# ROBERT GOGUEN *v.* COMMISSIONER OF CORRECTION (SC 20482)

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

*Syllabus*

In accordance with this court's decision in *Simms* v. *Warden* (230 Conn. 608), when a habeas court denies certification to appeal from its judgment or ruling, a petitioner may obtain appellate review only if he or she demonstrates, first, that the habeas court's denial of the petition for certification to appeal constituted an abuse of discretion and, second, that the habeas court's judgment or ruling should be reversed on its merits.

The self-represented petitioner, who had been convicted in 1996, pursuant to a guilty plea, of sexual assault in the second degree, sought a writ of habeas corpus, claiming that he should be allowed to withdraw that plea. The petitioner's prison sentence and period of probation imposed in connection with his 1996 conviction had concluded before he filed his habeas petition. At the time he filed his habeas petition, however, he was incarcerated in Maine because of a violation of the conditions of supervised release that were imposed as a result of a 2012 conviction under federal law for failing to register as a sex offender, a requirement that was imposed on the basis of his 1996 conviction. The habeas court declined to issue the writ for lack of jurisdiction and rendered judgment thereon, concluding that the petitioner was not in the custody of the respondent, the Commissioner of Correction, as a result of the 1996 conviction when he filed his habeas petition. The petitioner filed a petition for certification to appeal from the habeas court's judgment

* This case originally was argued before a panel of this court consisting of Chief Justice Robinson and Justices McDonald, D'Auria, Kahn, Ecker and Keller. Thereafter, Justice Mullins was added to the panel and has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

pursuant to statute (§ 52-470 (g)), which the habeas court denied, and the petitioner appealed to the Appellate Court. In his Appellate Court brief, the petitioner claimed that the habeas court had incorrectly determined that he was not in the custody of the respondent and that he should be allowed to withdraw his 1996 guilty plea because it was made unintelligently and involuntarily. The petitioner did not allege that the habeas court had abused its discretion in denying his petition for certification to appeal and did not ask the Appellate Court to construe his argument on the merits as a demonstration of the habeas court's abuse of discretion in denying the petition for certification. The Appellate Court dismissed the petitioner's appeal, concluding that the petitioner failed to brief the threshold issue of whether the habeas court had abused its discretion in denying his petition for certification to appeal. On the granting of certification, the petitioner appealed to this court. *Held*:

1. The Appellate Court properly dismissed the petitioner's appeal from the habeas court's judgment on the ground that the petitioner failed to allege or demonstrate in his brief submitted to the Appellate Court that the habeas court had abused its discretion in denying his petition for certification to appeal; to obtain appellate review when a habeas court denies a petition for certification to appeal, the petitioner must at least allege that the habeas court had abused its discretion in denying his or her petition for certification to appeal, either by expressly arguing specific reasons why the habeas court abused its discretion in denying certification or by expressly alleging that his or her argument on the merits demonstrates an abuse of discretion, and there is no exception to such requirement for self-represented petitioners, as to hold otherwise would render both § 52-470 (g) and the two part showing required by *Simms* meaningless.
2. To ensure that the courthouse doors are not shut on potentially meritorious claims as a result of a technicality or an understandable ignorance of procedures, this court exercised its supervisory authority to direct that the Judicial Branch's Notice of Appeal Procedures (Habeas Corpus) form be revised to include language that explicitly describes the requirement that a petitioner expressly claim in his or her appellate brief that the habeas court abused its discretion when it denied his or her petition for certification to appeal and explain how that discretion was abused.
3. Even if the Appellate Court had considered the petitioner's arguments regarding the merits of his claim that the habeas court incorrectly determined that he was not in the respondent's custody when he filed his habeas petition, those arguments did not support the petitioner's claim, made for the first time in his appeal to this court, that the habeas court had abused its discretion in denying his petition for certification to appeal: contrary to the petitioner's claim, the United States Supreme Court's decision in *Lackawanna County District Attorney* v. *Coss* (532 U.S. 394) does not permit a habeas petitioner to file a habeas petition that solely and directly challenges a conviction for which the petitioner

is no longer serving the sentence imposed in connection with that conviction; moreover, the petitioner was not in custody for his 1996 conviction on the ground that he was required to register as a sex offender as a result of that conviction, as the sex offender registration requirement is remedial rather than punitive and, therefore, was not a part of his sentence but was a collateral consequence of his conviction, which generally is insufficient to satisfy the requirement that a habeas petitioner be in custody for purposes of filing a habeas petition.

Argued March 24—officially released December 23, 2021**

*Procedural History*

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Oliver*, *J.*, rendered judgment declining to issue a writ of habeas corpus; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Alvord* and *Moll*, *Js.*, which dismissed the appeal, and the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

*Robert Goguen*, self-represented, the appellant (petitioner).

*James A. Killen*, senior assistant state's attorney, with whom, on the brief, was *David S. Shepak*, former state's attorney, for the appellee (respondent).

*Opinion*

MULLINS, J. The issue before us in this certified appeal is whether the Appellate Court properly dismissed the appeal of the petitioner, Robert Goguen, from the judgment of the habeas court on the ground that he failed in his brief to the Appellate Court to brief the claim that the habeas court had abused its discretion in denying his petition for certification to appeal pursu-

** December 23, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

ant to General Statutes § 52-470 (g).[1] The petitioner, proceeding as a self-represented party, filed a petition for a writ of habeas corpus challenging his 1996 conviction, pursuant to a guilty plea, of sexual assault in the second degree. The habeas court declined to issue the writ for lack of jurisdiction on the ground that the petitioner was not in the custody of the respondent, the Commissioner of Correction. The petitioner then filed a petition for certification to appeal to the Appellate Court pursuant to § 52-470 (g), which the habeas court denied.

Notwithstanding that ruling, the petitioner appealed to the Appellate Court, challenging the merits of the habeas court's ruling declining to issue the writ of habeas corpus. *Goguen* v. *Commissioner of Correction*, 195 Conn. App. 502, 503, 225 A.3d 977 (2020). The Appellate Court dismissed the appeal on the ground that the petitioner failed to brief any claim that the habeas court had abused its discretion in denying his petition for certification to appeal. See id., 505. This court then granted the petitioner's petition for certification to appeal from the judgment of the Appellate Court on the following issue: "Did the Appellate Court properly dismiss the self-represented petitioner's appeal because he failed to brief whether the habeas court had abused its discretion in denying his petition for certification to appeal?" *Goguen* v. *Commissioner of Correction*, 335 Conn. 925, 234 A.3d 980 (2020).

[1] General Statutes § 52-470 (g) provides: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies."

Our task in this appeal is to harmonize the legislative mandate of § 52-470 (g) that no appeal may be taken from a habeas court's judgment unless certification is granted with this court's interpretation of that statute in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994) (*Simms II*), which provides guidance on the procedure to be followed when a habeas court denies certification to appeal. In light of the statutory requirement, we explained in *Simms II* that, if a habeas court denies certification to appeal, a petitioner may obtain review only if he makes a "two part showing" on appeal: first, as a threshold matter, he must "demonstrate that the habeas court's ruling constituted an abuse of discretion," and, second, "[i]f the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits." Id. What *Simms II* leaves unclear is what exactly is required of an appellant to satisfy the threshold showing of an abuse of discretion before plenary review of the merits by a reviewing court is warranted.

As we discuss more fully in this opinion, the Appellate Court has concluded in several cases that the petitioner can satisfy the threshold requirement by expressly alleging in his brief that the arguments on the merits of the appeal demonstrate that the habeas court abused its discretion in denying the petition for certification to appeal. Conversely, the Appellate Court has held that, when a petitioner fails to expressly allege or brief that the denial of certification was an abuse of discretion and simply briefs the merits of his underlying claim without any reference to the requirement of *Simms II*, the petitioner's appeal must be dismissed. See part I of this opinion.

We conclude that, in order to make sense of the statutory requirement and *Simms II*, a petitioner must at least expressly allege and explain in his brief how

the habeas court abused its discretion in denying certification. We recognize, just as the Appellate Court has, that this may be done by expressly referring the reviewing court to the portion of the brief addressing the merits of the appeal and pointing out that, if the appeal is successful on the merits, then an abuse of discretion necessarily has been demonstrated. The petitioner must at least do that, however, in order to comply with the statute and *Simms II*.

The petitioner may not simply disregard the requirement of *Simms II* and brief only the merits of the underlying claim without any effort to comply with the "two part showing" required by *Simms II*, which includes the discrete question of whether the habeas court abused its discretion in denying certification. *Simms* v. *Warden*, supra, 230 Conn. 612. In this appeal, the petitioner never expressly alleged that the habeas court abused its discretion in denying certification to appeal. He argued only that the habeas court erred in declining to issue the writ. Accordingly, the Appellate Court's dismissal of his appeal appropriately adheres to the dictates of § 52-470 (g) and *Simms II* and its progeny, and must be affirmed.

The record reveals the following undisputed facts and procedural history. In 1996, the petitioner was convicted, after entering a guilty plea, of sexual assault in the second degree in violation of General Statutes (Rev. to 1995) § 53a-71 (a) (3). The petitioner was sentenced on October 25, 1996, to ten years in prison, execution suspended after four years, and five years of probation. Thereafter, in 1998, the legislature passed legislation, now codified at General Statutes § 54-250 et seq., requiring persons who have been convicted of certain sexual offenses, including the petitioner's offense, to register as sex offenders. See Public Acts 1998, No. 98-111. The legislation applied to the petitioner because he was released from prison after its effective date.

On April 11, 2017, the petitioner, proceeding as a self-represented party, filed a petition for a writ of habeas corpus, claiming, among other things, that he should be allowed to withdraw his 1996 guilty plea because, due to ineffective assistance of his counsel, his plea had not been made voluntarily. Specifically, he alleged that, while he was residing in Maine in 2012, he was convicted under federal law of failing to register as a sex offender—a requirement imposed as the result of his 1996 Connecticut conviction.[2] He further alleged that, as of the date he filed his habeas petition, he was incarcerated as a result of violating the conditions of supervised release that were imposed on him under federal law as a result of the federal 2012 conviction.

Pursuant to Practice Book § 23-24 (a),[3] the habeas court declined to issue a writ for lack of jurisdiction because, at the time that the petitioner filed the petition, he was no longer in the custody of the respondent as a result of the 1996 conviction.[4] Although the habeas court did not elaborate on its basis for this determination,[5] it is undisputed that neither the petitioner's term

[2] Neither party has briefed the various state and federal laws that required the petitioner to register as a sex offender while he was residing in Maine in 2012; and we do not address that issue, as it is not relevant to the issues before us on appeal.

[3] Practice Book § 23-24 (a) provides in relevant part: "The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that:

"(1) the court lacks jurisdiction . . . ."

[4] Thereafter, the petitioner filed a "brief and memorandum of law to support consideration for authority to act and amended request to vacate." The habeas court apparently treated this motion as a motion for reconsideration of its ruling declining to issue a writ, and it granted the motion but denied the requested relief. The petitioner then filed an "amended request to vacate." The habeas court took no action on that motion but referred the parties to its ruling denying the relief requested by the petitioner in his initial motion.

[5] The habeas court issued a summary two sentence order indicating that it was declining to issue a writ of habeas corpus because the petitioner was not in custody.

of incarceration nor his term of probation for the 1996 conviction was in effect on the date that he filed his petition for a writ of habeas corpus. The petitioner filed a petition for certification to appeal from the habeas court's judgment pursuant to § 52-470 (g), which the habeas court denied.

Despite the denial of his petition for certification, the petitioner appealed to the Appellate Court from the habeas court's judgment declining to issue a writ of habeas corpus.[6] In his brief to that court, the petitioner did not allege that the habeas court had abused its discretion in denying his petition for certification to appeal. He also did not ask the Appellate Court to construe his argument on the merits as a demonstration of the habeas court's abuse of discretion.

Instead, the petitioner claimed only that the habeas court had incorrectly determined that he was not in the custody of the respondent and that he should be allowed to withdraw his 1996 guilty plea because it was unintelligently and involuntarily made.[7] The respondent contended in his brief that the habeas court had not abused

[6] The petitioner was initially represented by counsel on appeal. Before the petitioner filed his brief with the Appellate Court, his counsel filed a motion for leave to withdraw as appellate counsel pursuant to Practice Book §§ 43-34 and 62-9 (d), and *Anders* v. *California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), which the habeas court granted. In a handwritten ruling granting that motion, the habeas court indicated that "[s]entences that are completely served cannot be attacked through habeas corpus simply because a later sentence was enhanced because of the previous conviction. *Maleng* v. *Cook*, 490 U.S. 488, 491–93 [109 S. Ct. 1923, 104 L. Ed. 2d 540] (1989); *Lebron* v. *Commissioner of Correction*, 274 Conn. 507, 510–12 [876 A.2d 1178] (2005) [overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014)]. Nor is the state's sex offender registration requirement part of the criminal sentence or judgment of conviction. *State* v. *Waterman*, 264 Conn. 484, 488–90 [825 A.2d 63] (2003). Therefore, the petitioner's claims lack any legal merit and are entirely frivolous."

[7] After the petitioner filed his initial appellant's brief, he filed an amended brief in which he raised substantially similar arguments.

its discretion in denying the petitioner's petition for certification to appeal and that it had properly declined to issue the writ.

The Appellate Court noted in a per curiam opinion that, under *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994) (*Simms I*), the petitioner was required, as a threshold matter on appeal, to "demonstrate that the denial of his petition for certification constituted an abuse of discretion." (Internal quotation marks omitted.) *Goguen* v. *Commissioner of Correction*, supra, 195 Conn. App. 504. The Appellate Court further noted that, to establish such an abuse of discretion, the petitioner was required to demonstrate that the habeas court's resolution of the underlying claim involved issues that "are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Internal quotation marks omitted.) Id.; see, e.g., *Simms* v. *Warden*, supra, 230 Conn. 616 (same). Finally, the Appellate Court noted that it had held previously that, "[i]f this burden is not satisfied, then the claim that the judgment of the habeas court should be reversed does not qualify for consideration by [the Appellate] [C]ourt." (Internal quotation marks omitted.) *Goguen* v. *Commissioner of Correction*, supra, 504. Because the petitioner had failed to brief this threshold issue, the Appellate Court declined to review the merits of the petitioner's claims and dismissed the appeal.[8] Id., 505.

The petitioner then filed a motion for reconsideration in which he claimed that the habeas court had abused its discretion when it denied his petition for certification

[8] Although the Appellate Court stated that the petitioner had failed to "brief" the claim that the habeas court abused its discretion when it denied his petition for certification to appeal; *Goguen* v. *Commissioner of Correction*, supra, 195 Conn. App. 505; there is no dispute that the petitioner failed even to make an allegation to that effect.

to appeal. In support of this claim, the petitioner argued the merits of his underlying claim that the habeas court had incorrectly determined that he was not in the respondent's custody. The Appellate Court denied the motion.

This certified appeal followed. On appeal to this court, the petitioner contends that his argument in his brief to the Appellate Court concerning the merits of his underlying claim that the habeas court incorrectly determined that it lacked jurisdiction to entertain his habeas petition because he was not in the respondent's custody "inherently demonstrate[s] that the habeas court [had] abused its discretion in . . . denying the petition for [certification to appeal]." He further contends that, because he was proceeding as a self-represented party, the Appellate Court should have liberally construed his brief on the merits as demonstrating that the habeas court had abused its discretion in denying his petition for certification for appeal, even though he had not expressly made that allegation. Accordingly, he argues, the Appellate Court incorrectly determined that he was not entitled to review of his claims on appeal.

The respondent contends that, to the contrary, the Appellate Court correctly determined that it had no authority to entertain the merits of the petitioner's appeal under § 52-470 (g), as that statute was construed by this court in *Simms I* and *Simms II*. Specifically, the respondent argues that, under *Simms II*, the petitioner must "make a *two part* showing" when the habeas court has denied his petition for certification to appeal. (Emphasis added; internal quotation marks omitted.) *Simms* v. *Warden*, supra, 230 Conn. 612. To allow a petitioner to ignore the threshold requirement of demonstrating that the habeas court abused its discretion when it denied the petition for certification, the respondent argues, would entirely eviscerate the mandate of

§ 52-470 (g) that "[n]o appeal from the judgment rendered in a habeas corpus proceeding . . . may be taken unless the appellant" petitions the habeas court for certification to appeal and the habeas court grants the petition. We conclude that the Appellate Court properly declined to review the petitioner's claims and dismissed the appeal.

I

Whether the Appellate Court had the authority to review the petitioner's claims on appeal from the judgment of the habeas court when he failed even to allege that the habeas court had abused its discretion in denying his petition for certification to appeal pursuant to § 52-470 (g) is a question of statutory interpretation over which we exercise plenary review. See, e.g., General Statutes § 1-2z (plain meaning rule); *Canty* v. *Otto*, 304 Conn. 546, 557–58, 41 A.3d 280 (2012) (general rules of construction are aimed at ascertaining legislative intent).

In *Simms I*, this court first considered the question of whether a habeas petitioner may seek appellate review of an adverse judgment of the habeas court under § 52-470 (g) when the habeas court has denied the petition for certification to appeal. See *Simms* v. *Warden*, supra, 229 Conn. 179. In that case, the habeas court dismissed the petition of the petitioner, Floyd Simms, and denied his petition for certification to appeal. Id., 179–80. The majority further determined in dictum, however, that General Statutes (Rev. to 1993) § 52-470 (b), now § 52-470 (g), did not provide that the habeas court's "denial of the requisite certification is final and dispositive." Id., 188. Rather, the majority construed the statute "to permit a disappointed habeas corpus litigant to invoke appellate jurisdiction[9] for ple-

[9] This court in *Simms I* assumed that General Statutes (Rev. to 1993) § 52-470 (b), now § 52-470 (g), implicated the appellate *jurisdiction* of the reviewing court. See *Simms* v. *Warden*, supra, 229 Conn. 186–87 (when petitioner appeals from judgment of habeas court after petition for certification has been denied, "the first issue for the appellate tribunal will necessarily

nary review of the decision of the habeas court upon carrying the burden of persuasion that denial of certification to appeal was an abuse of discretion or that an injustice appears to have been done."[10] (Footnote added.) Id., 189.

In *Simms II*, this court elaborated on the abuse of discretion standard that it had adopted in *Simms I*. Relying on the decision of the United States Supreme Court in *Lozada* v. *Deeds*, 498 U.S. 430, 431–32, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), a majority of this court concluded that a petitioner can satisfy the abuse of discretion standard by "demonstrating . . . that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Emphasis in original; internal quotation marks omitted.) *Simms* v. *Warden*, supra, 230 Conn. 616.

Thus, we explained in *Simms II* that a habeas petitioner whose petition for certification to appeal pursuant to § 52-470 (g) has been denied must "make a two

be whether it has jurisdiction to hear the appeal"). The court later clarified in *Simms II* that, in enacting the statute, "the legislature intended the certification requirement only to define the scope of our review and not to limit the jurisdiction of the appellate tribunal." *Simms* v. *Warden*, supra, 230 Conn. 615.

[10] Justice Borden authored a concurring opinion in *Simms I*, in which he opined that the majority's conclusion that a disappointed habeas litigant could still receive plenary review after certification is denied by the habeas court "could well eviscerate the limitations contained in [General Statutes (Rev. to 1993)] § 52-470 (b)" and render the denial of the petition for certification "an empty gesture . . . ." *Simms* v. *Warden*, supra, 229 Conn. 191–92 (*Borden*, *J.*, concurring). Justice Borden also opined that it was unlikely "that the 'threshold' issue [of whether the habeas court abused its discretion in denying the petition for certification] will be a jurisdictional issue that we will be able to dispose of prior to hearing the appeal on its merits. Unlike a question of whether an appeal was timely, a question of whether the habeas court abused its discretion requires an examination of the merits." Id., 192 (*Borden*, *J.*, concurring).

part showing" to prevail on appeal. Id., 612. First, the petitioner must "demonstrate that the habeas court's ruling constituted an abuse of discretion." Id. Second, "[i]f the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits." Id.; see, e.g., *McClain* v. *Commissioner of Correction*, 188 Conn. App. 70, 74, 204 A.3d 82 ("a petitioner can obtain appellate review of the dismissal of his petition for [a writ of] habeas corpus only by satisfying the two-pronged test enunciated by [the court] in [*Simms I*], and adopted in [*Simms II*]" (internal quotation marks omitted)), cert. denied, 331 Conn. 914, 204 A.3d 702 (2019).

The Appellate Court has recognized on several occasions that, "[i]n determining whether the habeas court abused its discretion in denying the petitioner's request for certification, [the court] necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Internal quotation marks omitted.) *McClain* v. *Commissioner of Correction*, supra, 188 Conn. App. 75; see, e.g., *Mercado* v. *Commissioner of Correction*, 183 Conn. App. 556, 562, 193 A.3d 671 ("[w]e examine the petitioner's underlying claim[s] of ineffective assistance of counsel in order to determine whether the habeas court abused its discretion in denying the petition for certification to appeal" (internal quotation marks omitted)), cert. denied, 330 Conn. 918, 193 A.3d 1211 (2018); *Brown* v. *Commissioner of Correction*, 179 Conn. App. 358, 364, 179 A.3d 794 (same), cert. denied, 328 Conn. 919, 181 A.3d 91 (2018); *Parrott* v. *Commissioner of Correction*, 107 Conn. App. 234, 236, 944 A.2d 437 (same), cert. denied, 288 Conn. 912, 954 A.2d 184 (2008); *Santiago* v. *Commissioner of Correction*, 90 Conn. App. 420, 424, 876 A.2d 1277 (same), cert. denied, 275 Conn. 930, 883

A.2d 1246 (2005), cert. denied sub nom. *Santiago* v. *Lantz*, 547 U.S. 1007, 126 S. Ct. 1472, 164 L. Ed. 2d 254 (2006).[11]

Nevertheless, the Appellate Court has also dismissed appeals repeatedly from decisions of the habeas court on the ground that the petitioner has failed to brief, i.e., allege and demonstrate, that the habeas court abused its discretion in denying the petition for certification to appeal. See, e.g., *Cordero* v. *Commissioner of Correction*, 193 Conn. App. 902, 902–903, 215 A.3d 1282 (dismissing appeal on ground that "petitioner neither alleged nor briefed [claim] that habeas court abused its discretion when it denied petition for certification to appeal"), cert. denied, 333 Conn. 944, 219 A.3d 374 (2019); *Thorpe* v. *Commissioner of Correction*, 165 Conn. App. 731, 733, 140 A.3d 319 (dismissing appeal on ground that "petitioner did not allege that the habeas court's denial of his petition for certification to appeal constituted an abuse of discretion until he filed his reply brief"), cert. denied, 323 Conn. 903, 150 A.3d 681 (2016); *Mitchell* v. *Commissioner of Correction*, 68 Conn. App. 1, 8, 790 A.2d 463 (dismissing appeal because petitioner failed to allege that habeas court's failure to grant certification to review denial of his petition constituted abuse of discretion), cert. denied, 260 Conn. 903, 793 A.2d 1089 (2002); *Reddick* v. *Commissioner of Correction*, 51 Conn. App. 474, 477–78, 722 A.2d 286 (1999) (dismissing appeal because petitioner claimed only ineffective assistance of counsel and did not brief question

[11] The Appellate Court expressly noted in *McClain* v. *Commissioner of Correction*, supra, 188 Conn. App. 72, *Mercado* v. *Commissioner of Correction*, supra, 183 Conn. App. 558, *Brown* v. *Commissioner of Correction*, supra, 179 Conn. App. 363, and *Parrott* v. *Commissioner of Correction*, supra, 107 Conn. App. 237, that the petitioners raised the threshold claim that the habeas court had abused its discretion when it denied their petitions for certification to appeal. There is no indication in *Santiago* v. *Commissioner of Correction*, supra, 90 Conn. App. 420, that the petitioner did not raise that claim.

of whether habeas court had abused its discretion in denying petition for certification to appeal).

We conclude that the fact that the Appellate Court may consider the merits of the petitioner's appeal in determining whether the habeas court abused its discretion when it denied the petition for certification does not mean that the petitioner can fail entirely to address that threshold issue and still obtain appellate review. This court made clear in *Simms I* that *only* by "carrying the burden of persuasion that denial of certification to appeal was an abuse of discretion or that an injustice appears to have been done" can a petitioner overcome the mandate of § 52-470 (g) that "[n]o appeal from the judgment rendered in a habeas corpus proceeding . . . may be taken" unless the habeas court grants the petitioner's petition for certification to appeal. *Simms* v. *Warden*, supra, 229 Conn. 189. In *Simms II*, we held that a petitioner can satisfy this burden *only* "by demonstrating . . . [1] that the issues are debatable among jurists of reason; [2] that a court *could* resolve the issues [in a different manner]; or [3] that the questions are adequate to deserve encouragement to proceed further." (Emphasis in original; internal quotation marks omitted.) *Simms* v. *Warden*, supra, 230 Conn. 616.

A conclusion that a habeas petitioner whose petition for certification to appeal has been denied need not even allege that the habeas court abused its discretion when it denied the petition for certification to appeal, but may obtain appellate review if he briefs only the merits of his underlying claims, would, as Justice Borden predicted in his concurring opinion in *Simms I*, "eviscerate the limitations contained in § 52-470 [g]. In effect, the denial of the petition for certification could become an empty gesture, because one does not need to be prescient to foresee that every disappointed habeas petitioner could, once his petition for certification is denied, file or perfect a direct appeal under the same

statute." *Simms* v. *Warden*, supra, 229 Conn. 192 (*Borden*, *J.*, concurring).

Accordingly, we conclude that, although the burden of obtaining appellate review of the threshold question under *Simms* and its progeny is minimal, the petitioner must at least *allege* that the habeas court abused its discretion in denying the petition for certification to appeal. The petitioner may satisfy this requirement in at least two ways.

