 12-63c (d), there would be no need to apply it to the present case because we conclude that the meaning of the word "submit" is unambiguous. *State* v. *Ledbetter*, 240 Conn. 317, 331 n.12, 692 A.2d 713 (1997) (rule of lenity "comes into play only if the statute remains ambiguous after all sources of legislative intent have been explored"); see also *Moskal* v. *United States*, 498 U.S. 103, 108, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990) (rule of lenity is reserved for those situations "in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute" (emphasis omitted; internal quotation marks omitted)).

709, 723, 104 A.3d 671 (2014) ("[w]e must interpret the statute so that it does not lead to absurd or unworkable results" (internal quotation marks omitted)). Under the plaintiff's reading, the property owner's burden to provide income and expense information to the assessor under § 12-63c would end at the mailbox. Under this interpretation, if a property owner postmarks the required forms, and they are subsequently delayed or lost in the mail, the burden would be on *the assessor* to locate that data. If a postmark is all that is required, a property owner in such a case could claim that its burden under § 12-63c (a) had already been satisfied, even if the assessor never receives the forms. Such a construction would provide absolutely no incentive to a property owner either to ensure that the required information is, in fact, received by the assessor or to assist an assessor in locating or replacing the information that had been lost in transit.[10] Construing "submit" to require *receipt* of the income and expense forms no later than June 1 ensures that municipal assessors obtain necessary information in a timely fashion.[11]

On the basis of the foregoing, we conclude that the word "submit" in § 12-63c (a) unambiguously requires that the income and expense information be received by the assessor by June 1. See, e.g., *Connecticut Housing Finance Authority* v. *Alfaro*, 328 Conn. 134, 142, 176

[10] The fact that postmark deadlines may prove to be workable—or, indeed, even preferable—in various other contexts does not alter the fact that the adoption of such a rule in this specific setting could well leave municipal assessors without the information necessary to timely comply with the demanding statutory deadlines to which they are subject.

[11] We note that the question of whether the plaintiff's reading of the relevant statutory text "yield[s] absurd or unworkable results" is analytically distinct from the examination of extratextual sources, such as expressions of legislative intent and considerations of broader public policy, that typically follows a determination of textual ambiguity. General Statutes § 1-2z. Although the line between these separate realms may not always be perfectly clear, we believe that these pragmatic concerns properly inform our reading of § 12-63c (a) in the present appeal.

A.3d 1146 (2018) ("[A]mbiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation. . . . In other words, statutory language does not become ambiguous merely because the parties contend for different meanings." (Internal quotation marks omitted.)). In the present case, therefore, the plaintiff did not "submit" its income and expense information when it placed that information in the hands of the United States Postal Service on May 31, 2016. The process of submission was not complete until the assessor received the forms on June 2, 2016, one day after the statutory deadline imposed by § 12-63c (a). Accordingly, the plaintiff failed to submit the required income and expense information under § 12-63c (d), and the 10 percent penalty imposed on the plaintiff pursuant to § 12-63c (d) was valid. The Appellate Court, therefore, properly affirmed the judgment of the trial court.

The judgment of the Appellate Court is affirmed.

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

ECKER, J., with whom McDONALD, J., joins as to parts I and II only, concurring in the judgment. The verb "submit" has multiple meanings, including two very different ones: "to send" and "to present or deliver." The majority holds that, as used in General Statutes § 12-63c (a), the word "submit" *unambiguously* means to present or deliver rather than to send. I cannot agree. To the contrary, the word itself is ambiguous—indeed, archetypically so—and this intrinsic ambiguity is only heightened, not removed, by reference to other subsections of § 12-63c and other arguably related statutes. The real question in this case is not whether the statute is ambiguous but how that ambiguity should be resolved. That question is answered by

resort to the usual tools of statutory construction, which, in this case, lead me to the same result reached by the majority. I write separately because methodology in statutory interpretation is important.

At the end of the day, I agree with the majority that § 12-63c should be construed to impose a delivery based deadline and, thus, required the plaintiff, Seramonte Associates, LLC, to deliver the relevant information to the defendant, the town of Hamden, on or before June 1, 2016. As I explain in greater detail in part I of this opinion, I do not reach this result because the statute contains clear and unambiguous language permitting no other conclusion. Indeed, I consider the statutory language in this regard to be opaque and unilluminating. Rather, as explained in part II of this opinion, I arrive at this result, not because the legislature has commanded it in unambiguous terms, but because it is the better, more reasonable construction of § 12-63c in light of that statute's manifest purpose, which, in my estimation as a judge, the legislature would have concluded is best achieved by construing the deadline in such a manner. My assessment in this regard is in harmony with the policy considerations expressed by the majority, with only one difference: I do not attribute the policy choice made interpretively by this court to emanate from an unambiguous legislative directive. Instead, it comes from my own assessment of what result best comports with the legislative objective underlying § 12-63c, as aided by the relevant legislative history. I make two concluding observations in part III of this opinion about statutory construction that can be learned from this case.

I

Section 12-63c employs the verb "submit" repeatedly to describe what is required of a taxpayer subject to the statute's terms. Subsection (a) requires the owner of

real property used primarily for purposes of producing income to "annually *submit* to the assessor not later than the first day of June, on a form provided by the assessor not later than forty-five days before said first day of June, the best available information disclosing the actual rental and rental-related income and operating expenses applicable to such property. . . ." (Emphasis added.) General Statutes § 12-63c (a). Subsection (d) imposes a penalty on any owner who fails to comply with the statutory requirement: "Any owner of such real property *required to submit* information to the assessor in accordance with subsection (a) of this section for any assessment year, who *fails to submit* such information as required under said subsection (a) . . . shall be subject to a penalty equal to a ten per cent increase in the assessed value of such property for such assessment year. . . ." (Emphasis added.) General Statutes § 12-63c (d).

The search for statutory ambiguity—the threshold inquiry that has become the predominant focus of statutory construction since the enactment of General Statutes § 1-2z—must begin with a definition of what ambiguity means in this context. Emphatically, the search for ambiguity is *not* a merits inquiry, and a court must not jump the gun to assess, at this threshold stage, which is the better or stronger interpretation of an ambiguous term. The only question is whether there is more than one *plausible* interpretation of the statute. As we recently explained, "although there must be more than one reasonable interpretation of a statute in order for it to be considered ambiguous, those interpretations need not be necessarily strong or have a high probability of success. Put differently, a statute is plain and unambiguous when the meaning . . . is so strongly indicated or suggested by the [statutory] language . . . that . . . it appears to be *the* meaning and appears to preclude any other likely meaning. . . . [I]f the text of

the statute at issue . . . would permit more than one likely or plausible meaning, its meaning cannot be said to be plain and unambiguous." (Emphasis in original; internal quotation marks omitted.) *Ledyard* v. *WMS Gaming, Inc.*, 338 Conn. 687, 698 n.6, 258 A.3d 1268 (2021); see *State* v. *Felix R.*, 319 Conn. 1, 24–25, 124 A.3d 871 (2015) (*McDonald, J.*, concurring) ("Under our rules of statutory construction, an ambiguity arises whenever statutory language is subject to more than one plausible interpretation. . . . Ambiguity, as a matter of statutory construction, does not require two or more *equally* reasonable interpretations." (Citations omitted; emphasis in original.)).

It is impossible not to find ambiguity in the use of the word "submit," as it appears in § 12-63c. Indeed, the ambiguity exists at three levels. First, the word "submit" itself conveys multiple different meanings. Second, the word "submit," as used in § 12-63c, retains that ambiguity; the statute does not provide contextual aid that serves to eliminate either of the textually plausible interpretations. Third, reference to other statutes using the same, similar, or alternative language also fails to resolve the ambiguity.

Section 12-63c, which requires a taxpayer annually to "submit" certain information to the assessor and penalizes the taxpayer for noncompliance, is pregnant with ambiguity for the simple reason that the word "submit" can mean either to *send* or to *deliver*. The dictionary definition of the word gives both meanings in a single entry: "to send or commit for consideration, study, or decision . . . ." Webster's Third New International Dictionary (2002) p. 2277. Indeed, some courts have found that the word "submit" means precisely what the majority says is not a plausible meaning, i.e., "to send." In *In re Youhoing*, 843 Fed. Appx. 248 (11th Cir. 2021), the Eleventh Circuit Court of Appeals concluded that a court order requiring the petitioner to

"submit" an application by a specified date was met when the application was sent prior to that date, even though it was received by the court after that date: "Under the terms of the [D]istrict [C]ourt's order, [the debtor] had to submit her [in forma pauperis] application by June 16, 2020. Submit means to send or commit for consideration, study, or decision. Webster's Third New International Dictionary [(1986) p. 2277]. [The debtor] sent her [in forma pauperis] application for the [D]istrict [C]ourt's consideration by June 16, 2020. Her [first class, United States] [m]ail package was marked with a June 15, 2020 postage date," although it was received on June 18, 2020. (Internal quotation marks omitted.) *In re Youhoing*, supra, 250.

The same conclusion was reached by a California Court of Appeal construing a prison regulation that required an inmate to "submit" an appeal from a classification decision within thirty days of the decision at issue. See *In re Lambirth*, 5 Cal. App. 5th 915, 923, 211 Cal. Rptr. 3d 104 (2016) (" 'Submit' is not defined in the regulations. Merriam-Webster's Collegiate Dictionary defines the verb 'submit' as 'to present or propose to another for review, consideration, or decision.' [Merriam-Webster's Collegiate Dictionary (11th Ed. 2009) p. 1244.] Webster's Third New International Dictionary similarly defines 'submit' as 'to send or commit for consideration, study, or decision.' [Webster's Third New International Dictionary (1993) p. 2277.] We conclude from these definitions that the plain, commonsense meaning of 'submit' entails sending rather than receipt."). One federal court, construing a statute requiring that a beneficiary designation form be received prior to the insured's death to be effective, concluded that the words "submitted" and "received" have *opposite* meanings. See *Metropolitan Life Ins. Co.* v. *Bradshaw*, 450 F. Supp. 3d 1258, 1264 n.38 (W.D. Okla. 2020) ("[The] terms [submitted and received] are not interchangeable.

To submit something means '*to send* or commit for consideration' . . . or '[t]o bring up or *present* for criticism, consideration, or approval' . . . . That is quite the opposite of receiving." (Citations omitted; emphasis in original.)) We need not go nearly so far to acknowledge that the word "submit" is at least ambiguous.[1]

I also consider it significant that the word "submit" comes from the Latin term, "mittere," to send. See Webster's Third New International Dictionary (2002) p. 2277 ("submit" derives from "[Middle English] submitten, [from Latin] submittere to let down, lower, set under, [from] sub- + mittere to send, throw"). The meaning of words can evolve over time, and there is no rule of construction requiring that the contemporary meaning of a word must remain true to its etymological origin. But it seems particularly compelling in our search for ambiguity that the precise meaning of the word advanced by the plaintiff is not only used to define that word in a modern dictionary, but also is the literal meaning of the word's original Latin root. Reference to the original Latin, Greek, or other root of a word can be a helpful clue to its meaning in the law. See, e.g., *Chamberlain* v. *Hemingway*, 63 Conn. 1, 5–6, 27 A. 239 (1893) (considering Latin root of word "river" to help determine meaning of term "watercourse").

The second level of ambiguity in the present case exists at the statutory level, within the context of § 12-63c and its various provisions. Often, the meaning of

[1] One way to harmonize the opposing meanings highlighted by these cases is to recognize that the proper construction of the word "submit" may depend on whether the action is seen from the perspective of the sender or the recipient of the submission, at least when there is a time interval between the acts of sending and receiving. To the taxpayer, in other words, the materials are submitted when they are sent; to the assessor, they are submitted when they are received. This understanding resolves the opposition while simultaneously illustrating the ambiguity inherent in the word.

an ambiguous word will be clarified by other provisions in the same statute. See, e.g., *In re Elianah T.-T.*, 326 Conn. 614, 623, 165 A.3d 1236 (2017) ("[i]n resolving [statutory] ambiguity, we first look to other portions of the language in [the same statute]"); *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 723, 6 A.3d 763 (2010) (when statutory term is ambiguous, court may "turn for guidance to other provisions in the statutory scheme" governing same subject matter). Not so here.

In particular, I disagree with the majority's view that the language used in § 12-63c (c) removes the ambiguity. That subsection provides in relevant part: "If upon receipt of information as required under subsection (a) of this section the assessor finds that such information does not appear to reflect actual rental and rental-related income or operating expenses related to the current use of such property, additional verification concerning such information may be requested by the assessor. . . ." General Statutes § 12-63c (c). The majority believes that this provision reinforces its conclusion that the word "submit" unambiguously means receive, not send, because it clarifies "that the word 'submit,' as it was employed by our legislature in § 12-63c (a), was intended to require something more than transmission alone."

I read subsection (c) of § 12-63c differently and understand its language to heighten (or at least replicate) the ambiguity contained in subsection (a), rather than to confirm the absence of any ambiguity. I might see the majority's point if subsection (c) authorized the assessor to request additional verification concerning such information if, "upon [*submission*] of information as required under subsection (a) . . . the assessor finds such information does not appear to reflect actual rental and rental-related income or operating expenses . . . ." (Emphasis added.) General Statutes § 12-63c (c).

That language would tend to demonstrate that "submit" must mean deliver to the assessor rather than send to the assessor because the assessor plainly could not find the information lacking unless and until the assessor actually received and reviewed that information. But, because subsection (c) uses the phrase "upon *receipt* of information" rather than "upon *submission* of information," the language suggests that receipt and submission should be understood to mean *different* things, not the same thing. See, e.g., *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic District Commission*, 284 Conn. 838, 850, 937 A.2d 39 (2008) ("[t]he use of the different terms . . . within the same statute suggests that the legislature acted with complete awareness of their different meanings . . . and that it intended the terms to have different meanings" (internal quotation marks omitted)); see also *Stone* v. *East Coast Swappers, LLC*, 337 Conn. 589, 602, 255 A.3d 851 (2020) (concluding that statute is ambiguous based in part on use of slightly different language in two different subsections of same statute).

The majority candidly acknowledges this problem and seeks to avoid its implications by pointing to the language in § 12-63c (c) providing that the assessor may act "upon receipt of information *as required under subsection (a) of this section*," and by arguing that the emphasized language modifies or informs what is meant by the word receipt. (Emphasis added.) In my view, this observation merely begs the question. Again, I may agree with the majority's claim if the statute said "upon submission of information as required . . . ." But—particularly in light of the oft cited rule of construction that a legislature will not use different words to mean the same thing in the same statute—I cannot agree that "submit" and "receipt" are rendered synonymous, and that the meaning of "submit" is thereby rendered unambiguous, by the legislature's clarifying reference back

to subsection (a). The ambiguity we face in the present case is not about what information is required by subsection (a). Nor is it about whether the information, as required by subsection (a), must be actually received by the assessor—of course it must. The question, for purposes of § 12-63c (a), is *when* the taxpayer will be deemed to have submitted the information for purposes of meeting the time deadline set forth in § 12-63c (a)—when the information is sent by the taxpayer or when it is received by the assessor? That question is not answered in subsection (c) of the statute, and it certainly is not answered in dispositive fashion.

I readily acknowledge that the legislature, in drafting § 12-63c, may have considered the two events, submission and receipt, to occur simultaneously; the taxpayer submits the information when the assessor receives it. Perhaps that is even the better reading of the statute. But "perhaps" is not enough to make a plausible reading implausible. In sum, I cannot say that the plaintiff's reading of the statute is unreasonable or implausible because it is sensible to posit that there can be a gap in time between when a document is submitted (sent) and when it is delivered (received), and there is nothing in § 12-63c that eliminates such an interpretation from the realm of plausibility.

The third level of ambiguity relevant to our analysis exists at a broader level, upon turning to other statutes imposing deadlines for filing tax related forms of one kind or another. I do not purport to offer a comprehensive treatment of all such laws, and, as should become clear, the validity of my point does not require such an encyclopedic survey. My purpose is simply to show that the legislature is fully capable of drafting statutes that do not contain the uncertain meaning that we confront in § 12-63c. For whatever reason, it did not employ unambiguous language in this particular statute. This

observation further explains why I feel justified, and even compelled, to find the language ambiguous.

There are numerous statutes that make it very clear, in one way or another, that a taxpayer will not be in compliance with a statutory filing deadline unless the required materials are *received* by the relevant authority on or before that deadline. See, e.g., General Statutes (Supp. 2022) § 12-129c (a) ("[s]uch taxpayer may submit such application to the assessor by mail, provided it is *received by* the assessor not later than April fifteenth in the assessment year" (emphasis added)); General Statutes § 12-146 ("[i]f any tax, at the time of assessment or because of a subsequent division, represents two or more items of property, the collector may *receive* payment in full of such part of the principal and interest of such tax as represents one or more of such items, even though interest in full on the entire amount of the principal of such tax has not been received up to the date of such payment" (emphasis added)); General Statutes (Supp. 2022) § 12-170w (a) ("[s]uch taxpayer may submit such application to the assessor, provided it is *received by* the assessor not later than April fifteenth in the assessment year with respect to which such tax relief is claimed" (emphasis added)); General Statutes § 12-233 (a) (1) (B) ("[w]here, within the sixty-day period ending on the day on which the time prescribed in this section for mailing a notice of deficiency assessment for any income year would otherwise expire, the commissioner *receives* a written document signed by such taxpayer showing that such taxpayer owes an additional amount of tax for such income year, the commissioner then shall have up to sixty days after the day such written document is received in which to mail a notice of deficiency assessment" (emphasis added)).[2]

[2] Other such statutes exist outside of the tax context. See, e.g, General Statutes (Supp. 2022) § 9-140 (a) (2) ("If a municipal clerk has a facsimile machine or other electronic means, an applicant may return a completed application to the clerk by such a machine or device, provided the applicant shall also mail the original of the completed application to the clerk, either

Likewise, numerous other statutes are drafted to clearly indicate that a taxpayer will comply with a statutory filing deadline if the required materials are mailed on or before that deadline. See, e.g., General Statutes § 12-41 (e) (3) ("any declaration [of personal property] received by the municipality to which it is due that is in an envelope bearing a *postmark* . . . showing a date within the allowed filing period shall not be deemed to be delinquent" (emphasis added)); General Statutes § 12-129 ("Any person, firm or corporation who pays any property tax in excess of the principal of such tax . . . may make application in writing to the collector of taxes for the refund of such amount. Such application shall be delivered *or postmarked* by the later of [three events]." (Emphasis added.)); General Statutes § 12-146 ("[n]o tax or installment thereof shall be construed to be delinquent under the provisions of this section if . . . the envelope containing the amount due as such tax or installment, as received by the tax collector of the municipality to which such tax is payable, bears a *postmark* showing a date within the time allowed by statute for the payment of such tax or installment" (emphasis added)).