First, the petitioner may strictly comply with the two part showing required by *Simms II* and expressly argue specific reasons why the habeas court abused its discretion in denying certification. Second, the petitioner may expressly allege that his argument on the merits demonstrates an abuse of discretion. In this second way, the petitioner at least points the court to its merits discussion and argues that its merits discussion satisfies the first prong of *Simms II*. What the petitioner cannot do is completely ignore the requirements of *Simms II* by briefing only the merits of the underlying claim. Permitting appellants to bypass the *Simms II* requirements would be inconsistent with the legislative intent of reducing the burden on the appellate system. See id., 182 (noting that "the manifest intention of the legislature, when it enacted § 52-470 [g], [was] to limit the opportunity for plenary appellate review of decisions in cases seeking postconviction review of criminal convictions").[12]

[12] The petitioner in the present case makes no claim that, even if he did not allege that the habeas court abused its discretion when it denied his petition for certification to appeal, the Appellate Court should have reviewed the merits of his claim on appeal because, otherwise, an injustice would occur. See *Simms* v. *Warden*, supra, 229 Conn. 189 (habeas petitioner can obtain appellate review of claims despite habeas court's denial of petition for certification to appeal if petitioner carries "burden of persuasion that denial of certification to appeal was an abuse of discretion or that an injustice appears to have been done"). We further note that this court in *Simms II* gave no indication that the court in *Simms I* had recognized two distinct paths to appellate review if a petition for certification has been denied,

We further conclude that there is no exception to the requirement that a habeas petitioner must expressly allege that the habeas court abused its discretion in denying the petition for certification to appeal when the petitioner is self-represented. "We are mindful that we should be solicitous to [self-represented] petitioners and construe their pleadings liberally in light of the limited legal knowledge they possess. . . . We are also mindful, however, that the right of self-representation provides no attendant license not to comply with the relevant rules of procedural and substantive law." (Citation omitted; internal quotation marks omitted.) *Kaddah* v. *Commissioner of Correction*, 299 Conn. 129, 140, 7 A.3d 911 (2010). It is beyond cavil that a self-represented habeas petitioner cannot simply ignore the statutory mandate of § 52-470 (g) that he file a petition for certification to appeal before the Appellate Court can review the habeas court's rulings. If the petition is denied, the petitioner is on notice that, at least as the default rule, he is not entitled to appellate review of his claims unless he demonstrates that the habeas court abused its discretion in denying certification.

We do not think that it imposes an undue burden on self-represented habeas petitioners to require them at least to allege that they are entitled to appellate review because the habeas court abused its discretion in denying the petition for certification to appeal. Indeed, self-represented petitioners have shown themselves capable of satisfying this requirement. See, e.g., *Joyce* v. *Commissioner of Correction*, 129 Conn. App. 37, 38, 19 A.3d 204 (2011) (self-represented habeas petitioner claimed that habeas court abused its discretion when it denied

namely, (1) demonstrating an abuse of discretion, or (2) demonstrating that an injustice appears to have been done. See id. Rather, the court appears to have assumed that the "injustice appears to have been done" prong was essentially a reframing of the abuse of discretion prong. Because the issue has not been raised in the present case, we express no opinion on the matter.

petition for certification to appeal); *Jolley* v. *Commissioner of Correction*, 98 Conn. App. 597, 597, 910 A.2d 982 (2006) (same), cert. denied, 282 Conn. 904, 920 A.2d 308 (2007); see also, e.g., *Coleman* v. *Commissioner of Correction*, 111 Conn. App. 138, 139, 958 A.2d 790 (2008) (self-represented habeas petitioner claimed that habeas court "abused its discretion by refusing to rule on his petition for certification to appeal"), cert. denied, 290 Conn. 905, 962 A.2d 793 (2009).

We conclude, therefore, that the Appellate Court properly dismissed the petitioner's appeal in the present case on the ground that he failed to demonstrate that the habeas court abused its discretion. Specifically, he failed to expressly allege that the court had erred in denying his petition for certification to appeal. In reaching this conclusion, we are mindful that this requirement may—not entirely without justification—be viewed as a mere technicality because, as the Appellate Court has recognized repeatedly, in many cases, there is considerable, if not complete, overlap between the first and second prongs of the "two part showing" required by *Simms II*. *Simms* v. *Warden*, supra, 230 Conn. 612. If the statutory mandate of § 52-470 (g) is to retain any force at all, however, a petitioner whose petition for certification to appeal has been denied must at least expressly allege that the denial was an abuse of discretion to obtain appellate review.

Allowing a petitioner to bypass completely any allegation that the habeas court abused its discretion would render a duly enacted statute meaningless, which we are not at liberty to do. It would also render the *Simms* two part test meaningless, given that a denial of certification would be treated no differently from a grant of certification; i.e., in either scenario, all that is required would be to brief solely the merits of the underlying claim.

II

Having reached this conclusion, however, we recognize that the requirement that a habeas petitioner expressly claim in his appellate brief that the habeas court abused its discretion when it denied his petition for certification, although clearly imposed under our precedent, may be viewed as a technical trap for the unwary. Because the failure to make such a claim results in the dismissal of the appeal, we feel that clearer guidance is in order.

Accordingly, to ensure that the courthouse doors are not shut on potentially meritorious claims as the result of a technicality or an understandable ignorance of procedures,[13] we exercise our supervisory powers to direct that Part I of Judicial Branch Form JD-CR-84, Rev. 1-21, entitled Notice of Appeal Procedures (Habeas Corpus), be revised to include the following language: "If the habeas court denies your petition for certification to appeal, you can appeal from that ruling. You must *expressly* claim in your appellate brief that the habeas court abused its discretion when it denied the petition for certification to appeal and explain how that discretion was abused. To establish that the habeas court abused its discretion, you must demonstrate that (1) the issues that you seek to raise on appeal are debatable among jurists of reason, (2) a court could resolve the issues in a different manner, or (3) the questions deserve encouragement to proceed further. See *Simms* v. *Warden*, 230 Conn. 608, 616, 646 A.2d 126 (1994). *If you do not expressly claim in your brief that the habeas court abused its discretion when it denied your petition for certification, your appeal will be dismissed.*"

In addition, we direct that Part II of the form be revised to include the following language after "[t]he

[13] We conclude in part III of this opinion that the petitioner's claims in the present case lack merit.

[p]etition for [c]ertification is denied": "You have the right to challenge this ruling by filing an appeal with the Appellate Court. Any such appeal must comply with the procedures set forth in Part I of this form for appealing from the denial of a petition for certification or it will be dismissed."

III

We further conclude that, even if the Appellate Court had considered the arguments the petitioner made in his Appellate Court brief on the merits of his claim that the habeas court incorrectly determined that he is not in the custody of the respondent, those arguments do not support his claim, made for the first time in his appeal to this court, that the habeas court had abused its discretion when it denied his petition for certification to appeal. The petitioner made two arguments in support of his claim that he is in custody for purposes of his habeas petition.

First, he contended that his claims come within an exception to the custody requirement set forth in *Lackawanna County District Attorney* v. *Coss*, 532 U.S. 394, 399, 121 S. Ct. 1567, 149 L. Ed. 2d 608 (2001), that, according to the petitioner, "allows a petitioner to collaterally attack an expired conviction, so long [as] the expired conviction affected guilt or the . . . sentence" that the petitioner is currently serving. Second, he contended that he was in custody pursuant to his 1996 conviction because he is required to register as a sex offender on the basis of that conviction. Neither claim has any merit.[14]

[14] We further note that the petitioner did not raise either claim in his habeas petition. A liberal reading of his postjudgment pleadings in the habeas court, however, reveals that he did attempt to raise these claims at that time. See, e.g., *Kaddah* v. *Commissioner of Correction*, supra, 299 Conn. 140 ("we should be solicitous to [self-represented] petitioners and construe their pleadings liberally in light of the limited legal knowledge they possess"). Moreover, we may review unpreserved claims when the party raising the claim is unable to prevail. See, e.g., *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 157–58, 84 A.3d 840

General Statutes § 52-466 (a) (1) provides in relevant part that "[a]n application for a writ of habeas corpus . . . shall be made to the superior court, or to a judge thereof, for the judicial district in which the person whose custody is in question is claimed to be illegally confined or deprived of such person's liberty." It is well established that, for a court to have jurisdiction to entertain a habeas petition seeking to challenge the legality of a criminal conviction, the petitioner must be in the custody of the respondent *as the result of that conviction* at the time that the petition is filed. See, e.g., *Richardson* v. *Commissioner of Correction*, 298 Conn. 690, 698, 6 A.3d 52 (2010) ("in order to satisfy the custody requirement of § 52-466, the petitioner [must] be in *custody on the conviction under attack* at the time the habeas petition is filed" (emphasis in original; internal quotation marks omitted)); *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 548, 911 A.2d 712 (2006) (habeas court lacked subject matter jurisdiction over petitioner's habeas petition because he was not in custody on expired convictions that petition sought to attack); *Lebron* v. *Commissioner of Correction*, 274 Conn. 507, 530–31, 876 A.2d 1178 (2005) (petitioner whose sentence for conviction that was under attack had expired was not in custody for purposes of § 52-466), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014); see also, e.g., *Maleng* v. *Cook*, 490 U.S. 488, 490–91, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989) (under federal statutes governing writs of habeas corpus, petitioner must "be in custody under the conviction or sentence under attack at the time his petition is filed" (internal quotation marks omitted)).

In *Lackawanna County District Attorney* v. *Coss*, supra, 532 U.S. 394, the United States Supreme Court

(2014) (unpreserved claim is reviewable when record is adequate for review, review cannot result in unfair prejudice to any party, and party raising claim cannot prevail).

held that, if a conviction that is no longer subject to direct or collateral attack "is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a [habeas] petition . . . on the ground that the prior conviction was unconstitutionally obtained." Id., 403–404. The court recognized three exceptions to this general rule for cases in which "the prior conviction [that was] used to enhance the sentence was obtained [when] there was a failure to appoint counsel in violation of the [s]ixth [a]mendment"; id., 404; the petitioner "[cannot] be faulted for failing to obtain timely review of a constitutional claim"; id., 405; and the petitioner obtains "compelling evidence that he is actually innocent of the crime for which he was convicted, and which he could not have uncovered in a timely manner." Id. The court observed that, "[i]n such situations, a habeas petition *directed at the enhanced sentence* may effectively be the first and only forum available for review of the prior conviction." (Emphasis added.) Id., 406.

Thus, the court in *Lackawanna County District Attorney* "merely went beyond the jurisdictional question presented in *Maleng* to consider the extent to which *the* [*prior expired*] *conviction itself* may be subject to challenge *in the attack* [*on*] *the* [*current*] *senten*[*ce*] which it was used to enhance." (Emphasis in original; internal quotation marks omitted.) *Lebron* v. *Commissioner of Correction*, supra, 274 Conn. 527. The court in *Lackawanna County District Attorney* did *not* permit the filing against a government official who no longer has custody of the petitioner of a habeas petition that directly and solely challenges the conviction for which the petitioner is no longer serving the sentence. See *Lackawanna County District Attorney* v. *Coss*, supra, 532 U.S. 401; see also, e.g., *Alaska* v. *Wright*, U.S. , 141 S. Ct. 1467, 1468, 209 L. Ed. 2d 431 (2021) (petitioner who was no longer serving sentence for state

conviction and who was in federal custody as result of federal conviction predicated on state conviction was not in custody for purposes of federal habeas statute requiring that petitioner be "in custody pursuant to the judgment of a [s]tate court" (internal quotation marks omitted)); *Ajadi* v. *Commissioner of Correction*, supra, 280 Conn. 547–48 (because habeas petitioner did not challenge conviction for which he was currently in custody but directly challenged convictions for which he was no longer in custody, *Lackawanna County District Attorney* did not support claim that habeas court had jurisdiction). We therefore reject the petitioner's claim in the present case that *Lackawanna County District Attorney* supports his claim that the habeas court incorrectly determined that he was not in the respondent's custody and, in turn, that the court abused its discretion when it denied the petitioner's petition for certification to appeal from its ruling to that effect.

We also are not persuaded by the petitioner's claim that, contrary to the habeas court's determination, he is in the respondent's custody pursuant to the 1996 conviction because he is required to register as a sex offender as a result of that conviction.[15] This court has held that the statutory sex offender registration requirements are remedial and not punitive in nature. See, e.g.,

[15] The petitioner included in his pleadings to the habeas court a form prepared by the Connecticut Department of Public Safety indicating that he would be required to register as a sex offender "for the period of ten years following the date of his or her release . . . or until otherwise released from such obligation in accordance with [Public Acts 1999, No. 99-183, § 6] . . . ." The petitioner alleged in his pleadings that he had been informed during the 2012 federal court proceedings on charges that he had failed to register that he was required under Connecticut law to register for the remainder of his lifetime. As we indicated, neither party has briefed the state and federal law governing the petitioner's current obligation to register as a sex offender. We assume, for purposes of this portion of the opinion, however, that the petitioner was subject to the registration requirement at the time he filed his habeas petition. We note that the respondent does not claim otherwise.

*State* v. *Waterman*, 264 Conn. 484, 497, 825 A.2d 63 (2003) (because sex offender registration statute is regulatory and not punitive in nature, application of statute to defendant "did not necessitate any modification, opening or correction of [his] sentence"); *State* v. *Kelly*, 256 Conn. 23, 90–95, 770 A.2d 908 (2001) (because sex offender registration statute "is regulatory and not punitive in nature," retroactive application of statute to defendant did not violate ex post facto clause of federal constitution). Thus, the requirement that the petitioner register as a sex offender is a collateral consequence of his 1996 conviction, not part of the sentence. Collateral consequences of a conviction generally are not sufficient to satisfy the condition that a habeas petitioner must be in custody. See, e.g., *Maleng* v. *Cook*, supra, 490 U.S. 492 ("once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack [on] it" under federal habeas law); *Lebron* v. *Commissioner of Correction*, supra, 274 Conn. 530 ("[l]ike the federal courts . . . our courts have never held that the collateral consequences of a conviction that expired *before the habeas petition was filed* are sufficient to render a petitioner in custody on the expired conviction within the meaning of § 52-466" (emphasis in original; internal quotation marks omitted)).

Consistent with this principle, the great majority of the federal courts that have considered the issue have concluded that the fact that a petitioner is subject to a state sex offender registration statute is not sufficient to satisfy the requirement under federal habeas law that he must be in custody when he files the petition. See, e.g., *Clark* v. *Oklahoma*, 789 Fed. Appx. 680, 682, 684 (10th Cir. 2019) (habeas court properly denied petition for certificate to appeal from decision dismissing

habeas petition because requirement under Oklahoma law that petitioner register as sex offender as result of Oklahoma conviction did not satisfy condition of federal statute that petitioner, who was incarcerated in Texas as result of Texas conviction, must be in custody for conviction being challenged when habeas petition is filed); *Hautzenroeder* v. *DeWine*, 887 F.3d 737, 743–44 (6th Cir. 2018) (because restrictions imposed by Ohio sex offender registration statute were collateral consequences of conviction, notwithstanding fact that Ohio Supreme Court had found statute to be punitive in nature, petitioner, who was no longer serving sentence for conviction, was not in custody for purposes of federal habeas statute); *Wilson* v. *Flaherty*, 689 F.3d 332, 338 (4th Cir. 2012) (requirements under Virginia law and Texas law that petitioner whose sentence had expired register as sex offender as result of Virginia conviction were collateral consequences of conviction and, therefore, did not satisfy custody requirement of federal habeas statute), cert. denied, 570 U.S. 917, 133 S. Ct. 2853, 186 L. Ed. 2d 909 (2013); *Virsnieks* v. *Smith*, 521 F.3d 707, 720–21 (7th Cir.) (when petitioner's only potentially viable claim in habeas proceeding involved application of Wisconsin sex offender registration statute, petitioner was not in custody for purposes of federal habeas statute, even though he was currently incarcerated as result of underlying conviction, because registration requirements were collateral consequences of conviction), cert. denied, 555 U.S. 868, 129 S. Ct. 161, 172 L. Ed. 2d 117 (2008); *Williamson* v. *Gregoire*, 151 F.3d 1180, 1184 (9th Cir. 1998) (because restrictions imposed by Washington sex offender registration statute were collateral consequences of conviction, petitioner, who was no longer serving sentence, was not in custody for purposes of federal habeas statute), cert. denied, 525 U.S. 1081, 119 S. Ct. 824, 142 L. Ed. 2d 682 (1999); cf. *Mitchell* v. *United States*, 977 A.2d 959, 967

(D.C. 2009) ("the [sex offender] registration requirement amounts to a collateral consequence of conviction that is not itself sufficient to render an individual in custody" under District of Columbia law governing motions for attacking sentences).[16]

At least one court has held to the contrary. In *Piasecki* v. *Court of Common Pleas*, 917 F.3d 161 (3rd Cir.), cert. denied, U.S. , 140 S. Ct. 482, 205 L. Ed. 2d 267 (2019), the United States Court of Appeals for the Third Circuit concluded that the requirements of Pennsylvania's sex offender registration statute were sufficiently onerous to constitute custody for purposes of the federal habeas statute. Id., 172–73. In reaching this conclusion, the court observed that the Pennsylvania statute required the petitioner to report to state police barracks at least four times per year for the rest of his life; to

[16] In *Alaska* v. *Wright*, supra, 141 S. Ct. 1467, a case with remarkable similarities to the present case, the petitioner was convicted of sexual abuse of a minor under Alaska law. Id. After the petitioner finished serving his sentence, he moved to Tennessee, where he failed to register as a sex offender as required by federal law and pleaded guilty to that offense. Id., 1467–68. During the course of the federal proceeding, he filed a petition for a writ of habeas corpus in federal court, challenging his Alaska conviction. Id., 1468. The United States District Court for the District of Alaska rendered judgment denying the petition, concluding that the petitioner was not in custody pursuant to a judgment of a state court, as required by the governing federal habeas statute. Id. The United States Court of Appeals for the Ninth Circuit reversed the judgment of the District Court on the ground that the state conviction was the predicate for the federal conviction. Id. The United States Supreme Court concluded that the Court of Appeals "clearly erred" under *Maleng v. Cook*, supra, 490 U.S. 492–93, when it concluded that the petitioner was in custody pursuant to the judgment of the state court because his sentence on the state conviction had expired. *Alaska* v. *Wright*, supra, 1468. Unlike the petitioner in the present case, the petitioner in *Wright* apparently made no claim that the fact that he was subject to Alaska's sex offender registration law rendered him in state custody, and the court did not directly address that issue. Nevertheless, the case provides indirect support for the proposition that the fact that an individual is subject to a state sex offender registration law as a result of a state conviction does not mean that the individual is in custody pursuant to that conviction when the sentence has fully expired.

report to state police barracks within three business days of changing his address, including a temporary stay at a different residence; to refrain from using the Internet; and "to personally report to the [s]tate [p]olice if he operated a car, began storing his car in a different location, changed his phone number, or created a new [e-mail] address." Id., 170–71. The court also observed that Pennsylvania courts had concluded that the requirements of the Pennsylvania statute were not remedial but were punitive in nature, and that the courts had "historically treated sex offender registration requirements as part of the judgment of sentence." Id., 175. The court concluded that the statute's "physical compulsion of . . . registration requirements and their direct relation to the judgment of sentence set them apart from consequences that are truly collateral and noncustodial." Id., 176–77.

Even if we were to assume that the Third Circuit Court of Appeals correctly determined in *Piasecki* that individuals who are subject to the Pennsylvania sex offender registration statute are in custody for purposes of the federal habeas statute, we conclude that the Connecticut sex offender registration scheme is clearly distinguishable. Unlike the Pennsylvania statute, the Connecticut statute does not subject individuals to any form of physical compulsion, its requirements are not imposed as part of the sentence, and this court has determined that the statute is regulatory in nature, not punitive. See, e.g., *State* v. *Waterman*, supra, 264 Conn. 489; see also, e.g., *White* v. *LaClair*, Docket No. 19-CV-1283 (MKB), 2021 WL 200857, *6 (E.D.N.Y. January 19, 2021) (distinguishing requirements of Pennsylvania sex offender registration statute at issue in *Piasecki* from requirements of New York statute on grounds that Pennsylvania's requirements were "significantly more restrictive," they had been determined to be punitive in nature

and they were imposed as part of sentence). Thus, we conclude that *Piasecki* has no persuasive force here.

We conclude in the present case, therefore, that, even if the Appellate Court had considered the petitioner's arguments on the merits of his claim that he was in the respondent's custody for purposes of his petition for habeas corpus, those arguments do not demonstrate that the issue is "debatable among jurists of reason; that a court *could* resolve the [issue in a different manner]; or that the [question is] adequate to deserve encouragement to proceed further." (Emphasis in original; internal quotation marks omitted.) *Simms* v. *Warden*, supra, 230 Conn. 616. Thus, the arguments do not demonstrate that the habeas court abused its discretion when it denied the petitioner's petition for certification to appeal.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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## LESLY FAJARDO ET AL. *v.* BOSTON SCIENTIFIC CORPORATION ET AL.
## (SC 20455)

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

*Syllabus*

Pursuant to this court's decision in *Bifolck* v. *Philip Morris, Inc.* (324 Conn. 402), under the risk-utility test, a product is in a defective condition that is unreasonably dangerous to the consumer if (1) a reasonable alternative design that would have avoided or reduced the risk of harm was available and the absence of that alternative design renders the product unreasonably dangerous, or (2) the product is a manifestly unreasonable design in that the risk of harm so clearly exceeds the product's utility that a reasonable consumer, informed of those risks and utility, would not purchase the product.

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

The plaintiffs, F and F's husband, sought to recover damages from, among others, the defendant L, who was F's gynecologist, L's medical practice, and the defendant B Co. for personal injuries that F sustained in connection with an unsuccessful surgery in which a transvaginal mesh sling designed by B Co., known as the Obtryx, was implanted in F's body for the purpose of treating F's stress urinary incontinence. During F's annual health examination, L diagnosed F with pelvic organ prolapse and recommended that he perform a surgical repair known as a colporrhaphy. L also recommended that F undergo a sling procedure to rectify her stress urinary incontinence. Because L did not perform the sling procedure, he referred F to P, a urologist. P described to F the risks and benefits of, and alternatives to, the sling procedure, and F gave P her informed consent to proceed with both the colporrhaphy and the sling procedure. The procedures were scheduled for the same day but performed consecutively. Immediately after L performed the colporrhaphy, P implanted the Obtryx in F. Thereafter, F continued to experience pain and had the Obtryx removed. The plaintiffs' complaint included claims against L and L's medical practice, alleging that L had failed to obtain F's informed consent to the sling procedure and that L made innocent, negligent or intentional misrepresentations regarding the risks and benefits of the sling procedure. The complaint also alleged a product liability claim against B Co. under the Connecticut Product Liability Act (§ 52-572m et seq.), namely, that the defective design of the Obtryx caused F's injuries. Prior to trial, L and L's medical practice, and the plaintiffs, filed separate motions for summary judgment in connection with the informed consent and misrepresentation claims. Specifically, the plaintiffs claimed that L had assumed a duty to obtain F's informed consent for the sling procedure by discussing and recommending that procedure to F. The trial court disagreed and, instead, granted the motion for summary judgment filed by L and L's medical practice, concluding that the duty to obtain informed consent rests with the physician performing the procedure, namely, P. The trial court also rendered summary judgment for L and L's medical practice on the misrepresentation claims. The plaintiffs' product liability claim subsequently was tried to a jury. The plaintiffs introduced into evidence the testimony of a product design expert, R, and various medical studies, which referred to a class of mesh slings known as tension free vaginal tapes (TVTs) that are implanted in a retropubic fashion, unlike the Obtryx, which is implanted using a transobturator approach. R testified that all slings made of polypropylene mesh, including the Obtryx and a certain TVT, are defective and unreasonably dangerous, that the polypropylene mesh caused a foreign body reaction in F and contributed to her injuries, and that a surgery known as the Burch procedure was his preferred method to treat stress urinary incontinence. He also testified regarding what he considered to be defects in the Obtryx, specifically, its heat-sealed middle section and detanged edges, which produce a stiffer mesh. Before the trial court

charged the jury, the plaintiffs e-mailed the court, requesting an instruction on both prongs of the risk-utility test. The court, however, declined to instruct the jury as to the reasonable alternative design prong and instructed the jury only with respect to the second prong regarding whether the design of the Obtryx was manifestly unreasonable. The jury returned a verdict for B Co., and the plaintiffs moved to set aside the verdict on the basis of the court's failure to give a reasonable alternative design instruction. The trial court denied that motion and rendered judgment in accordance with the jury's verdict, from which the plaintiffs appealed. *Held*:

1. The trial court properly rendered summary judgment for L and L's medical practice in connection with the plaintiffs' informed consent claim: this court previously had concluded, as a matter of law, that the duty to obtain a patient's informed consent rests solely with the physician who is to perform the procedure, and that jurisprudence was consistent with the rule recognized by most jurisdictions and legal and medical authorities that, when a physician refers a patient to a specialist for a consultation and that specialist performs the procedure, the specialist is solely responsible for educating the patient and obtaining her informed consent, even when the referring physician discussed the procedure with, or recommended it to, the patient; in the present case, the implantation of the Obtryx by P was an entirely separate procedure from the colporrhaphy performed by L, P was solely responsible for the sling procedure, even though L suggested it to F and referred her to P, and the trial court properly relied on the unanimous expert testimony presented at trial that the physician who performs a procedure, and not the referring physician, has the duty to obtain the patient's informed consent to the procedure; moreover, the plaintiffs' reliance on the lay standard of informed consent, which relates to the extent or degree of disclosure a physician must make to fulfill his duty rather than whether a physician has a duty to inform, was misplaced because L did not have a duty to obtain F's informed consent in the first instance; furthermore, even if this court were to consider the colporrhaphy and the sling procedure to be a single procedure, the plaintiffs' claim would nonetheless fail because, when more than one physician provides care to a patient in relation to a particular medical condition, the patient must prove by expert testimony which physician, if any, owes the patient a duty to obtain informed consent, and all the experts testified at trial that it was the duty of P, not L, to obtain F's informed consent to the sling procedure.
2. The trial court properly rendered summary judgment for L and L's medical practice in connection with the plaintiffs' misrepresentation claims: this court recently held that an innocent misrepresentation claim is not viable in the context of a urogynecologist's provision of medical services because such claims generally are governed by § 552C of the Restatement (Second) of Torts, which requires that the misrepresenta-

tion occur in a "sale, rental or exchange transaction with another," and the plaintiffs' innocent misrepresentation claim failed as a matter of law because the only medical services L provided to F, namely, recommending that F see a specialist and discussing the sling procedure, did not qualify as a sale, rental or exchange transaction; moreover, the plaintiffs' negligent and intentional misrepresentation claims also failed because L could not have negligently or intentionally misled, misinformed or misrepresented the quality, usefulness, risks or benefits of the Obtryx in light of the trial court's findings that L was unaware of what brand of sling P planned to implant in F and that L never discussed with F the Obtryx or any other products manufactured by B Co.

3. The plaintiffs could not prevail on their claim that the trial court improperly declined to instruct the jury on the reasonable alternative design prong of the risk-utility test:

a. This court assumed, without deciding, that the plaintiffs preserved their challenge to the trial court's jury instruction for purposes of this appeal because, even though the plaintiffs did not take exception to the instruction until after the jury was instructed and even though their e-mail request to charge the jury did not comply with the relevant rules of practice (§§ 16-21 and 16-23) insofar as it neither constituted a written request nor cited to any supporting evidence in the record, the trial court nonetheless determined that the plaintiffs timely requested a reasonable alternative design charge and addressed the claim on the merits.

b. In order to establish that they were entitled to an instruction on reasonable alternative design, the plaintiffs were required to present expert testimony regarding the alleged design defect of the Obtryx, whether an alternative design was technically and economically feasible, and whether the alternative would have reduced or avoided the risk of harm to F, as those issues involved complicated medical principles that were beyond the ken of the average juror; in the present case, the trial court determined, and the plaintiffs agreed, that R was the plaintiffs' product design expert, and, because the trial court correctly concluded that R was the only witness qualified to testify concerning reasonable alternative design, it properly focused on R's testimony in considering whether the plaintiffs had produced sufficient evidence to warrant such an instruction.

c. The plaintiffs failed to produce sufficient evidence that the class of retropubic slings consisting of TVTs constituted a reasonable alternative design to the Obtryx and that B Co.'s failure to use that alternative design rendered the Obtryx unreasonably dangerous: the plaintiffs' references to TVTs did not constitute identification of a reasonable alternative design, as the evidence demonstrated that the safety data related to TVT products, which can be made of many different types of mesh material with different pore sizes and weights that alter the performance of those products, varied considerably, and, to the extent that there was evidence regarding the safety data of TVTs, the studies the plaintiffs relied on

indicated merely that there were risks and complications with the use of TVT products, not that there was another product on the market that would have reduced the risk of harm to F in comparison to the Obtryx; moreover, some TVT products suffer from the same alleged defects as the Obtryx, namely, its heat seal and detanged edges, R testified that all transvaginal slings, including a specific TVT, made of polypropylene mesh are defective and unreasonably dangerous, regardless of whether they are heat-sealed or detanged, and the primary medical study on which the plaintiffs relied compared the Obtryx to a TVT manufactured by B Co., which was made of the same material and had the same heat seal as the Obtryx, and, therefore, did not support the plaintiffs' claim that there was a reasonable alternative design that would have reduced or avoided the risk of harm to F; furthermore, the plaintiffs did not point to a specific existing product and demonstrate that its use would have reduced or avoided the risk of harm to F but, rather, took a scattershot approach, pointing to different alternatives to the Obtryx, including surgical options, such as the Burch procedure, and the class of products known as TVTs, and that evidence did not demonstrate that any particular product was safer or would have reduced or avoided the risk of harm to F when compared to the Obtryx.

(*One justice concurring in part and dissenting in part*)

Argued April 27, 2020—officially released December 16, 2021*

*Procedural History*

Action to recover damages for, inter alia, personal injuries resulting from an allegedly defective product, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and transferred to the Complex Litigation Docket, where the complaint was withdrawn as to the defendant Bridgeport Hospital; thereafter, the court, *Zemetis*, *J.*, granted the motions for summary judgment filed by the defendant Lee Jacobs et al. and rendered judgment thereon; subsequently, the case was tried to a jury before *Zemetis*, *J.*; verdict for the named defendant; thereafter, the court denied the plaintiffs' motion to set aside the verdict and rendered judgment in accordance with the verdict, from which the plaintiffs appealed. *Affirmed.*

* December 16, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Brenden P. Leydon* and *Jacqueline E. Fusco*, for the appellants (plaintiffs).

*Daniel B. Rogers*, pro hac vice, with whom were *Proloy K. Das*, *Jennifer M. DelMonico* and *Eric Anielak*, pro hac vice, for the appellee (named defendant).

*James F. Biondo*, with whom, on the brief, was *Diana M. Carlino*, for the appellees (defendant Lee Jacobs et al.).

*Opinion*

MULLINS, J. This appeal arises from an action in which the named plaintiff, Lesly Fajardo (Fajardo),[1] suffered injuries related to the implantation of a transvaginal mesh sling,[2] a medical device that is implanted in women to treat stress urinary incontinence.[3] In this action, the plaintiffs alleged that the named defendant, Boston Scientific Corporation (Boston Scientific), defectively designed its Obtryx Transobturator Mid-Urethral Sling System (Obtryx),[4] a polypropylene transvaginal mesh sling, and that the product injured her in various ways after Edward Paraiso, a nonparty urologist, implanted it in her. The plaintiffs claimed, as relevant to this appeal, that Boston Scientific's sale of the Obtryx violated the Connecticut Product Liability Act, General Statutes § 52-572m et seq.

[1] Fajardo's husband, Jairo Fajardo, is also a plaintiff. We need not separately address his derivative claims for loss of consortium, insofar as they rise or fall with Fajardo's claims.

[2] The terms "mesh sling," "tape," and "sling" are used interchangeably in this opinion.

[3] Stress urinary incontinence is defined as the "leakage of urine as a result of coughing, straining, or some sudden voluntary movement, due to incompetence of the sphincteric mechanisms." Stedman's Medical Dictionary (28th Ed. 2006) p. 962.

[4] The midurethral sling is a narrow strap made of synthetic mesh or native tissue that is placed under the urethra. It acts as a hammock to lift or to support the urethra and the neck of the bladder.

The plaintiffs also brought, inter alia, claims of negligence sounding in informed consent and misrepresentation against Fajardo's gynecologist, the defendant Lee D. Jacobs, and Jacobs' medical practice, the defendant OB-GYN of Fairfield County, P.C. (medical defendants).[5] Their claims against the medical defendants rest on the theory that Jacobs, who referred Fajardo to Paraiso for a mesh sling implant, voluntarily assumed a duty to fully and accurately educate Fajardo as to the risks and benefits of, and the alternatives to, a mesh sling implant procedure. As to the misrepresentation claims, the plaintiffs alleged that Jacobs innocently, negligently and intentionally misled and misinformed Fajardo regarding the quality, usefulness, risks and/or benefits of the Obtryx.

Prior to trial, the trial court granted the medical defendants' motion for summary judgment, concluding, as a matter of law, that Jacobs, as a referring physician, had no duty to obtain Fajardo's informed consent for a procedure that Paraiso was to perform. The court also rendered summary judgment in favor of the medical defendants on the plaintiffs' misrepresentation claims. Thus, the case proceeded to trial only against Boston Scientific, and the jury returned a verdict in its favor. The plaintiffs moved to set aside the verdict, but the trial court denied that motion and rendered judgment in accordance with the jury's verdict. This appeal followed.[6]

On appeal, the plaintiffs claim that the trial court (1) incorrectly concluded that Jacobs did not owe a duty to procure Fajardo's informed consent to the sling procedure, (2) improperly rendered summary judgment in

[5] The plaintiffs withdrew their complaint against another defendant, Bridgeport Hospital.

[6] The plaintiffs appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

favor of the medical defendants on the plaintiffs' misrepresentation claims, and (3) improperly failed to instruct the jury that it could find Boston Scientific liable under the Connecticut Product Liability Act if Fajardo's injuries resulted from Boston Scientific's failure to adopt a reasonable alternative design that rendered the Obtryx unreasonably dangerous. We conclude that the trial court properly rendered summary judgment in favor of the medical defendants on the informed consent and misrepresentation claims and that it properly declined to instruct the jury on the reasonable alternative design prong of the risk-utility test. Accordingly, we affirm the judgment of the trial court.

## I

## CLAIMS AGAINST MEDICAL DEFENDANTS

### A

### Informed Consent Claim

The plaintiffs assert that the trial court improperly rendered summary judgment in favor of the medical defendants because it incorrectly concluded that Jacobs had not assumed a duty to obtain Fajardo's informed consent for implantation of the mesh sling and the sling procedure. Specifically, the plaintiffs argue that Jacobs assumed the duty by discussing and recommending the sling procedure to treat Fajardo's stress urinary incontinence. The plaintiffs also claim that Jacobs had a duty to obtain Fajardo's informed consent because Jacobs was involved in or maintained control over the surgical procedure performed by Paraiso. Neither claim has merit.

The following facts and procedural history are relevant to this claim. On March 26, 2010, Fajardo visited Jacobs, her gynecologist, for her annual preventative health examination. During that visit, Fajardo consulted

with Jacobs about her gynecological and urological concerns. In his medical notes for this appointment, Jacobs noted that " '[the] patient complains of stress incontinence daily, very disruptive, she wants surgical repair.' "

After a physical examination, Jacobs diagnosed Fajardo with pelvic organ prolapse—a weakness in the vaginal wall that causes the bladder, colon, or rectum to herniate into the vagina. Specifically, Jacobs determined that Fajardo suffered from a grade 2 cystocele (prolapse of the bladder) and a grade 2 rectocele (prolapse of the posterior vaginal wall). Jacobs explained that a surgery to address the cystocele and rectocele probably would not rectify the incontinence issues. Consequently, given her interest in a more permanent fix to the incontinence issues, Jacobs discussed with Fajardo the option of "her see[ing] a urologist for an evaluation to see what could be offered to her [to address the incontinence]."

Also, during or as a result of this appointment, Jacobs wrote an office note, in which he stated that the " 'risks, benefits, and alternatives of sling/AP (anterior and posterior colporrhaphy)[7] discussed, all questions answered.' " (Footnote added; footnote omitted.) Then, as he had with numerous other similarly situated patients, he referred Fajardo to Paraiso, a urologist, for consultation and evaluation regarding her stress urinary incontinence.

On April 10, 2010, Fajardo consulted with Paraiso. He diagnosed her with stress urinary incontinence and recommended that she consent to having Paraiso surgically implant a midurethral mesh sling to treat it. Paraiso described the risks and benefits of, and alternatives to, the procedure. He then obtained Fajardo's "oral

[7] Colporrhaphy is surgical repair of the vaginal wall. An anterior colporrhaphy treats a cystocele or urethrocele (prolapse of the urethra into the vagina), whereas a posterior colporrhaphy treats a rectocele.

'informed consent' " to proceed with surgical repairs to both her vaginal walls (a colporrhaphy performed by Jacobs) and urethra (a mesh sling implant performed by Paraiso).

Paraiso also discussed with Fajardo that both procedures would occur on the same day in a hospital surgical setting. Fajardo thereafter signed two separate consent forms, one for the A/P repair to be performed by Jacobs, and one for the sling procedure to be performed by Paraiso. Paraiso then communicated this plan to Jacobs.

On December 15, 2010, Fajardo signed Bridgeport Hospital's informed consent form, after having read and discussed it with Jacobs. Thereafter, Jacobs surgically repaired Fajardo's vaginal walls. Paraiso was not present during Jacobs' portion of the surgery. On the same day, immediately following Jacobs' procedure, Paraiso surgically implanted the Obtryx in Fajardo to address the stress urinary incontinence. Jacobs was not present during Paraiso's procedure. Jacobs also was not aware of the type of mesh sling Paraiso implanted into Fajardo. Furthermore, Paraiso is not associated with the medical defendants and is not a party to this action. The plaintiffs also do not allege that Jacobs had any vicarious liability for Paraiso's actions.

After these surgeries, Fajardo still experienced pain. Eventually, the sling had to be removed. As a result of her continued issues, and her belief that Jacobs had assumed a duty but failed to adequately inform her of the risks associated with the sling procedure, the plaintiffs brought claims against the medical defendants, alleging, inter alia, lack of informed consent, as well as intentional, negligent and innocent misrepresentation.

Before trial, the plaintiffs moved for summary judgment. They claimed that they were entitled to summary

judgment in connection with their informed consent claim against Jacobs because Jacobs "voluntarily assumed the duty to obtain informed consent from . . . Fajardo for implantation of the mesh sling and the mesh sling procedure when he recommended the sling procedure, informed her that it was mesh that would be permanently implanted into her to treat her stress urinary incontinence . . . [and that] it would fix her [stress urinary incontinence], and convinced her that it was safe." The plaintiffs argued that the undisputed facts supported their claim.

The medical defendants also filed a motion for summary judgment on the informed consent issue. In support of their motion, the medical defendants asserted that Jacobs was not obligated to obtain Fajardo's informed consent for implantation of the mesh sling and the sling procedure because he was not the physician who performed that procedure. The medical defendants relied on testimony from both their own and the plaintiffs' experts, who all agreed that it was Paraiso's duty—as the physician performing the surgery—to obtain Fajardo's informed consent for implantation of the mesh sling and the sling procedure.

Although the plaintiffs and the medical defendants gave slightly different accounts of the conversations that occurred during the March 26, 2010 appointment, both the plaintiffs and the medical defendants agreed that there were no disputed issues of material fact relevant to the informed consent claim. They agree that the issue for the trial court was whether, on the undisputed facts that Jacobs had discussed and recommended the sling procedure to Fajardo, as a matter of law, Jacobs was obligated to obtain Fajardo's informed consent.

The trial court denied the motion for summary judgment filed by the plaintiffs and granted the motion for summary judgment filed by the medical defendants. In

doing so, the trial court explained: "[The plaintiffs urge] the court to impose a duty on Jacobs to obtain [Fajardo's] informed consent for Paraiso's implant of the [Boston Scientific] mesh because Jacobs 'assumed a duty' when, according to Jacobs' . . . office note [dated March 26, 2010], [he made the notation that] the 'risks, benefits, and alternatives of sling/AP surgery discussed, all questions answered.' The court rejects this request." (Footnote omitted.) In rejecting that request, the trial court relied on *Logan* v. *Greenwich Hospital Assn.*, 191 Conn. 282, 465 A.2d 294 (1983), in which this court concluded that "[t]he principle that one who gratuitously undertakes a service [that] he has no duty to perform must act with reasonable care in completing the task assumed is not applicable to" a physician who discussed a procedure with a patient but then referred the patient to another physician to perform the surgery. Id., 305.

The trial court concluded that, in the present case, "Jacobs was a referring physician regarding the urological surgery performed by Paraiso. Jacobs is not alleged to have any vicarious liability for the conduct of Paraiso." The trial court further concluded that the duty to obtain informed consent "rests [with] the physician performing the procedure. The procedure is the mesh implant. Paraiso performed the implant. Paraiso, not Jacobs, had to obtain [Fajardo's] informed consent for the surgical implantation of the [Boston Scientific] mesh product."

On appeal, the plaintiffs assert that the trial court misapplied *Logan* v. *Greenwich Hospital Assn.*, supra, 191 Conn. 305, in concluding that a physician can never assume a duty of obtaining informed consent. We read neither *Logan* nor the trial court's interpretation of that decision as concluding that a physician can never assume a such duty. Rather, as we explain herein, we agree with the medical defendants that, under the cir-

cumstances of the present case and without expert testimony to the contrary, the physician conducting the vaginal mesh implantation surgery was responsible for obtaining Fajardo's informed consent.

We first set forth the applicable standard of review. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . Finally, the scope of our review of the trial court's decision to grant the plaintiff's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Dougan* v. *Sikorsky Aircraft Corp.*, 337 Conn. 27, 35, 251 A.3d 583 (2020).

We begin our analysis with a brief review of the law of informed consent. "The informed consent doctrine derives from the principle that [e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent . . . commits an assault, for which he is liable in damages." (Internal quotation marks omitted.) *Sherwood* v. *Danbury Hospital*, 278 Conn. 163, 180, 896 A.2d 777 (2006). "The essential elements of a cause of action based [on] a lack of informed consent are [1] a breach of [2] duty by the defendant and [3] a causal connection between that breach and [4] the harm to

the plaintiff." *Lambert* v. *Stovell*, 205 Conn. 1, 6, 529 A.2d 710 (1987). Only the second element, duty, is at issue in the present appeal.

In the realm of informed consent, as throughout the law of tort, "[t]he existence of a duty is a question of law and [o]nly if such a duty is found to exist does the trier of fact then determine whether the defendant violated that duty in the particular situation at hand. . . . If the court determines, as a matter of law, that a defendant owes no duty to a plaintiff, a verdict should be directed [or summary judgment rendered] because [i]t is merely reaching more speedily and directly a result [that] would inevitably be reached in the end." (Citation omitted; internal quotation marks omitted.) *Petriello* v. *Kalman*, 215 Conn. 377, 382–83, 576 A.2d 474 (1990).

Several of our informed consent cases have presented, in one form or another, the issue of whether a physician or institution may owe a duty to obtain a patient's informed consent to a procedure that is to be performed by a third-party physician. In each case, this court has concluded, as a matter of law, that the physician who performed the procedure was solely responsible for obtaining the patient's informed consent. See, e.g., *Sherwood* v. *Danbury Hospital*, supra, 278 Conn. 171 n.8 (treating physician, rather than hospital, is responsible for procuring patient's informed consent); *Petriello* v. *Kalman*, supra, 215 Conn. 385 ("informed consent . . . is the sole responsibility of the attending physician to obtain"); *Logan* v. *Greenwich Hospital Assn.*, supra, 191 Conn. 304–306 (internist who discussed kidney biopsy with patient and referred her to urologist to obtain biopsy did not assume duty to procure patient's informed consent). The Appellate Court has reached the same conclusion. See, e.g., *Torres* v. *Carrese*, 149 Conn. App. 596, 622–23, 90 A.3d 256, cert. denied, 312 Conn. 912, 93 A.3d 595 (2014); *Mason* v.

*Walsh*, 26 Conn. App. 225, 230–31, 600 A.2d 326 (1991), cert. denied, 221 Conn. 909, 602 A.2d 9 (1992).

Those results are consistent with the rule, recognized by other jurisdictions and legal and medical authorities, that, when a physician refers a patient to a specialist for a consultation, it is the specialist—assuming that he ultimately performs the procedure at issue—who is solely responsible for educating the patient and obtaining her informed consent. See, e.g., *Brotherton* v. *United States*, Docket No. 2:17-CV-00098-JLQ, 2018 WL 3747802, *4 (E.D. Wn. August 7, 2018) ("the majority of jurisdictions that have addressed whether referring physicians have a duty to obtain a patient's informed consent have concluded that they do not" (internal quotation marks omitted)); 61 Am. Jur. 2d 314, Physicians, Surgeons, and Other Healers § 168 (2012) ("only the physician or health care provider who actually gives the treatment or performs the operation has a duty to inform the patient of the risks involved and [to] obtain the patient's informed consent").

As one federal court has explained, "[t]his makes common sense. The physician performing a procedure should advise on the risks of the procedure. When a primary care physician refers a matter to a specialist, it is not logical to impose a legal duty on the primary care physician to explain the risk of a procedure [that] the specialist may perform. Generally the reason for the referral to a specialist is because the specialist has more training, knowledge, or experience in the particular area of medicine." *Brotherton* v. *United States*, supra, 2018 WL 3747802, *5.

In Connecticut, *Logan* v. *Greenwich Hospital Assn.*, supra, 191 Conn. 282, is the seminal case regarding the duty of a referring physician to obtain informed consent. In *Logan*, this court examined whether the plaintiff's internal medicine specialist (internist) had a

duty to obtain the plaintiff's informed consent for a needle biopsy of her kidney that was performed by a different physician. See id., 304–306. The internist had informed the patient that she had lupus and recommended that she get a biopsy of her kidneys to determine to what extent the lupus had affected her kidneys. Id., 284–85. The internist explained that the procedure would involve the insertion of a needle into her back to obtain a specimen of kidney tissue. Id., 285. He further explained that it was a simple procedure in which local anesthesia would be used, that she may experience some bleeding and discomfort, and that she could leave the hospital in a day or two if there were no complications. Id.

The internist referred the plaintiff to Peter Bogdan, a urologist who would perform the operation, and told the patient that Bogdan would describe the details more fully. Id. Bogdan performed the needle biopsy and injured the plaintiff during the procedure. Id., 286–87. The plaintiff brought a claim of negligence against the internist for failure to obtain her informed consent. Id., 287. The trial court denied the internist's motion for a directed verdict, but the jury nonetheless returned a verdict in favor of the internist. The plaintiff appealed. Id., 284.

On appeal, this court concluded that the trial court should have granted the internist's motion for a directed verdict. In doing so, this court explained: "Although it is undisputed that [the internist] did discuss the kidney biopsy with the plaintiff and describe the procedure generally, there was no evidence that it was his duty to do so. In fact, the testimony indicated the contrary. The plaintiff's expert witness . . . testified that an internist . . . had no obligation to discuss the surgical procedure with the plaintiff or to obtain her informed consent. He stated unequivocally that those duties

rested [with] the physician who was to perform the operation." Id., 305.

In reaching this conclusion, this court expressly rejected the voluntary assumption of duty principle on which the plaintiffs rely in the present case. In *Logan*, the plaintiff claimed that the internist, by discussing the biopsy procedure with her, assumed and therefore owed a duty to the plaintiff to obtain her informed consent. Responding to this claim, this court clarified that "[t]he principle that one who gratuitously undertakes a service [that] he has no duty to perform must act with reasonable care in completing the task assumed is not applicable to this situation. . . . Although [the internist] did describe the general nature of the operation to the plaintiff and some of the possible complications, he also told her that a more detailed explanation would be provided by Bogdan, the urologist. There is no evidence that his reliance [on] the operating surgeon to provide the information necessary for informed consent was contrary to normal medical practice or was unreasonable under these particular circumstances." (Citations omitted.) Id.

*Logan* is in line with the rule followed in most jurisdictions, which is that the physician conducting the surgery is the one who owes the duty of obtaining the patient's informed consent. This rule applies even under circumstances in which the referring physician discusses the surgical procedure with the patient and recommends that the patient undergo the procedure. *Logan* teaches that it is the physician who performs the actual procedure who is responsible for obtaining the informed consent to that procedure.

In the present case, Jacobs, Paraiso and the plaintiffs all agree that the implantation of the sling, performed by Paraiso, was a separate procedure from the repair to the vaginal wall performed by Jacobs. And Paraiso

was solely responsible for performing the sling procedure. Thus, like the internist in *Logan*, notwithstanding the fact that Jacobs may have mentioned the sling procedure or even suggested that Fajardo may be a good candidate for the sling procedure, the fact remains that Jacobs referred her to Paraiso, the specialist, for further consultation. The plaintiffs presented no evidence to undermine the fact that Paraiso, as the physician who performed the sling procedure, was the physician responsible for obtaining Fajardo's informed consent.

In fact, here, as in *Logan*, even the plaintiffs' experts explained that the physician who performs the surgery is required to obtain a patient's informed consent, not the referring physician. Indeed, the plaintiffs' expert, Richard Bercik, a urologist, testified: "[T]he surgeon who is doing the procedure is responsible for the evaluation of the patient for that condition, the selection of how they're going to do the surgery, what they're going to do, and informing the patient. That's all [in] the hands of the person doing the procedure." The medical defendants' expert also agreed that it was the duty of the surgeon who performed the implantation procedure to obtain the patient's informed consent for that procedure and not the referring physician.

In rendering summary judgment, the trial court relied on the fact that "all disclosed medical experts agree [that] Paraiso, not Jacobs, had to obtain [Fajardo's] informed consent for the implant[ation] of the mesh product." We conclude that the trial court properly relied on the unanimous expert testimony to support its conclusion that Jacobs did not owe a duty to Fajardo to obtain her informed consent.

The plaintiffs also raise a similar but slightly different argument to support their claim that Jacobs had a duty to obtain Fajardo's informed consent to the sling procedure. In particular, they argue that, because Jacobs was

Fajardo's gynecologist and she had established a high level of trust with him, she expected and trusted him to give her the information necessary for her to give informed consent. For support, they rely on the lay standard of informed consent adopted in *Logan*. They claim that the lay standard requires this court to determine whether a particular physician has a duty to obtain informed consent based on the patient's perspective of the interaction, instead of by relying on expert testimony regarding common practices in the medical community. We disagree.

In *Logan* v. *Greenwich Hospital Assn.*, supra, 191 Conn. 282, this court concluded that, in order to obtain informed consent from a patient, a physician must "provide the patient with that information [that] a reasonable patient would have found material for making a decision whether to embark [on] a contemplated course of therapy." Id., 292–93. This standard is referred to as the "lay standard of disclosure" because it focuses on what information a reasonable patient would want to know about a particular procedure in order to give his or her informed consent. Id.

We have made clear that "[o]ur standard of disclosure for informed consent in this state is an objective standard that does not vary from patient to patient based on what the patient asks or what the patient would do with the information if it were disclosed. . . . [T]he lay standard of informed consent requires a physician to provide the patient with that information [that] a reasonable patient would have found material for making a decision whether to embark [on] a contemplated course of therapy. . . . In adopting the objective lay standard, this court recognized that rather than impose on the physician an obligation to disclose at his peril whatever the particular patient might deem material to his choice, most courts have attempted to frame a less subjective measure of the physician's duty." (Citation

omitted; emphasis omitted; internal quotation marks omitted.) *Duffy* v. *Flagg*, 279 Conn. 682, 692, 905 A.2d 15 (2006).

Contrary to the plaintiffs' assertion, the lay standard adopted in *Logan* does not speak to *whether* a physician has a duty to inform, but, rather, the standard governs how a physician who has a duty to obtain informed consent fulfills that duty. In other words, the lay standard applies only to the content of the disclosure that must be made. It is only once the duty to inform is established that the lay standard dictates how that duty must be satisfied. See *Mason* v. *Walsh*, supra, 26 Conn. App. 230 ("[o]nce the existence of the duty to inform has been established, the degree or extent of disclosure necessary to satisfy the duty must be proven in accordance with the lay standard"). If the physician does not have a duty in the first instance, the lay standard simply does not apply. Here, Jacobs never had the duty to obtain Fajardo's informed consent for the mesh implantation procedure. Thus, for purposes of determining whether Jacobs had a duty to inform at all, the lay standard does not inform that question.

Lastly, the plaintiffs claim that, because the two surgeries here took place on the same day and Jacobs maintained control over the procedures, he thus owed a duty to obtain Fajardo's informed consent. This claim is factually and legally meritless.

First, it is undisputed that the two surgeries were separate procedures, performed by different physicians with different training and specialties. Jacobs was not present when Paraiso performed the implantation procedure. Most important, it is undisputed that it was Paraiso, not Jacobs, who decided which vaginal mesh to implant in Fajardo, consistent with normal medical practice. The plaintiffs have failed to point to any evidence to support their claim that Jacobs retained con-

trol over the implantation of the surgical mesh, which occurred during a different surgery. Thus, the fact that these distinct surgeries took place on the same day does not establish that Jacobs maintained control over the separate procedure performed by Paraiso. As a factual matter, then, this is not a scenario in which multiple physicians were performing or involved in a single surgical procedure.[8]

Second, even if we were to consider both surgeries as one surgical procedure, despite all of the evidence to the contrary, the plaintiffs' claim still fails because they provided no expert testimony to demonstrate that Jacobs had any duty to obtain Fajardo's informed consent. To be sure, this court has clarified that, when more than one physician provides care to the plaintiff, in relation to a particular medical condition, the plaintiff must prove by expert testimony which physician, if any, owes the plaintiff a duty to obtain informed consent. See *Godwin* v. *Danbury Eye Physicians & Surgeons, P.C.*, 254 Conn. 131, 144, 757 A.2d 516 (2000), citing *Mason* v. *Walsh*, supra, 26 Conn. App. 230; see also *Mason* v. *Walsh*, supra, 230 ("[When] . . . a surgeon engages one or more specialists to perform a portion of a procedure, the issue as to who has the duty to obtain the patient's consent to that portion of the procedure to be performed by the specialist arises. It was incumbent [on] the plaintiff to establish by expert testimony *which of the physicians*, *if any*, owed him the duty of disclosing sufficient facts to permit him to exercise an informed consent to the use of general anesthesia." (Emphasis added.)).