For whatever reason, the legislature did not use either one of these more standard formulations when it

separately or with the absentee ballot that is issued to the applicant. If the clerk does not *receive* such original application by the close of the polls on the day of the election, primary or referendum, the absentee ballot shall not be counted." (Emphasis added.)); cf. Practice Book § 2-79 (a) ("The client security fund committee shall send a notice to each attorney who has not paid the client security fund fee pursuant to Section 2-70 of these rules that the attorney's license to practice law in this state may be administratively suspended unless within sixty days from the date of such notice the client security fund committee *receives* from such attorney proof that he or she has either paid the fee or is exempt from such payment. If the client security fund committee does not *receive* such proof within the time required, it shall cause a second notice to be sent to the attorney advising the attorney that he or she will be referred to the Superior Court for an administrative suspension of the attorney's license to practice law in this state unless within thirty days from the date of the notice proof of the payment of the fee or exemption is *received*." (Emphasis added.)).

drafted § 12-63c, and we are left uncertain what to make of the variation. The majority acknowledges that many statutes imposing filing deadlines employ language that unambiguously requires that the materials must either be mailed or received, as the case may be, on or before the designated deadline. The majority emphasizes the fact that those statutes contain language that is different in some way from the language used in § 12-63c. And that is exactly the point—the legislature clearly knows how to draft statutes that are unambiguous in this particular regard so that the person subject to the filing deadline knows with certainty whether the materials must be mailed by the deadline or received by the deadline. Section 12-63c is ambiguous precisely because it does *not* contain the language that would make the requirement clear but, instead, uses language that could convey either meaning. It could be said that, by using the word "submit," § 12-63c requires that the information must be received by the June 1 deadline because the statute does not contain the postmarked language contained in other statutes. But it just as easily could be said that, by using the word "submit," § 12-63c permits the information to be sent (but not received) by June 1, because the statute uses the same "submit" language used to mean "sent" in § 12-129c and General Statutes (Supp. 2022) § 12-170w, but does not include the qualifying language in those statutes requiring receipt by the deadline.

The ambiguity contained in § 12-63c regarding the meaning of the word "submit," in summary, is heightened due to the existence of the many other statutes in Connecticut that impose filing deadlines using far more definitive language. Those statutes leave me still more unsure about what to make of the legislature's use of different, less definitive language in §12-63c. The only thing certain, in my view, is that "it is quite impossible to tell" exactly what the statute means, "and the

magic wand of ipse dixit does nothing to resolve that ambiguity." *United States* v. *Yermian*, 468 U.S. 63, 77–78, 104 S. Ct. 2936, 82 L. Ed. 2d 53 (1984) (Rehnquist, J., dissenting).

II

The question remains how to resolve the ambiguity that has been identified. There are only two alternatives: either the statute required the taxpayer's information to be delivered to the assessor by June 1, 2016, in which case the penalty properly was imposed on the plaintiff, or the information was submitted in compliance with the statute when it was sent to the assessor prior to June 1, 2016, in which case the penalty must be vacated. I have no easy answer, but I believe that the assistance provided by the canons of construction allows us to arrive at a wholly credible resolution of the question presented without the need to declare the statutory language unambiguous.[3] This is not to say that all of the interpretive clues point in the same direction. In

[3] There are different ways to categorize the manifold canons of construction, but most scholars identify three distinct categories: textual (or intrinsic aid) canons, reference (or extrinsic aid) canons, and substantive canons. One commentator has provided this helpful summary: "Textual canons are those canons whereby the interpreter, looking solely at the text of the statute, can apply a canon to resolve an ambiguity in the text." A. Kiracofe, Note, "The Codified Canons of Statutory Construction: A Response and Proposal to Nicholas Rosenkranz's *Federal Rules of Statutory Interpretation*," 84 B.U. L. Rev. 571, 574 n.15 (2004). "Reference canons refer the interpreter to interpretive guides that can be found outside of the text of the statute, 'extrinsic aids' such as the previous [common-law] solution to the problem the statute addresses, the legislative history of the statute, or agency interpretations of the statute." Id., 575 n.15. "Substantive canons are canons that provide interpretive guidance by taking into account the substance or subject area of the statute being interpreted. Under these doctrines, some statutes are construed strictly (i.e., criminal statutes, statutes in derogation of the common law, and statutes that infringe on a domestic or foreign state's sovereign immunity) . . . while others are construed liberally (i.e., civil rights statutes, securities statutes, and antitrust statutes)." (Citation omitted.) Id., 574–75 n.15.

fact, a reasonable argument can be made in favor of either side.

On the one hand, there is the familiar and oft applied canon of construction directing that "[a] statute imposing a penalty should receive a strict construction in favor of those who might be subject to its provisions." *Hartford-Connecticut Trust Co.* v. *O'Connor*, 137 Conn. 267, 274, 76 A.2d 9 (1950). This rule is not limited to criminal penalties but includes statutory civil penalties, as well,[4] and has been applied specifically to tax statutes imposing civil penalties. See, e.g., *Commissioner of Internal Revenue* v. *Acker*, 361 U.S. 87, 91, 80 S. Ct. 144, 4 L. Ed. 2d 127 (1959) ("We are here concerned with a taxing [a]ct [that] imposes a penalty. The law is settled that penal statutes are to be construed strictly

[4] See, e.g., *Caldor's, Inc.* v. *Bedding Barn, Inc.*, 177 Conn. 304, 317, 417 A.2d 343 (1979) ("the fact that the alternate remedy is nominally civil in form does not make an essentially penal statute primarily remedial"); *Mott's Super Markets, Inc.* v. *Frassinelli*, 148 Conn. 481, 488, 172 A.2d 381 (1961) (When it "provided for a penalty [for the violation of a civil statute], the legislature changed the fundamental nature of the act. It made a violation a public, as distinguished from a private, wrong. The statute became penal. . . . As a penal statute, it must be strictly construed." (Citations omitted.)); *Dennis* v. *Shaw*, 137 Conn. 450, 453, 78 A.2d 691 (1951) ("to construe [the statute] as creating by implication a civil liability . . . would violate the [long recognized] principle of statutory construction that penal statutes are to be construed strictly and not extended by implication"); *Bankers Trust Co.* v. *Blodgett*, 96 Conn. 361, 366, 114 A. 104 (1921) ("[t]he test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual" (internal quotation marks omitted)), aff'd, 260 U.S. 647, 43 S. Ct. 233, 67 L. Ed. 439 (1923); see also *Bergamatto* v. *Board of Trustees of NYSA-ILA Pension Fund*, 933 F.3d 257, 268 (3d Cir. 2019) (citing cases from various federal courts applying canon to hold that statutory penalty provision in Employee Retirement Income Security Act must be strictly construed); 3 S. Singer, Sutherland Statutes and Statutory Construction (8th Ed. 2020) § 59.1, pp. 167–68 ("[c]ourts usually construe a statute as penal [when] its primary purpose is expressly enforceable by fine, imprisonment, forfeiture, certain types of civil recoveries, or similar punishment"); 3 S. Singer, supra, § 59.1, p. 172 ("[a] statute usually is penal if it contains some sanction to compel obedience beyond mere redress to an individual for injuries received").

. . . and that one is not to be subjected to a penalty unless the words of the statute plainly impose it . . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.)); *Bassett* v. *Commissioner of Internal Revenue*, 67 F.3d 29, 34 (2d Cir. 1995) (Leval, J., dissenting) ("[t]he [United States] Supreme Court has repeatedly stated that ambiguities in the penalty provisions of tax statutes are to be strictly construed against the government"); *United States* v. *Hill*, 368 F.2d 617, 621 (5th Cir. 1966) (statute imposing penalty for failure to collect and pay taxes must be strictly construed); *Estate of Skeba* v. *United States*, 432 F. Supp. 3d 461, 467 (D.N.J. 2020) (noting long established rule of strict construction in such cases), appeal dismissed, Docket No. 20-1464, 2020 WL 5200912 (3d Cir. April 15, 2020); Internal Revenue Service, Technical Advice Memorandum No. 9627004, 1996 WL 374422 (July 5, 1996) ("It is a settled rule that statutes imposing penalties should be strictly construed. All questions in doubt must be resolved in favor of those from whom the penalties are sought."). See generally S. Johnson, "The Canon That Tax Penalties Should Be Strictly Construed," 3 Nev. L.J. 495, 498 (2003) (noting that, "[a]lthough the [canon] is irregular in its application, it is of long familiarity").[5]

The fundamental principle animating the rule of strict construction as applied to penal statutes has been summarized as follows: "Strict construction is a means of [en]suring fairness to persons subject to the law by requiring penal statutes to give clear and unequivocal warning in language that people generally would understand, concerning actions that would expose them to liability for penalties and what the penalties would be. . . . Another reason for strict construction is to protect the individual against arbitrary discretion by officials and judges. . . . A related argument is to the effect

[5] The canon is not without its critics. See, e.g., S. Johnson, supra, 3 Nev. L.J. 504–25 (arguing that canon is unnecessary and unwise for various reasons).

that [because] the power to declare what conduct is subject to penal sanctions is legislative rather than judicial, it would risk judicial usurpation of the legislative function for a court to enforce a penalty whe[n] the legislature had not clearly and unequivocally prescribed it." (Citation omitted; internal quotation marks omitted.) *State* v. *Cote*, 286 Conn. 603, 615–16, 945 A.2d 412 (2008); see 3 S. Singer, Sutherland Statutes and Statutory Construction (8th Ed. 2020) § 59.3, pp. 188–94 ("[T]he [strict construction] premise has always been grounded in the separation of powers principle and classical liberal ideas about individual rights and freedoms. The usual rationales for the rule include: [t]he power to punish is vested in the legislative and not the judicial department; [because] the state makes the laws, they should be construed most strongly against it; to avoid arbitrary judicial discretion; legislatures should be required to provide fair warning in common language of what a law intends; to temper harshness [when] a punishment is disproportionate; [and] the law's 'tenderness' for individual rights. Courts most commonly invoke the justifications relating to fair notice and legislative supremacy." (Footnotes omitted.)).

The applicability of this important principle is not avoided in the present case by the observation that the plaintiff taxpayer was, in fact, notified by the defendant town of its view that the statute required delivery of the designated information by the June 1 deadline. That fact is irrelevant because the issue before us is one of statutory construction, not the fairness of the statute's application to any specific taxpayer based on extraneous circumstances. The inquiry is what the legislature intended and whether the enactment of that intention in § 12-63c provides fair notice of the conduct that will trigger the statute's penalty provision. The proper construction of the statute does not turn on the municipal assessor's interpretation. Nor does it ask whether the

taxpayer received notice of the municipal assessor's interpretation.

There is another hand, however, as so often is the case, and it offers competing considerations that recommend a contrary result. There are some rather obvious and compelling policy considerations that favor a construction of the statute to require *delivery* of the information to the office of the assessor on or before the statutory deadline. A delivery deadline establishes a bright-line, uniform rule that is not subject to the vagaries of the many different delivery methods (regular mail, express mail, electronic transmission, etc.). As the majority points out, a delivery based deadline eliminates the problems of proof that would otherwise arise using a deadline based on when the required information is sent by the taxpayer. Perhaps most important, in the words of the majority opinion, a delivery deadline most effectively "ensures that municipal assessors obtain necessary information in a timely fashion." Text accompanying footnote 11 of the majority opinion. I agree entirely with the majority's observations in this regard. What separates us is not the substance of these policy considerations or the conclusion reached upon consideration of them, but a methodological difference; I do not believe that these policy considerations properly are included as part of the ambiguity analysis under § 1-2z.[6] See part III of this opinion.

Indeed, my conclusion that § 12-63c is ambiguous allows me to consult the legislative history of the stat-

[6] I do not agree with the majority that we must construe the statute to impose a delivery based deadline because the alternative would be "unworkable . . . ." Construing the statute to impose a "when sent" deadline would very likely not work *as well* as a delivery based deadline in terms of ease of administration, but it clearly would not be *unworkable*; many deadlines are satisfied by mailing rather than delivery, with the burden on the sender to prove timely mailing when a dispute arises. See, e.g., *Rivers* v. *New Britain*, 288 Conn. 1, 17, 950 A.2d 1247 (2008) (for purposes of § 1-2z, "unworkable" means "not capable of being put into practice successfully" (internal quotation marks omitted)).

ute, and there to find objective support for the majority's supposition that a delivery deadline best serves the legislature's intention to provide tax assessors with enough time to perform their work. The support is indirect and perhaps only of moderate assistance in construing the precise nature of the submission deadline in § 12-63c, but it demonstrates that the legislature did, in fact, intend to impose a deadline that would make it easier for assessors to complete their work on a timely basis. For that very reason, § 12-63c (a) was amended in 1987 to move the submission date up from November 1, to June 1, of the relevant assessment year. See Public Acts 1987, No. 87-94, § 1. During the Joint Standing Committee Hearings, Charles Agli, the assistant tax assessor of the city of New Britain, stated that the change of date was required because municipalities complete their appraisals from July through September, "and to receive the information in November is too late to be of any use." Conn. Joint Standing Committee Hearings, Finance, Revenue and Bonding, Pt. 2, 1987 Sess., p. 595; see 30 H.R. Proc., Pt. 8, 1987 Sess., p. 2748, remarks of Representative Ronald L. Smoko ("This bill will allow our assessors a bit more information in order to determine fair market value on income property by requiring that information on income and expenses be provided to the assessor in June of an assessment year rather than November. They only have until January [31] to file the final grand list . . . . This bill will allow them to handle their valuations in a more deliberative fashion, [and] provide them with the time needed."). These remarks indicate that the legislature was aware of the time sensitive nature of the information to be submitted and support the view that it did not intend that the taxpayer could comply with the statute by mailing a form that might be delayed or lost in the mail.

Seen from this perspective, construing § 12-63c to establish a delivery based filing deadline is consistent

with the most fundamental and time-honored rule of statutory construction dating back to the earliest days of our scheme of government: "A statute ought to be construed [by the judicial authority] according to the true intention of the makers." *State* v. *Brooks*, 4 Conn. 446, 447 (1823); see *Knox* v. *Protection Ins. Co.*, 9 Conn. 430, 434–35 (1833) ("such construction ought to be given, as will effectuate the intentions of the legislature . . . such as will promote the object, and prevent the evil [as intended]"). Although there is a divergence of opinion about the *means* by which judges can or should ascertain the legislature's intentions when engaging in the task of statutory construction, few would dispute that the ultimate objective remains unchanged. See, e.g., *State* v. *Banks*, 321 Conn. 821, 842, 146 A.3d 1 (2016) ("reviewing courts should not construe statutes in disregard of their context and in frustration of the obvious legislative intent or in a manner that is hostile to an evident legislative purpose . . . or in a way that is contrary to common sense" (internal quotation marks omitted)); *State* v. *DeCiccio*, 315 Conn. 79, 98, 105 A.3d 165 (2014) ("[s]tatutes should be construed . . . to effectuate the legislature's intent, consistent with the ordinary meaning of the words used"); *State* v. *George A.*, 308 Conn. 274, 283 n.11, 63 A.3d 918 (2013) ("[t]his commonsense interpretation of the statute [prohibiting the possession of child pornography] advances the legislative purpose of protecting children by targeting the market for child pornography" (internal quotation marks omitted)); *Turner* v. *Turner*, 219 Conn. 703, 712, 595 A.2d 297 (1991) ("compelling principles of statutory construction . . . require us to construe [an ambiguous] statute in a manner that will not thwart its intended purpose"); see also *Soto* v. *Bushmaster Firearms International, LLC*, 331 Conn. 53, 140, 202 A.3d 262 ("canons of [statutory] construction . . . [are] merely [tools] to assist us in gleaning [legislative intent]; [they] should

not be applied in the face of a contrary manifestation of legislative intent"), cert. denied sub nom. *Remington Arms Co., LLC* v. *Soto*, U.S. , 140 S. Ct. 513, 205 L. Ed. 2d 317 (2019); 2A N. Singer & S. Singer, Statutes and Statutory Construction (7th Ed. 2014) § 47-22, p. 402 ("canons of statutory construction . . . [are] only an aid to the ascertainment of the true meaning of the statute" and must be given effect to ensure "that the will of the [l]egislature shall not fail" (internal quotation marks omitted)).

Having considered the arguments on both sides of the dispute, an umpire could declare either side a winner in the tug-of-war between competing considerations. One might reasonably conclude that it is both sensible and important to require the government to speak in clear and unequivocal terms before it will be allowed to impose a substantial penalty on a taxpayer who delivers tax forms one day late, and § 12-63c, unlike other statutes, fails to provide such unequivocal notice. Alternatively, it is entirely reasonable to hold that it does no violence to the ambiguous but clear enough meaning of the word "submit" to construe § 12-63c to create a simple, bright-line rule requiring all taxpayers to deliver the tax information on or before June 1, especially when such a rule best facilitates the fair and efficient administration of the underlying legislative objective.

I am persuaded that the latter reasoning should prevail in the present case because, for the reasons discussed, a delivery rule is consistent with the statutory text and, in my view, best serves the legislative purpose and intention. The statutory text unquestionably permits such a reading—"submit" can mean to deliver or to present—and a delivery based deadline avoids the numerous practical difficulties that would be caused by a "when sent" rule. Accordingly, I concur in the result that the majority reaches and would affirm the judgment of the trial court.