[8] The plaintiffs cite to cases from other jurisdictions that have concluded that a referring physician owes a duty to obtain a patient's informed consent when the referring physician maintains control over the procedure performed. See, e.g., *O'Neal* v. *Hammer*, 87 Haw. 183, 187, 953 P.2d 561 (1998). Because we conclude that the plaintiffs did not produce sufficient evidence for the jury to conclude that Jacobs maintained control over Fajardo's vaginal mesh procedure, we need not address these cases from other jurisdictions.

In the present case, even Bercik, the plaintiffs' expert, a urogynecologist and reconstructive surgeon, and professor of female pelvic medicine, agreed with Jacobs and Paraiso that, as a general matter, it is the consulting surgeon who is going to perform the procedure who is responsible for evaluating the patient, selecting the appropriate treatment, and educating the patient regarding that procedure. Frederick Rau, the medical defendants' expert, a board certified obstetrician and gynecologist, agreed that, under circumstances such as these, "[t]he referring physician has no medical duty or responsibility to obtain a patient's informed consent for a surgical procedure he/she is not going to perform. . . . [I]n this case . . . Jacobs acted entirely reasonably in discussing a potential sling procedure with [Fajardo], but he had no duty to obtain [her] informed consent for the ultimate sling procedure that was performed." Thus, not a single expert testified that Jacobs had a duty to obtain Fajardo's informed consent to the mesh implant.

Based on the foregoing, we conclude that the trial court properly rendered summary judgment in favor of the medical defendants in connection with the informed consent claim.

B

Misrepresentation Claims

The plaintiffs also claim on appeal that the trial court improperly rendered summary judgment in favor of the medical defendants on the claims of innocent, negligent, and intentional misrepresentation. We disagree.

First, this court recently concluded that a claim of innocent misrepresentation against a urogynecologic surgeon did not lie as a matter of law. See *Farrell* v. *Johnson & Johnson*, 335 Conn. 398, 421, 238 A.3d 698 (2020). In so concluding, this court explained that the

surgeon's "provision of medical services did not qualify as a 'sale, rental or exchange transaction' under § 552C of the Restatement (Second) [of Torts], and, therefore, a claim for innocent misrepresentation does not lie under our existing innocent misrepresentation precedent." Id. Similarly, in the present case, Jacobs' provision of medical services, which involved only his recommendation that Fajardo see a specialist and discuss the sling procedure, does not qualify as a "sale, rental or exchange transaction . . . ." 3 Restatement (Second), Torts § 552C, p. 141 (1977). Therefore, the plaintiffs' claim of innocent misrepresentation fails as a matter of law.

Second, we agree with the trial court that the plaintiffs' claims of negligent and/or intentional misrepresentation also fail. The trial court found that "Jacobs was unaware of what kind of a sling Paraiso planned to implant in [Fajardo]." Indeed, the trial court also found that "the parties agree [that] Jacobs never discussed [Boston Scientific] products with [Fajardo]." Thus, because Jacobs did not know what product Paraiso would implant in Fajardo and never discussed Boston Scientific products with Fajardo, he could not have negligently or intentionally misled, misinformed or misrepresented the quality, usefulness, risks and benefits of the Obtryx.

Accordingly, we conclude that the trial court properly rendered summary judgment in favor of the medical defendants on the plaintiffs' misrepresentation claims.

## II

## INSTRUCTIONAL ERROR CLAIM AGAINST BOSTON SCIENTIFIC

We next turn to the plaintiffs' claim that the trial court improperly declined to charge the jury on the reasonable alternative design prong of the risk-utility

test. Specifically, the plaintiffs claim that they introduced sufficient evidence that the tension free vaginal tape (TVT)[9] was a safer reasonable alternative design to Boston Scientific's device, the Obtryx, which caused Fajardo's injuries. Boston Scientific contends that the plaintiffs' instructional error claim is unreviewable because it was not timely or properly preserved. Boston Scientific argues, in the alternative, that, if we conclude that the claim is reviewable, no such instruction was warranted in light of the evidence that was presented at trial and the governing law.

Even if we assume, for purposes of this appeal, that the request for a reasonable alternative design instruction was timely and properly made, we agree with the trial court that the evidence did not support such an instruction. Accordingly, we affirm the judgment of the trial court.

## A

## Legal Background

Before we turn to the parties' specific contentions, it is helpful briefly to situate the dispute within its broader legal context. In 2016, we decided a pair of cases that required us to reexamine and clarify the legal standards that govern claims brought under the Connecticut Product Liability Act. See *Bifolck* v. *Philip*

[9] The record demonstrates that the term "TVT" is used both with respect to the Ethicon branded tension free vaginal tape (the specific TVT type product the plaintiff identified in her complaint) and as a generic term for similar tension free vaginal tapes in the class of TVT products, such as Boston Scientific's Advantage tape. Unless otherwise noted, we use the term in that broader, generic context. Although the plaintiffs juxtaposed the Obtryx to the class of TVT products generally, they did not focus on a particular TVT product with which to compare the Obtryx and, most important, did not demonstrate how another specific product without the alleged defects of the Obtryx would have avoided her injuries, a point we discuss in more detail subsequently in this opinion. See parts II C through E of this opinion.

*Morris*, *Inc.*, 324 Conn. 402, 152 A.3d 1183 (2016); *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, 321 Conn. 172, 136 A.3d 1232 (2016).

In *Izzarelli*, we sharply limited the scope of the traditional legal standard governing defective product design claims, the so-called "ordinary consumer expectation test," under which, "[t]o be considered unreasonably dangerous, the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." (Internal quotation marks omitted.) *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, supra, 321 Conn. 185. We clarified that that test "would be appropriate [only] when the incident causing injury is so bizarre or unusual that the jury would not need expert testimony to conclude that the product failed to meet the consumer's expectations." Id., 191. In other words, "[t]he ordinary consumer expectation test is reserved for cases in which the product failed to meet the ordinary consumer's minimum safety expectations, such as res ipsa [loquitur] type cases." (Emphasis omitted.) Id., 194.

In most product liability cases, by contrast, the plaintiff is required to establish a defective design under the modified consumer expectation test, pursuant to which "the jury would weigh the product's risks and utility and then inquire, in light of those factors, whether a reasonable consumer would consider the product design unreasonably dangerous." (Internal quotation marks omitted.) Id., 190; see id., 194. In applying that test, we indicated that the jury is to be instructed to consider a nonexclusive list of factors, one of which may be the availability of a feasible alternative design. See id., 190–91, 208–10.

In *Bifolck*, we further clarified *Izzarelli*'s ordinary and modified consumer expectation tests. First, we

renamed them the "consumer expectation test" and the "risk-utility test," respectively. *Bifolck* v. *Philip Morris, Inc.*, supra, 324 Conn. 432. Second, we set forth two distinct prongs or methods by which the latter test may be satisfied. "Under the risk-utility test, which will govern most cases, a product is in a defective condition unreasonably dangerous to the consumer or user if:

"(1) A reasonable alternative design was available that would have avoided or reduced the risk of harm and the absence of that alternative design renders the product unreasonably dangerous. In considering whether there is a reasonable alternative design, the jury must consider the feasibility of the alternative. Other relevant factors that a jury may consider include, but are not limited to, the ability of the alternative design to reduce the product's danger without unreasonably impairing its usefulness, longevity, maintenance, and esthetics, without unreasonably increasing cost, and without creating other equal or greater risks of danger [*Bifolck 1*]; or

"(2) The product is a manifestly unreasonable design in that the risk of harm so clearly exceeds the product's utility that a reasonable consumer, informed of those risks and utility, would not purchase the product [*Bifolck 2*]." Id., 434–35.

Here, the trial court declined to give an instruction under *Bifolck 1* and gave only a *Bifolck 2* instruction. The question in the present case is whether the trial court correctly concluded that the evidence did not support an instruction under the reasonable alternative design prong of the risk-utility test (i.e., *Bifolck 1*). We conclude that it did.

It is well established that, "[i]n determining whether the trial court improperly refused a request to charge, [w]e . . . review the evidence presented at trial in the light most favorable to supporting the . . . proposed

charge. . . . A request to charge [that] is relevant to the issues of [a] case and [that] is an accurate statement of the law must be given. . . . If, however, the evidence would not reasonably support a finding of the particular issue, the trial court has a duty not to submit it to the jury. . . . Thus, a trial court should instruct the jury in accordance with a party's request to charge [only] if the proposed instructions are reasonably supported by the evidence. . . . If . . . the evidence reasonably does not support a finding on the particular issue, the trial court is duty bound to refrain from submitting it to the jury." (Citation omitted; internal quotation marks omitted.) *Brown* v. *Robishaw*, 282 Conn. 628, 633, 922 A.2d 1086 (2007).

Whether the evidence presented by a party reasonably supports a particular request to charge "is a question of law over which our review is plenary." Id. Similarly, whether there is a legal basis for the requested charge is a question of law also entitled to plenary review. See id., 633–34.

B

Reviewability of Plaintiffs' Instructional Claim

First, we must address Boston Scientific's assertion that the plaintiffs' claim is unreviewable because the plaintiffs failed to properly preserve their challenge regarding the instruction. Boston Scientific contends that the plaintiffs' *Bifolck 1* instruction claim is unpreserved because they did not submit a written request to charge on the instruction and also failed to cite evidence in the record to support such an instruction pursuant to Practice Book §§ 16-21 and 16-23. The following facts are necessary to address this contention.

Before the trial court charged the jury, the parties and the court had off-the-record discussions regarding *Bifolck 1*, the reasonable alternative design charge. Fol-

lowing those discussions, the plaintiffs requested the charge through an e-mail to the court and did not cite to any evidence in the record to support the request.[10] However, the plaintiffs did not formally submit a written request for the court to charge the jury as to *Bifolck 1* pursuant to Practice Book §§ 16-21 and 16-23; nor did they take exception to the court's charge on the record before the jury was instructed.[11]

It was not until the jury had been charged and dismissed for the day that the plaintiffs formally took exception to the court's design defect instruction, claiming entitlement to an instruction on *Bifolck 1*. Although the plaintiffs' request did not technically comply with the requirements of Practice Book §§ 16-21 and 16-23, the trial court determined that the plaintiffs "did timely submit a request to charge on the 'reasonable alternative design' test . . . ." Ultimately, in response to the plaintiffs' motion to set aside the verdict, the trial court addressed the merits of the plaintiffs' claim and rejected it.

It is important to note that, in their e-mail request to the court, the plaintiffs did not cite to any evidence to support their request for a *Bifolck 1* charge. In failing to cite to any evidence in the request to charge, the plaintiffs failed to comply with Practice Book §§ 16-21 and 16-23. Accordingly, the trial court would have been

[10] Counsel for the plaintiffs submitted the following request by e-mail: "In further response to [the defendants'] prior comments [the] [p]laintiffs contend that both consumer expectation and risk utility . . . of *Bifolck* are all applicable."

[11] The court charged the jury in relevant part: "The plaintiff[s] [claim] the Obtryx was defectively designed. In order to prove that a product was defective, the plaintiff[s] must prove the condition [they] claimed to be a defect made the product unreasonably dangerous. A product is in a defective condition unreasonably dangerous to the consumer or user if the design of the product [was] so manifestly unreasonable in that the risk of harm so clearly exceeds the product's utility that a reasonable consumer, informed of those risks and utility, would not purchase the product."

warranted in denying the plaintiffs' request on the basis that the plaintiffs did not cite to evidence to support it. See, e.g., *State* v. *Bettini*, 11 Conn. App. 684, 690, 528 A.2d 1180 ("[i]n the absence of compliance with the rules of practice, the trial court is entitled to deny a request to charge"), cert. denied, 205 Conn. 804, 531 A.2d 937 (1987); see also *State* v. *Kendall*, 123 Conn. App. 625, 672, 2 A.3d 990, cert. denied, 299 Conn. 902, 10 A.3d 521 (2010).

We point this out because it is this lack of specificity in the plaintiffs' request to charge that the concurrence and dissent capitalizes on and uses as an opportunity to recast and create its own arguments that, in its opinion, the plaintiffs should have made at trial to support their request for a reasonable alternative design instruction.

Nevertheless, despite the plaintiffs' failure to comply with Practice Book §§ 16-21 and 16-23, the trial court determined that the plaintiffs timely requested a *Bifolck 1* charge and addressed the request on the merits. Therefore, for the purposes of this appeal, we assume, without deciding, that the plaintiffs have preserved their challenge to the jury instruction.

C

Plaintiffs' Instructional Claim

The plaintiffs assert that the evidence presented at trial was sufficient to support the instruction, and, as a result, the trial court improperly declined to charge the jury on the reasonable alternative design prong of the risk-utility test. In support of their claim, the plaintiffs cite to a study introduced into evidence; see S. Ross et al., "Transobturator Tape Compared with Tension-Free Vaginal Tape for Stress Incontinence: A Randomized Controlled Trial," 114 Obstetrics & Gynecology 1287 (2009) (Ross study); the testimony of their

product design expert, Bruce Rosenzweig, and other studies admitted into evidence.

Our decisions in *Bifolck* and *Izzarelli* establish the framework within which a plaintiff is entitled to a reasonable alternative design instruction under the risk-utility test. In *Bifolck*, this court explained: "In order to state a prima facie case that will permit the case to be submitted to the jury, the plaintiff must simply prove that the alternative design was feasible (technically and economically) and that the alternative would have reduced or avoided the harm." *Bifolck* v. *Philip Morris, Inc.*, supra, 324 Conn. 433. In *Izzarelli*, in which we addressed cigarette design, this court explained that, "[t]o establish the defect, the plaintiff's case required expert testimony on [product] design and manufacture, as well as the feasibility of an alternative design." *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, supra, 321 Conn. 203–204.

At the outset, we must determine what type of evidence is sufficient to prove that an "alternative design was feasible (technically and economically) and that the alternative would have reduced or avoided the harm." *Bifolck* v. *Philip Morris, Inc.*, supra, 324 Conn. 433. Although we concluded in *Izzarelli* that expert testimony was required in that case, a question has arisen as to whether expert testimony is always required as a necessary component under the risk-utility test. This court has not addressed that specific question.

The issue has, however, received some attention in the federal courts. Indeed, as the United States District Court for the District of Connecticut has recognized, "[n]either *Izzarelli* nor *Bifolck* state[s] explicitly that expert testimony is required under the risk-utility test. However, both cases suggest it by juxtaposing the consumer expectation test, which does not require expert testimony, and the risk-utility test." *Frederick* v. *Deco*

*Salon Furniture, Inc.*, Docket No. 3:16-cv-00060 (VLB), 2018 WL 2750319, *7 (D. Conn. March 27, 2018). Consistent therewith, the United States District Court for the District of Connecticut and the Second Circuit have applied the expert requirement to such claims.

For example, in deciding a motion for summary judgment for a defective design claim involving a water treatment pump, the United States District Court for the District of Connecticut concluded that "this is the type of complex case [that] requires an expert opinion as to defect and as to feasible alternative design." *Water Pollution Control Authority* v. *Flowserve US, Inc.*, Docket No. 3:14-cv-00549 (VLB), 2018 WL 1525709, *24 (D. Conn. March 28, 2018), aff'd, 782 Fed. Appx. 9 (2d Cir. 2019).

The court explained that, because the case involved the requirements of a pump for a wastewater treatment facility, the jury would not be "as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training." (Internal quotation marks omitted.) Id. The Second Circuit agreed with this analysis, explaining that, under Connecticut law, "[e]xpert evidence is necessary to satisfy the risk-utility test [when] the nexus between the injury and the alleged cause would not be obvious to the lay juror, because expert knowledge is often required in such circumstances to establish the causal connection between the accident and some item of physical or mental injury." (Internal quotation marks omitted.) *Water Pollution Control Authority* v. *Flowserve US, Inc.*, 782 Fed. Appx. 9, 14–15 (2d Cir. 2019).

This position is consistent with the majority of other jurisdictions. "[W]hen technical issues are involved (issues beyond common knowledge and experience) in a [product] liability or a [product related] case, expert

testimony is required to generate a jury issue. . . . Technical issues requiring expert testimony include engineering, metallurgical and medical principles. . . . When such principles are at issue in a design defect case, expert testimony is necessary to establish a reasonable alternative design and the ability of such design to reduce the foreseeable harm of the challenged product—that is to say, expert testimony may be needed to establish the elements of breach and causation." (Citations omitted; internal quotation marks omitted.) *Farm Bureau Property & Casualty Ins. Co.* v. *CNH Industrial America, LLC*, Docket No. C16-3122-LTS, 2018 WL 2077727, *17 (N.D. Iowa February 5, 2018).

Other jurisdictions have explained that, "[w]hen understanding the nature of the alleged defect requires knowledge . . . beyond that possessed by the average lay person . . . [the] law requires expert testimony to establish both the defect and the practical and technically feasible alternative design." (Internal quotation marks omitted.) *Buck* v. *Ford Motor Co.*, Docket No. 3:08CV998, 2012 WL 12887708, *3 (N.D. Ohio June 25, 2012), aff'd, 526 Fed. Appx. 603 (6th Cir. 2013); see, e.g., *Hilaire* v. *DeWalt Industrial Tool Co.*, 54 F. Supp. 3d 223, 252 (E.D.N.Y. 2014) ("New York law requires plaintiffs to use expert testimony as to the feasibility and efficacy of alternative designs in order to prove a design defect"). Indeed, in another product liability case involving vaginal mesh products, the United States District Court for the Southern District of Iowa explained that expert testimony was required on the issue of "whether an alternative safer design existed for a medical device, which plainly involves medical principles." *Willet* v. *Johnson & Johnson*, 465 F. Supp. 3d 895, 905 (S.D. Iowa 2020).

Thus, as we have in other contexts, we conclude that expert testimony is required in a reasonable alternative design case when the evidence regarding the defect and

whether the alternative was feasible (technically and economically) and whether the alternative would have reduced or avoided the risk of harm is beyond the ken of the average juror. See, e.g., *LePage* v. *Horne*, 262 Conn. 116, 125, 809 A.2d 505 (2002) ("[e]xpert testimony is required when the question involved goes beyond the field of the ordinary knowledge and experience of judges or jurors" (emphasis omitted; internal quotation marks omitted)). In the present case, the evidence regarding whether there was an alternative design to the Obtryx that would have reduced or avoided the risk of harm to Fajardo involved complicated medical principles. These medical principles included the material from which the products were made, how the different products were placed in the body, how each worked to treat the condition of stress urinary incontinence, how the products interacted with the human body when implanted, and the risks and potential side effects. Accordingly, in order to prove that Boston Scientific's product was unreasonably dangerous under *Bifolck 1*, the plaintiffs were required to produce expert testimony on a reasonable alternative design.

Here, the trial court determined that Rosenzweig "was [the plaintiffs'] product design expert." The plaintiffs agree that he was their design expert. In fact, in their brief to this court, the plaintiffs focus on Rosenzweig and his testimony in other cases.[12] Therefore, in evaluating the plaintiffs' motion to set aside the verdict based on the failure of the trial court to give the *Bifolck 1* instruction, the trial court reviewed Rosenzweig's tes-

[12] The plaintiffs do not rely on Bercik, whom the concurrence and dissent is forced to rely on to support its position. It is not surprising that the plaintiffs do not rely on Bercik because, as we explain subsequently in this opinion; see footnote 23 of this opinion and accompanying text; Bercik did not testify about the design of the Obtryx or its defects; he merely explained that he had implanted the Obtryx once or twice but usually implants the Ethicon branded TVT. He gave no opinion on whether use of the Ethicon branded TVT would have reduced or avoided the risk of harm to Fajardo.

timony and the documentary evidence that came in through him.

The trial court determined: "While [Rosenzweig] was critical of several design characteristics of the Obtryx product, he offered no reasonable alternative design of a mesh product that was available to [Boston Scientific] when the Obtryx [implanted] in [Fajardo] was produced. The court rejects [the plaintiffs'] current suggestions [that] the jury might infer [that Rosenzweig] endorsed any polypropylene transvaginal mesh product, however designed or configured, as [Rosenzweig] . . . in this case . . . testified [that] transvaginal polypropylene implants are defective and unreasonably dangerous because transvaginal polypropylene mesh products provoke a foreign body rejection or reaction in women." Indeed, Rosenzweig testified that, in his opinion, all vaginal slings made of polypropylene mesh are defective. He specifically testified that a TVT produced by Gynecare, which is part of the Ethicon division of Johnson & Johnson (Ethicon branded TVT), is defective.

We agree with the trial court that Rosenzweig was the only witness qualified to opine on reasonable alternative design, and, therefore, the trial court properly focused on the testimony of Rosenzweig to determine whether the plaintiffs had produced sufficient evidence to warrant an instruction under the reasonable alternative design prong. We do the same and, as explained more fully in this opinion, conclude that the evidence was not sufficient to warrant an instruction on reasonable alternative design.[13]

[13] Although the ultimate determination of whether the facts supported the instruction is a legal question subject to plenary review, the facts underpinning that determination will not be overturned in the absence of a finding that they were clearly erroneous. In the present case, the trial court determined that Rosenzweig was the plaintiffs' product design expert, and the plaintiffs do not challenge that finding, let alone assert that it is clearly erroneous. The trial court further found that Rosenzweig's testimony was that all polypropylene mesh slings are defective and unreasonably dangerous

D

Framing of the Issue Presented

In order to better understand the issue that is truly in dispute in this appeal, it is important to keep in mind that a plaintiff in Connecticut has two ways to establish that "a product is in a defective condition unreasonably dangerous to the consumer or user . . . ." *Bifolck* v. *Philip Morris, Inc.*, supra, 324 Conn. 434. Those two ways are: "(1) A reasonable alternative design was available that would have avoided or reduced the risk of harm and the absence of that alternative design renders the product unreasonably dangerous. . . . [*O*]*r* (2) [t]he product is a manifestly unreasonable design in that the risk of harm so clearly exceeds the product's utility that a reasonable consumer, informed of those risks and utility, would not purchase the product." (Emphasis added.) Id., 434–35. Therefore, in Connecticut, unlike in some states and in accordance with the position of the Restatement (Third) of Torts, Products Liability, proof of a reasonable alternative design is not necessary to prove that a product has a defective design. It is only one way of proving defective design.

In the present case, the jury was instructed under the second theory of liability, namely, that the risk of harm from the Obtryx so clearly exceeded its utility that a reasonable consumer would not purchase it. Accordingly, although the concurring and dissenting opinion spends considerable energy laying out how the plaintiffs demonstrated that the Obtryx was defective,

and that the Burch procedure, which is a surgical repair, was his preferred method. The plaintiffs do not challenge these findings by the trial court as clearly erroneous, and the concurrence and dissent does not find them to be unsupported by the evidence. In fact, instead of addressing why the trial court's findings are clearly erroneous, the concurrence and dissent ignores them and engages in its own fact-finding. At no point did Rosenzweig opine that use of the Ethicon branded TVT or any other TVT product would have reduced or avoided Fajardo's injuries.

it is important to remember that the jury considered whether the product was defective insofar that it was a "manifestly unreasonable design in that the risk of harm so clearly exceeds the product's utility . . . ." Id., 435. Indeed, the jury was able to consider all of the evidence presented and ultimately found that the Obtryx was not defective under *Bifolck 2*.

The issue on appeal is not whether the jury should have been able to consider the plaintiffs' claims at all. Instead, the question is whether the plaintiffs introduced sufficient evidence that the Obtryx is defective because a reasonable alternative design was available that would have reduced or avoided the risk of harm to Fajardo and Boston Scientific's failure to adopt that reasonable alternative design rendered the Obtryx unreasonably dangerous. In considering the plaintiffs' claim and the position of the concurrence and dissent, it is important to remember that "a manufacturer is not required to design the safest possible product or a safer product than the one it designed, so long as the design adopted was reasonably safe. The duty assumed by the manufacturer is to design the product for its intended use, namely, that use which could reasonably be foreseen. Stated differently, a manufacturer has a duty to avoid placing on the market a product [that], because of its defective design, presents an unreasonable risk of harm to others." (Footnotes omitted.) 6 S. Speiser et al., American Law of Torts (2010) § 18:73, pp. 180–81.

Accordingly, in considering the plaintiffs' claim, the issue is not whether the plaintiffs have produced sufficient evidence that the Obtryx had defects and that some of those defects may have caused Fajardo's injuries, which is the claim under *Bifolck 2* that the jury considered and rejected. Rather, the issue presented by this appeal is whether the plaintiffs introduced sufficient evidence that there was a reasonable alternative design available to Boston Scientific's Obtryx and that

Boston Scientific's failure to use that alternative design rendered the Obtryx unreasonably dangerous.

E

Whether an Instruction on a Reasonable Alternative Design Was Warranted

On appeal, the plaintiffs assert that Rosenzweig's testimony, the Ross study, and other studies introduced into evidence established a reasonable alternative design to the Obtryx, namely, the TVT. To the extent that the plaintiffs assert that they presented sufficient evidence that the TVT is a reasonable alternative design to the Obtryx, it appears—from the evidence on which they rely—that they must be referring to the class of tension free vaginal tape that is implanted in a retropubic fashion.[14] First, Rosenzweig does not compare the Obtryx

[14] The concurrence and dissent asserts that it is an "erroneous assumption" that, to the extent that the plaintiffs referred to the TVT, it was the class of retropubic slings rather than the Ethicon branded TVT. Part III A of the concurring and dissenting opinion. That claim is belied by the record. Indeed, a review of the plaintiffs' memorandum in support of their motion for a new trial reveals that the plaintiffs never once identified the Ethicon branded TVT as the reasonable alternative design for which they had presented sufficient evidence to support a charge. Instead, in their memorandum in support of the motion, the plaintiffs cited to "safer alternatives" to the Obtryx, including the Burch procedure. Even in their brief to this court, the plaintiffs again referred to "safer alternatives" and the Burch procedure, and, for the first time, mentioned "TVT" as one of the safer alternatives without indicating whether it was the Ethicon branded TVT.