III

Why spill so much ink to arrive at the same ultimate conclusion as the majority? Perhaps it is enough to say that the analytical path taken by a court in any judicial decision matters as much as the outcome because it is the reasoning of the court that must be examined and apprehended by anyone wishing to understand the precedential meaning of the decision. The difference in approach in this case, in my view, was significant enough to justify writing separately. It also provides an opportunity to identify two points of concern emerging from this analysis that I consider worthy of consideration.

First, this case illustrates quite starkly that the rules of statutory construction work best when they are heeded not only by the judges who read the statutes but by the legislators who write them. This is true because most rules of construction operate as presumptions that judges employ to understand how the legislature communicates its intended meaning.[7] These presumptions work—that is, the judicial construction of a statute will accurately apprehend the legislative intention—only if the legislature in fact operates in accordance with the same rules. In this sense, the activ-

[7] These presumptions are too numerous to catalog. By way of example only, they include the presumption that the legislature chooses its words with the utmost care to express its intention; no word or phrase is superfluous; different but similar words used in the same statutory scheme are intended to have different meanings; the legislature is aware of related statutory and common-law doctrine; particular statutory enumerations will be understood to limit the scope of an associated general term; the inclusion of one thing will imply the exclusion of others; a limiting clause or phrase is read as modifying only the noun or phrase that immediately precedes it unless the limiting language is separated from the preceding noun or phrase by a comma, in which case one may infer that the qualifying phrase is intended to apply to all its antecedents, not only the one immediately preceding it; criminal statutes, as a general rule, apply prospectively only, in the absence of a clear and unequivocal expression of a contrary legislative intent; and civil statutes that affect substantive rights usually will apply prospectively only, whereas procedural statutes usually will be applied retroactively.

ity of statutory construction is dialogic; it functions as a cooperative interbranch venture that will succeed only if the participants speak the same language.[8]

I do not know whether the interbranch dialogue that I describe actually occurs in practice, or if it is unrealistic to imagine that the legislature itself uses the rules of construction to guide its drafting process. Even if it occurs, such a dialogue would not result in the elimination of ambiguity, or anything close to that. Ambiguities are inevitable for a combination of reasons, including the intrinsic nature of language that makes ambiguity impossible to stamp out; the inevitability of imprecise drafting caused by carelessness, time pressure, or other such factors; the need or desire of the legislature to draft a statute using open textured language; the impossibility of foreseeing every possible set of circum-

[8] The idea of statutory construction as an "interbranch dialogue" is well known and much debated. A leading law review article notes that "much interpretive theory and doctrine" in the field of statutory interpretation are based on the existence of an ongoing "dialogue between courts and Congress," in which there is "some congressional awareness and responsiveness to the rules [of construction] that courts employ." A. Gluck & L. Bressman, "Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I," 65 Stan. L. Rev. 901, 917 (2013). The Gluck and Bressman article contains empirical evidence indicating that, at least at the federal level, the individuals who actually draft the statutes enacted by Congress either do not know or do not care about many of the most important rules of construction that courts use to interpret those statutes. See id., 907 ("[T]here were a host of canons that our respondents told us that they do not use, either because they were unaware that the courts relied on them or despite known judicial reliance. For example, our respondents were mostly unaware of and do not use 'clear statement rules' . . . . [O]ur respondents [also] told us that they . . . do not generally draft in accordance with the rule against superfluities, that they do not consult dictionaries when drafting, and that legislative history remains a critical tool regardless of whether courts use it." (Emphasis omitted.)). Small wonder that, for these and other reasons, some commentators doubt whether the concept or practice of interbranch dialogue holds any promise for improving the work that courts do with respect to statutory construction. See, e.g., J Brudney & E. Leib, "Statutory Interpretation as 'Interbranch Dialogue'?," 66 UCLA L. Rev. 346, 352–61 (2019).

stances that a litigant may later claim comes within the scope of a statute; and the fact that the legislature sometimes will deliberately use ambiguous language to cover over or defer resolution of a disputed area of application. See, e.g., J. Landau, "Oregon Statutory Construction," 97 Or. L. Rev. 583, 616 (2019) ("A statute may be ambiguous for any number of reasons—whether lexical, syntactical, referential, semantic, or vague in the linguistic sense. The courts refer to all of those different forms of indeterminacy as 'ambiguity.' "); J. Shobe, "Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting," 114 Colum. L. Rev. 807, 866 (2014) (describing three types of ambiguity found in statutes, namely, strategic, avoidable unintentional, and dynamic ambiguity).

It seems obvious that the ambiguity found in § 12-63c was unintentional and easily could have been avoided. That is no sin, of course, and I am not complaining. Indeed, my point is not at all that the legislature could or should have expressed itself more clearly by saying either that the required information must be received by the assessor by June 1, or that it must be postmarked by that date. My point, rather, is directed at those of us whose task it is to interpret statutes. In my view, if the Judicial Branch hopes to engage in a successful dialogue with the Legislative Branch about statutory construction, then judges must express themselves in frank and direct language. If the relevant rules of construction, properly applied, should lead us to conclude that a statute is ambiguous, then it is important that we do not rescue the statute from that condition. Otherwise, the legislature will not know that something more is needed if it wishes to achieve "plain meaning."

My second concern relates to a particular feature of § 1-2z that can be seen in operation in the present case. The point begins with the uncontroversial observation

that the interpretive methodology under § 1-2z requires a singular and exclusive focus on the question of statutory ambiguity as a threshold inquiry. See, e.g., *Heim* v. *Zoning Board of Appeals*, 289 Conn. 709, 716 n.7, 960 A.2d 1018 (2008) ("§ 1-2z requires a threshold determination whether the [statute] is ambiguous"); *Teresa T.* v. *Ragaglia*, 272 Conn. 734, 742 n.4, 865 A.2d 428 (2005) ("[t]he legislature enacted [§ 1-2z] in response to our decision in *State* v. *Courchesne*, 262 Conn. 537, 816 A.2d 562 (2003), and we have recognized that this [statute] has legislatively overruled that part of *Courchesne* in which we stated that we would not require a threshold showing of linguistic ambiguity as a precondition to consideration of sources of the meaning of legislative language in addition to its text" (internal quotation marks omitted)). If there is no ambiguity, the inquiry is at an end, and the court may use no other tools of construction to discern legislative intention, unless the textual analysis triggers the narrow exception when the unambiguous meaning yields absurd or unworkable results.[9] The majority opinion in this case proceeds in accordance with this prescribed framework.

I have no criticism whatsoever of placing the statutory text at the dead center of the work of statutory construction. It has always belonged there, and still does. We are all textualists now, as Justice Elena Kagan has famously observed,[10] and the statutory text (and its immediate context) is, without any doubt, the most important consideration for the task of interpretation. But I believe that there is a very real risk that the exclusive and blindered threshold focus on linguistic ambiguity mandated by §1-2z can—and sometimes

[9] I express no view as to whether a legislative directive of this nature violates the constitutional separation of powers.

[10] See, e.g., B. Kavanaugh, Book Review, "Fixing Statutory Interpretation," 129 Harv. L. Rev. 2118, 2118 and n.1 (2016).

does—distract us from the fundamental question of legislative intention that must be answered by judges seeking "to say what the law is," which is what we do when we construe a statute. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803). Countless intelligent and experienced jurists have spent centuries developing a wide variety of tools for ascertaining the meaning of a statute when engaged in the work of statutory construction. Some of those rules are more useful than others, their utility must regularly be reassessed and readjusted as necessary, and all of the rules (including the textualist's preference for dictionaries) must always be applied with care and in good faith to avoid mistake or mischief. But the aids to construction in our judicial toolbox collectively represent a valuable legacy, and it is no small wonder that § 1-2z did not quite manage to distill the wisdom of the ages into its two sentence mandate.[11]

In any event, the present case demonstrates one certain thing about the enterprise of statutory construction, which is that considerations of public policy will always find a way into the analysis. If the goal of § 1-2z is to require judges to employ a method of interpretation that would prevent them from using their toolbox of rules, whether deliberately or not, to "legislate from the bench" under the guise of statutory construction,[12] that objective has failed and was doomed from the outset to fail. Without reference to § 1-2z, every judge I know tries very hard to avoid allowing his or her own subjective policy preference to influence his or her construction of a statute. But if judges consciously

[11] Indeed, § 1-2z itself failed to express itself in plain and unambiguous terms. See *Hummel* v. *Marten Transport, Ltd.*, 282 Conn. 477, 498, 923 A.2d 657 (2007) (concluding that "the word 'text,' " as used in § 1-2z, is not plain and unambiguous).

[12] See, e.g., *State* v. *Courchesne*, supra, 262 Conn. 627 (*Zarella, J.*, dissenting) ("[i]ndeed, a court's disregard of the plain meaning of a legislature's enactments amounts to little more than judicial lawmaking").

or unconsciously are motivated to graft their policy preferences onto the text of a statute, nothing in § 1-2z will prevent them from doing so, or even perceptibly mitigate the risk. The statute merely moves the field of play by shifting the interpretive action to the threshold ambiguity inquiry. Why? Because the ambiguity determination is open to the same subjective forces as any other interpretive practice. United States Supreme Court Justice Brett Kavanaugh has explained: "One judge's clarity is another judge's ambiguity. It is difficult for judges (or anyone else) to [determine the level of ambiguity in a given piece of legislation] in a neutral, impartial, and predictable fashion." B. Kavanaugh, Book Review, "Fixing Statutory Interpretation," 129 Harv. L. Rev. 2118, 2137 (2016); see, e.g., W. Farnsworth et al., "Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation," 2 J. Legal Analysis 257, 276 (2010) ("Some judges read the text and say that it just seems clear. Other judges read the same text and say that it just doesn't. These disputes are difficult to resolve because . . . there are no legal standards that quite bear on them, and no way to falsify a judge's claim one way or the other.").

For this reason, subjective policy preferences inevitably color the analysis. See W. Farnsworth et al., supra, 2 J. Legal Analysis 271 ("[w]hen respondents are asked how ambiguous a statute seems or whether two proposed readings of it are plausible, their judgments about the answers tend to follow the strength of their preferences about the outcome as a matter of policy: the more strongly they prefer one reading over the other, the more likely they are to say that the statute is unambiguous or that only one reading of the text is plausible"). Justice Kavanaugh puts the point directly: "Because judgments about clarity versus ambiguity turn on little more than a judge's instincts, it is harder for judges to ensure that they are separating their policy views from

what the law requires of them. And it's not simply a matter of judges trying hard enough: policy preferences can seep into ambiguity determinations in subconscious ways. As a practical matter, judges don't make the clarity versus ambiguity determination behind a veil of ignorance; statutory interpretation issues are all briefed at the same stage of the proceeding, so a judge who decides to open the ambiguity door already knows what he or she will find behind it." (Footnotes omitted.) B. Kavanaugh, supra, 129 Harv. L. Rev. 2138–39.

My point is cautionary in nature and not as ambitious as the foregoing observations may imply. The task of statutory construction is often difficult, and the tools we use to discern the true meaning of legislation, as applied to any particular set of circumstances, are not guaranteed to result in a clear and incontestable result. Perhaps, hopefully, there is an ongoing interbranch dialogue that establishes and reinforces a set of interpretive conventions that will help judges construe statutes in accordance with legislative intent. But, even under optimal conditions, many statutes contain ambiguities, and sometimes those ambiguities are not easy to resolve. Section 1-2z has not removed our ability to resort to the tools of construction needed to construe statutes, as required in any particular case, and I am confident that we will continue to use those tools, as necessary and appropriate, with care and good judgment, in the faithful execution of our constitutional duties.

Accordingly, I respectfully concur in the judgment.

JANE C. DOWLING *v.* HEIRS OF NORMAN J. BOND ET AL.
(SC 20665)

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

Syllabus

The plaintiff landowner sought to quiet title to an abutting parcel of real property, to which the defendant O Co. held record title. The plaintiff's shorefront property, which was located on a peninsula protruding into Long Island Sound, had been owned by the B family for nearly seventy-five years before the plaintiff purchased it. The deed conveying the property to the plaintiff identifies the abutting parcel, which is forty feet wide and bound to the south by Long Island Sound, as a right of way. O Co., a nonprofit organization formed to promote the interests of certain property owners on the peninsula, had acquired title to the parcel and other rights of way to the shoreline in the 1970s. The plaintiff and her husband, during their plans to expand the house on the property, began to investigate the property's prior ownership and retained various attorneys, including M, to research whether the B family had acquired title to the parcel by adverse possession and to pursue that claim. M recommended that the plaintiff file a notice of her claim of adverse possession on the land records pursuant to a provision (§ 47-33f) of the Marketable Title Act (§ 47-33b et seq.) to ensure that O Co. did not attempt to extinguish her claim under the act. M also sent a letter analyzing the factual and legal grounds for and against the claim, in which M ultimately concluded that the plaintiff had acquired title to the parcel by adverse possession. Thereafter, the plaintiff recorded a notice of claim on the land records of the town in which her property and the parcel were located, claiming a fee interest in the parcel by virtue of adverse possession. In the present quiet title action, the plaintiff alleged that her predecessors in title had used and possessed the parcel for more than fifteen years in an open, visible, notorious, adverse, exclusive, continuous and uninterrupted manner such that the predecessors in title, and, through them, the plaintiff, had acquired title to the parcel. O Co. denied the plaintiff's claim and filed a counterclaim, alleging slander of title, pursuant to statute (§ 47-33j), on the basis of the plaintiff's filing notice of her claim of adverse possession on the land records and seeking, inter alia, to quiet title in the fee of the parcel in its favor. During a bench trial, the plaintiff presented evidence of specific uses of the parcel by the B family that, according to her, supported her claim of adverse possession, namely, evidence that they had twice repaired a seawall in front of the parcel, installed a septic system leaching field, a portion of which was under the parcel, used a parking area on a

portion of the parcel adjacent to the property's driveway, and planted several trees, maintained the lawn and installed a birdbath on the parcel. After finding that O Co. held record title to the parcel, the trial court concluded that none of the B family's uses established that they had repudiated their right by deed to pass over the parcel or placed O Co. or its predecessors on notice of an adverse possession claim. The court also found that, although the deed conveying the property to the plaintiff conveyed an easement over the parcel, the B family did not intend to convey a fee title to the parcel. The court therefore concluded that the plaintiff had failed to establish that her predecessors in title had repudiated their permissive use of the parcel and that, even if proof of repudiation were not required, the plaintiff had failed to establish her claim of adverse possession. Accordingly, the court found for O Co. on both the plaintiff's quiet title claim and the portion of O Co.'s counterclaim seeking to quite title. The court also found for O Co. on the portion of its counterclaim alleging slander of title, concluding that the plaintiff had filed her notice of claim with a reckless disregard for its truth and for the purpose of slandering O Co.'s fee title to the parcel. On appeal from the trial court's judgment in favor of O Co., *held*:

1. The trial court improperly required the plaintiff to establish, as a threshold matter in proving her claim of adverse possession, that she or her predecessors in title had clearly and unequivocally repudiated their right by deed to pass over the parcel:

The repudiation doctrine, which recognizes that, when an original entry on land is by permission of the owner or under some right or authority derived from the owner, the possession of the land does not become hostile until the permission or authority has been clearly repudiated by the occupant, did not apply under the circumstances of the present case, as the authorities suggested that, when the right to use land for a particular purpose is conferred by deed, and the claimant has used the land for some other purpose that is more extensive than the right conferred by the deed, the use may be considered hostile and give rise to a claim of adverse possession.

In the present case, the plaintiff claimed that she or members of the B family used the parcel for purposes for which they did not have permission, either by license or by deed, and that their use in such a manner was sufficiently open, hostile and notorious to give notice to O Co. of a claim of adverse possession, and that was all the law required.

2. Notwithstanding the trial court's improper application of the repudiation doctrine, that court correctly determined that the plaintiff had failed to establish the elements of adverse possession:

a. The plaintiff could not prevail on her claim that the trial court improperly had required her to establish, in order to satisfy the element of adverse possession that she used the parcel under a claim of right, that

she and her predecessors in title had the subjective intent to use the parcel as owners, rather than establishing only that they engaged in acts that objectively evinced such an intent:

This court's cases make clear that the party claiming adverse possession must show his or her intent to use the property as his or her own and that that issue involves an inquiry into that individual's mental condition.

Accordingly, the trial court correctly determined that the plaintiff was required to prove that she and members of the B family subjectively intended to use the parcel as their own in order to establish her claim of adverse possession.

b. The trial court's conclusion that the plaintiff failed to establish the elements of adverse possession was not so inextricably intertwined with its incorrect application of the repudiation doctrine that it could not stand as an independent ground for affirmance, as the evidence in the record supported each of the trial court's findings that formed the basis of its rejection of the uses that, according to the plaintiff, established adverse possession of the parcel:

The B family made no assertion of ownership to the parcel in the various governmental permit applications that they submitted when repairing the seawall, and they shared the expense of those repairs with neighbors, indicating that they were not acting under a claim of ownership.

The limited evidence regarding the septic system, including a memorandum from O Co. stating that its members could install septic systems in the rights of way, suggested a permissive use, and the septic system was underground and, thus, was not a visible or notorious use of the parcel.

The evidence demonstrated that the members of the B family were aware that they did not own the parcel and understood that O Co. could remove the trees they had planted on the parcel if the trees interfered with the right of way, the B family used the gravel parking area that encroached on the parcel only when they hosted large gatherings, which was not inconsistent with O Co.'s use of the parcel or the manner in which other owners of property abutting the rights of way leading to the shoreline used the rights of way, and the birdbath that was installed on the parcel, which was only thirty-six inches in diameter, was not a substantial structure that could give rise to a claim of adverse possession of the entire parcel.

Historical evidence showed that the heirs of the individual who originally subdivided the properties on the peninsula and O Co.'s predecessor had expressed an intent to maintain the rights of way for the benefit of the community of property owners in the development, and the trial court found no evidence that members of the B family had acted in a way that was inconsistent with their easement over the parcel, that their conduct

with respect to the parcel was dissimilar to the conduct of other shorefront lot owners with respect to rights of way abutting their properties, or that they had acted in a way inconsistent with the prevailing community spirit on the peninsula, such that their activities did not evince an intent to use the property as their own.

Accordingly, although the plaintiff was not required to establish that her predecessors in title had repudiated their right by deed to pass over the parcel in order to establish adverse possession, she was required to establish that any more extensive use of the parcel was not impliedly permitted, which she failed to do, and the trial court's legal error regarding the repudiation doctrine could not have impacted its conclusion that the plaintiff had failed to establish adverse possession.

3. O Co. failed to demonstrate, as a matter of law, that the plaintiff had acted with malice when she filed notice of her claim of adverse possession on the land records, the trial court therefore incorrectly determined that she slandered O Co.'s title, and, accordingly, this court reversed in part the trial court's judgment and remanded the case with direction to render judgment for the plaintiff on that portion of O Co.'s counterclaim alleging slander of title under § 47-33j:

The plaintiff's notice of claim was premised on an incorrect legal theory that had been endorsed by her attorneys, namely, that she could establish adverse possession by showing that she and her predecessors in title had used the parcel in a manner that objectively evinced their intent to own it, regardless of their subjective beliefs regarding actual ownership, and, although M and the plaintiff's other attorneys were incorrect regarding that legal proposition, the malice necessary for slander of title does not exist when the offending party's actions rest on a rational but incorrect interpretation of the law.

In the present case, the fact that the plaintiff's attorneys were incorrect with respect to their interpretation of the law did not mean that their position was so irrational that no reasonable attorney could propound it, as they relied on this court's own case law, albeit case law that has since been overruled, and a number of other jurisdictions employ the rule urged by the plaintiff's attorneys.

Accordingly, although the plaintiff's claim of adverse possession was weak, both factually and legally, the claim was at least colorable in light of her mistaken but not entirely unreasonable position that she was not required to establish that her predecessors in title had any subjective intent to use the land as their own.

Although evidence of a bad or corrupt motive or an intent to inflict harm is not required to establish a claim of slander of title under § 47-33j, lack of such a motive or intent may be probative, and, in the present case, the plaintiff had nothing to gain by recording a notice of a knowingly

false claim, and her sole motive in recording the notice was to prevent her adverse possession claim from being extinguished by operation of the Marketable Title Act.

Insofar as this court determined that O Co. could not prevail on its slander of title claim under § 47-33j, O Co. was not entitled to attorney's fees and costs pursuant to that statute, and, accordingly, this court vacated the trial court's award of attorney's fees and costs.

Argued March 30—officially released October 18, 2022

Procedural History

Action for a declaratory judgment to determine the rights of the parties to a certain parcel of real property, brought to the Superior Court in the judicial district of New London, where the defendant The Old Black Point Association, Inc., filed a counterclaim; thereafter, the court granted the motion to bifurcate the issues of liability and damages filed by the defendant The Old Black Point Association, Inc.; subsequently, the case was tried to the court, *Hon. Emmet L. Cosgrove*, judge trial referee; judgment for the defendant The Old Black Point Association, Inc., on the complaint and the counterclaim; thereafter, the court, *Hon. Emmet L. Cosgrove*, judge trial referee, granted the motion for costs filed by the defendant The Old Black Point Association, Inc., and the plaintiff appealed. *Reversed in part*; *vacated in part*; *judgment directed.*

Wesley W. Horton, with whom were *Louis B. Blumenfeld* and, on the brief, *Brendon P. Levesque* and *Lorinda S. Coon*, for the appellant (plaintiff).

Timothy D. Bleasdale, with whom were *Edward B. O'Connell* and *Tracy M. Collins*, for the appellee (defendant The Old Black Point Association, Inc.).

Opinion

ECKER, J. This appeal arises from a dispute over the ownership of a parcel of land that abuts property owned by the plaintiff, Jane C. Dowling, and to which the

defendant The Old Black Point Association, Inc.,[1] holds record title. The plaintiff brought this quiet title action against the defendant, contending that her predecessors in title had acquired fee ownership of the disputed parcel by adverse possession. The defendant filed a counterclaim, alleging, among other things, that the plaintiff had slandered its title to the parcel under General Statutes § 47-33j by filing a notice of her claim of adverse possession on the land records. Following a bench trial, the trial court concluded that the plaintiff had failed to establish her claim of adverse possession and that the defendant had prevailed on its counterclaim and rendered judgment accordingly. After a subsequent hearing in damages, the trial court awarded $338,542.50 in attorney's fees and $44,876.33 in costs to the defendant. This appeal followed.[2]

We conclude that the trial court correctly determined that the plaintiff had failed to establish ownership of the parcel by adverse possession but that it incorrectly determined that the defendant had established its counterclaim for slander of title. Accordingly, we affirm the judgment in favor of the defendant on the plaintiff's quiet title action and reverse the judgment in favor of the defendant on its counterclaim for slander of title.

The following facts were found by the trial court or are undisputed. In 2006, the plaintiff purchased property located at 287 Old Black Point Road in East Lyme (property) from John M. Bradley, Scott Bradley and Anne Bradley Davis (collectively, Bradley siblings) for $2.6

[1] The complaint also named as defendants the heirs of Norman J. Bond and "all unknown persons, claiming or who may claim any rights, title, interest or estate in or lien or encumbrance [on] the real property described in this complaint, adverse to the plaintiff, whether such claim be vested or contingent." Those defendants are nonappearing, and all references to the defendant in this opinion are to The Old Black Point Association, Inc.

[2] The plaintiff appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

million. The deed to the property, which is located on a peninsula protruding into Long Island Sound known as Old Black Point, indicates that it is bounded on the north by Avenue A, on the east by "a [right of way forty] feet wide," on the south by Long Island Sound and on the west by "land now or formerly of Annette Hills Olds . . . ."

The defendant is a nonprofit organization formed "[t]o promote social, recreational, cultural and athletic activities of owners and occupants of property in Old Black Point . . . ." During negotiations for the sale of the property by the Bradley siblings to the plaintiff, representatives of the defendant met with the plaintiff's son, Vincent Dowling, Jr. (Dowling Jr.), to discuss the forty foot right of way that forms the easterly boundary of the property (parcel).[3] The defendant's representatives advised Dowling Jr. that the defendant had acquired title to the parcel in the 1970s, along with other rights of way running from Avenue A to the shoreline, several of which ran through a seventy-five foot right of way or "reservation" running along the shoreline.[4] The defendant was interested in enforcing a parking ban on all of the rights of way and, to this end, wanted Dowling Jr. to reconfigure a gravel parking area for the property that encroached on the parcel. The defendant and Dowling Jr. also had a discussion about removing some trees that had been planted along the northern

[3] Dowling Jr. had originally entered into the contract to purchase the property, but he assigned the contract to the plaintiff after he decided to purchase another property abutting the easterly boundary of the parcel.

[4] The warranty deed conveying the property to the plaintiff provided that the property includes a strip of land, approximately seventy-five feet wide, north of Long Island Sound and bounded by extensions of the eastern and western boundaries of the property, on condition that the strip "shall not be built upon." (Internal quotation marks omitted.) Other shoreline properties similarly extend into the reservation. The parcel and many of the other rights of way running from Avenue A to the reservation along the shoreline are covered in grass and are visually indistinguishable from the lawns of the properties that they run between, as is the reservation along the shoreline.

boundary of the parcel and who would be responsible for maintaining the parcel, including the portion of a seawall that runs along the parcel's southern boundary.[5] Dowling Jr. informed Scott Bradley of the substance of the meeting and requested that the Bradley siblings reduce the price of the property to cover any costs associated with the reconfiguration of the driveway.

On January 16, 2006, Scott Bradley sent an email to the defendant's board of governors asking the defendant to "consider less drastic measures" than those discussed with Dowling Jr.[6] He pointed out that the Bradley family had owned the property for almost seventy-five years and had always used a portion of the parcel for parking; that, in 1998, it had split the cost to repair the portion of seawall abutting the parcel with the owner of the adjoining property; and that the trees had been on the parcel for thirty years. Scott Bradley suggested that, in light of his family's historic use of the parcel, the doctrine of adverse possession might present "legal issues . . . not favorable to the approach [that the defendant] is currently pursuing."

The Bradley siblings ultimately agreed to reduce the purchase price of the property by $68,000 "in lieu of resolving the issues relating to . . . [the location of] the driveway and the [condition of the] seawall . . . ." In a "comprehensive title affidavit" provided to the plaintiff at the closing, the Bradley siblings' representative by power of attorney asserted that "a portion of a gravel drive and parking area [located on the property] . . . encroaches onto a right of way owned by another." The property was conveyed to the plaintiff by a war-

[5] The seawall runs along the southern shoreline of Old Black Point, including the shoreline forming the southern boundary of the plaintiff's property, with its easterly end near the parcel's eastern boundary.

[6] Scott Bradley indicated in a subsequent email to certain members of the board that he had provided a copy of the January 16, 2006 email to "VJ," or Dowling Jr.

ranty deed that was recorded in the East Lyme land records on March 24, 2006.

Thereafter, the plaintiff and her husband, Vincent Dowling, Sr. (Dowling Sr.), made plans to renovate and expand the house on the property. Their architect informed them that they could not expand the house in an easterly direction because of its close proximity to the parcel's western boundary.

After searching the East Lyme land records, probate records, and other records pertaining to the ownership of the property, Dowling Sr., who is a retired attorney, sent an email to Dowling Jr. on January 8, 2007, stating that there was "no basis for the assertion that the [defendant] has a legal interest in the [parcel]." Rather, Dowling Sr. believed that the activities of the plaintiff's predecessors in title over the preceding seventy-five years had resulted in the acquisition of title by adverse possession. Those activities included (1) the restoration of the portion of the seawall abutting the parcel after the 1938 hurricane, (2) the installation of the driveway and parking area that encroached on the parcel, (3) the installation of a birdbath on the parcel, (4) the installation of a septic system, part of which was located under the parcel, (5) the planting of trees across a portion of the parcel's northern boundary, and (6) the mowing and maintenance of the parcel.

Apparently, after conducting additional research, Dowling Sr. learned that attorney Robert W. Marrion had conveyed certain ownership interests in the rights of way on Old Black Point to the defendant by way of a deed dated December 22, 1977. On February 8, 2007, Dowling Sr. sent Dowling Jr. an email stating that, for a variety of reasons, the defendant's position that it owned the parcel by virtue of this deed "border[ed] on the ludicrous."[7]

[7] Specifically, Dowling Sr. believed that the eleven deeds transferring the interests in the rights of way from the heirs of the landowner who had originally subdivided the property, Norman J. Bond, to Marrion—which

In February, 2007, Dowling Sr. retained Attorney Clifford J. Grandjean to investigate whether the plaintiff's predecessors in title had acquired title to the property by adverse possession. After researching the issue, on June 6, 2007, Grandjean sent a letter to the defendant indicating that he was "aware of a flurry of [quitclaim] deeds involving rights of way in the mid-1970s" from the former record title owners to Marrion. Grandjean indicated that he did not believe that these quitclaim deeds established the defendant's ownership of the parcel because, among other reasons, title to the parcel had passed to the plaintiff's predecessors in title long before the quitclaim deeds were recorded. Grandjean also asked the defendant "to desist from any entry upon the [parcel] without specific permission of [the plaintiff]" and indicated that "to do so without permission will constitute an act of trespass."

On September 14, 2007, Grandjean sent a letter to Dowling Sr. regarding a meeting that he had had with the defendant's attorney, Granville Morris. Grandjean indicated that Morris had provided a packet containing some of the defendant's meeting minutes and correspondence referring to the parcel. The packet included what Grandjean characterized as "some troubling correspondence signed by both Stephen Bradley and Anne Bradley in the early 1970s regarding trees they erected

were the interests that Marrion subsequently transferred to the defendant—could not have included the interests of all of the heirs. Dowling Sr. also referred in his email to a memorandum dated March 1, 1982, from Frank W. Hubby III, to representatives of the defendant, in which Hubby described the history of the ownership of the Old Black Point rights of way and indicated that the defendant now owned some of them, including the parcel. Dowling Sr. believed that Hubby's analysis was flawed because the 1886 deeds conveying the waterfront properties referred to a map dated 1886, whereas the various deeds conveying interests in the rights of way that Hubby referred to contained references to another map filed on the East Lyme land records in 1915. The trial court ultimately concluded that the 1886 map and the 1915 map were substantially identical for purposes of this litigation.

on the [parcel].”[8] It also included minutes showing that Anne Bradley, who had been on the defendant’s board of governors, had participated in discussions regarding the rights of way in the 1970s.

Several months later, Grandjean wrote another letter to Dowling Sr., inquiring whether he should commence litigation over the ownership of the parcel. He indicated that he would be willing to do so if Dowling Sr. had “a realistic view of the factual ‘warts’ [that] exist in the case . . . .” In response to a request by Dowling Sr. that he identify the “potential stumbling blocks” to a successful resolution of the dispute over ownership of the parcel, Grandjean sent another letter indicating that he had concerns about whether the “adverse” element of adverse possession could be established when it was clear that, at the time that the land was initially subdivided in 1886, “the original landowner intended to convey, in perpetuity, a limited right to the [parcel] to [the plaintiff’s] predecessor in title.” Grandjean was also concerned that the court would impute knowledge of the defendant’s ownership of the parcel to Anne Bradley as the result of her membership in the defendant’s board of governors in the 1970s, when the defendant was acquiring title to the rights of way. Grandjean further stated that the Bradley siblings had indicated “that they knew the strip [containing the right of way] was there—they just thought it was far narrower than it turned out to be.”

On January 19, 2009, Eunice Groark, the president of the defendant’s board of governors, wrote a letter to the plaintiff and Dowling Sr. on behalf of the defendant, in which she reported the results of the defendant’s investigation into the ownership of the parcel.

[8] Stephen Bradley and Anne Bradley were the parents of the Bradley siblings and were their predecessors in title to the property. See footnote 16 of this opinion.

Groark indicated that the plaintiff's property had originally been part of a farm owned by Norman J. Bond that was subdivided in 1886. She further indicated that the deed conveying the newly created property, as well as an adjoining property, to a "Mr. How"[9] indicated that there was a forty foot right of way running along its easterly boundary, and there was no evidence that ownership of the right of way had been conveyed to How. All ownership rights, including ownership of various rights of way, that were retained by Bond passed to his heirs at his death and were acquired by the defendant in the 1970s. The right of way at issue had been shown on town maps as an avenue or road for more than 100 years. Groark also indicated that Scott Bradley had informed her that the Bradley family had always realized that the parcel did not belong to them and that they had not maintained the parcel under a claim of ownership. Rather, the Bradleys had repaired the portion of the seawall between the parcel and Long Island Sound in order to protect their own property and had mowed the parcel because that was the common practice among the owners of properties abutting the various rights of way.

Thereafter, the plaintiff retained Attorney Dwight H. Merriam of the law firm of Robinson & Cole, LLP, to pursue her claim to ownership of the parcel. In turn, Merriam retained Attorney Richard S. Johnson to conduct a title search of the parcel. On December 2, 2010, Merriam provided Dowling Sr. with a draft memorandum indicating that there was a "risk" that the defendant would rely on the Marketable Title Act (MTA), General Statutes § 47-33b et seq.,[10] to invalidate the

[9] Groark referred to a "Mr. Howe," and that spelling is occasionally used throughout the record. The typed transcript of the handwritten 1886 deed conveying the property from Bond's estate indicates that it was conveyed to "Daniel R. How," and we use that spelling for purposes of this opinion.

[10] General Statutes § 47-33c provides: "Any person having the legal capacity to own land in this state, who has an unbroken chain of title to any interest in land for forty years or more, shall be deemed to have a marketable record

plaintiff's claim of adverse possession and recommending that, pursuant to General Statutes § 47-33f,[11] the plaintiff file a notice of her claim of adverse possession on the land records "during or prior to 2016" to ensure that the claim was not extinguished. (Emphasis omitted.) On August 9, 2011, Merriam wrote a ten page, single spaced letter addressed to the plaintiff, in which he analyzed the factual and legal grounds for and against a claim of adverse possession, and concluded that title to the parcel had passed to the plaintiff by adverse possession. The letter closed by inquiring whether the plaintiff wanted to commence a quiet title action. In a separate email to Dowling Sr., Merriam indicated that the letter was "not an opinion letter" but "a forceful statement of [the plaintiff's] best case . . . ."[12] On December 23, 2015, the plaintiff filed a notice of claim pursuant to General Statutes § 47-33f on the East Lyme land records, in which she claimed a fee interest in

title to that interest, subject only to the matters stated in section 47-33d. A person has such an unbroken chain of title when the land records of the town in which the land is located disclose a conveyance or other title transaction, of record not less than forty years at the time the marketability is to be determined, which conveyance or other title transaction purports to create such interest in land, or which contains language sufficient to transfer the interest, either in (1) the person claiming that interest, or (2) some other person from whom, by one or more conveyances or other title transactions of record, the purported interest has become vested in the person claiming the interest; with nothing appearing of record, in either case, purporting to divest the claimant of the purported interest."

[11] General Statutes § 47-33f (a) provides in relevant part: "Any person claiming an interest of any kind in land may preserve and keep effective that interest by recording, during the forty-year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice in writing, duly verified by oath, setting forth the nature of the claim. . . ."

[12] The trial court ultimately found that Merriam's legal conclusions and advice to the plaintiff were based on incomplete information because the plaintiff had failed to provide Merriam with the title affidavit, closing documents or Grandjean's letter outlining the "warts" in her claim of adverse possession. (Internal quotation marks omitted.) We discuss this issue in part III of this opinion.

the parcel "by virtue of adverse possession in favor of her predecessors."