Furthermore, Boston Scientific's brief to this court demonstrates that it also understood the plaintiffs to be claiming that the class of TVTs was a reasonable alternative design. Boston Scientific argues specifically in its brief: "Without naming a specific product, the plaintiffs argue that other polypropylene slings, presumably without detanged portions, are reasonable alternative designs to the Obtryx." Boston Scientific further asserted that "the plaintiffs never identified at trial any specific alternative design [that] they claim [Boston Scientific] should have used with the Obtryx." (Emphasis omitted.) Boston Scientific also explained that "[t]he plaintiffs' posttrial reliance on a single clinical study for the proposition that other polypropylene slings constitute reasonable alternative designs is inconsistent with the evidence presented by the plaintiffs at trial."

to the Ethicon branded TVT. Second, the Ross study did not compare the Obtryx to the Ethicon branded TVT but compared the Obtryx to another retropubic sling manufactured by Boston Scientific. Third, the other studies entered into evidence did not compare the Obtryx device to the Ethicon branded TVT.[15] Finally, despite the efforts of the concurrence and dissent; see part III A 1 and footnote 22 of the concurring and dissenting opinion; Bercik did not compare the Ethicon branded TVT to the Obtryx; he notes only that he and a few other physicians with whom he works prefer the Ethicon branded TVT to other slings but that one of his superiors in his working group at Yale School of Medicine still uses the Obtryx.[16]

[15] Although the Moalli study compared the tensile property of the mesh used in five other devices (including the mesh used in the Obtryx) to the mesh used in the Ethicon branded TVT, it did not compare how the Obtryx performed in the human body to how the Ethicon branded TVT performed in the human body; nor did it compare the risks of harm from the two devices. See P. Moalli et al., "Tensile Properties of Five Commonly Used Mid-Urethral Slings Relative to the TVT," 19 International Urogynecology J. 655, 663 (2008) ("Although it is important to understand the behavior of a sling before implantation, the behavior of these slings in vivo and after incorporation into host tissue may be inferred, but is not directly apparent from these studies. Indeed, the next logical step to the current study is the implementation of rigorous in vivo studies to determine how the textile and tensile properties of polypropylene slings relate to tissue behavior, efficacy, patient morbidity, and patient satisfaction.").

[16] The concurrence and dissent asserts that Bercik "testified that Fajardo could have been a candidate for the TVT, that the Obtryx was the cause of her injuries, and that he had begun using the TVT in favor of transobturator slings, including the Obtryx, because of his negative experience with the latter." Footnote 17 of the concurring and dissenting opinion. Bercik actually testified that, at the time Farjado came to see him in 2014 when she was experiencing pain from the Obtryx, he recommended that she could potentially benefit from the TVT. Bercik explained that he recommended the TVT at that time because the transobturator sling procedure had not worked, so he would not try that again. This clearly is not testimony suggesting that the TVT was safer or a more reasonable alternative and should have been used in 2010 when Fajardo had the Obtryx implanted, as the concurrence and dissent suggests.

Similarly, Brian Hines, a urogynecologist who did not testify at the trial in the present case, also saw Fajardo after she was having pain from the

The class of TVTs cannot, however, be a reasonable alternative design that would have reduced or avoided the risk of harm to Fajardo. Specifically, the evidence in the record demonstrates that products that belong to the class of TVTs can be made of many different types of mesh material of various pore sizes and differing weights and that those design differences can alter performance and safety. Therefore, the plaintiffs' repeated reference to TVT does not constitute identification of a reasonable alternative design when the safety data related to that class of products vary considerably. By referring to the class of TVTs when some products within that class suffer from the same alleged defects as the Obtryx—a point we will elaborate on shortly—the plaintiffs failed to produce sufficient evidence of a reasonable alternative design that would have reduced or avoided the risk of harm to Fajardo.

A review of Rosenzweig's testimony reveals that he testified regarding defects in the Obtryx. First, he explained that, in his opinion, all slings made with polypropylene mesh are defective. Rosenzweig explained that the use of that type of mesh caused a foreign body reaction in Fajardo and contributed to the cause of her injuries. The Obtryx is made of polypropolyene mesh, but so, too, is the Ethicon TVT.

Obtryx. A review of his notes from that appointment, which were an exhibit at the trial, reveals that Hines suggested the TVT as an option for Fajardo *after* she had already tried the Obtryx, but he also notified her that it had many of the same risks of injury that she experienced with the Obtryx and that further testing was required to determine if she would be a good candidate for this procedure. Again, Hines did not opine on whether the TVT should have been used at the time of Fajardo's original surgery, only that, after she already had issues with the Obtryx, the TVT could possibly be an alternative. Accordingly, we disagree with the concurrence and dissent that "[t]his evidence would have permitted the jury to conclude not only that the TVT is, in general, a viable alternative to the Obtryx . . . but also that it was well suited to Fajardo's individual needs." Part II A 1 of the concurring and dissenting opinion.

Second, Rosenzweig testified that the mesh used in the Obtryx had a detanged or heat-sealed edge and that it made the mesh stiffer in the area that had been sealed. Rosenzweig explained: "When you seal the edge of the mesh, you increase the stiffness of the mesh. . . . But, what scientists have shown is that stiffness of mesh is a bad property. It increases the foreign body reaction . . . the inflammatory reaction, the amount of scarring, and all the sequelae that we're going to continue to talk about . . . ." Rosenzweig was later asked: "Earlier, you described some problems with the detanging or the heat sealing of the center portion of the . . . Obtryx sling. Does that detanging add any benefit that would outweigh the added risks . . . from the stiffness?" Rosenzweig responded, "[n]o."[17]

To the extent that the plaintiffs are claiming that the class of TVTs is a reasonable alternative design that would have reduced or avoided the risk of harm to Fajardo, this testimony does not support the plaintiffs' claims. First, there was evidence that other products within the class of TVTs are made of the exact same mesh as the Obtryx, and those products have the same heat seal and detanging. Rosenzweig testified that the Advantage sling has the "same heat-sealed center." The plaintiffs did not demonstrate how a TVT product with the same allegedly defective material and heat sealing as the Obtryx would have reduced or avoided the risk of harm to Fajardo. Second, even if the plaintiffs established that other TVTs do not have the heat seal and detanging, that does not prove that the use of that other product would have reduced or avoided the risk of harm to Fajardo. In fact, the plaintiffs' product design expert testified that all vaginal slings made of polypro-

[17] Rosenzweig never testified that a particular TVT would have been a reasonable alternative design. At most, Rosenzweig testified that "the data [are] limited but [show] that . . . for [the] Obtryx and the Advantage mesh . . . it's inferior to the other slings that are on the market."

pylene mesh are defective and unreasonably dangerous. Even more to the point, Rosenzweig admitted that he considered the Ethicon branded TVT defective for that reason.

Nevertheless, the plaintiffs also rely heavily on the Ross study in support of their claim that the class of products known as TVTs is a reasonable alternative design to the Obtryx. It cannot be emphasized enough that the Ross study does not address the Ethicon branded TVT at all. Instead, it compared two products made by Boston Scientific—the Obtryx and the Advantage branded TVT. See S. Ross et al., supra, 114 Obstetrics & Gynecology 1288. Therefore, the plaintiffs' reliance on that study undermines the claim of the concurrence and dissent that the plaintiffs pointed to the Ethicon branded TVT as a reasonable alternative design.

Furthermore, the Ross study does not even support the plaintiffs' claim that the class of TVTs was a reasonable alternative design to the Obtryx that would have reduced or avoided the risk of harm to Fajardo. Specifically, there was evidence at trial that the Obtryx and the Advantage branded TVT are made of the exact same mesh material. In explaining the Ross study, Rosenzweig stated: "This is a study that was done and published in 2009. It's a randomized control trial comparing the Obtryx sling made of Advantage mesh with the Advantage sling that goes behind the pubic bone, also made of Advantage mesh." Rosenzweig also testified that the Advantage sling is made of the exact same material as the Obtryx, including the heat seal. Because Rosenzweig identified the heat seal in the mesh that is used in the Obtryx as one of the primary defects that caused Fajardo's injury, a study that compared two products made of the same mesh with the same heat seal does not support the plaintiffs' claim that there

was a reasonable alternative design that would have reduced or avoided the risk of harm to Fajardo.

The only difference between the two devices compared in the Ross study was their placement in the body. The Advantage sling was designed to be placed in a retropubic fashion, meaning behind the pubic bone. The Obtryx, on the other hand, was designed to be placed using a transobturator approach. See S. Ross et al., supra, 114 Obstetrics & Gynecology 1287. Rosenzweig did not testify that the risk of harm to Fajardo would have been reduced or avoided if a retropubic sling was used. Instead, Rosenzweig identified only the polypropylene mesh and the heat seal as the defects that caused Fajardo's injuries. Accordingly, contrary to the plaintiffs' position, the Ross study did not support their request for a reasonable alternative design instruction.

Furthermore, even if the plaintiffs were able to make a claim of reasonable alternative design by pointing to a class of products, it is important to note that Rosenzweig testified that, in his opinion, *all* mesh products fabricated from polypropylene, including the Ethicon branded TVT, as well as other products within the class of TVTs, are unsafe and unsuitable for implantation in the human body. Rosenzweig's testimony was that any vaginal sling made of polypropylene mesh is defective and not reasonably safe, and that the Burch procedure, a surgical option, was the best approach to treat stress urinary incontinence.[18]

[18] To the extent that the plaintiffs' claim may be understood to be that the surgical procedure testified to by Rosenzweig constitutes a reasonable alternative design, we agree with the courts that have considered this issue and concluded that a surgery is not a reasonable alternative design to a particular product. See, e.g., *Mullins* v. *Johnson & Johnson*, 236 F. Supp. 3d 940, 943 (S.D. W. Va. 2017) ("[e]vidence that a surgical procedure should have been used in place of a device is not an alternative, feasible design in relation to the TVT").

As the Fifth Circuit has explained, "[a] design is not a safer alternative if, under other circumstances, [it would] impose an equal or greater risk of harm than the design at issue. . . . Similarly, the plaintiff must show the safety benefits from [the] proposed design are foreseeably greater than the resulting costs, including any diminished usefulness or diminished safety." (Citation omitted; emphasis omitted.) *Casey* v. *Toyota Motor Engineering & Mfg. North America, Inc.*, 770 F.3d 322, 331 (5th Cir. 2014). Accordingly, we cannot conclude that the plaintiffs produced sufficient evidence to warrant an instruction that the class of TVTs constitutes a reasonable alternative design.

We agree with the concurrence and dissent that pointing to an existing product that has been successfully commercialized can serve as evidence of the feasibility of an alternative design; see part II A 1 of the concurring and dissenting opinion; but we simply find that proposition inapplicable to the present case.

To put it simply, that is just not the way that the plaintiffs tried this case. The plaintiffs did not produce sufficient facts to support a reasonable alternative design claim. Namely, the plaintiffs did not point to a specific existing product on the market and demonstrate that its use would have reduced or avoided the risk of harm to Fajardo. At best, the plaintiffs took a scattershot approach, pointing to different alternatives to the Obtryx that included surgical options and a class of products known as TVTs. Specifically, the plaintiffs' product design expert recommended a surgical alternative known as the Burch procedure, the Ross study compared the Obtryx to an entirely different product, the Advantage tape, another study compared transobturator slings like the Obtryx to retropubic slings (the class of products known as the TVT), and another study compared mesh used in products within the class of TVTs to the mesh used in the Ethicon branded TVT.

The evidence did not, however, demonstrate that any particular product was safer or, most important, would have reduced or avoided the risk of harm to Fajardo when compared to the Obtryx.

We recognize that the commentary to the Restatement (Third) provides that "other products already available on the market may serve the same or very similar function at lower risk and at comparable cost. Such products may serve as reasonable alternatives to the product in question." Restatement (Third), Torts, Products Liability § 2, comment (f), p. 24 (1998); see part II A 1 of the concurring and dissenting opinion. This court, however, has not adopted the Restatement (Third). See *Bifolck* v. *Philip Morris, Inc.*, supra, 324 Conn. 431 ("the defendant's arguments have not persuaded us that we should adopt the Restatement (Third) at this time").

Although we have not expressly adopted the Restatement (Third), it does inform our analysis in the present case. Even if this court had adopted the Restatement (Third), and if we agreed with the concurrence and dissent that the plaintiffs pointed to a single product on the market as a reasonable alternative—namely, the Ethicon branded TVT—pointing to a product on the market alone would not have satisfied the plaintiffs' burden in this case. Although pointing to a product on the market with an alternative design may demonstrate that the alternative design is feasible, it does not by itself establish that the alternative design would have reduced or avoided the harm to Fajardo. See, e.g., *Bic Pen Corp.* v. *Carter*, 171 S.W.3d 657, 671–72 (Tex. App. 2005) (not requiring expert testimony based on counsel's concession but reviewing safety data introduced into evidence to determine whether products on market were reasonable alternative design that would have avoided injury), rev'd on other grounds, 251 S.W.3d 500 (Tex. 2008). The plaintiffs still needed to produce

sufficient evidence to demonstrate that, if Boston Scientific had adopted the design of the Ethicon branded TVT, it would have reduced or avoided the risk of harm to Fajardo.

To the extent that there was information regarding the safety data of the TVT, that evidence was that there were risks and complications with the use of the TVT. For example, one study explained that "one of the primary problems in using the TVT is that as a result of its low stiffness, the mesh easily deforms when tensioning under the urethra. Specifically, pulling the sling gently results in thinning of the mesh (permanent deformation) and fraying at the tanged edges. Consequently, various companies have modified polypropylene sling meshes for easier placement by heat sealing the midportion of the sling that lays under the urethra . . . ." P. Moalli et al., "Tensile Properties of Five Commonly Used Mid-Urethral Slings Relative to the TVT," 19 International Urogynecology J. 655, 656 (2008) (Moalli study). Another study explained the complications from the TVT to "include bladder perforation, excessive blood loss, urinary retention, pelvic hematoma, and suprapubic wound infection. Later complications include exacerbation of existing or development of de novo overactive bladder, persistent suprapubic discomfort, and vaginal mesh erosion. Rare complications, such as bowel injuries and female sexual dysfunction, have been reported." H. Cholhan et al., "Dyspareunia Associated with Paraurethral Banding in the Transobturator Sling," 202 Am. J. Obstetrics & Gynecology 481.e1, 481.e1 (2010) (Cholhan study). The authors of the Ross study also explained that "the most common perioperative complications associated with TVT were bladder perforation and bleeding"; S. Ross et al., supra, 114 Obstetrics & Gynecology 1291; and that "[c]oncern about complications associated with TVT led in 2001 to the development of another minimally invasive pro-

cedure using the transobturator tape." (Footnotes omitted.) Id., 1287–88.[19] Contrary to the assertions of the concurrence and dissent; see part II A 2 of the concurring and dissenting opinion; we do not conclude that the plaintiffs had to point to a risk free product on the market to allow the jury to find that there was a reasonable alternative design for the Obtryx. Nevertheless, the plaintiffs did have to produce evidence that the other product on the market would have reduced the risk of harm to Fajardo.

Furthermore, because this case involves complex medical devices with complicated medical risks and injuries, evidence comparing their relative safety data would have had to come from an expert qualified to testify regarding the designs of the Ethicon branded TVT and the Obtryx, and qualified to explain how use of the Ethicon branded TVT would have reduced or avoided the risk of harm to Fajardo.[20] In discussing

[19] The authors of the Ross study also explained that "[t]wo systematic reviews have examined the evidence on effectiveness of transobturator tape compared with TVT, without finding clear differences in outcome. Objective cure [rates] after transobturator tape ranged from 84 [percent] to 98 [percent]; for TVT it ranged from 86 [percent] to 99 [percent]. The objective cure rates in [the Ross] study (81 [percent] for transobturator tape, 77 [percent] for TVT) appear lower than those previously reported, but the difference is likely because [the Ross study's] follow-up and definition of objective cure was very rigorous." S. Ross et al., supra, 114 Obstetrics & Gynecology 1291.

[20] In the present case, the concurrence and dissent asserts that the plaintiffs produced sufficient evidence for the jury to consider their claim that the Ethicon branded TVT was a reasonable alternative design to the Obtryx. The basic premise underlying that position is that the evidence at trial established that the Ethicon branded TVT is the "gold standard" to treat stress urinary incontinence, that the Obtryx differed from the Ethicon branded TVT in three ways, and that those three design differences rendered the Obtryx unreasonably dangerous. We disagree with the position of the concurrence and dissent in three fundamental ways.

First, despite the repeated protestations of the concurrence and dissent, the evidence in the record did not establish that the Ethicon branded TVT is the "gold standard" to treat stress urinary incontinence. See, e.g., part II A 1 of the concurring and dissenting opinion. To the contrary, the one product design expert who testified at trial testified that a surgical procedure,

whether expert testimony was required for a reasonable

not the Ethicon branded TVT, was the best method to treat stress urinary incontinence. The product design expert also testified that all products made of polypropylene mesh are defective, including the Ethicon branded TVT. Furthermore, as we discuss subsequently in this opinion, there was evidence in the studies introduced at trial that, although the Ethicon branded TVT may have been the first such product on the market, it had several deficiencies that caused manufacturers to create alternatives. What the plaintiffs' expert never did was testify that the design of the Ethicon branded TVT would have entailed less risk of harm to Fajardo and, thus, would not have caused greater or equal injury. At best, the plaintiffs' expert testified that the Obtryx had three alleged defects, but we do not learn from Rosenzweig or any other expert how or whether the Ethicon branded TVT would have reduced or avoided the risk of harm to Fajardo.

Second, the concurrence and dissent acknowledges that the one product design expert who testified did not identify the Ethicon branded TVT as a reasonable alternative design to the Obtryx. Nevertheless, while acknowledging that expert testimony on reasonable alternative design is required in this case, the concurrence and dissent asserts that any evidence that the product design expert did not provide is supplemented by other evidence in the case, including circumstantial evidence. We disagree.

The question of whether there was a reasonable alternative design available for the Obtryx involved complex medical principles, and the jury needed qualified expert testimony about each element of the prima facie case of reasonable alternative design. Courts have repeatedly explained that "[a]ny decision [that] pertains to the design of the device involves engineering, metallurgical and medical principles beyond common knowledge and experience. Whether the device had a design defect, whether the foreseeable risks of harm the device posed could have been reduced or avoided by the adoption of a reasonable alternative design and whether the omission of such design rendered the device not reasonably safe are technical, scientific issues that cannot be fully understood by the average juror without some expert assistance." *Benedict* v. *Zimmer, Inc.*, 405 F. Supp. 2d 1026, 1033 (N.D. Iowa 2005); see also *Neilson* v. *Whirlpool Corp.*, Docket No. 3:10-cv-00140-JAJ-RAW, 2012 WL 13018693, *11 (S.D. Iowa January 3, 2012) ("An average juror has no understanding as to the actual design of the Whirlpool washer or any alternative designs [that] might reduce the risk of foreseeable harm. This is the exact type of case in which a 'jury needs assistance to reach an intelligent or correct decision. . . . Design defect cases sometimes involve technical, scientific issues [that] cannot be fully understood by the average juror without some expert assistance.' "). If we adopt the position of the concurrence and dissent and allow other nonexpert testimony to fill in gaps left by the qualified expert in this type of case, the jury does not have the assistance necessary to reach an intelligent or correct decision.

Third, although the Obtryx may have differed from the Ethicon branded TVT in three ways, evidence of these different design elements is not enough.

alternative design in another case involving a pelvic mesh product, the United States District Court for the Southern District of Iowa explained: "Whether expert testimony is required ultimately depends on whether it is a fact issue [on] which the jury needs assistance to reach an intelligent or correct decision. . . . Although Iowa law does not appear to require expert testimony for recovery in a [product] liability action, the plaintiff must supply sufficient evidence to satisfy the trial court that the jury, with its common knowledge, could reasonably find an alternative design to be practicable and feasible. . . . Technical issues requiring expert testimony include engineering, metallurgical and medical principles. . . . When such principles are at issue in a design defect case, expert testimony is necessary to establish a reasonable alternative design and the ability of such design to reduce the foreseeable harm of the challenged product—that is to say, expert testimony may be needed to establish the elements of breach and causation. . . . Also, [e]xpert testimony regarding reasonable alternative designs is subject to the same standard as any other expert testimony. . . . *Here, the issue is whether an alternative safer design existed for a medical device, which plainly involves medical principles. . . . Indeed, this is a case well outside the common experience of jurors, such as a stuffed toy with hard plastic buttons, because it involves more technical and scientific issues.*" (Citations omitted; emphasis added; internal quotation marks omitted.) *Willet* v. *Johnson & Johnson*, supra, 465 F. Supp. 3d

The plaintiffs needed to prove, through expert testimony, that use of the Ethicon branded TVT would have reduced or avoided the risk of harm to Fajardo. There simply was not sufficient evidence on this point. To the contrary, Rosenzweig testified that Fajardo suffered from a chronic foreign body reaction, that use of polypropylene mesh can cause a foreign body reaction, and that both the Ethicon branded TVT and the Obtryx were made of polypropylene mesh. Accordingly, the plaintiffs did not produce sufficient evidence to support an instruction under *Bifolck 1*.

905. We conclude that, under Connecticut law, the issue of whether one particular vaginal mesh sling on the market would reduce or avoid the risk of harm is an issue on which the jury needed assistance to reach an intelligent decision.[21] Therefore, we agree with the trial court that the plaintiffs' failure to produce such expert

[21] There was evidence introduced in the present case that the transobturator approach was as effective and reduced or avoided some risk of injuries to patients. For example, the authors of the Petri study explained that "numerous different types of transobturator slings like inside-out tapes and thermally annealed non-knitted, non-interwoven polypropylene tape (Obtape) were developed and tested in clinical trials. In terms of efficacy, both retropubic and transobturator tapes are found to have similar subjective and objective cure rates . . . . Only one meta-analysis showed that the occurrence of bladder perforations, pelvic hematoma, and storage lower urinary tract symptoms was significantly less common in patients treated by transobturator tapes . . . ." (Citations omitted.) E. Petri & K. Ashok, "Comparison of Late Complications of Retropubic and Transobturator Slings in Stress Urinary Incontinence," 23 International Urogynecology J. 321, 321 (2012); see id., 324 (concluding that obstructive complications seen more commonly in retropubic tapes as compared to transobturator tapes were more frequently associated with persistent pain, dyspareunia, and tape related infections). Other studies introduced at trial explained that "[p]otential advantages of the transobturator approach include fewer bladder and bowel injuries and less voiding dysfunction and urinary retention than with traditional sling procedures." P. Rosenblatt & S. Pulliam, "Update on Suburethral Slings for Stress Urinary Incontinence," Contemporary OB/GYN, April 15, 2004, available at https://www.contemporaryobgyn.net/view/update-suburethral-slings-stress-urinary-incontinence (last visited December 10, 2021). Another study concluded that, "[i]n short-term follow-up there was no obvious difference between [retropubic] and [transobturator] routes in terms of safety and efficacy." T. Tarcan et al., "Safety and Efficacy of Retropubic or Transobturator Midurethral Slings in a Randomized Cohort of Turkish Women," 93 Urologia Internationalis 449 (2014).

The studies showed that each approach had benefits and risks. The question under *Bifolck 1* is not simply whether there are other feasible designs, but whether there is a feasible design that would have reduced or avoided the risk of harm to Fajardo. This complicated medical evidence demonstrates that the jury needed the assistance of an expert qualified to testify regarding product design to enable the jury to make an intelligent decision regarding whether there was a reasonable alternative design that would have reduced or avoided the risk of harm to Fajardo. The plaintiffs failed to produce that expert evidence, and therefore, its request for an instruction under *Bifolck 1* was properly denied.

testimony on that issue was fatal to the plaintiffs' claim under the reasonable alternative design theory of *Bifolck 1*.

To be sure, the Restatement (Third) also makes clear that "[i]t is not sufficient that the alternative design would have reduced or prevented the harm suffered by the plaintiff if it would also have introduced into the product other dangers of equal or greater magnitude." Restatement (Third), supra, § 2, comment (f), p. 23. Rosenzweig testified that a substantial contributing factor of Fajardo's injuries was the fact that she experienced a foreign body reaction to the Obtryx. Rosenzweig explained that polypropylene mesh slings can cause this type of reaction. Accordingly, Rosenzweig opined that all polypropylene mesh slings are defective and unreasonably dangerous. He specifically opined that the Ethicon branded TVT, which is made of polypropylene mesh, was defective. Given this testimony from the plaintiffs' product design expert, we cannot see how the plaintiffs could have successfully claimed that the Ethicon branded TVT or the class of TVTs was a reasonable alternative design that would have reduced or avoided the harm suffered by Fajardo. Therefore, the trial court was correct not to instruct the jury on the reasonable alternative design prong.

Even if we were to consider Bercik's testimony as expert testimony on reasonable alternative design, as the concurrence and dissent suggests; see, e.g., footnote 6 of the concurring and dissenting opinion; we cannot conclude that it supports the plaintiffs' request for a reasonable alternative design instruction. First, Bercik's testimony was not based on sufficient data to comment on reasonable alternative design. Bercik never established his qualifications regarding product design and testified that he was unaware of a key design element of the Ethicon branded TVT, namely, the type of mesh

used in the product.[22] Furthermore, the fact that Bercik testified that he prefers the Ethicon branded TVT does not support a reasonable finding that it would have reduced or avoided the risk of harm to Fajardo. Beside knowing next to nothing about the design features of the Obtryx, and not remembering why he stopped using it, he also admitted that, although his preference is for the Ethicon branded TVT, his supervisor uses the

[22] At trial, Bercik testified as follows:

"Q. What kind of polypropylene is the TVT sling made of that you use?

"A. I'm not sure—I'm not sure what you're asking.

"Q. Is a TVT sling made of the same polypropylene as the Obtryx sling?

* * *

"Q. Doctor, do you know what kind of polypropylene the Obtryx sling is made of?

"A. I do know it's made of something called—I think Marlex.

"Q. Okay.

"A. It's what they use.

"Q. Okay. Do you know . . . if the TVT sling is made of the same Marlex?

"A. I don't know if it's made of the same—like, from the same manufacturer or anything like that.

"Q. Okay. Is—

"A. I don't know.

"Q. —is TVT made by the same manufacturer as the Obtryx sling?

"A. No, ma'am.

"Q. Okay.

"A. Different company."

Although the concurrence and dissent asserts that Bercik's testimony is not necessary or important to its position; see footnote 6 of the concurring and dissenting opinion; it cites to his testimony no less than thirty-seven times, refers to the fact that Bercik was disclosed as a product design expert, and relies on him as such. However, by characterizing Bercik as a product design expert, the concurrence and dissent disregards the fact that there was a motion in limine to exclude him from testifying as a product design expert. Although there is not a clear ruling on that motion in the record, there is discussion on the record about his testimony being limited, and Bercik testified that he was not aware of a key aspect of the design of the Ethicon branded TVT, namely, the type of mesh from which it is made. Moreover, in its memorandum of decision, the trial court explained that "Rosenzweig . . . was [the plaintiffs'] product design expert," and the plaintiffs neither challenge that conclusion on appeal nor cite to Bercik in support of their claim. Accordingly, we disagree with the efforts of the concurrence and dissent to cast Bercik as qualified to give expert testimony regarding whether the TVT was a reasonable alternative design for the Obtryx.