Thereafter, the plaintiff brought this quiet title action, alleging in the operative complaint that her predecessors in title had used and possessed the parcel for more than fifteen years in an open, visible, notorious, adverse, exclusive, continuous and uninterrupted manner such that the predecessors in title, and through them, the plaintiff, had acquired title to the parcel. The defendant denied the plaintiff's claim and raised the following special defenses: (1) the parcel is a right of way shared in common with others, and, therefore, the plaintiff's use of the property was not exclusive; (2) even if the plaintiff and her predecessors adversely possessed the parcel, title to the parcel was extinguished by the defendant's adverse possession of the parcel for more than fifteen years following the period of adverse possession claimed by the plaintiff; (3) the plaintiff's use of the parcel was permissive; (4) if the plaintiff's predecessors acquired title by adverse possession, her title was extinguished pursuant to the MTA because her interest was not asserted within forty years following the recording of the deeds from Bond's heirs to Marrion conveying their interest in the parcel; and (5) any interest of the plaintiff's predecessors in the parcel was extinguished because it was an unrecorded interest predating the effective date of the MTA and was not recorded on the land records during the statutory two year grace period between July 1, 1969, and July 1, 1971. In addition, the defendant filed a counterclaim, asserting that (1) the defendant had acquired marketable record title to the parcel under the MTA, and (2) the plaintiff committed the statutory tort of slander of title under § 47-33j[13]

[13] General Statutes § 47-33j provides: "No person may use the privilege of recording notices under sections 47-33f and 47-33g for the purpose of slandering the title to land. In any action brought for the purpose of quieting title to land, if the court finds that any person has recorded a claim for that purpose only, the court shall award the plaintiff all the costs of the action, including such attorneys' fees as the court may allow to the plaintiff, and

when she filed her notice of claim pursuant to § 47-33f because she "knew or should have known" that her predecessors in title to the parcel lacked the requisite intent to convey an adverse possessory interest in the parcel to her. The defendant sought a judgment declaring that the plaintiff's notice of claim was null and void and without legal effect, a decree that the defendant has marketable title to the parcel under § 47-33b, and attorney's fees and costs pursuant to § 47-33f.

The case was tried to the court. In its memorandum of decision, the trial court noted that, contrary to the plaintiff's suggestion in some of the correspondence preceding the quiet title action, she was not claiming that she had title to the parcel free and clear of the rights of other property owners in Old Black Point to pass across it but, rather, was claiming only that she possessed a fee title to the parcel subject to those rights. The court then found that the evidence presented at trial established that the parcel was first identified on a map of the Bond estate recorded in the East Lyme land records in 1886. That map showed twenty-five lots bordering on a seventy-five foot "avenue" running along Long Island Sound, as well as other rights of way located between several of the lots and accessing the avenue. A map filed on the land records in 1915 also showed the seventy-five foot strip, now designated a "reservation," and the rights of way. The court also found that all owners of the lots shown on the maps were entitled to use the rights of way and the seventy-five foot reservation to access the shoreline and concluded that the 1886 and 1915 maps created a common scheme of development.[14]

in addition, shall decree that the defendant asserting the claim shall pay to the plaintiff all damages the plaintiff may have sustained as the result of such notice of claim having been so recorded."

[14] "When making a finding as a matter of law that a common development scheme exists, courts look to four factors: (1) the common grantor's intent to sell all of the subdivided plots; (2) the existence of a map of the subdivision; (3) actual development of the subdivision in accordance with the general

With respect to the issue of whether the defendant had record title to the parcel, the court concluded that the parcel was not included in the 1886 deed transferring the property from Bond's estate to How but that the deed granted an easement over the parcel, the boundaries of which were marked by merestones. The court further found that, "[b]y virtue of a distribution from [Bond's] estate . . . in 1926, the fee title to the rights of way . . . [on] Old Black Point, including the parcel, was to the eight heirs of . . . Bond." In the mid-1970s, Marrion, acting as trustee for the defendant, contacted the Bond heirs and secured quitclaim deeds conveying their interests in the rights of way to him, as trustee. Eleven deeds were recorded on November 21, 1975, and the twelfth and final deed was recorded in January, 1976. The trial court found that Marrion had obtained quitclaim deeds from all of Bond's heirs. On December 23, 1977, Marrion conveyed his interest in the fee title to the rights of way, including the parcel, to the defendant by quitclaim deed. Accordingly, the trial court concluded that the defendant held record title to the parcel.

The trial court then addressed each of the specific uses of the property that, according to the plaintiff, supported her claim of adverse possession, beginning with the plaintiff's claim regarding the repair of the portion of the seawall adjacent to the parcel after the 1938 hurricane.[15] The court noted that, shortly after the

scheme; and (4) substantially uniform restrictions contained in the deeds of the subdivided plots." *DaSilva* v. *Barone*, 83 Conn. App. 365, 373, 849 A.2d 902, cert. denied, 271 Conn. 908, 859 A.2d 560 (2004).

[15] Much of the trial court's discussion of the specific facts regarding each aspect of the plaintiff's claim took place in the context of the court's consideration of the defendant's argument that the plaintiff's uses of the parcel did not give rise to adverse possession because the plaintiff and her predecessors in title had permission to use the parcel, and they had never repudiated the prior permissive use. As we discuss more fully in part I of this opinion, when a claimant's initial possession of the property for a particular purpose is permissive, the possession does not become hostile until the permission or authority has been clearly repudiated.

hurricane, the board of directors of the defendant's predecessor association had written a letter to its members, property owners at Old Black Point, describing how the hurricane had destroyed ten to thirty feet of the seventy-five foot reservation in front of the shorefront properties. The letter indicated that the owners of the shorefront properties were working together to build a seawall and to rebuild the lawn "at individual expense." The letter also indicated that this was being done to "protect the property and [to] preserve the beauty of [Old Black] Point—and consequently will inure to the benefit of all." The trial court found that Mary Tremaine Bradley[16] and the owner of the neighboring property to the west—which did not abut the parcel—shared the cost of repairing or replacing the seawall in front of their respective properties and in front of the parcel. In addition, the trial court found that continuing the seawall in front of the parcel was necessary to protect Mary Tremaine Bradley's property.

With respect to the evidence that Stephen Bradley and Anne Bradley had repaired the seawall in front of the parcel in the late 1990s, the trial court noted that the engineer who was handling the application to perform the repairs asked Anne Bradley who owned the parcel, but there was no evidence of any response. On March 11, 1997, the engineer wrote to the defendant indicating that the Bradleys had applied to various government entities for permission to repair the seawall, including the portion abutting the parcel. He further indicated that the ownership of the parcel was unclear but that either the town of East Lyme or the defendant was the "most probable owner," and he requested that

[16] Mary Tremaine Bradley owned the property from 1927 to 1946. In 1946, she transferred the property to her nephew, Stephen Bradley. In 1971, Stephen Bradley transferred title to himself and his wife, Anne Bradley in survivorship. In 1994, Anne Bradley transferred title to an irrevocable trust for the benefit of her children, the Bradley siblings.

the defendant provide a "letter of endorsement" for the proposed project. A copy of the engineer's letter was sent to the Bradleys. On March 16, 1997, the defendant provided the requested endorsement in writing. The trial court found that the cost of this repair in front of the parcel was shared by the Bradleys and the owners of the shoreline property abutting the Bradleys' property to the west.

The trial court concluded that the plaintiff had failed to establish by clear and convincing evidence that the repairs to the seawall in 1938 and the 1990s put the Bond heirs or the defendant "on notice of a repudiation of their ownership of the fee [to the parcel] or that an adverse possession claim was initiated or continuing." In addition, the court concluded that, because all of the shorefront property owners had repaired the portions of the seawall located on the rights of way abutting their respective properties after the 1938 hurricane, and because the cost of constructing and repairing the seawall adjacent to the parcel had been shared by the plaintiff's predecessors in title and their neighbors in both 1938 and the 1990s, the evidence did not establish that the plaintiff's predecessors in title had asserted a claim of ownership over the parcel.

The court then addressed the plaintiff's claim that the installation of a septic system leaching field by her predecessors in title supported her claim of adverse possession to the parcel. The court found that a portion of the existing septic system for the plaintiff's property lies partly under the parcel. The court then noted that the defendant had sent a memorandum to all of its members in 1964 addressing the sanitation "situation" on Old Black Point. The memorandum stated that septic systems could be installed in the rights of way between the various properties, including the right of way abutting the Bradley property. The trial court indicated that this authorization suggested a permissive use. The court

also referred to the evidence showing that Stephen Bradley and Anne Bradley submitted an application to the East Lyme Department of Health for a sewage disposal system in July, 1971. The court ultimately concluded that, because the circumstances surrounding the installation of the septic system and when it was installed were unclear, the existence of the septic system did not support the plaintiff's claim of adverse possession. The court further noted that, because the septic system was underground, it was not a visible or notorious use of the property for purposes of adverse possession. Accordingly, the court concluded that the evidence relating to the septic system did not constitute "clear and convincing evidence of repudiation or adverse possession."

The court also rejected the plaintiff's claim that the fact that Stephen Bradley and Anne Bradley had planted several evergreen trees or shrubs across a portion of the entrance to the parcel in 1971 supported their claim of adverse possession. The evidence showed that the defendant initially had objected to the plantings. The Bradleys responded by stating that their "sole intent in planting the shrubs was to establish some means of controlling the proper use of the [right of way] and at the same time [to] have the area look reasonably attractive," and offered to make a gift of the plants to the defendant so that it could remove them when it chose. The defendant declined this offer because neither the Bradleys nor the defendant owned the parcel at the time.[17] Ultimately, the defendant's board of governors decided by vote that it would allow the plants to remain but would remove them "at any time in the future when they interfere with the [right of way]." Stephen Bradley was present at the meeting when this

[17] As we explained, Bond's heirs owned the parcel at the time, and the defendant did not obtain title until several years after this exchange of correspondence.

vote was taken. The trial court concluded that this evidence did not support a finding "of a repudiation by the Bradleys of the Bond ownership of the parcel" or that the planting of the trees was "an open, adverse, notorious use under a claim of right by the Bradleys to assert that they owned the fee to the parcel . . . ."

With respect to the plaintiff's claim pertaining to the Bradley family's use of a gravel parking area on the parcel adjacent to the property's driveway, the trial court found that the evidence showed that the Bradleys had not used the area for parking on a daily basis, but only when there were larger family gatherings, and that other property owners in Old Black Point likewise used the rights of way adjacent to their lots for similar purposes. The court also noted that, in exchange for a reduction in the purchase price of $68,000, the plaintiff had agreed to reconfigure her driveway and parking area so that the parking area was located on her property and the driveway was located on the parcel, consistent with her right to pass and repass. The court concluded that this use did "not provide clear, positive, and unequivocal evidence of repudiation or of adverse possession."

Finally, the trial court addressed the plaintiff's claim pertaining to the maintenance of the lawn on the parcel and the installation of a birdbath. The court concluded that, prior to 2006, the shorefront property owners had retained one or two landscaping contractors to mow the entire lawn in front of the properties, including the rights of way and the seventy-five foot reservation running along the shoreline. The court further concluded that there was limited evidence as to how the property owners shared the expense of maintaining the lawn but that the plaintiff was aware that the landscaping contractors were unwilling to allocate the cost of mowing the rights of way, including the parcel. Regarding the birdbath, the court found that it was a small

structure, approximately thirty-six inches in diameter at its largest, and that there was no evidence of who installed it or when. The court concluded that the evidence pertaining to lawn maintenance and the installation of the birdbath was not clear and convincing evidence of "repudiation of the easement rights" or adverse possession.

The trial court next considered whether the Bradley siblings had intended to convey title to the parcel when they sold the property to the plaintiff. The court found that the deed conveying the property to the plaintiff expressly provided that it conveyed an easement over the parcel and that the property did not include title to the fee.[18] In addition, the title affidavit provided by the Bradleys' representative at the closing expressly stated that "a portion of a gravel drive and parking area . . . encroaches onto a right of way owned by another." On the basis of this evidence, the court concluded that the Bradley siblings did not intend to convey a fee title.

On the basis of these subsidiary findings, the trial court concluded that the plaintiff had failed to establish that her predecessors in title had repudiated their permissive use. The court further concluded that, even if proof of repudiation were not required, the plaintiff had failed to establish her claim of adverse possession. The court therefore found in favor of the defendant on both the plaintiff's quiet title claim and the defendant's quiet title counterclaim. In addition, the court concluded that, because the plaintiff's notice of claim was filed more than forty years after the date that eleven out of the twelve deeds conveying the interests of Bond's heirs in the parcel to Marrion were filed, which deeds repre-

[18] The trial court noted that the deed's property description described the eastern border of the property as "running along the west line of a right of way 40 feet wide, south 3° 20' west 150 feet to a merestone; thence running south 72° 30' west to the southeast corner of north piece . . . ."

sented seven-eighths of the heirs' interests, the notice had no effect under the MTA.

The trial court then turned to the defendant's slander of title counterclaim and concluded that the defendant established that the plaintiff had filed her notice of claim on the land records "with a reckless disregard for its truth and for the purpose of slandering the defendant's title to the fee." In support of this conclusion, the trial court relied on substantially the same evidence that it relied on to support its ruling on the plaintiff's quiet title claim, in addition to evidence concerning the dealings between the parties during the period preceding the plaintiff's filing of the notice of claim. The court determined that this evidence established that the plaintiff and Dowling Sr. were aware at the time they filed the notice that the defendant had record title to the parcel and that they knew or should have known that "there was no basis for the plaintiff's claim that her predecessors in title intended to convey any adverse possession claims to the fee of the parcel." The court also found it significant that Dowling Sr. had not provided Merriam with the title affidavit indicating that the parcel was owned by another or Grandjean's letter outlining the "stumbling blocks" to the plaintiff's adverse possession claim, and also had not discussed with Merriam the issue identified by Grandjean concerning the initial permissive entry onto the parcel by the plaintiff's predecessors in title. The court concluded that, because the plaintiff "did not make a full and fair disclosure to her attorneys," she was not entitled to raise an advice of counsel defense.[19]

After conducting an evidentiary hearing on damages, the trial court found that the defendant was entitled to

[19] The plaintiff filed a motion to reargue, contending that there was no evidence to support a finding that the plaintiff recklessly disregarded the truth or to support a finding imputing the reckless disregard of Dowling Sr. to her. The trial court denied the motion.

damages for attorney's fees of $338,542.50 and costs of the litigation in the amount of $44,876.33 pursuant to § 47-33j. Because the court found all of the claims in the case to be inextricably intertwined, its award of damages included legal fees and costs incurred by the defendant in prosecuting its own claims, as well as those incurred in defending the plaintiff's claims. The court rendered judgment for the defendant on the plaintiff's quiet title claim and on the defendant's quiet title and statutory slander of title claims, and awarded $383,418.83in damages to the defendant. Additional facts and procedural history will be set forth as necessary.

This appeal followed. The plaintiff claims on appeal that (1) the trial court applied an incorrect standard when it required the plaintiff to establish that she had repudiated her right by deed to use the parcel as a right of way, (2) because the trial court's conclusion that the plaintiff had failed to establish the elements of adverse possession was inextricably intertwined with its incorrect application of the repudiation doctrine, that conclusion was also incorrect, (3) the trial court incorrectly determined that the plaintiff's predecessors in title did not convey the parcel to her, (4) the trial court incorrectly determined that, for purposes of the MTA, the eleven deeds from Bond's heirs to Marrion that were recorded in the East Lyme land records in November, 1975, constituted root of title because the twelfth deed, representing a one-eighth interest in the parcel, was not filed until January, 1976, less than forty years before the plaintiff filed her notice of claim, (5) the trial court incorrectly determined that the defendant had established its claim of statutory slander of title when the defendant failed to plead and prove pecuniary damages, (6) the trial court's determination that the plaintiff slandered the defendant's title to the property and that she was not entitled to an advice of counsel defense was

erroneous, and (7) the trial court incorrectly determined that the defendant was entitled under § 47-33j to attorney's fees and costs incurred in defending the plaintiff's quiet title action.

With respect to the plaintiff's first claim, we agree with the plaintiff that the trial court improperly required her to establish that she had repudiated her right by deed to use the property as a right of way. We also conclude, however, that, contrary to the plaintiff's second claim, the trial court correctly determined that the plaintiff failed to establish her claim of adverse possession. Accordingly, we need not reach the plaintiff's third and fourth claims. With respect to the plaintiff's sixth claim, we agree with the plaintiff that the trial court incorrectly determined that the defendant had established its slander of title claim. We therefore need not reach the plaintiff's fifth and seventh claims.

I

The plaintiff first claims that the trial court applied an incorrect standard when it required her to establish, as a threshold matter, that, because she and her predecessors had a right of way to use the parcel, they had "repudiated" the defendant's permission to enter the parcel in order to prove adverse possession. Specifically, the plaintiff contends that she and her predecessors in title had no "permission" to pass over the parcel because she and her predecessors had a right by deed to pass over it, and permission to pass and a right to do so are not the same thing. The plaintiff further contends that, even if her right to pass over the parcel can be construed as permissive, she had permission only to use the parcel to pass and repass, not to possess and use the land as an owner. Because she claims that her predecessors in title used the parcel under a claim of right to ownership, she contends that they were not required to repudiate the permission to pass over the

parcel. We agree with the plaintiff that the repudiation doctrine does not apply on the facts of this case, in which the right to use the land in a particular way was conferred by deed and in which the plaintiff contends that she used the land in a more extensive way that satisfies the standard requirements of adverse possession.

The general legal principles governing adverse possession are well settled.[20] When "title is claimed by adverse possession, the burden of proof is on the claimant. . . . The essential elements of adverse possession are that the owner shall be ousted from possession and kept out uninterruptedly for fifteen years under a claim of right by an open, visible and exclusive possession of the claimant without license or consent of the owner. . . . The use is not exclusive if the adverse user merely shares dominion over the property with other users. . . . Such a possession is not to be made out by inference, but by clear and positive proof. . . . In the final analysis, whether possession is adverse is a question of fact for the trier. . . . The doctrine of adverse possession is to be taken strictly." (Citations omitted; internal quotation marks omitted.) *Roche* v. *Fairfield*, 186 Conn. 490, 498–99, 442 A.2d 911 (1982); see *Rudder* v. *Mamanasco Lake Park Assn., Inc.*, 93 Conn. App. 759, 780, 890 A.2d 645 (2006) ("[adverse] possession is not to be made out by inference, but by clear and convincing proof" (internal quotation marks omitted)).

The inquiry is necessarily fact specific and context dependent. "In evaluating such claims, [t]he location and condition of the land [at issue] must be taken into consideration and the alleged acts of ownership must

[20] Whether the trial court applied the correct legal standard to the plaintiff's claim of adverse possession is a question of law subject to plenary review. See, e.g., *Boccanfuso* v. *Conner*, 89 Conn. App. 260, 282, 873 A.2d 208, cert. denied, 275 Conn. 905, 882 A.2d 668, and cert. denied, 275 Conn. 905, 882 A.2d 668 (2005).

be understood as directed to those circumstances and conditions. . . . Additionally, in assessing whether hostility exists, the relation that the [alleged] adverse possessor occupies with reference to the owner is important." (Citations omitted; internal quotation marks omitted.) *Rudder* v. *Mamanasco Lake Park Assn., Inc.*, supra, 93 Conn. App. 775. "In sum, when determining whether the necessary elements of adverse possession exist, each claim must be decided on its own particular facts. The requirements vary according to, and it is necessary to consider, the nature and situation of the property. To determine whether particular acts constitute adverse possession, it is sometimes necessary to consider the character of the property and the purposes for which it is suitable, the circumstances attending the possession, the acts and declarations of [the] claimant while in possession, and the relation of the holder of the legal title to the claimant." (Internal quotation marks omitted.) Id., quoting 2 C.J.S. 459, Adverse Possession § 33 (2003); see 16 M. Wolf, Powell on Real Property (2019) § 91.03, pp. 91-14 through 91-15 ("whether possession may be characterized as actual depends on the nature and location of the property, the uses to which it can be applied, and all the facts and circumstances of a particular case").

The role that the claimant's state of mind plays in the analysis, of particular importance in the present case, is also well established, although the doctrine is not without nuance.[21] On the one hand, it is typically said that the proper inquiry is conducted with reference to the actions and words of the party claiming ownership, not that party's unexpressed motives, knowledge or beliefs. This court has observed that "the only legitimate inquiry in a case of adverse possession [is] whether

[21] We revisit and elaborate on this subject in part II of this opinion, which further examines the mental state required to establish adverse possession under Connecticut law.

the party claiming ownership had the actual, open, adverse occupancy and possession of the controverted property, claiming it as [his] own . . . and actually excluding all other persons from its possession, for an uninterrupted period of fifteen years." (Internal quotation marks omitted.) *O'Connor* v. *Larocque*, 302 Conn. 562, 580–81, 31 A.3d 1 (2011). "The possession alone, and the qualities immediately attached to it, are regarded. No intimation is there as to the *motive* of the possessor. If he intends a wrongful disseisin, his actual possession for fifteen years, gives him a title; or if he occupies what he believes to be his own, a similar possession gives him a title." (Emphasis in original.) *French* v. *Pearce*, 8 Conn. 439, 443 (1831); see *O'Connor* v. *Larocque*, supra, 595 n.23 ("[a] person's mistaken belief that he or she is the lawful owner is immaterial in an action seeking title by adverse possession"). Thus, a claim of adverse possession is equally valid whether the party making that claim used the property with the knowledge that it was owned by another or, instead, mistakenly believed that he owned the property.

That having been said, consideration of intent is by no means irrelevant to a claim of adverse possession because the claimant must establish that he or she possessed the land "under a claim of right . . . ." (Internal quotation marks omitted.) *Horowitz* v. *F. E. Spencer Co.*, 132 Conn. 373, 378, 44 A.2d 702 (1945). "[This] means nothing more than [using the land] . . . without recognition of the right of the landowner, and that phraseology more accurately describes it than to say that it must be under a claim of right." (Internal quotation marks omitted.) *Phillips* v. *Bonadies*, 105 Conn. 722, 726, 136 A. 684 (1927). To establish that the claimant used the land under a claim of right, "the intent of the possessor to use the property as his own must be shown. This issue involves an inquiry into his mental condition." *Horowitz* v. *F. E. Spencer Co.*, supra,

378–79; see *O'Connor* v. *Larocque*, supra, 302 Conn. 581 ("[t]o establish title by adverse possession, the claimant must oust an owner of possession . . . under a claim of right with the intent to use the property as his own and without the consent of the owner" (internal quotation marks omitted)); *Top of the Town, LLC* v. *Somers Sportsmen's Assn., Inc.*, 69 Conn. App. 839, 842, 797 A.2d 18 (same), cert. denied, 261 Conn. 916, 806 A.2d 1058 (2002).

This brings us to the issue of permissive use, because prior permission may undermine the existence of a claim of right; use of the land by the express or "implied permission by the true owner is not adverse" and, therefore, cannot ripen into adverse possession. (Internal quotation marks omitted.) *Woodhouse* v. *McKee*, 90 Conn. App. 662, 675, 879 A.2d 486 (2005); see *Phillips* v. *Bonadies*, supra, 105 Conn. 725 ("[u]se by express or implied permission or license cannot ripen into an easement by prescription"). "[O]ne who enters into the possession of land in subordination to the title of the real owner . . . is estopped from denying that title while he holds actually *or presumptively* under it. . . . As with a prescriptive easement, implied permission by the true owner is not adverse." (Emphasis in original; internal quotation marks omitted.) *Woodhouse* v. *McKee*, supra, 674–75.

"[T]o establish the requisite notice of [his] hostile claim to the disputed area, the [claimant must] do something more than what was customary throughout the neighborhood and regarded as permissive . . . ." *Rudder* v. *Mamanasco Lake Park Assn., Inc.*, supra, 93 Conn. App. 777–78; see *Falvo* v. *Pejepscot Industrial Park, Inc.*, 691 A.2d 1240, 1243 (Me. 1997) (when evidence showed that "[the] plaintiffs used [the defendant company's] land in the same manner as other residents [in the company's development], that no residents were denied permission to use the land, and that [the] plain-

tiffs complied with the mill owners' customary request that residents keep the mill property clean and neat," use was permissive, and plaintiffs failed to establish required element of hostility); 16 M. Wolf, supra, § 91.05 [5] [a], p. 91-36.1 ("a permissive use, which is consistent with a dedicator's intent, cannot simultaneously be detrimental to the dedicator's ownership rights").

The doctrine of repudiation recognizes that "[p]ossession that is permissive in its inception may become hostile. However, if the original entry is not hostile, it does not become so and the statute does not begin to run as against the rightful owner until the adverse claimant disavows the idea of holding for, or in subservienc[e] to, another and actually sets up an exclusive right in the adverse claimant. If the original entry on land is by permission of the owner or under some right or authority derived from the owner, the possession does not become hostile until the permission or authority has been clearly repudiated by the occupant. To change the character of the possession from permissive to hostile, the disavowal of the record owner's title and the assertion of an adverse claim must be shown by some clear, positive, and unequivocal act brought home to the owner, such as an explicit disclaimer. Otherwise, the possession will not be presumed to be hostile." (Internal quotation marks omitted.) *Woodhouse* v. *McKee*, supra, 90 Conn. App. 675; see 3 Am. Jur. 2d 132, Adverse Possession § 47 (2013) ("[i]f the original entry is not hostile, the possession does not become hostile until the adverse claimant disavows the idea of holding for, or in subservienc[e] to, the true owner and actually sets up an exclusive right in the adverse claimant"). "There must be either actual notice of the hostile claim, or acts or declarations of hostility so manifest and notorious, or so open and notorious, that actual notice will be presumed, in order to change permissive possession to hostile or adverse possession." 3 Am. Jur. 2d, supra,

§ 47, pp. 132–33. "For the purpose of changing permissive possession to hostile possession, mere possession or ordinary acts of ownership that are consistent with the permission are not enough to provide notice of the hostile claim. The evidence of adverse holding when the original entry is by permission must be very clear." (Footnote omitted.) Id., § 48, p. 133.

In the present case, the plaintiff contends that these principles of repudiation, which govern the use of land that was originally permissive, are inapplicable because she and her predecessors had an irrevocable right by deed to pass over the parcel. She contends that her right to use the parcel to pass and repass therefore was not permissive in the sense that would require her to demonstrate repudiation and, thus, that the trial court improperly required her to establish, by clear and convincing evidence, that she had clearly and explicitly repudiated her right to pass and repass in order to establish adverse possession.

We agree with the plaintiff and conclude that the repudiation doctrine does not apply under the circumstances of this case. Research has unearthed no cases or authorities that expressly distinguish permissive use from use pursuant to a right conferred by deed in their treatment of the repudiation doctrine. Our case law, however, has applied the principle that a clear and unequivocal repudiation of the landowner's permission to use the land for a particular purpose, such as to pass and repass, is required to establish adverse possession only in cases in which (1) the permission was in the form of a personal right or license, not a right conferred by deed, and (2) the claimant had used the land in the manner for which permission was granted. See *Vaicunas* v. *Gaylord*, 196 Conn. App. 785, 794, 230 A.3d 826 (2020); *Brander* v. *Stoddard*, 173 Conn. App. 730, 747, 164 A.3d 889, cert. denied, 327 Conn. 928, 171 A.3d 456 (2017); *Mulle* v. *McCauley*, 102 Conn. App. 803, 813–14,

927 A.2d 921, cert. denied, 284 Conn. 907, 931 A.2d 265 (2007); *Rudder* v. *Mamanasco Lake Park Assn., Inc.*, supra, 93 Conn. App. 783; *Top of the Town, LLC* v. *Somers Sportsmen's Assn., Inc.*, supra, 69 Conn. App. 845. Although we have found no cases expressly holding that repudiation is *not* required when the original permission to use the land for a particular purpose was granted by deed, the proposition stands to reason, and the authorities suggest, that, when the right to use land for a particular purpose was conferred by deed, and the claimant has used the land for some *other* purpose that is more extensive than the right conferred by deed, the use may be considered hostile and give rise to a claim of adverse possession. Cf. 2 Restatement (Third), Property, Servitudes § 7.7, comment (c), p. 377 (2000) ("Adverse possession of the . . . servient estate does not affect the servitudes burdening . . . the property unless the adverse possessor *also* does something to modify or terminate the servitudes. . . . Whether an adverse possessor of a servient estate acquires title free of the servitude burden depends on whether the property has been used in a way that is adverse to the persons entitled to enforce the servitude." (Emphasis added.));[22] see also *Gemmell* v. *Lee*, 59 Conn. App. 572,

[22] In the present case, the plaintiff does not claim that her use of the property terminated the servitudes on the parcel, namely, the rights of other landowners at Old Black Point to pass and repass over it. Rather, she claims an ownership interest in the parcel subject to those servitudes. Comment (c) to § 7.7 of the Restatement (Third) of Property, Servitudes, presumes that a person can obtain ownership by adverse possession of property that remains subject to a servitude by engaging in acts that are inconsistent with ownership by another but that are consistent with the existing servitude, as the plaintiff claims in the present case. See 2 Restatement (Third), Property, Servitudes § 7.7, comment (c), p. 377 (2000).

We note that there is some authority for the proposition that adverse possession of the fee title of a property operates indirectly to extinguish any easements in the property. See *Boccanfuso* v. *Conner*, 89 Conn. App. 260, 284, 873 A.2d 208 (referring to cases involving "a claim of adverse possession seeking title to the fee of the land over which an easement existed, which claim, if successful, could operate indirectly to extinguish the easement" (emphasis omitted)), cert. denied, 275 Conn. 905, 882 A.2d

578–79, 757 A.2d 1171 (rejecting defendants' claim that they had obtained "sole and exclusive rights" to road when their use of road was consistent with their easement over road by deed, and others had continuously used easement), cert. denied, 254 Conn. 951, 762 A.2d 901 (2000).

It makes sense to distinguish for these purposes between permissive use under a revocable personal right or license and use pursuant to a right by deed. A person who is entitled by deed to use land for a particular purpose has no reason, if that right is irrevocable and runs with the land, to claim adverse possession to establish ownership unless they wish to expand their use beyond the scope of the deeded entitlement. By contrast, a person whose permissive use is by personal right or license may wish to obtain ownership by adverse possession, even when they do not intend to expand their use of the land to unpermitted uses because, otherwise, the permission may be revocable and may not be transferable. This difference has consequences for the repudiation doctrine. When a claimant wishing to establish ownership by adverse possession has used the land permissively under a personal right or license, and has used the land *only for that purpose*, the only way that the landowner can be placed on notice of a claim of adverse possession is by a clear and unequivocal declaration that the claimant is using the land under

668, and cert. denied, 275 Conn. 905, 882 A.2d 668 (2005); id. ("[i]f there is adverse possession sufficient to divest a fee simple title to land, it will also operate to extinguish an easement in such land" (internal quotation marks omitted)), quoting 3 H. Tiffany, The Law of Real Property (3d Ed. 1939) § 827, p. 397. The defendant in the present case avoids making any express argument that a claimant's possession of a property that does *not* operate to extinguish an easement must necessarily also be insufficient to divest the owner of the fee title as a matter of law. As the circumstances of the present case show, however, it may be difficult, as a practical matter, for a claimant to establish the elements of adverse possession when the claimant fails to manifest any intention to prohibit use of land by its record owner or others who have a right to use it.

a claim of right.[23] See 3 Am. Jur. 2d, supra, § 48, p. 133 ("mere possession or ordinary acts of ownership *that are consistent with the permission* are not enough to prove *notice* of the hostile claim" (emphasis added)). When a claimant has permission (whether by deed or otherwise) to use the land for a particular purpose, however, the mere use of the land for a purpose that is *not* permitted and that is inconsistent with the true owner's rights should be sufficient to put the landowner on notice of a potential claim of adverse possession. See id., § 47, pp. 132–33 ("acts . . . of hostility so manifest and notorious, or so open and notorious, that actual notice will be presumed . . . [are sufficient] to change permissive possession to hostile or adverse possession"). For this reason, logic dictates that the repudiation doctrine applies only when the person claiming adverse possession had permission in the form a personal right or license to use the land for a particular purpose and the claimant used the land only for that purpose, because it is only in that situation that the claimant's open use of the land would be insufficient to put the record owner on notice of a hostile possession.

In the present case, the plaintiff is contending that she and her predecessors in title used the parcel for purposes for which they did not have permission, either by license or by deed, and that their use in such a manner was sufficiently open, hostile and notorious to give notice to the defendant of a claim of adverse possession. That is all that the law requires. To the extent the trial court concluded that the plaintiff was required to establish that her predecessors in title had

[23] Obviously, if a person has an irrevocable right by deed to use land for a particular purpose, such as to pass and repass over it, and the person uses the land only for that purpose, the person would have no cause to repudiate the right by deed in order to obtain the *same* right by prescription or adverse possession. This point presumably explains why the cases applying the repudiation doctrine involve personal permission or licenses that can be revoked.

clearly and unequivocally repudiated their right by deed to pass and repass over the parcel to establish a claim of adverse possession, that conclusion was incorrect.

II

We next address the plaintiff's claim that the trial court incorrectly determined that she failed to establish the elements of adverse possession. She makes two arguments in support of this claim. First, she contends that the trial court improperly required her to establish that she had the subjective intent to use the parcel as an owner to establish that she used the parcel under a claim of right.[24] Second, she contends that the court's conclusion that she failed to establish the elements of adverse possession was so intertwined with its incorrect determination that she was required to establish repudiation of her right by deed to use the property as a right of way that it cannot stand as an independent ground for affirmance. We disagree with both claims.