Obtryx. Thus, in his testimony, he acknowledged his preference for the Ethicon branded TVT, but that testimony does not establish that it is a reasonable alternative design to the Obtryx that would have reduced or avoided the risk of harm to Fajardo.[23]

We do not agree with the concurrence and dissent that other studies and documents that were entered into evidence were sufficient to support a reasonable alternative design claim.[24] See parts II A 1 and 2 of the concurring and dissenting opinion. At most, these studies demonstrate that the Ethicon branded TVT was the first tension free vaginal tape manufactured, and for that reason, there is more data evaluating its safety and effectiveness. Nevertheless, the evidence in the studies demonstrate that, "[a]lthough the [Ethicon branded] TVT was the first [midurethral] sling to gain widespread acceptance, numerous other [midurethral] sling systems have subsequently been introduced. While all of the meshes consist of a knitted polypropylene

[23] The concurrence and dissent asserts that Bercik "indicated that he had tried using the Obtryx, which employs a transobturator approach, had a negative experience with it, and so began using the Ethicon TVT, which uses a different approach." Footnote 22 of the concurring and dissenting opinion. That does not accurately characterize Bercik's actual testimony. He testified that he had implanted slings using the transobturator approach in the past but that he had stopped doing that because of complications. He then clarified that he had "trialed the [Obtryx] maybe once in the operating room" and had "never used it on a regular basis . . . ." He further explained: "I think I mentioned I [tried] the Obtryx once, and I don't remember why I don't—it was something about it that I didn't like. I don't know, I don't recall, it was ten years ago. But I gave up using other obturator approach slings because of my experience." Contrary to the representations of the concurring and dissenting opinion; see footnote 22 of the concurring and dissenting opinion and accompanying text; Bercik clearly testified that his "negative experience" was with other slings implanted using the transobturator approach, not the Obtryx.

[24] The plaintiffs assert that "[t]here were also a number of other studies admitted as full exhibits [that] supported the claim that the risks of the Obtryx outweigh its benefits in comparison with safer alternatives on the market at the time." The plaintiffs did not, however, identify the studies to which they refer.

material, they have been altered as a marketing strategy to overcome [clinician perceived] deficiencies in the [Ethicon branded] TVT." P. Moalli et al., supra, 19 International Urogynecology J. 655.

Furthermore, also contrary to the representations of the concurrence and dissent, the evidence did not demonstrate that the class of TVTs or the Ethicon branded TVT is the "gold standard" to treat stress urinary incontinence. Part II A 1 of the concurring and dissenting opinion. The concurrence and dissent asserts that, "although the majority steadfastly resists this fact, expert witnesses and evidence from scholarly journals on which those witnesses relied repeatedly identified the TVT as the 'gold standard,' [and/or] 'the standard of care' . . . ." Id. However, no expert in the present case pointed to the TVT (either the Ethicon branded TVT or the class of products known as the TVT) as the "gold standard." Thus, no one explained what is meant by the term. Instead, the design expert in the present case testified that all slings made of polypropylene mesh are unreasonably dangerous and that a surgical procedure is the best method for treating stress urinary incontinence.[25]

[25] One of the studies introduced into evidence explains: "The retropubic tension-free vaginal tape (TVT, Gynecare, Somerville, NJ, USA) which was introduced in [the] 1990s is commonly acknowledged as the gold standard of [midurethral slings] by virtue of its extensive safety and efficacy data in the literature." Y. Lim et al., "Do the Advantage Slings Work As Well As the Tension-Free Vaginal Tapes?," 21 International Urogynecology J. 1157, 1157 (2010) (Lim study). Although the Lim study does state that the TVT has the most extensive data and was the original vaginal sling on the market, its authors concluded: "In this study, we found that the Advantage sling appears to be as effective as the TVT. There was a trend [toward] more overactive bladder and voiding difficulty issues, which may be related to the slightly stiffer nature of the Advantage sling, thus requiring the Advantage slings to be left slightly looser than [the] TVT. Further randomized controlled trials are necessary to confirm this supposition." Id., 1161.

Thus, although the Lim study may establish that the Ethicon branded TVT was a feasible alternative to the Obtryx, it does not establish that it would have reduced or avoided the risk of harm to Fajardo. The concurrence and dissent repeatedly uses the term "gold standard" to imply that the Ethicon

In the present case, the plaintiffs simply did not introduce sufficient evidence to warrant an instruction on a reasonable alternative design. We find a recent case from the United States District Court for the District of Connecticut instructive in this regard. In granting a manufacturer's motion for summary judgment on a reasonable alternative design claim, the court explained that the plaintiff "has not established that a reasonable alternative [water treatment] pump design was available. [The expert's] report, even if admitted, does not identify a reasonable alternative. Rather, [the expert's] report opines that [the plaintiff] should have used [the competitor's] pumps, which have larger motors. However, the [competitor's] motors would have required an expensive reworking of the system as a whole, and were considered and rejected by [the plaintiff] during the bidding process. . . . [The plaintiff] has offered no evidence that a 'reasonable alternative design was available' for pumps that would meet the [plaintiff's] system specifications 'that would have avoided or reduced the risk of harm' without 'unreasonably increasing cost.' " (Citation omitted.) *Water Pollution Control Authority* v. *Flowserve US, Inc.*, supra, 2018 WL 1525709, *25.

Similarly, the plaintiffs in the present case did not produce sufficient evidence that an alternative design was available that would have met Fajardo's needs and have avoided or reduced the risk of harm without unreasonably increasing cost. To the contrary, evidence presented at trial showed that the class of TVTs had varying degrees of safety, depending on the type of material

branded TVT was the safest product on the market. But, as we have explained previously in this opinion, there was evidence presented at trial that the Ethicon branded TVT and each of the other products within the class of TVTs had risks and complications associated with them. In light of the fact that they were complicated medical devices with complicated safety information, the plaintiffs had to do more to demonstrate that use of the Ethicon branded TVT would have reduced or avoided the risk of harm to Fajardo.

that was used to make them, and some even had the exact same defect alleged to have caused Fajardo's injuries in this case. Furthermore, the plaintiffs' expert testified that all polypropylene mesh slings are defective, including the Ethicon branded TVT. Accordingly, we cannot conclude that the trial court incorrectly determined that the plaintiffs did not produce sufficient evidence of a reasonable alternative design that would have avoided injuries to Fajardo to warrant an instruction on reasonable alternative design.

The plaintiffs cite to *Campbell* v. *Boston Scientific Corp.*, 882 F.3d 70 (4th Cir. 2018), in support of their claim that there was sufficient evidence in the present case to warrant an instruction on the reasonable alternative design prong. We disagree. In that case, the defendant claimed that there was insufficient evidence to support the jury verdict and, specifically, to show that there was a safer alternative design. See id., 79. Based on the trial record and the expert's testimony in that case, the Fourth Circuit concluded that there was sufficient evidence to support the safer alternative design claim. As one example of evidence that supported the plaintiffs' claim in that case, the court pointed to the expert's testimony regarding the Ross study. See id. The Fourth Circuit's conclusion that, based on the particular safer alternative design claim made by the plaintiffs in that case and supported by evidence, the Ross study supported the safer alternative design claim.

The Fourth Circuit's conclusion, however, does not mean that the Ross study will always support a reasonable alternative design claim. In the present case, the Ross study does not support the plaintiffs' claim that there is a reasonable alternative design, particularly because the plaintiffs claimed and their expert testified that the heat-sealed mesh used in the Obtryx caused Fajardo's injuries. Because the Ross study compared

two slings made of the exact same heat-sealed mesh, that study is not evidence of a reasonable alternative design, in light of the claim that was presented by the plaintiffs in this case.

Based on the foregoing, we conclude that the plaintiffs did not produce sufficient evidence to warrant an instruction on a reasonable alternative design. Accordingly, we conclude that the trial court properly declined their request for such an instruction.

The judgment is affirmed.

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

ECKER, J., concurring in part and dissenting in part. I agree with, and join, part I and much of parts II A and B[1] of the majority opinion. I disagree, however, with parts II C through E, in which the majority concludes that the trial court properly declined to charge the jury on the reasonable alternative design prong of the risk-utility component of the Connecticut Product Liability Act, General Statutes § 52-572m et seq., as interpreted by this court in *Bifolck* v. *Philip Morris, Inc.*, 324 Conn. 402, 434–35, 152 A.3d 1183 (2016). Specifically, I do not agree with the majority's conclusion that the plaintiffs, Lesly Fajardo (Fajardo) and Jairo Fajardo, "did not produce sufficient evidence . . . to

[1] I agree with all of part II A except the majority's ultimate conclusion that "the trial court correctly concluded that the evidence did not support an instruction under the reasonable alternative design prong of the risk-utility test . . . ." Part II A of the majority opinion. In part II B, the majority assumes, without deciding, that the plaintiffs' instructional challenge was properly preserved at trial. For the reasons identified by the majority, I have no difficulty concluding that the issue is in fact properly preserved. Specifically, I agree with the majority that it would elevate form over substance to refuse to consider the issue on appeal when the trial court resolved it on the merits after concluding that the legal claim was timely presented. See part II B of the majority opinion.

warrant an instruction on reasonable alternative design." Part II E of the majority opinion.

The trial court concluded that there was insufficient evidence in the trial record to support a jury instruction on the plaintiffs' claim that the Obtryx Transobturator Mid-Urethral Sling System designed by the named defendant, Boston Scientific Corporation, was defective under the risk-utility test because there was a viable and safer reasonable alternative design to the Obtryx. For the reasons set forth at length in part II of this opinion, I am convinced that this ruling was erroneous. There was abundant evidence presented at trial from which the jury could have concluded that one particular competitor product, a retropubic tension free vaginal sling trademarked "TVT" that is produced by Gynecare, part of the Ethicon division of Johnson & Johnson,[2] qualified as a reasonable alternative to the Obtryx. It was undisputed that not only is this TVT commercially viable, it is the most widely used treatment for stress urinary incontinence, the condition suffered by Fajardo, and meets the recognized standard of care for treatment of that condition. The plaintiffs proffered expert testimony, including the testimony of retained experts, Fajardo's treating physicians, and articles in respected medical research journals, that, if credited by the jury, together established that (1) the Obtryx differs from Ethicon's TVT in three primary respects, namely, its transobturator approach, its heat-sealed middle section, and its detanged edges, (2) each of those departures from the design of the TVT constitutes a defect, because they each increase the risks to the patient with no offsetting benefit, (3) the injuries that Fajardo suffered

[2] In part III A of this opinion, I explain why the majority is incorrect when it contends that all of the references to "TVT" at trial were to the category of TVT-type retropubic slings modeled on Ethicon's branded TVT, rather than to that market-leading product itself. See footnote 14 of the majority opinion and accompanying text. Unless otherwise noted, all references in this opinion to the TVT are to the Ethicon product.

were caused by those design defects, and (4) the TVT would have avoided or reduced the risk of those types of harm and been a more suitable choice for Fajardo. Nothing more is required to warrant a jury instruction on a theory of reasonable alternative design under *Bifolck*. For these reasons, I respectfully concur in part and dissent in part.

I

Before I discuss the evidence in the record that warranted a reasonable alternative design jury charge, I emphasize three important preliminary points that should be uncontroversial. First, I agree with the majority regarding the standard of review. "[A] trial court should instruct the jury in accordance with a party's request to charge if the proposed instructions are reasonably supported by the evidence. . . . *We therefore review the evidence presented at trial in the light most favorable to supporting the* [*plaintiffs'*] *proposed charge*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Godwin* v. *Danbury Eye Physicians & Surgeons, P.C.*, 254 Conn. 131, 139, 757 A.2d 516 (2000). The emphasized language carries constitutional significance. "It must always be borne in mind that litigants have a constitutional right to have issues of fact decided by the jury and not by the court." (Internal quotation marks omitted.) *Larsen Chelsey Realty Co.* v. *Larsen*, 232 Conn. 480, 499, 656 A.2d 1009 (1995). For this reason, "[a] trial court should instruct a jury on [every] issue for which there is any foundation in the evidence, even if weak . . . ." (Internal quotation marks omitted.) *Henriques* v. *Magnavice*, 59 Conn. App. 333, 336, 757 A.2d 627 (2000); see also *Curran* v. *Kroll*, 303 Conn. 845, 857, 37 A.3d 700 (2012) ("it is well established that a plaintiff has the same right to submit a weak case as he has to submit a strong one" (internal quotation marks omitted)).

Second, the essential elements of a product liability claim predicated on a design defect are well established. The plaintiff must establish each of the following elements by a preponderance of the evidence: (1) the defendant was engaged in the business of selling the product; (2) the product was, by reason of its design, in a defective condition unreasonably dangerous to the consumer; and (3) the defect caused the injury for which compensation is sought. See, e.g., *Bifolck* v. *Philip Morris, Inc.*, supra, 324 Conn. 434; Connecticut Civil Jury Instructions § 3.10-1, available at https://www.jud.ct.gov/JI/Civil/Civil.pdf (last visited December 10, 2021). When the plaintiff seeks to establish the second element—defective design—on a reasonable alternative design theory, he or she also must establish that (A) a reasonable alternative design was available (B) that would have avoided or reduced the risk of harm, and (C) the failure to use that alternative design rendered the product unreasonably dangerous. See, e.g., *Bifolck* v. *Philip Morris, Inc.*, supra, 434–35; see also footnote 16 of this opinion. A reasonable alternative design instruction is *required* if there is sufficient evidence in the record to permit the jury to find for the plaintiff on each of these elements.

Third, although the majority correctly observes that the existence of a reasonable alternative design typically must be established, at least in part, via expert testimony;[3] see part II C of the majority opinion; this court never has imposed a unitary source requirement such that a *single* expert must provide all component parts of that expert opinion. As I discuss more fully in part III C of this opinion, no rule or principle precludes the jury from piecing together the requisite quantum of proof from multiple sources, including the testimony of one or more expert witnesses, articles or other writings

[3] See, e.g., *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, 321 Conn. 172, 203–204, 136 A.3d 1232 (2016).

containing expert opinions admitted in evidence without restriction, and other qualifying evidence, including circumstantial evidence. See, e.g., *Thompson* v. *Ethicon, Inc.*, Docket No. SAG-19-03159, 2020 WL 3893253, *5 (D. Md. July 10, 2020) (court was aware of "no authority [requiring] that a single expert witness establish each element of a claim"); *Slepski* v. *Williams Ford, Inc.*, 170 Conn. 18, 22, 364 A.2d 175 (1975) (jury in product defect case may rely on combination of expert testimony, lay witnesses, and circumstantial evidence); *Morgan* v. *Hill*, 139 Conn. 159, 161–62, 90 A.2d 641 (1952) (trier was privileged to accept portions of different experts' conflicting testimony in arriving at estimate of damage); *Louisiana Dept. of Transportation & Development* v. *Scramuzza*, 673 So. 2d 1249, 1261 n.10 (La. App. 1996) ("[j]uries may even mix and match parts of several expert opinions"), rev'd in part on other grounds, 692 So. 2d 1024 (La. 1997); *Bieniek* v. *Keir*, Docket No. A-3096-06T5, 2008 WL 1848293, *5 (N.J. Super. App. Div. April 23, 2008) (jury properly could have accepted different portions of dueling experts' conclusions).

Moreover, is well established that a jury may draw reasonable inferences from an expert's testimony no less than the testimony of any other witness and come, thereby, to a conclusion that it could not permissibly reach solely on the basis of lay knowledge. See, e.g., *Procaccini* v. *Lawrence + Memorial Hospital, Inc.*, 175 Conn. App. 692, 725–27, 168 A.3d 538 (although no single expert testified that decedent died of delayed respiratory depression, jury reasonably could have inferred such from all expert testimony considered together), cert. denied, 327 Conn. 960, 172 A.3d 801 (2017); *Carter* v. *State*, 620 S.W.3d 147, 153 (Tex. Crim. App. 2021) ("At first glance, it seems irrational to expect an ordinary [fact finder] to make an inference regarding positioning of certain components in a synthetic compound. But, the mere fact that an ordinary [fact finder], prior

to any evidence being presented, could not make the required inferential step, does not mean that an informed [fact finder] could not reasonably make such an inference. That is all to say that an ordinary jury could still draw a reasonable inference from an expert's testimony about technical elements as long as each inference is supported by the evidence presented at trial."), petition for cert. filed (U.S. August 24, 2021) (No. 21-269); *Anderson* v. *Combustion Engineering, Inc.*, 256 Wis. 2d 389, 394, 647 N.W.2d 460 (2002) ("a jury is entitled to draw reasonable inferences from expert testimony even if, at first blush, it may appear that the jury's conclusions based on those inferences require proof by specialized expert testimony").

Likewise—and this becomes particularly important with respect to the testimony of the plaintiffs' primary design expert, Bruce A. Rosenzweig, a professor of urogynecology—the jury is free to credit one portion of an expert's testimony while rejecting a different part of that same testimony. See, e.g., *State* v. *Leroya M.*, Conn. , , A.3d (2021) ("[t]he [fact finder] is free to accept or reject each expert's opinion in whole or in part" (internal quotation marks omitted)); *Grondin* v. *Curi*, 262 Conn. 637, 657 n.20, 817 A.2d 61 (2003) ("[I]t is the province of the jury to weigh the evidence and determine the credibility and the effect of testimony . . . . [T]he jury is free to accept or reject each expert's opinion in whole or in part." (Internal quotation marks omitted.)); *In re David W.*, 254 Conn. 676, 693, 759 A.2d 89 (2000) ("the trier is entitled to accept in part . . . [and] disregard in part . . . the uncontradicted testimony of [an expert] witness"); *Champagne* v. *Raybestos-Manhattan, Inc.*, 212 Conn. 509, 545, 562 A.2d 1100 (1989) ("the trier of fact may accept part of the testimony of an expert without being bound by all of the opinion of the expert" (internal quotation marks omitted)); *Yontef* v. *Yontef*, 185 Conn. 275, 281, 440 A.2d

899 (1981) ("[the trier of fact] is free to rely on whatever parts of an expert's opinion the [trier] finds probative and helpful"). I do not understand the majority to have intended to dispense with this indisputable rule; nor does the majority suggest any reason why it should not apply in the present case. Indeed, it applies with full force because Boston Scientific has relied—both at trial and on appeal—almost exclusively on the specious argument that the jury could not have credited Rosenzweig's testimony that the Obtryx is defective vis-à-vis the TVT because Rosenzweig also believed that *all* polypropylene slings are defective. I explain the many failings in this argument in part III B of this opinion, an analysis to which the majority has offered no response.

II

With these principles in mind, I turn now to the evidence that was presented at trial in support of the plaintiffs' theory that the TVT represented a reasonable alternative design at the time Boston Scientific marketed and sold Fajardo's Obtryx. It is undisputed that Boston Scientific was engaged in the business of selling the Obtryx and, therefore, that the first element of the plaintiffs' product liability claim was established. My disagreement with the majority centers on the second (defective condition unreasonably dangerous to the consumer, which includes proof of feasibility) and third (causation) elements of the claim.

A

1

Beginning with feasibility, I note that there was overwhelming evidence at trial that the TVT is a feasible design. Indeed, although the majority steadfastly resists this fact, expert witnesses and evidence from scholarly journals on which those witnesses relied repeatedly identified the TVT as the "gold standard," "the standard

of care," and/or the most widely used treatment for precisely the condition from which Fajardo suffered. A "gold standard," commercially available product is the paradigmatic feasible alternative.

Four different research studies entered in evidence as full exhibits, each published in respected medical journals and relied on by the plaintiffs' experts, identified the TVT—either the Ethicon TVT or another TVT-type sling—as the primary accepted treatment for the condition from which Fajardo suffered, namely, female stress urinary incontinence. Three of the studies expressly identified the TVT as the "gold standard" for treating Fajardo's condition. See H. Cholhan et al., "Dyspareunia Associated with Paraurethral Banding in the Transobturator Sling," 202 Am. J. Obstetrics & Gynecology 481.e1, 481.e1 (2010) (Cholhan study) ("[TVT is the] widely accepted . . . gold standard for the treatment of [stress urinary incontinence]"); Y. Lim et al., "Do the Advantage Slings Work As Well As the Tension-Free Vaginal Tapes?," 21 International Urogynecology J. 1157, 1157 (2010) (Lim study) ("TVT . . . is commonly acknowledged as the gold standard of [synthetic midurethral slings] by virtue of its extensive safety and efficacy data in the literature"); P. Moalli et al., "Tensile Properties of Five Commonly Used Mid-Urethral Slings Relative to the TVT," 19 International Urogynecology J. 655, 656 (2008) (Moalli study) (TVT is "the gold standard").[4] A fourth study in evidence referred to the TVT

[4] Two of these studies, Lim and Moalli, specifically discuss the Ethicon TVT, rather than the class of TVT-like slings, as the gold standard. See Y. Lim et al., supra, 21 International Urogynecology J. 1157; P. Moalli et al., supra, 19 International Urogynecology J. 656. To the extent that the majority faults the plaintiffs for not having identified by name the particular studies that support their reasonable alternative design claim; see footnote 24 of the majority opinion; the studies that they reference and that I discuss in this opinion were provided to us in the appendix to the plaintiffs' brief, and are the same studies that their experts discussed at length at trial and that they cited in their arguments to the judge and jury.

as "the surgery of choice for treating stress urinary incontinence" and "the standard of care." S. Ross et al., "Transobturator Tape Compared with Tension-Free Vaginal Tape for Stress Incontinence: A Randomized Controlled Trial," 114 Obstetrics & Gynecology 1287, 1287–88 (2009) (Ross study).

In light of the fact that four of the studies relied on by the plaintiffs' experts expressly state that the TVT is the "gold standard" or "standard of care" for the treatment of female stress urinary incontinence, it is difficult to understand the majority's insistence that "the evidence in the record did not establish that the Ethicon branded TVT is the 'gold standard' to treat stress urinary incontinence." Footnote 20 of the majority opinion. The question is not whether the majority would have been persuaded by that evidence had they sat as jurors, or whether I am persuaded by it, but, rather, whether there was *any* evidence on the basis of which *the jury* could have reached that conclusion. Clearly there was, and the majority offers no explanation why the jury could not reasonably have relied on the statements and opinions contained in medical studies admitted as substantive evidence at trial.[5]

In addition, the jury reasonably could have found that two of Fajardo's treating physicians, Richard Bercik, a urogynelogical reconstructive surgeon and professor of female pelvic medicine at Yale School of Medicine, and Brian Hines, a urogynecologist, specifically recommended that Fajardo consider use of the TVT to treat her condition. Bercik further testified that he and his colleagues have had negative experiences with transobturator slings such as the Obtryx and generally have stopped

[5] None of these studies, for example, suggested that the TVT is suitable only for certain women or only under certain conditions, or only as a replacement after another sling has been removed, or that it is more expensive than other slings, or otherwise not feasible for patients such as Fajardo.

implanting them in favor of the TVT.[6] This evidence would have permitted the jury to conclude not only that the TVT is, in general, a viable alternative to the Obtryx that is readily available in Connecticut, but also that it was well suited to Fajardo's individual needs.

Finally, it was clear from the evidence presented at trial that the defendant's own expert witness, Peter L. Rosenblatt, also a urogynecologist, concurred that the TVT is a feasible alternative design. In a 2004 article

[6] The majority seems to take the position that we should not take Bercik's testimony into account for any purpose when considering whether there was sufficient evidence before the jury to warrant a reasonable alternative design instruction. The majority argues that (1) although Bercik was disclosed as an expert on sling design and design alternatives, and apparently recognized by the defendants' counsel as such, he purported to testify only as a "treating physician," (2) the plaintiffs do not cite to Bercik's testimony in their appellate briefs, (3) the trial court did not consider Bercik's testimony when it denied the plaintiffs' instructional request, and (4) Bercik's testimony lacked credibility. See footnotes 12, 13 and 22 of the majority opinion and accompanying text. First, Bercik's testimony is cited herein for very limited purposes, is relied on only as secondary evidence, and is not necessary or even important to my position—the testimony of Rosenzweig (who testified that he relied on Bercik's assessment and testimony in forming his own opinions) and the various studies and other documents on which he relied were sufficient to warrant a reasonable alternative design instruction. Second, and more generally, I disagree with the majority's all-or-nothing analysis with respect to the use of Bercik's testimony. As I explain in part III C of this opinion, once Bercik's testimony was admitted without objection or limitation, it was available for the jury to use for any purpose; it must be construed in the light most favorable to the plaintiffs' request, regardless of whether the trial court overlooked it or whether the majority deems it to be credible or deems Bercik to be a fitting expert. Bercik's notes recommending that Fajardo consider a TVT were before the trial court when it considered the plaintiffs' motion, and, indeed, the defendants' counsel himself solicited much of the testimony to which the majority objects. To the extent that the trial court failed or declined to consider that evidence of record, that omission was either proper or improper as a matter of law and was not, as the majority incorrectly posits, a factual "finding" to which we must defer. Footnote 13 of the majority opinion. I do agree with the majority that the plaintiffs' counsel has not relied on Bercik's testimony on appeal, and I discount its importance primarily for that reason. That said, I do not ignore this evidence altogether when it was relied on by Rosenzweig and reinforces a proposition established by other evidence.

that was admitted into evidence, Rosenblatt wrote that, with the invention of the Gynecare TVT, "[f]or the first time, surgeons had a reproducible, highly-effective, minimally-invasive sling procedure." P. Rosenblatt & S. Pulliam, "Update on Suburethral Slings for Stress Urinary Incontinence," Contemporary OB/GYN, April 15, 2004, available at https://www.contemporaryobgyn.net/view/update-suburethral-slings-stress-urinary-incontinence (last visited December 10, 2021); see id. ("study after study has consistently demonstrated the procedure's safety and effectiveness"). Rosenblatt testified at trial that, of the roughly 2000 studies showing that polypropylene slings are safe and effective for the treatment of female stress urinary incontinence, most have studied the TVT. Bercik agreed with Rosenblatt that the TVT is safe and effective. The fact that a product has been shown to be safe and effective in treating a particular condition necessarily implies that it is a feasible alternative for that purpose. See, e.g., *Kosmynka* v. *Polaris Industries*, *Inc.*, 462 F.3d 74, 80 (2d Cir. 2006) ("[p]ractical engineering feasibility can be demonstrated by expert testimony concerning either a prototype that the expert has prepared or similar equipment using an alternative design that has been put into use by other makers"); *Messina* v. *Ethicon*, *Inc.*, Docket No. 6:20-cv-1170-Orl-40LRH, 2020 WL 7419586, *4 (M.D. Fla. December 17, 2020) ("safe and effective" implies feasible); *Wald* v. *Costco Wholesale Corp.*, Docket No. 03 Civ. 6308JSR, 2005 WL 425864, *7 (S.D.N.Y. February 22, 2005) ("To satisfy the first and most important element, lack of reasonable safety, plaintiffs must show that it was feasible to design the product in a safer manner. . . . [The] [p]laintiff has done so in one of the most basic ways: he has identified makers of similar equipment who have already put into use the alternative design that has been proposed." (Citation omitted; internal quotation marks omitted.)); Restatement (Third),

Torts, Products Liability § 2, comment (f), pp. 23–24 (1998) ("Cases arise in which the feasibility of a reasonable alternative design is obvious and understandable to laypersons and therefore expert testimony is unnecessary to support a finding that the product should have been designed differently and more safely. . . . [O]ther products already available on the market may serve the same or very similar function at lower risk and at comparable cost. Such products may serve as reasonable alternatives to the product in question.").