A

The plaintiff argues that she was not required to establish that she and her predecessors in title had the

[24] It is not entirely clear whether the plaintiff is claiming that the trial court incorrectly determined that, to establish the "claim of right" element of adverse possession, she had to show that she and her predecessors in title had the subjective intent to use the parcel as their own or, instead, she is claiming that the trial court concluded—properly, in the plaintiff's view—that she was required to show only that she and her predecessors engaged in acts that objectively evince such an intent, but incorrectly determined that the plaintiff had failed to meet her burden of proof. Our review of the record satisfies us that the trial court concluded that the plaintiff was required to establish that she had the subjective intent to use the parcel as her own. Specifically, the trial court concluded that, although it is irrelevant whether a claimant intended to take the land at issue from another or mistakenly believed that he owned the land, "courts are allowed to consider whether the prospective possessor *intended* to use the property as [his] own . . . ." (Emphasis in original.) We further note that the trial court denied the plaintiff's motion in limine, in which the plaintiff asserted that evidence of the subjective intent of the plaintiff and her predecessors to use the parcel as their own was irrelevant to the plaintiff's claim of adverse possession. Accordingly, we treat the plaintiff's claim as a claim that the court applied an incorrect standard.

subjective intent to use the parcel as an owner, but only that they engaged in acts that objectively evinced such an intent. In support of this claim, the plaintiff relies on this court's statement in *French* v. *Pearce*, supra, 8 Conn. 443, "that it is the visible and adverse possession, with an intention to possess, that constitutes its adverse character, and not the remote views or belief of the possessor." The short answer to this argument is that any uncertainty arising from the language employed in *French* was eliminated by this court in *Horowitz* v. *F. E. Spencer Co.*, supra, 132 Conn. 373, in which we stated that, to the extent the court's decision in *French* and other earlier cases suggested that the subjective intent of the party claiming adverse possession to use the property as his own was not relevant to a claim of adverse possession, the cases had "been impliedly overruled." Id., 379. In no uncertain terms, *Horowitz* explains that cases since *French* had clarified that "the intent of the possessor to use the property as his own must be shown. This issue involves an inquiry into his mental condition." Id., 378–79; see id., 378 (" '[a]n essential element of the defendant's claim of title by adverse possession was that the use or occupation of the property be under a claim of right, and the intention of the person or persons using the property was material [on] the issue as to the character of such use' "), quoting *Mentz* v. *Greenwich*, 118 Conn. 137, 146, 171 A. 10 (1934); see also 3 Am. Jur. 2d, supra, § 42, p. 128 (In some jurisdictions, "[t]he claimant's intent to possess the disputed land, rather than the intent to take from the true owner, governs whether possession is hostile. In other words, hostile use or possession does not require an intention to dispossess the rightful owner, or even knowledge that there is one, but rather, there must be an intention to claim the property as one's own to the exclusion of all others. In such jurisdic-

tions, no matter how hostile to the true owner the possession may be in appearance, it cannot be adverse unless it is accompanied by the intent on the part of the occupant to make it so." (Footnotes omitted.)).[25]

Indeed, *French* never held to the contrary. The discussion in that case of the required mental state to establish adverse possession does not question whether a claimant must intend to use the property as his own; such an intention is plainly required. See *French* v. *Pearce*, supra, 8 Conn. 443 (holding "that it is the visible and adverse possession, *with an intention to possess*, that constitutes its adverse character" (emphasis added)). The issue addressed in *French* focused on a related but fundamentally different question: must a claimant *intend to act wrongfully* when exercising possession over land, that is, must the acts establishing a claim of ownership be accompanied by knowledge that the claim is contrary to the rights of the actual owner? See id., 442–43. The court unequivocally answers "no" to this question, holding that the claimant's "guilt or inno-

[25] Other jurisdictions arguably have concluded that subjective intent to use the property as one's own is not required or, indeed, is admissible to establish a claim of adverse possession and that adverse possession is shown exclusively by acts objectively evincing adverse use. See *Mavromoustakos* v. *Padussis*, 112 Md. App. 59, 71, 684 A.2d 51 (1996) ("adverse possession is to be determined by the objective manifestations of the adverse use, not by the subjective intent of the possessor" (internal quotation marks omitted)), cert. denied, 344 Md. 718, 690 A.2d 524 (1997); *Totman* v. *Malloy*, 431 Mass. 143, 145, 725 N.E.2d 1045 (2000) ("[t]he guiding principle behind the elements of adverse possession is not to ascertain the intent or state of mind of the adverse claimant, but rather to provide notice to the true owner"); *Kellison* v. *McIsaac*, 131 N.H. 675, 679, 559 A.2d 834 (1989) ("trespassory use constitutes adverse use sufficient to satisfy the hostility requirement of adverse possession"). Even in these jurisdictions, however, it is unclear to us whether the claimant is still required to show his "intent to use the property as one's own," just not the "intent to dispossess the true owner of the property." In any event, it is clear that, under *Horowitz*, proof of the claimant's intent to use the property as his own is required to establish adverse possession in Connecticut. See *Horowitz* v. *F. E. Spencer Co.*, supra, 132 Conn. 378–79.

cence" is irrelevant. Id., 443. *French* holds that the required intention to possess is present, regardless of whether the possession is knowingly wrongful. See id. ("[i]f [the claimant] intends a wrongful disseisin, his actual possession for fifteen years, gives him a title; or if he occupies what he believes to be his own, a similar possession gives him a title"). The reasoning underlying this holding is equally clear: "The very nature of the act is an assertion of [the claimant's] own title, and the denial of the title of all others. It matters not . . . that the possessor was mistaken, and had [the claimant] been better informed, would not have entered on the land. This bears on another subject—the moral nature of the action; but it does not point to the [i]nquiry of adverse possession."[26] Id., 445.

[26] This holding, which has come to be known as the Connecticut rule; see R Helmholz, "Adverse Possession and Subjective Intent," 61 Wash. U. L.Q. 331, 339 (1983); is in contrast to "the older view (the Maine view) that, when a landowner occupies land beyond his true boundary line under the mistaken belief that in fact it lies within his boundary, his possession cannot be adverse and cannot ripen into title. Because the possessor is acting through ignorance or mistake, and would amend his occupation were the true boundary line known to him, his possession lacks the element of hostility necessary for adverse possession." Id.; see *Striefel* v. *Charles-Keyt-Leaman Partnership*, 733 A.2d 984, 992 n.9 (Me. 1999) ("Historically, two distinct lines of thought have emerged regarding the intent necessary to establish title by adverse possession in mistaken boundary cases. According to the minority or Maine rule . . . [o]ne who by mistake occupies . . . land not covered by his deed, with no intention to claim title beyond his actual boundary, wherever that may be, does not thereby acquire title by adverse possession to land beyond the true line. In contrast, the majority or Connecticut rule, based on *French* v. *Pearce*, [supra, 8 Conn. 439], recognizes adverse possession even when the occupancy began as a result of a mistaken, rather than intentional, trespass." (Citation omitted; internal quotation marks omitted.)). Although Professor Helmholz refers to "the doctrine that pure possession is what matters for purposes of determining title"; R Helmholz, supra, 346; it appears that Helmholz intends the phrase "pure possession" to refer to use of the land without *intent to take land known to be owned by another*. Indeed, Helmholz rejects the view of some commentators that " 'claim of right' " means "no more than physical occupation inconsistent with the rights of the true owner" in favor of the view that, under the Connecticut rule, possession must be accompanied by an "honest intent" to use the land as one's own. Id., 343.

In support of her claim that evidence of intent to use the property as one's own is not required, the plaintiff cites the statement of the Appellate Court in *98 Lords Highway, LLC* v. *One Hundred Lords Highway, LLC*, 138 Conn. App. 776, 54 A.3d 232 (2012), that "[t]he legal significance of the open and visible element [of adverse possession] is not . . . an inquiry as to whether a record owner subjectively possessed an understanding that a claimant was attempting to claim the owner's property as his own." (Internal quotation marks omitted.) Id., 809. That statement, however, addresses the "open and visible" element of a claim of adverse possession, which focuses on whether the use of the property was sufficiently visible and public that the *record title owner* was or should have been on notice of the use. The Appellate Court's observation in *98 Lords Highway, LLC*, does not speak to the showing necessary to establish that the claimant is in possession of the property under a claim of right, an inquiry that requires the party claiming adverse possession to establish his or her intention to use the property as its owner. The plaintiff also inaptly cites the Appellate Court's statements in *98 Lords Highway, LLC*, that "exclusive possession can be established by acts, which at the time, considering the state of the land, comport with ownership; [that is], such acts as would ordinarily be exercised by an owner in appropriating the land to his own use and the exclusion of others. . . . It is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as is consistent with the character of the premises in question." (Internal quotation marks omitted.) Id., 810. These statements again simply describe the nature of the acts that can establish that the claimant's use was exclusive, open and visible. We recognize as a general principle that a party's intent often is proved by evi-

dence of that person's actions,[27] and a party claiming adverse possession may seek to establish the requisite intent by reference to *acts* evidencing a claim of ownership, but this evidentiary point does nothing to remove the requirement to establish such intent.

The trial court correctly determined that the plaintiff was required to prove that she and her predecessors in title subjectively intended to use the property as their own to establish her claim of adverse possession.

B

We next address the plaintiff's claim that the trial court's determination that she failed to establish the elements of adverse possession was so intertwined with its incorrect conclusion that she was required to establish that she had repudiated her right by deed to pass and repass over the parcel that it cannot stand as an independent ground for affirmance. The argument is without merit.

We find more than adequate evidence in the record to support each and every finding of the trial court undergirding its rejection of the plaintiff's various claims proffered to establish adverse possession. Many of these findings are recited earlier in this opinion and will not be repeated here, but the following points well illustrate that the court's conclusions rest on a solid evidentiary basis. With respect to Stephen and Anne Bradley's repair of the seawall in front of the parcel in the late 1990s, the trial court noted that the permit

[27] See, e.g., *State* v. *Campbell*, 328 Conn. 444, 546, 180 A.3d 882 (2018) ("[D]irect evidence of . . . state of mind is rarely available. . . . Therefore, intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom." (Internal quotation marks omitted.)); see also *Pimental* v. *River Junction Estates, LLC*, 207 Conn. App. 361, 370, 263 A.3d 847 (2021) ("the intention to dedicate the way to public use may be implied from the acts and conduct of the owner, and public acceptance may be shown by proof of the actual use of the way by the public" (internal quotation marks omitted)).

application package that the Bradleys submitted to various government agencies contained "no assertion of [their] exclusive ownership of the parcel." Indeed, the Bradleys' engineer noted in his letter to the defendant, a copy of which was sent to the Bradleys, that the "most probable owner" of the parcel was either the town of East Lyme or the defendant, and he sought the defendant's "endorsement" of the project, which it provided. The trial court questioned why the Bradleys would have asked their neighbors to share the expense of the repairs to the seawall in front of the parcel if they were acting under a claim of ownership.

With respect to the septic system, the court found that the limited evidence presented by the plaintiff was insufficient to establish the circumstances of its installation but that it was suggestive of a permissive use. Moreover, as the court observed, because the septic system was underground, it was not a visible or notorious use of the parcel. It certainly cannot be said that the evidence regarding the septic system provides clear and convincing evidence of adverse possession.

The evidence pertaining to the planting of the evergreen trees adds no meaningful support to the plaintiff's claim. The trial court concluded that this particular evidence showed that Stephen Bradley and Anne Bradley, "by their words and conduct, recognized that title to the parcel was in another," i.e., that they had no intent to use the property as their own.[28] Specifically,

[28] As we indicated, a claimant who knows that another person has title to the property still may have the intent to use a property as his or her own. There may be circumstances, however, under which evidence of a claimant's knowledge that another person has title to the property can support an inference that the claimant did not intend to use the property as his or her own. In the present case, in light of Stephen Bradley's and Anne Bradley's involvement with the defendant and their knowledge of the defendant's concern with preserving the various rights of way, their knowledge that the parcel was owned by the defendant supports the inference that they did not intend to use it as their own.

the court referred to the series of letters and board minutes showing that the Bradleys were aware that the defendant's position was that it would remove the trees if, at any time, they interfered with the right of way over the parcel, and that the Bradleys did nothing to disabuse the defendant of that belief. Indeed, the court noted that Scott Bradley and John Bradley testified that they and their parents always had understood that they did not own the parcel and that "anybody [could] use it," although Scott Bradley was surprised, at the time that they sold the property to the plaintiff, at how wide the parcel was. (Internal quotation marks omitted.)

With respect to the gravel parking area that encroached on the parcel, the trial court found that the Bradleys did not use the area on a daily basis, but only when they had large gatherings, and that the use of the area to park did not block the right of way. Accordingly, the court concluded that that use was not inconsistent with the defendant's ownership of the parcel. The court further found that the Bradley siblings had agreed to a reduction in the purchase price of $68,000 due, in part, to the need to reconfigure the parking area so that it would be located on the plaintiff's property, with the driveway located over the parcel. In addition, and significantly in our view, the court found that other owners of property abutting the rights of way leading to the shore used the rights of way in a similar manner.

Similarly, nothing in the record leads us to doubt the trial court's conclusions regarding the maintenance of the lawn by the plaintiff's predecessors in title and the installation of the birdbath. The court found that there was only limited evidence as to how the shorefront residents of Old Black Point had shared the expense for mowing their lawns, including the rights of way and the seventy-five foot reservation, and that there was no evidence that the Bradleys had acted any differently from the other property owners. The court concluded

that this evidence did not constitute "clear and convincing evidence supporting [the plaintiff's] adverse possession claim," and we agree. The court also found that there was no evidence as to who had installed the birdbath or when it was installed and that, in any event, it was only thirty-six inches in diameter and not a substantial structure that could give rise to a claim of adverse possession of the entire parcel.

The foregoing findings formed the primary basis of the trial court's conclusion that the plaintiff had failed to establish adverse possession because her predecessors' use of the parcel was not hostile, open and notorious. Neither the court's factual findings nor its corresponding legal conclusion was affected in any respect by the court's erroneous application of the repudiation doctrine.

Additional findings of the trial court relating to still more distant historical events further undermined the plaintiff's claim of adverse possession. During the 1920s and 1930s, Bond's heirs, some of whom were active in the defendant's predecessor association, were concerned that the rights of way might be subject to claims of adverse possession. In a letter dated February 8, 1930, one of the heirs, Attorney Stephen Bond, wrote to all of the Old Black Point lot owners expressing his view that the rights of way should be kept open and stating that "[a] true reflection of community spirit and wishes helps in deciding how these passways shall be treated." Stephen Bond also referred to a merestone being hurled into the sea. In response, Arthur Francis, apparently an owner of property located at Old Black Point, indicated in a letter to Stephen Bond that the merestone had not been moved but merely "lower[ed]" by "Miss Bradley," or Mary Tremaine Bradley. The trial court concluded that the heirs of Norman J. Bond and the defendant's predecessor had expressed an intent in this correspondence "to maintain [the rights of way]

for the benefit of the community of owners of lots in the development . . . . They also strove to be neighborly in the maintenance of their control and ownership of the rights of way."

The trial court found that the plaintiff had presented no evidence that Mary Tremaine Bradley "acted in a way inconsistent with her easement over the parcel" and that her conduct with respect to the parcel "was similar to the conduct of other shorefront lot owners in the neighborhood" with respect to the rights of way abutting their properties. In other words, because Mary Tremaine Bradley's activities on the parcel, such as the reconstruction of the seawall and lawn after the 1938 hurricane, which was paid for by her and her neighbor, were consistent with the prevailing "community spirit" at Old Black Point and the actions of other property owners abutting the various rights of way, the activities did not evince an intent to use the property as her own. See 3 Am. Jur. 2d, supra, § 41, p. 127 ("[when] there is a close and cooperative relationship between the record owner and the person claiming title through adverse possession, a presumption of hostility may not apply"); see also *Rudder* v. *Mamanasco Lake Park Assn., Inc.*, supra, 93 Conn. App. 777–78 ("to establish the requisite notice of their hostile claim to the disputed area, the [claimants must] do something more than what was customary throughout the neighborhood and regarded as permissive use").

These findings, regarding the words and conduct of Stephen Bradley and Mary Tremaine Bradley almost one century ago, indicate either that the plaintiff's right by deed to pass and repass over the parcel included the implied right to maintain the parcel in various ways for the benefit of all of the property owners entitled to use the right of way, or that the plaintiff's predecessors in title had an implied license to use the parcel in a manner that was customary in the neighborhood and

regarded as permissive. In neither event could the trial court's legal error regarding the repudiation doctrine have impacted the necessary conclusion that the plaintiff had failed to establish adverse possession.[29]

On the basis of the foregoing, we reject the plaintiff's claim that the trial court's conclusion that she failed to establish adverse possession of the parcel by clear and convincing evidence cannot stand as a ground for the court's decision, independent of the court's incorrect determination that the plaintiff was required to establish that she and her predecessors in title had repudiated their right by deed to pass and repass over the parcel. The court plainly, and reasonably, found with respect to each of the plaintiff's claims that she had not established all of the elements of adverse possession, specifically, she failed to establish that she and her predecessors in title had "actual, open, adverse occupancy and possession of the controverted property, claiming it as [their] own . . . and actually excluding all other persons from its possession, for an uninterrupted period of fifteen years." (Internal quotation marks omitted.) *O'Connor* v. *Larocque*, supra, 302 Conn. 580–81.

III

The plaintiff claims that the trial court incorrectly determined that she slandered the defendant's title to the parcel under § 47-33j when she filed the notice of her claim of adverse possession of the parcel on the land records. We conclude that the defendant failed to establish its claim of slander of title as a matter of law.

The clearly erroneous standard applies to our review of the factual findings underlying the determination that

[29] In other words, although the plaintiff was not required to establish that her predecessors in title had repudiated their right by deed to pass and repass over the parcel in order to establish adverse possession, she was required to establish that any more extensive use of the parcel was not impliedly permitted, which she failed to do.

a defendant has committed slander of title under § 47-33j by making a defamatory statement with knowledge of its falsity or in reckless disregard of the truth. See *Fountain Pointe, LLC* v. *Calpitano*, 144 Conn. App. 624, 655, 76 A.3d 636 ("[w]hether a defendant has knowledge of the falsity of a defamatory statement is a question within the province of the trier of fact" (internal quotation marks omitted)), cert. denied, 310 Conn. 928, 78 A.3d 147 (2013); see also id., 636 (when factual basis of court's decision is challenged, court must determine whether facts are clearly erroneous). When the underlying facts are undisputed, however, whether those facts satisfy the applicable legal standard is a question of law subject to plenary review. Cf. *Burns* v. *Adler*, 325 Conn. 14, 33, 155 A.3d 1223 (2017) (although question of whether party acted in bad faith is question of fact subject to review for clear error, "whether undisputed facts meet the legal standard of bad faith is a question of law" subject to plenary review). Whether a legal position taken by a party accused of slander of title is reasonable also presents a question of law. Cf. *Morris* v. *Paul Revere Life Ins. Co.*, 109 Cal. App. 4th 966, 973, 135 Cal. Rptr. 2d 718 (2003) (when issue of whether insurer acted in bad faith depends on reasonableness of insurer's legal position, issue presents "a pure question of law" subject to de novo review).

General Statutes § 47-33j provides: "No person may use the privilege of recording notices under sections 47-33f and 47-33g for the purpose of slandering the title to land. In any action brought for the purpose of quieting title to land, if the court finds that any person has recorded a claim for that purpose only, the court shall award the plaintiff all the costs of the action, including such attorneys' fees as the court may allow to the plaintiff, and in addition, shall decree that the defendant asserting the claim shall pay to the plaintiff all damages

the plaintiff may have sustained as the result of such notice of claim having been so recorded."