Once experts for both sides had established that the TVT represents an alternative to the Obtryx that is widely used to treat Fajardo's condition and is deemed safe and effective by the medical community, and had provided the necessary context for the jury to understand the supporting clinical studies in evidence, the jury was free to conclude that the plaintiffs had shouldered their burden of establishing feasibility under *Bifolck*. Although the majority takes issue with some of my analysis in this regard, I understand the majority to agree with the ultimate conclusion in this part of my opinion that the TVT, as a successful and widely commercialized product, represents a technologically and economically viable alternative to the Obtryx that would have been a feasible option for Fajardo. I believe that our disagreement, instead, is limited to whether the jury reasonably could have found that use of the TVT would have avoided or reduced the risk of harm presented by the Obtryx. I address those issues in parts II A 2 and B of this opinion.

2

The plaintiffs next needed to establish that the design of the Obtryx renders it unreasonably dangerous relative to the TVT and, hence, defective. They did this by demonstrating that, although the two slings are similar, the Obtryx has three distinguishing features, each of

which renders it more dangerous than the TVT without any corresponding benefit: it has a heat-sealed middle section that makes it less flexible and more subject to contraction than other slings, it features detanged edges that hinder the integration of the sling with native tissue, and it is designed for a transobturator approach, which results in more palpable tape (a characteristic linked to tape extrusion and vaginal erosion) and paraurethral banding (linked to leading to internal dyspareunia), as well as vaginal tenderness and groin pain.

There was abundant evidence from which the jury could have found that these three design features, which undisputedly constitute the primary design differences between the TVT and the Obtryx, render the Obtryx unreasonably dangerous. With respect to heat sealing, Rosenzweig explained to the jury how the Lim and Moalli studies found that the unique heat sealing process used by Boston Scientific renders its sling products significantly stiffer than the TVT and, therefore, potentially more likely to cause erosion, vaginal obstruction, and voiding dysfunction. See Y. Lim et al., supra, 21 International Urogynecology J. 1161; P. Moalli et al., supra, 19 International. Urogynecology J. 662.[7] Rosenzweig also testified that the heat sealing process aggravates the foreign body reaction associated with the use of polypropylene mesh. He explained that the heat-sealed center portion makes the Obtryx stiffer than other midurethral slings and that "stiffness of mesh is a bad property" that is associated with a higher rate of

[7] I disagree with the majority's statement that, "[a]t most, these studies demonstrate that the Ethicon branded TVT was the first tension free vaginal tape manufactured, and for that reason, there is more data evaluating its safety and effectiveness." Part II E of the majority opinion. The significance of the studies is not so limited. The Moalli study, for example, compared the Ethicon TVT to five more recently developed slings, including the Obtryx, and concluded that the TVT "has a unique tensile behavior" that "in theory . . . lowers the rate of erosions of a sling into the urethra or bladder." P. Moalli et al., supra, 19 International Urogynecology J. 662.

complications, such as inflammation, groin pain, scarring, urgency, overactive bladder, vaginal erosion, and dyspareunia, or pain during intercourse. Whereas Rosenzweig testified that midurethral slings such as the Obtryx can contract, causing chronic pain, Bercik testified that, in his clinical experience, significant contracture does not tend to occur with the TVT.

Similarly, with respect to detanging, the Moalli study, on which Rosenzweig relied, stated that the tanged edges of the TVT were "designed to 'grip' tissue after sling placement." P. Moalli et al., supra, 19 International. Urogynecology J. 655. Doreen Rao, a principal engineer for Boston Scientific, acknowledged that some of her colleagues thought that maintaining the tangs—rough edges where the polypropylene mesh had been cut—was useful in holding the sling in place and promoting ingrowth of native tissue. Rao referred to this as the "leading theory." Rao was unable to document any offsetting benefits from Boston Scientific's decision to remove the tangs, other than that detanging "presents a smoother surface." Rosenzweig testified more definitively that detanging adds no benefit to outweigh the heightened risks associated with a lack of integration of the sling with the patient's native tissue. The jury should have been given the option to agree with Rosenzweig insofar as his testimony spoke to the shortcomings of the Obtryx relative to the TVT.

With respect to the risks associated with the transobturator design of the Obtryx, the plaintiffs highlighted the Ross study, a randomized, double blind, clinical study of nearly 200 women, which compared the Obtryx to Boston Scientific's own Advantage retropubic midurethral sling. See S. Ross et al., supra, 114 Obstetrics & Gynecology 1288–89. Because the two slings are made from the same material and share other common design features, the study was able to isolate the safety and effectiveness of using a transobturator approach vis-à-

vis the traditional retropubic approach. The study found no statistically significant difference in the products' cure rates. See id., 1291. The study did find, however, that the vaginal mesh was much more likely to remain palpable to the touch one year after surgery among women who received transobturator slings, an outcome that the authors deemed "concerning" due to the heightened risk of tape extrusion and vaginal erosion. Id., 1293; see id., 1287–88, 1290. More women in the transobturator group also experienced tenderness and groin pain. See id., 1290, 1292–93. The authors' final conclusion: "Compared with the [Advantage] TVT group, more women in the transobturator tape group had tape that was palpable and groin pain on vaginal examination. The presence of palpable tape is concerning; longer follow-up is needed to determine whether this outcome leads to extrusion or resolves over time. Until long-term follow-up is available from this and other trials, TVT should remain the midurethral sling procedure of choice." Id., 1293–94. The Cholhan study likewise suggested that tapes such as the TVT, which feature a retropubic design, have a more favorable risk-benefit profile than do transobturator tapes, such as the Obtryx, for the treatment of female stress urinary incontinence. See H. Cholhan et al., supra, 202 Am. J. Obstetrics & Gynecology 481.e1. That study identified a "concerning" new complication—paraurethral banding, leading to internal dyspareunia—that occurred in transobturator but not retropubic sling patients.[8] Id., 481.e3.

[8] Although the plaintiffs' counsel highlighted the Ross and Cholhan studies to make this point, that was not the only evidence before the jury indicating that the use of a transobturator design was a defect relative to the TVT. One study on which Rosenzweig relied, for example, found that "[t]he complications of persistent pain and dyspareunia were strikingly more frequent among [the transobturator] compared to [the retropubic] group." E. Petri & K. Ashok, "Comparison of Late Complications of Retropubic and Transobturator Slings in Stress Urinary Incontinence," 23 International Urogynecology J. 321, 324 (2012) (Petri study).

Rosenzweig testified that he relied on each of these studies in forming his opinions regarding the product defects and injuries at issue in this case and that they are authoritative in the field. He also made crystal clear the conclusion that the jury itself easily could have drawn from the Cholhan, Lin, Moalli, Ross and other studies in evidence, namely, that these three design features render the Obtryx "defective . . . ." Rosenzweig opined that the unique detanged and heat-sealed features of the Obtryx have no benefits that outweigh the added risks. He characterized the research as demonstrating that, because the transobturator design of the Obtryx was associated with significantly higher incidences of groin pain and other complications, "the retropubic sling is better than the [Obtryx] transobturator sling." Rosenzweig specifically linked negative research findings regarding transobturator slings to Fajardo's Obtryx.[9] He concluded, to a reasonable degree of medical certainty, that "[the Obtryx sling] is defective in design."[10]

In an e-mail to Boston Scientific that also was admitted as a full exhibit, Paul Tulikangas, a urogynecologist and female pelvic medicine and reconstructive surgery specialist, likewise interpreted the medical research to mean that the Obtryx is "inferior" to other midurethral slings, with higher rates of erosion, groin pain, and voiding issues compared to the TVT.[11] Bercik appeared

[9] The majority incorrectly states that "Rosenzweig identified only the polypropylene mesh and the heat seal as the defects that caused Fajardo's injuries" and did not consider the transobturator design of the Obtryx to be a defect. Part II E of the majority opinion. Boston Scientific itself concedes that "Rosenzweig testified that retropubic and nondetanged slings may be better" than the Obtryx. I further address this point in part III A of this opinion.

[10] For reasons elaborated in part III B of this opinion, it is of no legal consequence that Rosenzweig also held the view that *all* polypropylene mesh devices (including the TVT) are defective. The jury was entitled to accept Rosenzweig's opinion with respect to the Obtryx in particular and reject his broader opinion regarding the entire class of products.

[11] The majority makes no mention of the Tulikangas opinion letter, but the plaintiffs' counsel referenced the letter three times during closing argument,

to concur, indicating that he had abandoned the use of transobturator slings, including the Obtryx, because he and other physicians experienced a high rate of complications and that he now exclusively uses the TVT.

The foregoing evidence leads me to conclude with confidence that the plaintiffs set out a prima facie case that the three design features by which the Obtryx departs from the TVT render the Obtryx defective. The majority disagrees and, deploying an argument never articulated by Boston Scientific, appears to take the position that the Obtryx could not have been defective relative to the TVT because both products present potential dangers and risks. The majority emphasizes, for example, that "there were risks and complications with the use of the [Ethicon branded] TVT"; part II E of the majority opinion; and that "the Ethicon branded TVT and each of the other products within the class of TVTs had risks and complications associated with them." Footnote 25 of the majority opinion. These observations miss the fundamental point. A design is defective if it creates a *greater* risk of harm than the alternative design without sufficient offsetting benefit, which means that the question is not whether the alternative is risk free, but whether it confers the same benefits with a *lesser* risk of harm. See, e.g., *Bifolck* v. *Philip Morris, Inc.*, supra, 324 Conn. 434–35. This point is clear even in the very cases that the majority cites in support of its argument. Thus, the majority cites *Casey* v. *Toyota Motor Engineering Mfg. North America, Inc.*, 770 F.3d 322, 331 (5th Cir. 2014), for the proposition that " '[a] design is not a safer alternative if, under other circumstances, [it would] impose an *equal or greater risk* of harm than the design at issue.' " (Emphasis altered.) Part II E of the majority opinion; see *Water Pollution Control Authority* v. *Flowserve US*,

highlighted the fact that Tulikangas believed that the Obtryx is an inferior product, and referenced the letter in briefing to the trial court.

*Inc.*, Docket No. 3:14-cv-00549 (VLB), 2018 WL 1525709, *25 (D. Conn. March 28, 2018) (plaintiff was required to establish that reasonable alternative design "would have avoided or reduced the risk of harm *without unreasonably increasing cost*" (emphasis added; internal quotation marks omitted)), aff'd, 782 Fed. Appx. 9 (2d Cir. 2019).

It is, of course, true that, if an alternative design reduces certain risks but increases other risks, or raises costs, or reduces functionality, it may not be a *reasonable* alternative design. But the majority is incorrect that, if two competing medical product designs both have benefits, and both have risks, then neither can be defective, and neither can be a reasonable alternative design. *Every* medical product and procedure involve some degree of risk. The plaintiffs' task was not to demonstrate that the TVT is risk free. Rather, they had only to present evidence from which the jury reasonably could conclude that the Obtryx was unnecessarily dangerous and that the TVT reduces those dangers without sacrificing functionality and without adding other, offsetting risks or costs.

The evidence cited in the preceding paragraphs establishes precisely that. Indeed, viewing the evidence in the light most favorable to the plaintiffs, this case presents a textbook example of a reasonable alternative design, insofar as Boston Scientific, in designing the Obtryx, essentially took the TVT and altered it in three ways.[12] The jury could have found that, in addition to those risks shared equally by the two products (e.g., surgical risks or risks involved in the body's reaction to foreign materials such as polypropylene), the Obtryx, by virtue of those three alterations, carries three *additional* sets

[12] In its brief, Boston Scientific acknowledges that it "developed the Advantage mesh from which it makes the Obtryx (and all its midurethral slings) to be substantially similar to other mesh on the market, like the TVT mesh."

of risks—stemming from its heat-sealed middle, detanged edges, and transobturator design—that (1) are not shared by the TVT, and (2) do not offer any significant offsetting benefits or cost savings.[13] Indeed, Boston Scientific itself acknowledges that, although Rosenzweig was of the view that all polypropylene mesh devices are defective, "Rosenzweig may believe the . . . characteristics [of the Obtryx] allegedly make it more defective/unreasonably dangerous . . . ." Under the applicable law, including the cases on which the majority relies, that showing is enough for the jury to find the Obtryx unreasonably dangerous, and hence defective, on a theory of reasonable alternative design.

B

With respect to the third element of the plaintiffs' defective design claim, which requires evidence that the defective features of the design of the Obtryx caused or contributed to Fajardo's injuries, there was sufficient evidence from which the jury reasonably could have reached that conclusion. First, as I discussed, there was extensive evidence that three specific design elements of the Obtryx increase the risk of harm to patients, including Fajardo. The heat-sealed middle section makes the sling less flexible and more subject to contraction than other slings, which, in turn, aggravates the foreign body reaction associated with the use of polypropylene mesh and results in a higher rate of complications, such as inflammation, groin pain, scarring,

[13] The majority repeatedly contends, erroneously, that some products in the class of TVT-type slings "had the exact same defect alleged to have caused Fajardo's injuries in this case." Part II E of the majority opinion. Not so. In fact, the record demonstrates that *no* TVT-type sling has *all* of the defects alleged to make the Obtryx unreasonably dangerous. The jury reasonably could have found, on the basis of the evidence in the record, that any TVT-type sling would have reduced at least some of the risks to Fajardo, such as the risks associated with the use of a transobturator design, without any offsetting costs or risks. The plaintiffs' claim, in any event, was targeted at the Ethicon TVT in particular. See part III A of this opinion.

urgency, overactive bladder, vaginal erosion, and dyspareunia. The detanged edges hinder the integration of the sling with native tissue. The transobturator design results in vaginal tenderness and groin pain, and may be linked to tape extrusion, vaginal erosion, and internal dyspareunia. Dyspareunia, pelvic pain and swelling, and worsening incontinence are the very symptoms that Fajardo alleged.

Second, the plaintiffs' expert witnesses were of the opinion that these defective characteristics of the Obtryx were in fact responsible for Fajardo's injuries. Rosenzweig testified that the decision by Boston Scientific to heat seal the middle portion of the Obtryx stiffened the sling, which, in turn, aggravated Fajardo's incontinence and exacerbated the foreign body reaction, inflammation, scarring, and the other sequelae of her condition. He opined that "Fajardo has . . . chronic groin pain from the Obtryx sling . . . ." He further noted that Fajardo's sling was palpable when removed, consistent with the cautions contained in the Ross study regarding the transobturator design, and that her injuries were to her obturator foramen, which was precisely where the Obtryx was inserted. Ultimately, Rosenzweig unequivocally opined, to a reasonable degree of medical certainty, that "[t]he defects of the Obtryx sling caused the injuries to . . . Fajardo."[14] The majority's statement to the contrary fails to acknowledge the clear significance of this evidence.[15]

[14] Fajardo's treating physicians concurred with Rosenzweig that the Obtryx was the cause of her injuries. Bercik testified that, to a reasonable degree of medical certainty, the Obtryx had caused Fajardo's worsening incontinence and dyspareunia. This was consistent with Hines' recommendation to Fajardo that she have the mesh removed because it was "clearly . . . what's causing her pain."

[15] As I previously noted, the majority contends that Rosenzweig's testimony regarding the dangers created by these particular defects is of no force because Rosenzweig also believed that the Obtryx was defective because it contained polypropylene. The logic of this point escapes me. See part III B of this opinion.

Finally, the jury reasonably could have concluded, on this record, that using a TVT in lieu of the Obtryx would have reduced, if not avoided altogether, the risks of harm that the Obtryx presented.[16] Indeed, insofar as the primary design differences between the Obtryx and the TVT were also the precise defects alleged to have injured her, by far the most logical conclusion is that selecting a TVT would have reduced her risk of dyspareunia, groin pain, and incontinence, consistent with the medical studies in evidence.

As I previously discussed, it is well within the province of the jury to draw reasonable inferences from an expert's testimony and, thus, to come to a conclusion that it could not permissibly reach solely on the basis of lay knowledge. In the present case, the jury was at liberty to combine various elements of the expert evidence—Rosenzweig's testimony, the Tulikangas opinion letter, and the medical studies admitted as full exhibits[17]—to reach the reasonable conclusion that the

[16] The required showing should not be misunderstood. The plaintiff is not required to show that the alternative design would have avoided or reduced the plaintiff's injuries. The legal standard requires evidence only that the alternative design could avoid or reduce *the risk of harm* created by the defendant's product. See footnote 3 of this opinion. This is not a causation requirement but, rather, proof that a product is defective because an alternative would present a reduced risk of harm to a user or consumer. See, e.g., *Gardner* v. *Ethicon, Inc.*, Docket No. 4:20-cv-00067-SAL, 2020 WL 5077957, *4–5 (D.S.C. August 27, 2020) (rejecting defendant's argument that plaintiff was required "to connect the reasonable alternative design to her specific injuries" by presenting expert testimony that safer alternative design existed for defective products that would have prevented or reduced plaintiff's injuries, and holding that "the risk-utility test relates to the defectiveness of the design—not causation"); *Thompson* v. *Ethicon, Inc.*, supra, 2020 WL 3893253, *6 (rejecting "hypertechnical criticism" of plaintiff's expert testimony and holding that it was enough that expert established that device was defective and tied that defect to plaintiff's injuries); *Rheinfrank* v. *Abbott Laboratories, Inc.*, 137 F. Supp. 3d 1035, 1040–41 (S.D. Ohio 2015) (plaintiff need only establish that use of alternative design would reduce general risk of similar harm for similarly situated patients).

[17] I would also add to this list the testimony of Bercik, one of the physicians who treated Fajardo for her sling related injuries and ultimately removed the Obtryx. He testified that Fajardo could have been a candidate for the

elimination of three specific dangerous features of the Obtryx would reduce the risk of danger presented by that product. See, e.g., *State* v. *Nunes*, 260 Conn. 649, 675, 800 A.2d 1160 (2002) (substance of experts' testimony was held sufficient to establish causation to reasonable degree of medical certainty, despite fact that experts merely stated that "the symptoms experienced by the victim were consistent with those of chloral hydrate" (emphasis omitted)); *Procaccini* v. *Lawrence + Memorial Hospital, Inc.*, supra, 175 Conn. App. 725–26 (recognizing that expert opinion is required to prove causation in medical malpractice action but holding that jury could find causation from cumulative effect of expert testimony and other evidence, including circumstantial evidence); see also *Thompson* v. *Ethicon, Inc.*, supra, 2020 WL 3893253, *5 (applying same rule in context of mesh litigation). Because the plaintiffs had only to persuade the jury that use of the TVT would have reduced the risks posed by the Obtryx, establishing that the TVT posed a lower danger to Fajardo with respect to any one of the three suspect design features would have been sufficient to warrant a reasonable alternative design instruction. Construing the evidence in the light most favorable to the plaintiffs, as we must, there was sufficient evidence of all three defects to warrant such an instruction.[18]

TVT, that the Obtryx was the cause of her injuries, and that he had begun using the TVT in favor of transobturator slings, including the Obtryx, because of his negative experience with the latter. The majority offers a different interpretation of Bercik's opinion on this subject, on the basis of other testimony of his. See footnote 16 of the majority opinion. Rather than explaining why I read that testimony differently, it will suffice to say that the jury should have been allowed to choose which of Bercik's testimony to emphasize and whether Bercik's opinions ultimately supported the plaintiffs' claims.

[18] In rejecting this conclusion, the majority relies on generalities and truisms regarding the need for expert testimony in product design defect cases. See footnote 20 of the majority opinion. Those generic propositions are unhelpful here because the plaintiffs in this case presented extensive expert testimony and peer reviewed scientific research studies that permitted the jury to decide the case. The majority consistently states that expert testimony

C

I have established that the plaintiffs were entitled to the requested instruction if there was evidence tending to show that a reasonable alternative design was available that would have avoided or reduced the risk of harm and the failure to use that alternative design rendered the product unreasonably dangerous. The plaintiffs claimed in particular that the unique characteristics of the Obtryx—a heat-sealed middle section, detanged edges, and a transobturator design—rendered it less safe than the TVT and that those differences caused or contributed to Fajardo's injuries. They contended that the TVT was a generally safe, effective, and widely used mesh sling product for the treatment of female stress urinary incontinence and that the Obtryx did not offer any significant advantages in safety or effectiveness vis-à-vis the "gold standard" TVT that would justify the increased rate of complications. They offered expert testimony, bolstered by respected clinical studies, in support of those contentions, and in support of the conclusion that the Obtryx should not be used due to its unnecessarily high rate of serious complications.

The claim as presented was not oblique or difficult to understand. The plaintiffs' counsel throughout trial directly and repeatedly referenced the foregoing body

is necessary to allow the jury to conclude that there is an alternative design that is feasible, which is sufficiently safer than the product at issue to render the latter defective, and that the use of that alternative design would have reduced the risk of the types of injuries suffered by the plaintiff. Once the experts and the research studies had demonstrated that there are three primary design features that distinguish the Obtryx from the TVT, that each of those three differences makes the Obtryx unnecessarily dangerous, that those features are defects that caused or contributed to Fajardo's injuries, and that the TVT was a viable alternative, it is unclear what more the majority believes the jury needed to hear from the experts before it could reasonably conclude that the TVT was a reasonable alternative design, the use of which would have reduced the risk of the injuries caused by the defective design of the Obtryx.

of research suggesting that TVT slings are superior in design and feature a more favorable risk-benefit profile vis-à-vis transobturator slings in general, and the Obtryx in particular. In his closing argument, the plaintiffs' counsel began by discussing this body of research at some length and by emphasizing that the TVT had been proven to be a safer product than the Obtryx, with fewer complications, and, therefore, that it should remain the midurethral procedure of choice. He specifically linked the higher incidence of complications relative to TVT with the unique design features of the Obtryx, such as the detanged edges and heat-sealed mid-portion, and the resulting increase in material stiffness, as well as the Obtryx' transobturator approach. Later, counsel analogized the Obtryx to the Ford Pinto and its proclivity to burst into flames during rear-end collisions, explaining that evidence that mesh slings are generally safe was simply irrelevant to the plaintiffs' claim that the Obtryx is specifically dangerous.

Finally, in his rebuttal, the plaintiffs' counsel argued: "[A]lmost their whole defense was saying mesh slings are good. Very, very little of what they said had to do with the Obtryx. And they said that [the] plaintiffs are here telling you all mesh slings are bad. Those words never left my mouth once. I put a lot of evidence in front of you, but there's a feasible alternative called the TVT, which is superior. And that's just not my words, that's . . . Tulikangas who told them that, that their product is inferior." A few minutes later, he returned to this theme: "So, then [the defendants' counsel] tell[s] you how great TVT is, is a complete distraction and actually supports our claim that there is a better product that doesn't have near[ly] as many problems. And they were told that." He then closed with a final reference to the Ross study: "Here's the 2009 Ross study, and let's look at the last sentence. Use TVT, don't use the Obtryx. That's th[e] conclusion." The evidence of rea-

sonable alternative design was presented at trial as a distinct theory of product defect, the claim was argued forcefully on the basis of that evidence, and the evidence was sufficient in all respects to allow the jury to exercise its constitutional function.[19]

## III

Despite the evidence discussed in part II of this opinion, and the requirement that we construe that evidence in the light most favorable to the plaintiffs, the majority remains unpersuaded that a reasonable alternative design instruction was appropriate, for four primary reasons. First, the majority contends that the TVT cannot qualify as a reasonable alternative design because the term "TVT," as used at trial, is ambiguous, and did not adequately identify one specific product brand. Second, the majority contends that the plaintiffs could not rely on the expert opinion of Rosenzweig to establish that

[19] I reject the majority's position that, although the plaintiffs (1) disclosed two experts who would testify as to safer alternatives to the Obtryx, (2) set forth abundant evidence of a reasonable alternative design, (3) referenced their "feasible alternative" theory during closing argument, and (4) requested a reasonable alternative design jury instruction, they nevertheless were not entitled to such an instruction because they "took a scattershot approach" to arguing the case. Part II E of the majority opinion. It is true that the plaintiffs and their various expert witnesses offered several different theories of liability: they argued that the TVT was a reasonable alternative design, that the Burch procedure is a better treatment option than vaginal mesh, and that polypropylene is ill-suited for use in medical devices. It is beyond dispute, however, that a plaintiff is free to present multiple alternative or even contradictory theories of liability to the jury and is entitled to an instruction on any of the theories for which there is minimally sufficient evidence to support a verdict. See, e.g., *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, 722, 183 A.3d 1164 (2018) (" 'a party may plead, in good faith, inconsistent facts and theories' "); *Dreier* v. *Upjohn Co.*, 196 Conn. 242, 245, 492 A.2d 164 (1985) ("[u]nder our pleading practice, a plaintiff is permitted to advance alternative and even inconsistent theories of liability"). The question is not whether a reasonable alternative design was the plaintiffs' only or even principal theory of the case but, rather, whether there was sufficient evidence before the jury to warrant an instruction. The answer, quite clearly, in my view, is yes.

the TVT represents a reasonable alternative design when Rosenzweig also opined that all polypropylene mesh products are unsafe. Third, the majority contends that the jury was precluded from considering published medical research studies, the testimony of treating physicians, and certain other testimony when evaluating whether the Obtryx was defectively designed. Fourth, the majority, having weighed the evidence presented at trial, finds that the evidence in support of the plaintiffs' reasonable alternative design theory was unpersuasive, lacked credibility, or was contradicted by other evidence of record. I consider each argument in turn.

A

The majority first argues that the TVT cannot qualify as a reasonable alternative design because the term "TVT" is ambiguous. The majority contends that "[t]he record demonstrates that the term 'TVT' is used both with respect to the Ethicon branded tension free vaginal tape (the specific TVT type product [Fajardo] identified in her complaint) and as a generic term for similar tension free vaginal tapes in the class of TVT products, such as Boston Scientific's Advantage tape. Unless otherwise noted, [the majority] use[s] the term in that broader, generic context. Although the plaintiffs juxtaposed the Obtryx to the class of TVT products generally, they did not focus on a particular TVT product with which to compare the Obtryx . . . ." Footnote 9 of the majority opinion. On the basis of this premise—which, as I will explain, is incorrect—the majority proceeds on the assumption that a plaintiff may not satisfy its burden of producing sufficient evidence of a reasonable alternative design by pointing to a class of products that themselves differ in material, design, safety and efficacy with some containing the very same defects of which the plaintiff complains. The majority proceeds to evaluate the expert testimony and other evidence presented by the plaintiffs through the lens of its errone-

ous assumption that "the plaintiffs are claiming that the class of TVTs is a reasonable alternative design . . . ."[20] Part II E of the majority opinion.