The elements of the statutory claim are informed by its common-law origin. See *Fountain Pointe, LLC* v. *Calpitano*, supra, 144 Conn. App. 655 ("[a]s there is little appellate case law regarding the actual malice element of a [statutory] slander of title claim, we turn to the precedents of common-law slander to guide our analysis"). "To establish a case of slander of title, a party must prove the uttering or publication of a false statement derogatory to the plaintiff's title, with malice, causing special damages as a result of diminished value of the plaintiff's property in the eyes of third parties. The publication must be false, and the plaintiff must have an estate or interest in the property slandered." (Internal quotation marks omitted.) Id., 652; see 3 Restatement (Second), Torts § 624, pp. 342–43 (1977) (rules on liability for publication of injurious false statements in § 623A of Restatement (Second) of Torts apply to publication of false statement disparaging another's property rights in land); 3 Restatement (Second), Torts, supra, § 623A (b), p. 334 ("[o]ne who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if . . . he knows that the statement is false or acts in reckless disregard of its truth or falsity");[30] see also 50 Am. Jur. 2d 925, Libel and Slander § 523 (2017) ("[m]alice in the making of a slanderous statement regarding the ownership of property is an essential element of a claim for slander of title").

Actual malice has a particular meaning in this context. "The proper inquiry is whether a defendant believes,

[30] As the following discussion makes clear, the type of malice necessary to establish slander of title requires a showing that the defendant either knew that the statement was false or published the statement with reckless disregard of the truth. Rather than use the term "malice" to define the required elements, the Restatement (Second) of Torts uses this alternative formulation, but the required showing is the same.

honestly and in good faith, in the truth of his statements and whether he has grounds for such belief." *Gambardella* v. *Apple Health Care, Inc.*, 291 Conn. 620, 638, 969 A.2d 736 (2009). "[A]ctual malice requires a showing that a statement was made with knowledge that it was false or with reckless disregard for its truth. . . . A negligent misstatement of fact will not suffice; the evidence must demonstrate a purposeful avoidance of the truth. . . . Further, proof that a defamatory falsehood has been uttered with bad or corrupt motive or with an intent to inflict harm will not be sufficient to support a finding of actual malice . . . although such evidence may assist in drawing an inference of knowledge or reckless disregard of falsity." (Citations omitted; internal quotation marks omitted.) Id., 637–38. Acting with "reckless disregard" of the truth in this context means recording a notice "despite [having] a high degree of awareness of probable falsity or entertaining doubts as to its truth." 50 Am. Jur. 2d, supra, § 523, pp. 925–26.

"Malice is not present, for purposes of an action for slander of title, [when] the allegedly slanderous statement regarding the title of property, although false, was made in good faith and with probable cause for believing it or with a reasonable belief in its veracity. . . . The malice necessary for a slander of title action also does not exist when the offending party's actions rest on a rational, yet incorrect, interpretation of law." (Footnotes omitted.) Id., § 523, pp. 927–28; see *Hicks* v. *Early*, 235 Ark. 251, 254, 357 S.W.2d 647 (1962) ("Malice may not be inferred from a mistake of law honestly made. . . . The evidence of malice must support the reasonable inference that the representation not only was without legal justification or excuse, but was not innocently made." (Internal quotation marks omitted.)); *Whildin* v. *Kovacs*, 82 Ill. App. 3d 1015, 1016, 403 N.E.2d 694 (1980) ("if the [claimant] . . . has reasonable grounds to believe that he has title or a claim to the

property, he has not acted with malice"); *Anton, Sowerby & Associates, Inc.* v. *Mr. C's Lake Orion, LLC*, 309 Mich. App. 535, 549, 872 N.W.2d 699 (2015) ("slander of title is not established when premised on a rational interpretation of law").

In the present case, the trial court concluded that the claim of adverse possession that the plaintiff made in the notice of claim that she recorded on the East Lyme land records was made with a reckless disregard for its truth. In support of this conclusion, the court found, most significantly, that the title affidavit that the Bradley siblings' representative presented at the closing showed that the plaintiff was aware that the Bradley siblings knew that they did not have title to the parcel and, therefore, must have known that their "use of the parcel was not with the intent to use [it] exclusively as their own." The court also observed that Grandjean, one of the lawyers consulted by Dowling Sr. had informed his client (whose knowledge the court imputed to the plaintiff) that Anne Bradley participated in the defendant's board meetings in the mid-1970s during the period when Marrion, the defendant's attorney, acquired the interests of the Bond heirs in the rights of way and then conveyed those interests to the defendant. In addition, the court observed that Dowling Sr. "ignored the import of a permissive user seeking to adversely possess the fee of the easement" after Grandjean expressed his concerns about the fact that the Bradley family had had a deeded right to pass and repass over the parcel. Finally, the court observed that Grandjean indicated to Dowling Sr. that Marrion had done "a workmanlike job" in identifying the heirs of Norman J. Bond and having their interests in the parcel transferred to the defendant in the 1970s.[31] (Internal quotation marks

[31] The trial court further observed the following additional facts in support of its conclusion that the plaintiff acted with reckless disregard for the truth: the deed to the property indicated that it was bounded to the east by a "right of way 40 feet wide" and granted the plaintiff an easement over the parcel; the Bradley siblings had reduced the sale price of the property by

omitted.) The trial court concluded that the plaintiff's awareness of the facts that her predecessors in title knew that the defendant had record title to the parcel[32] and never intended to use the parcel as their own established that the plaintiff's claim of adverse possession was knowingly false.

We do not take these factual findings lightly; nor do we brush aside their legal significance without due consideration. The evidence, as developed at trial, established that the plaintiff had a weak, even unwinnable, claim of adverse possession. Some of that evidence was known to the plaintiff or her husband before the plaintiff filed the notice of her claim of adverse possession on the land records, and most of the relevant facts could or should have been known prior to that time. The sticking point here, however, is that the plaintiff's claim of adverse possession was premised on an incorrect *legal* theory, namely, the proposition that a claimant's lack of subjective intent to use the property as

$68,000 in lieu of resolving "certain issues relating to the location of the driveway on the property, and the condition of the seawall"; (internal quotation marks omitted); and Dowling Jr. was aware before the sale of the defendant's position that it had title to the parcel. The court also reiterated its findings rejecting the plaintiff's claims that the specific uses of the parcel by the plaintiff's predecessors in title established adverse possession.

[32] The fact that a claimant knew that he or she did not have record title to the land at issue, standing alone, is not fatal to a claim of adverse possession. See *French* v. *Pearce*, supra, 8 Conn. 443 ("[i]f [the claimant] intends a wrongful disseisin, his actual possession for fifteen years, gives him a title"); *Eberhardt* v. *Imperial Construction Services, LLC*, 101 Conn. App. 762, 768, 923 A.2d 785 ("[a] claim of right does not necessarily mean that the adverse possessor claims that it is the proper titleholder, but that it has the intent to disregard the true owner's right to possession" (internal quotation marks omitted)), cert. denied, 284 Conn. 904, 931 A.2d 263 (2007). As we explained in part II of this opinion, for purposes of establishing a claim of right, the claimant's subjective intent to use the land as his or her own is dispositive. We agree with the trial court, however, to the extent that it concluded that a claimant's knowledge that he or she did not have title to the land may, in appropriate circumstances, support a finding that the claimant did not intend to use the land as his or her own.

his or her own is not fatal to a claim of adverse possession—and that legal theory was endorsed, and perhaps even generated, by her attorneys. On the basis of advice from her attorneys, including Merriam, the plaintiff believed that she could establish adverse possession by showing that she and her predecessors in title used the property in a manner that objectively evinced ownership, regardless of their subjective beliefs regarding actual ownership. In other words, the plaintiff's claim was based on the mistaken premise that a person may adversely possess land *by accident*.

The source of this error is clear from Merriam's letter to Dowling Sr., outlining the reasoning that would support the plaintiff's claim of adverse possession. This document was written "as a forceful statement" advocating the plaintiff's "best case," not as a neutral opinion letter, but it plainly was not intended to misrepresent the facts or the law; to the contrary, it purported to adhere to the facts, as known to the author, and, more important for present purposes, the letter contained extensive legal citations in support of various legal propositions that plainly were intended to present the client with a true and accurate portrayal of Connecticut law governing adverse possession. In particular, the letter demonstrates without any doubt that the author was aware that the Bradleys disavowed any claim of ownership of the parcel.

After reviewing the facts that had been made known to him, Merriam discussed the law of adverse possession and its component elements, and then applied each aspect of the law to the facts to reach a conclusion arguing that each respective element of adverse possession was established in this case. The letter did not stop there. Merriam proceeded to address two of the arguments against adverse possession that had been raised by the defendant by that point in time, one of which was the claim that the Bradleys never claimed

ownership of the parcel. This portion of the letter appears under a separate heading entitled "*Anne Bradley's alleged opinion regarding the* [*p*]*arcel does not affect your adverse possession*." (Emphasis in original.) Merriam provides the following advice in this part of the letter: "Determining adverse possession is an objective test based on the adverse possessor's actions, not his or her subjective personal opinions. Thus . . . the nature of the possession is the sole inquiry, not the possessor's subjective intent, since a claimant may acquire title by adverse possession 'even though the possessor knows that he is wholly occupying without right; all that is necessary to prove is that there was a user as of right, that is, one in disregard of any rights of the holder of the legal title.' [*Ruick* v. *Twarkins*, 171 Conn. 149, 158, 367 A.2d 1380 (1976).] In 2007 . . . Morris, counsel for [the defendant], asserted that Anne Bradley, a prior owner of the [p]roperty, was an active member of [the defendant] and, as such, apparently understood the importance of 'exterior [rights of way]' to the [defendant], and that, ostensibly, this knowledge prevented her from adversely possessing the [p]arcel. Similarly . . . Groark, [p]resident of [the defendant], asserted in a letter that Scott Bradley stated that his family did not believe they owned the [p]arcel but had built the seawall on that portion to protect the [p]roperty and mowed the [p]arcel 'but not under a claim of ownership.' These statements may be hearsay. Even if . . . Groark's hearsay report of the subjective opinions of the Bradleys is accurate, those opinions are not probative because the [Bradley siblings'] *actions*, and the actions of other predecessors in title in using and dominating the [p]arcel, especially in leveling, backfilling, and maintaining a unified lawn, objectively demonstrate the intent to use the [p]arcel as their own, thereby establishing adverse possession." (Emphasis in original.)

Two things are clear from this evidence. First, the plaintiff's lawyer knew, at the time he drafted his letter,

that there was significant evidence in the defendant's possession indicating that the Bradley family had not used the parcel under a claim of ownership. Merriam may not have known the *extent* of that evidence because it appears that Dowling Sr. had not provided him with the affidavit of title from the closing, but the specific issue clearly had been brought to his attention, and it was directly addressed by him in a portion of the letter explicitly devoted to that very issue. Second, regardless of the volume of evidence regarding the states of mind of the Bradleys with respect to ownership, Merriam considered that evidence legally irrelevant. He advised his clients in no uncertain terms that the various family members' "subjective opinions" about the ownership of the land and the nature of their own use of it were "not probative because the [Bradley siblings'] *actions*, and the actions of other predecessors in title in using and dominating the [p]arcel . . . objectively demonstrate the intent to use the [p]arcel as their own, thereby establishing adverse possession."[33] (Emphasis in original.)

As we previously explained in our discussion of the relevant legal principles, Merriam (and the plaintiff's other lawyers) were and remain incorrect on this legal point. A claimant may adversely possess land through *mistake*, i.e., with the mistaken belief that the claimant

[33] In addition, as we indicated; see footnote 24 of this opinion; the plaintiff's attorneys—Wesley W. Horton and Brendon P. Levesque of Horton, Dowd, Bartschi & Levesque, P.C., and Louis B. Blumenfeld of Cooney, Scully and Dowling—filed a motion in limine before trial, in which they asked the trial court to exclude all evidence of anyone's subjective intention with respect to the use and ownership of the parcel on the ground that such intent is irrelevant for purposes of establishing the elements of adverse possession under *French* v. *Pearce*, supra, 8 Conn. 439. Moreover, the plaintiff's trial attorneys, Blumenfeld and Lorinda S. Coon of Cooney, Scully and Dowling, argued in their posttrial brief to the trial court that the rule in Connecticut "is an objective test of adverse possession based simply on occupancy without consent." Thus, two respected law firms evidently labored under the same misapprehension regarding Connecticut law on this particular point.

owned the land at issue, but Connecticut cases also make it clear that a subjective *intent to use the land as one's own*—i.e., under a claim of right—is an essential element of adverse possession.[34] The fact that we have concluded that this legal position is *wrong*, however, does not mean that the position was so irrational that no reasonable attorney could propound it. See 50 Am. Jur. 2d, supra, § 523, p. 928 ("[t]he malice necessary for a slander of title action . . . does not exist when the offending party's actions rest on a rational, yet incorrect, interpretation of law"). In support of their position, the plaintiff's attorneys relied on this court's statement in *French* v. *Pearce*, supra, 8 Conn. 443, "that it is the visible and adverse possession, with an intention to possess, that constitutes its adverse character, and not the remote views or belief of the possessor." Although this court expressly disavowed the plaintiff's reading of *French* in *Horowitz*—while tacitly recognizing that that reading was not entirely unreasonable—neither the defendant nor the trial court cited *Horowitz*; rather, they relied only on subsequent case law that is *implicitly* inconsistent with *French*. We further note that a number of other jurisdictions appear to have adopted the rule urged by the plaintiff. See footnote 25 of this opinion. We conclude, therefore, that, although the plaintiff's claim of adverse possession was, in our view, quite weak, both factually and legally, the claim was at least colorable in light of her mistaken but not entirely unreasonable position that she was not required to establish that her predecessors in title had any subjective intent to use the land as their own to establish the "under a claim of right" element of the claim.[35] Because the

[34] See part II A of this opinion; see also *Horowitz* v. *F. E. Spencer Co.*, supra, 132 Conn. 377.

[35] Having concluded that the malice necessary to establish slander of title did not exist because the plaintiff's attorneys' belief that a subjective intent to use the property as one's own is not an element of adverse possession was not irrational, albeit incorrect, we need not consider whether the trial court properly rejected the plaintiff's advice of counsel defense on the ground that the plaintiff failed to disclose all relevant facts to her attorneys,

plaintiff's awareness that her predecessors in title knew that they did not own the parcel and had no intent to use it as their own[36] was not inconsistent with her legal theory, and because her legal theory, although wrong, was not entirely unreasonable, we conclude that, as a matter of law, the trial court incorrectly determined that the plaintiff had acted with actual malice when she filed the notice of her claim of adverse possession of the parcel pursuant to § 47-33f.

including the $68,000 reduction in the purchase price related to the exclusion of the parcel, the title affidavit indicating that the property's parking area and driveway encroached on the parcel and Grandjean's "stumbling blocks" letter. See *Verspyck* v. *Franco*, 274 Conn. 105, 112, 874 A.2d 249 (2005) ("full and fair disclosure of material facts [is] required by the advice of counsel defense"). In other words, even if we were to attribute her attorneys' states of mind to the plaintiff, they were not acting with the requisite malice. As we suggested, however, all of the withheld information went to the plaintiff's knowledge that (1) the Bradley siblings knew that they did not own the parcel, and (2) none of her predecessors in title had intended to use the parcel as their own. Because the plaintiff's attorneys believed that she could establish adverse possession, even in the absence of such intent, the withheld information was not material. See id., 114 (defendant was not entitled to advice of counsel defense when "the fact finder reasonably could have concluded that [the] omitted facts were material").

[36] We assume for purposes of this opinion that the trial court properly found that the plaintiff was aware before recording her notice of claim that her predecessors in title had no intent to use the parcel as their own. We note, however, that "[a]dverse possession claims are highly fact and context specific." *Rudder* v. *Mamanasco Lake Park Assn., Inc.*, supra, 93 Conn. App. 775. Although the plaintiff clearly was aware of some of the evidence supporting the conclusion that the Bradleys had no intent to use the property as their own before she filed the notice, she would not necessarily have known that that evidence would not be undermined or controverted by other evidence. For example, although the plaintiff was aware of certain evidence that the Bradley siblings, Stephen Bradley, and Anne Bradley knew that they did not have title to the parcel, there was other evidence that, at least conceivably, and without preknowledge of all of the evidence that would be presented at trial, could support a finding that the Bradleys subjectively intended to use the parcel as their own. This evidence includes Scott Bradley's letter to the defendant indicating that, as the result of his family's use of the parking area encroaching on the parcel, the doctrine of adverse possession might present legal issues "not favorable to the approach [that the defendant] is currently pursuing." Thus, even if the plaintiff had applied

Moreover, although evidence of a bad or corrupt motive or an intent to inflict harm is not required to establish a slander of title claim, lack of such a motive or intent may be probative. See *Fountain Pointe, LLC* v. *Calpitano*, supra, 144 Conn. App. 655–56 ("proof that a defamatory falsehood has been uttered with [a] bad or corrupt motive or with an intent to inflict harm will not be sufficient to support a finding of actual malice . . . although such evidence may assist in drawing an inference of knowledge or reckless disregard of falsity" (internal quotation marks omitted)). It is difficult in the present case to perceive what the plaintiff would have had to gain by recording a notice of a knowingly false claim of adverse possession on the land records. The trial court found that the plaintiff was "determined to acquire fee to the parcel by negotiation or litigation," but the recording of the notice of claim would have placed little, if any, pressure on the defendant to negotiate or settle the issue of ownership in favor of the plaintiff because there is no evidence that the recording of the notice interfered with the defendant's right to use the parcel or with any plans to transfer title to it. There is also no evidence that the notice interfered in any way with the rights of neighboring landowners to pass and repass over the parcel. As far as the evidence shows, the plaintiff's sole motive in recording the notice was to prevent her claim of adverse possession from being extinguished by operation of the MTA. We conclude, therefore, that the trial court incorrectly determined that the defendant established its counterclaim for slander of title under § 47-33j.[37]

the proper legal standard, it is not entirely clear to us that her claim of adverse possession would have been in reckless disregard of the truth.

[37] Because the defendant cannot prevail on its counterclaim for slander of title under § 47-33j, it was not entitled to attorney's fees and costs pursuant to that statute. We therefore need not address the plaintiff's claim that the trial court improperly included attorney's fees and costs for defending the plaintiff's quiet title action.

The judgment is reversed insofar as the trial court found in favor of the defendant on its counterclaim for slander of title, the case is remanded with direction to render judgment for the plaintiff on that claim, and the award of attorney's fees and costs is vacated; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.