The flaws in the majority's position become manifest upon careful review of its reasoning. The majority elaborates: "To the extent that the plaintiffs assert that they presented sufficient evidence that the TVT is a reasonable alternative design to the Obtryx, it appears —from the evidence on which they rely—that they must be referring to the class of tension free vaginal tape that is implanted in a retropubic fashion. First, Rosenzweig does not compare the Obtryx to the Ethicon branded TVT. Second, the Ross study did not compare the Obtryx to the Ethicon branded TVT but compared the Obtryx to another retropubic sling manufactured by Boston Scientific. Third, the other studies entered into evidence did not compare the Obtryx device to the Ethicon branded TVT. Finally . . . Bercik did not compare the Ethicon branded TVT to the Obtryx; he notes only that he and a few other physicians with whom he works prefer the Ethicon branded TVT to other slings but that one of his superiors in his working group at Yale School of Medicine still uses the Obtryx." (Citation omitted; footnotes omitted.) Part II E of the majority opinion. The majority also contends that, insofar as certain TVTs, such as Boston Scientific's own Advantage, have the same alleged design defects as the Obtryx—a heat-sealed, detanged center section—there is no evidence that use of the TVT would have prevented Fajardo's injuries.

The argument of the majority, in summary, relies on five propositions: (1) the term "TVT" can refer both to the Ethicon branded TVT and to the broader class of

[20] The majority points to nothing in the record suggesting that the trial court declined to give the requested instruction for this reason or even considered the issue.

retropubic slings; (2) the plaintiffs use the term in the latter, broader sense, not with reference to any particular sling product; (3) a class of products cannot qualify as a reasonable alternative design; (4) some members of the class of TVTs, most notably Boston Scientific's Advantage retropubic sling, have the same design features as, and are no safer than, the Obtryx; and (5) the plaintiffs, therefore, did not proffer sufficient evidence to warrant a reasonable alternative design instruction.[21]

I agree with the first proposition, that the term "TVT" can be ambiguous. The majority is simply mistaken, however, with respect to the latter three propositions. First, the vast majority of the evidence in the record, and the focal point of the plaintiffs' reasonable alternative design argument, addressed the original, Ethicon branded TVT, rather than a generic class of retropubic slings. Second, nothing in law or logic bars the plaintiffs from arguing that all TVT-type retropubic slings are superior to the Obtryx *and* that the original, Ethicon branded TVT is especially superior. And third, the plaintiffs presented compelling evidence that the Obtryx was less safe than both the Ethicon TVT and other TVT-type retropubic slings. Accordingly, the fact that the term "TVT" is occasionally used loosely, in the course of a ten day trial, to refer to retropubic slings generally is of no consequence; the trial court did not rely on that argument, and nothing about it justifies the court's instructional ruling.

[21] I might quibble as well with other assumptions underlying the majority's argument. Its claim, for example, that different TVTs are made from many different materials finds little, if any, support in the record. See part II E of the majority opinion. Indeed, the defense expert, Rosenblatt, testified that, although the *brands* of polypropylene used may vary, all synthetic slings are produced from type 1 microporous polypropylene and are "about the same" and "extremely similar." Certainly, the jury could have so concluded. But, for reasons of expediency, I will focus my attention on the most prominent flaws in the majority's argument.

1

The majority incorrectly suggests that the plaintiffs never compared the Obtryx to any particular TVT product and that their references were only to the class of tension free tape that is implanted in a retropubic fashion. The truth is that, with just a handful of exceptions, all of the references to "TVT" in the record were expressly to the product that bears that name, the TVT-brand sling manufactured by the Gynecare unit of Johnson & Johnson's Ethicon division. This is no surprise. As the majority acknowledges, the plaintiffs identified one particular TVT product in their complaint, and only one—the Ethicon TVT. Indeed, unless my review of the record missed contrary evidence, Ethicon's is the *only* vaginal mesh that uses the trade name "TVT." In light of these facts, I do not understand why the majority resists the reasonable assumption that the Ethicon TVT is *the* TVT to which the plaintiffs were referring.

The cross-examination of one of the plaintiffs' experts at trial illustrates that everyone in the courtroom—including Boston Scientific's own lawyers—clearly understood that the TVT under discussion was the Ethicon TVT. Bercik testified, among other things, that Fajardo would have been a suitable candidate for the TVT. He repeatedly made clear that the TVT to which he was referring was the Ethicon TVT in particular, and not retropubic slings more generally. The following colloquies, for example, took place during his cross-examination.

"Q. And then you say [that Fajardo] may potentially benefit from repeat sling procedure, and what you left out when you read to the jury was the word TVT. You wrote TVT at the end of the sentence, right?

"A. I did.

"Q. Okay. And so what you were reporting in your note is that . . . Fajardo might benefit from a repeat sling procedure, TVT, right? That's what you wrote?

* * *

"Q. But a TVT is a polypropylene sling, right? It's made from polypropylene?

"A. So, it's a specific brand of a polypropylene sling.

"Q. Sir, my . . . question is [whether] the TVT is a polypropylene sling, right?

"A. Yes, sir.

"Q. *Okay. And it's also . . . made by Johnson & Johnson and not Boston Scientific, right*?

"A. *That's correct.*

"Q. *Ethicon. And you have implanted that polypropylene sling for many years. You talked . . . with . . . Fajardo's lawyers about that, right*?

"A. *Yes, sir.*

"Q. Okay. And you currently use and recommend that polypropylene sling to women with stress urinary incontinence, right?

"A. Yes, sir, I do.

"Q. And you place about 100 of those polypropylene midurethral slings a year, right?

"A. Give or take, yeah.

* * *

"Q. Sure. . . . For the slings that . . . you have implanted . . . *the TVT sling manufactured by Johnson & Johnson*, those women [who] have that sling, there's a risk that their sling[s] may need to be removed?

"A. Oh, I see what you're saying. Yes.

"Q. Yeah. And any time that you implant a TVT sling in the hundreds of women that you have recently, you discuss with them the potential that the sling may need to be removed as a potential risk, right?

"A. I do. I generally quote about a 1 percent risk.

"Q. All right. And you continue to recommend slings as an option for women to use despite the fact that there's a risk that they may need to be . . . removed, correct?

"A. No, I don't—I don't recommend slings, plural. I recommend a sling, a specific sling.

"Q. You recommend a specific sling, the one that you choose to use, even with a risk of potential removal, correct?

"A. Right. Based [on] my experience and my knowledge of—of the risk and complication rates, yes.

"Q. And you also agree that, [with] the sling that you recommend, there is a risk of contracture with that sling, as well, agreed?

"A. . . . With my experience, I have not seen significant contracture with that sling." (Emphasis added.)

The following additional colloquies took place on redirect examination.

"Q. [I]s *TVT made by the same manufacturer as the Obtryx sling*?

"A. *No, ma'am.*

"Q. *Okay.*

"A. *Different company.*

* * *

"Q. *Okay. So the TVT that you use has a different approach than the Obtryx sling. Correct*?

"A. *Yes*, *ma'am*." (Emphasis added.)

It could not be any clearer that Fajardo's treating physician was comparing the Ethicon TVT to the Obtryx.[22] He opined that the Ethicon sling was a suitable alternative for Fajardo specifically. He opined that the Ethicon sling was safer than the Obtryx in various respects, with fewer complications, less contraction, and less risk of removal. He went out of his way to emphasize that he was recommending only one particular sling, sold by one particular company. And both the plaintiffs' and the defendants' counsel repeatedly indicated that they understood that the sling at issue was the Ethicon TVT, not a general class of retropubic slings or Boston Scientific's own retropubic Advantage sling. It is impossible to read the record any other way.

Other key testimony at trial would have reinforced the fact that the term "TVT" is primarily used in reference to the Ethicon branded TVT, and not to a class of TVT-like products. Rosenblatt, the primary defense expert, testified that the first mesh sling was the TVT, which was developed in 1998. He referred to it as the "Ethicon TVT," and he explained that, unlike Boston Scientific's vaginal slings, the TVT was manufactured from Prolex branded polypropylene, rather than Marlex. Indeed, Rosenblatt repeatedly distinguished "the TVT" from "TVT-like retropubic slings," such as Boston Scientific's Advantage, making perfectly clear that he was not using the term "TVT" broadly to encompass all retropubic slings. Notably, he emphasized that the TVT—unlike the Advantage and the Obtryx—does not

[22] Despite the majority's statement to the contrary; see footnote 16 of the majority opinion; Bercik did compare the Ethicon TVT to the Obtryx. He indicated that he had tried using the Obtryx, which employs a transobturator approach, had a negative experience with it, and so began using the Ethicon TVT, which uses a different approach. This comparative testimony was not dwelled on at any length, but it is part of the trial transcript, and it was for the jury to determine its persuasiveness.

have the controversial detanged edges, which, he explained, is a novel development and is unique to the Boston Scientific products.[23]

In addition, Rao, the Boston Scientific engineer, distinguished the Advantage from the Ethicon branded TVT, making clear that the TVT, unlike Boston Scientific's products, did not have the heat-sealed center, detanged edges, and other design flaws alleged to have caused Fajardo's injuries.[24] I am not aware of any trial

[23] Rosenzweig was operating on the same premise, using "the TVT" as synonymous with the Ethicon branded TVT. When asked whether he "recall[ed] what the first sling—transvaginal sling, or through the vagina . . . was called," he responded, "[t]he TVT."

[24] Rao was examined as follows:

"Q. So, can you tell me how the Advantage project—[how] you came to work on that project?

"A. Well, the project started before I was assigned to work on it. And I was assigned to help to develop a mesh that was very similar to the TVT mesh that was currently on the market.

"Q. And what were your duties as assigned to the Advantage mesh project?

"A. To characterize the TVT mesh so we understood its structure and understood what it was made of and to find a manufacturer that could make a comparable mesh product that we could then test and see if it was indeed similar to the TVT mesh, and also to look for ways to improve [on] the existing TVT mesh that was in the field.

* * *

"A. I'm not 100 percent sure. I know that, by the time I joined, we knew that the TVT mesh was made from polypropylene, and we also knew that we, Boston Scientific, had a polypropylene mesh on the market made from the same—that could be used to knit the structure that we wanted for the Advantage mesh.

* * *

"Q. Okay. Now, can you describe to me your responsibilities as technical team leader for the mesh?

"A. So, my responsibility was to figure out how to make a mesh that was similar, if not better, than the TVT mesh. So, we needed to figure out what the TVT mesh was made [of], what its properties were, what its structure was, and then find a vendor that could knit and heat-set the mesh.

* * *

"Q. Okay. What changes did you-all actually make to the Advantage mesh to differentiate your product from [the] TVT?

"A. So we detanged the section that would go under the urethra. If I can explain that, when you cut a knit structure, there [are] little fibers that stick out [of] the edges. We smooth those fibers through a heat process so that

testimony, by contrast, that suggested that the TVT that was held up as an alternative to the Obtryx represented a class of products.

Most of the exhibits introduced at trial likewise used the term "TVT" in reference to the Ethicon branded product of that name, rather than as a synonym for retropubic slings generally; many expressly distinguished Boston Scientific's Advantage retropubic sling from *the* TVT. The Lim study, for example, distinguished the Advantage from the "Gynecare" TVT and postulated that the defects in the former result from the heat sealing process, which renders the Advantage stiffer and less elastic than the TVT. See Y. Lim et al., supra, 21 International Urogynecology J. 1157, 1161. Moalli compared the "Gynecare TVT™" from Ethicon with the Advantage and four other midurethral slings. See P. Moalli et al., supra, 19 International. Urogynecology J. 655. The authors stated that the Gynecare TVT, which has unique tensile properties, is "the gold standard"; id., 656; and explained how newer slings, such as the Advantage, depart from the TVT by adding a heat-sealed middle, a tensioning suture, or a different weave pattern. See id., 662. Another study in evidence likewise distinguished the TVT from subsequent retropubic slings such as Advantage. See generally T. Tarcan et al., "Safety and Efficacy of Retropubic or Transobturator Midurethral Slings in a Randomized Cohort of Turkish Women," 93 Urologia Internationalis 449 (2014).

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they wouldn't be as kind of prickly to the tissue. And we also made sure that we cut our mesh very straight.

* * *

"Q. Did Boston Scientific, during the development of the Advantage mesh, do testing on the TVT product?

"A. Yes, we did.

* * *

"Q. Your role, as you indicated earlier, was to basically try to develop a mesh that was substantially similar to the TVT mesh, right?

"A. Yes."

In other trial exhibits, physician consultants to Boston Scientific also used the term "TVT" to specifically reference the Ethicon product. In an e-mail, one consultant, Joseph Macaluso, referred to the "TVT™," distinguishing the actual trademarked TVT from what he refers to as "TVT-type" mesh. Similarly, in his correspondence with Boston Scientific, Tulikangas responded to an e-mail from Boston Scientific, stating: "Advantage vs TVT—Longer term follow-up—Retrospective—Multiple Institutions—Shows that [Advantage] is just as effective as TVT . . . ."[25] Indeed, of the scores of exhibits in evidence, only one, the Ross study, consistently used the terms "TVT" and "retropubic" interchangeably. See generally S. Ross et al., supra, 114 Obstetrics & Gynecology 1287.

In most instances, it also was apparent that counsel for both sides, when referencing the "TVT," were referring to the Ethicon product in particular. As the majority concedes, all of the plaintiffs' references to "TVT" in the operative complaint expressly referenced Ethicon's original, branded TVT. See footnote 9 of the majority opinion. In his closing argument, the plaintiffs' counsel identified the TVT as "a competitor's product," which eliminates any possibility that he was referencing the class of TVTs that includes Boston Scientific's Advantage sling. In support of his claim that the TVT is a superior product for which Fajardo would have been well suited, he discussed the Moalli study and the testimony of Bercik, both of which addressed the Ethicon TVT, in particular. Counsel explained how "the TVT people," unlike Boston Scientific, designed the TVT with tanged edges "for a functional purpose to grip

[25] In addition, plaintiffs' exhibit 86, a review of mesh testing data by John Lehmann, identifies the TVT tested as "Gynecare" and states that "[t]he TVT device has a significant clinical record of success . . . ." Plaintiffs' exhibit 87, another study conducted by another Boston Scientific consultant, likewise identifies "the commercially available TVT device" with Gynecare.

tissue." Although counsel's other references to TVT, such as in the context of discussing the Ross study, were arguably ambiguous, at no point did he suggest that the TVT that he was holding up as a comparator was the class of retropubic slings, much less Boston Scientific's own Advantage product.

We can be certain that Boston Scientific was not confused by the supposed ambiguity. In its closing, Boston Scientific continued to hew to the position that it took throughout the trial, namely, that the TVT is a particular product rather than a class. Counsel walked the jury through the historical use of polypropylene in medical devices: "You then have the first product that comes onto the market in 1998, and that's called, you've heard, the TVT. It's a polypropylene mesh sling. Five years later, Boston Scientific puts out its first polypropylene mesh sling called the Advantage . . . ."

The majority cites no examples of any instance at trial when Boston Scientific uses the term "TVT" to refer to a class of products. Indeed, even on appeal, the defendants themselves have not taken the position espoused by the majority that the term "TVT" was used at trial in reference to the class of retropubic slings. In its brief, Boston Scientific repeatedly distinguishes "the TVT," which was "first . . . marketed in 1998" and "lacks detanged edges," from retropubic slings such as the Advantage. Although Boston Scientific does fault the plaintiffs for not identifying a competitor product that, in its view, "would have reduced or avoided the risk of harm to . . . Fajardo," it is perfectly clear from its brief that Boston Scientific understands that the Ethicon TVT is among the reasonable alternative designs at issue. (Emphasis omitted.)

It is clear, then, that there was abundant evidence from which the jury reasonably could have found that the original TVT, the branded product manufactured

and sold by the Gynecare unit of Johnson & Johnson's Ethicon division, represented a reasonable alternative to the Obtryx. Expert testimony and supporting scientific studies established that that particular sling (1) is widely used, (2) is safe and effective, (3) was a feasible option for Fajardo, (4) is superior to the Obtryx, and (5) does not have the design features that allegedly caused Fajardo's injuries, namely, a heat-sealed middle section, detanged edges, and a transobturator approach. If there are concerns that the jury might have been confused by Ross' looser use of the term "TVT," or ambiguities in the arguments of counsel, then the trial court could have solved the problem by instructing the jury to consider only the evidence tending to show that the Ethicon TVT in particular represented a reasonable alternative design. There was no justification for throwing out the entire claim.

2

Even were we to assume, purely for the sake of argument, that the plaintiffs intended the "TVT" to refer to a class of products rather than a particular product, the majority has provided neither authority nor argument in support of its contention that a class of products cannot serve as a reasonable alternative design. A consumer injured by a cigarette lighter using a novel ignition device would be entirely justified in holding up the class of disposable butane lighters using a flint wheel as a reasonable alternative design, rather than, say, arbitrarily pointing to some particular BIC or Scripto model. As one federal court in Connecticut has explained, "proof of a feasible alternative design [is] a euphemism for avoidability . . . ." (Internal quotation marks omitted.) *Mals* v. *Smith & Nephew, Inc.*, Docket No. 3:19-cv-01770 (VLB), 2020 WL 3270835, *5 (D. Conn. June 17, 2020). If the defendant's product differs in some important way from all competitor products, and in a way that is demonstrably responsible for the plain-

tiff's injuries, then why should it matter that those various, safer alternatives are not in every respect identical?

In the present case, *every* sling in the class of TVT-type products lacks at least one of the three defects of the Obtryx, namely, the use of a transobturator rather than a retropubic design. Evidence in the record that was introduced and relied on by the plaintiffs' design experts and emphasized by the plaintiffs' counsel during both opening and closing arguments, such as the Ross and Cholhan studies, as well as other evidence, such as the Petri study; see footnote 8 of this opinion; indicated that the use of a transobturator approach was a defect of the Obtryx that is associated with injuries of the type suffered by Fajardo. Rosenzweig clearly summarized this body of research for the jury, stating that, because the transobturator design of the Obtryx was associated with significantly higher incidences of groin pain and other complications, "the retropubic sling is better than the [Obtryx] transobturator sling." He summed up his discussion of these and other complications associated with the Obtryx by opining that the Obtryx is defective and that its defects caused Fajardo's injuries. Accordingly, even if the majority were correct that the plaintiffs tried the case by comparing the Obtryx only to the class of retropubic slings, rather than to the Ethicon TVT in particular, there was abundant evidence from which the jury could have found that the use of any retropubic sling would have reduced the risk of the types of injuries that Fajardo suffered.

To summarize, the plaintiffs demonstrated at trial that both of the Boston Scientific products, the Advantage and the Obtryx, are inferior to the Ethicon TVT insofar as they have two unique design elements: detanged edges and a heat-sealed middle section. The plaintiffs also demonstrated that the Obtryx is worse even than the Advantage, insofar as the former sling has a third design defect: transobturator slings are more

dangerous than retropubic slings, without offsetting benefits. So, the Obtryx is the worst of both worlds. Fajardo would have reduced her risks had she used any TVT-style retropubic sling, and she would have minimized her risks to the greatest extent by using the Ethicon TVT, rather than a heat-sealed, detanged Boston Scientific TVT product. However defined, TVT was a safer product, a less defective, reasonable alternative design. At least, the jury could have so found. It should have been allowed to do so.

B

The second reason that the majority believes that a reasonable alternative design instruction was not warranted, despite the abundant evidence that the TVT was a viable, superior alternative that could have prevented Fajardo's injuries, is that the plaintiffs also presented some evidence that *all* polypropylene slings are unreasonably dangerous because polypropylene is not suitable for use in the human body. Specifically, the majority embraces Boston Scientific's principal argument—the same argument that apparently persuaded the trial court—that the plaintiffs could not, as a matter of law, have established that the TVT is a reasonable alternative design because their own product design expert, Rosenzweig, testified that, in his opinion, all mesh products fabricated from polypropylene, including the TVT, are unsafe and unsuitable for implantation in the human body. The plaintiffs counter, and I agree, that the fact that Rosenzweig was of the view that all polypropylene mesh products are unsafe does not mean that the jury was precluded from finding that the TVT represents a reasonable alternative design to the Obtryx sling. I reach this conclusion for several reasons.

1

As I explained in part I of this opinion, the jury was not confined to the binary choice of either crediting all

of Rosenzweig's opinions or rejecting them whole hog. Our law governing expert witnesses is very clear on this point. The jurors were free to credit Rosenzweig's opinion that the unique features of the Obtryx—a heat-sealed center, detanged edges, and a transobturator approach—constituted design flaws that caused or contributed to Fajardo's injuries, while at the same time rejecting his more idiosyncratic view that all polypropylene mesh products are defective and, instead, crediting the trial testimony of other experts that polypropylene *is* a suitable material for use in medical implants and that the TVT is a safe and effective treatment for female stress urinary incontinence. Indeed, the trial court instructed the jury to that effect immediately before Rosenzweig testified.

Rosenzweig himself provided ample basis for the jury to disregard his more extreme views regarding the dangers of polypropylene. Although Rosenzweig's own opinion was that polypropylene is not a suitable material for medical implants and that the alternative Burch procedure is a preferable means of treating stress urinary incontinence, he also repeatedly acknowledged at trial that those views do not represent the prevailing opinion among urogynecologists and, indeed, are well outside the medical mainstream. For example, Rosenzweig testified that, according to the medical literature, polypropylene mesh is the "gold standard" for treating stress incontinence and that its use has been endorsed as safe and effective by every major urological association. He agreed with the defendants' counsel that polypropylene has been used in the human body for more than fifty years in millions of patients, that polypropylene slings such as the TVT are effective and widely used, and that physicians who use them do so reasonably and consistent with the prevailing standard of care. Rosenzweig acknowledged that his own colleagues at Rush University Medical Center regularly use such

slings and continue to train residents in the use thereof. In short, he agreed that polypropylene slings represent the most commonly used modality for treating stress urinary incontinence and that their use is supported by extensive medical data, including more than 2000 studies.

Accordingly, the jury reasonably could have credited Rosenzweig's testimony that the unique design characteristics of the Obtryx render it especially dangerous and contributed to Fajardo's injuries while simultaneously concluding that Rosenzweig is an outlier with respect to his strident opposition to any medical use of polypropylene. The jury could have credited the testimony of various other witnesses—such as Bercik, Rosenblatt, and Boston Scientific's biomaterials expert, Stephen Badylak—that polypropylene, such as that used in the TVT, is a generally safe material that is widely used for the fabrication of medical implants and accepted by all major medical associations.

2

Another reason that Rosenzweig's beliefs regarding the dangers associated with polypropylene did not fatally taint his entire testimony is that I do not accept Boston Scientific's view, apparently shared by the majority, that an alternative product design that is unsafe, but significantly less so than the defendant's product design, cannot, ipso facto, be a *reasonable* design. It is noteworthy that neither Boston Scientific nor the majority has identified a single authority for the theory that a federally regulated product that is legally on the market and in widespread use cannot qualify as a reasonable alternative design if it is safer than the product at issue but, nevertheless, poses safety risks that arguably outweigh its advantages. Rather, the few courts and commentators to have considered the issue uniformly have concluded that a less unsafe prod-

uct can qualify as a reasonable alternative design if that product lacks the features that caused or contributed to the plaintiff's injuries. Indeed, several federal courts have reached that very conclusion in the multidistrict vaginal mesh litigation, rejecting similar arguments. See, e.g., *Herrera-Nevarez by Springer* v. *Ethicon, Inc.*, Docket No. 17 C 3930, 2017 WL 3381718, *7 (N.D. Ill. August 6, 2017) ("the fact that [an expert] evidently does not believe that any such devices are safe does not preclude him from ranking them on a comparative basis"); *Kaiser* v. *Johnson & Johnson*, Docket No. 2:17-CV-114-PPS, 2018 WL 739871, *7 (N.D. Ind. February 7, 2018) (similar); *Wiltgen* v. *Ethicon, Inc.*, Docket No. 12-cv-2400, 2017 WL 4467455, *5 (N.D. Ill. October 6, 2017) (similar); see also *Campbell* v. *Boston Scientific Corp.*, 882 F.3d 70, 79 (4th Cir. 2018) (rejecting argument that Rosenzweig's testimony did not support finding of reasonable alternative design).

Although those courts did not elaborate on the reasoning underlying their rulings, legal scholars have made a persuasive case. For example, Professor Douglas A. Kysar has explained that "even an unavoidably unsafe product sometimes can be made marginally less unsafe. By allowing courts to balance the risks and rewards posed by alternative product designs, the risk-utility test provides manufacturers with incentives to constantly evaluate and [to] adopt such reasonable alternative designs." D. Kysar, "The Expectations of Consumers," 103 Colum. L. Rev. 1700, 1717 (2003). The Restatement (Third) is of the same view: "The requirement . . . that the plaintiff show a reasonable alternative design applies in most instances even though the plaintiff alleges that the category of product sold by the defendant is so dangerous that it should not have been marketed at all. . . . [This applies to] [c]ommon and widely distributed products such as alcoholic beverages, firearms, and [aboveground] swimming pools

. . . .” (Citation omitted.) Restatement (Third), supra, § 2, comment (d), p. 20.

Consider the hypothetical of a tobacco company that develops a cigarette featuring a novel design that, while more stylish in appearance than those currently on the market, has a less effective filter that removes fewer carcinogens. A cigarette design expert might well testify that the new product is unnecessarily dangerous relative to traditional designs, which are less likely to cause cancer, while also acknowledging that she would never smoke or allow her children to smoke and that she is of the view that no cigarettes should be legal due to the well-known medical risks associated with smoking. Of course, cigarettes are legal. They are heavily regulated, but society has accepted that the health and financial costs associated with smoking related illnesses are justified by the economic benefits and the rights of adults to make their own determination that the pleasure that they derive from smoking outweighs the risks.

Moreover, this in for a penny, in for a pound theory of product liability is especially poorly suited to the medical device field. The parties, and all of the experts who testified at trial, agreed that every surgical intervention and every internally implanted medical device carry some potentially serious risks. Much of the practice of Western medicine involves the process of attempting to identify and quantify such relative risks so that clinicians and patients can make informed decisions as to whether the dangers associated with a particular intervention are justified by the potential benefits. As is clear from the present case, medical experts no less than their patients reasonably may reach different conclusions about whether, for example, it is prudent to implant a particular medical device that has a reasonable likelihood of curing an irksome but nonlethal condition, such as chronic stress urinary incontinence, but that also has the potential to cause serious pain and

other side effects. So long as that device falls within the standard of care and is deemed to have some medical utility, I see no reason why the law should not incentivize manufacturers to minimize those risks, rather than pile risk upon risk, to the extent reasonably possible. The majority's holding in the present case removes that incentive and potentially disincentivizes manufacturers of certain categories of products from developing design innovations that reduce the risk of harm.

3

Finally, the majority ignores the fact that this court already has, in essence, decided this very question in the plaintiffs' favor. In *Bifolck*, we made clear that a plaintiff is not precluded from arguing that a class of products is inherently, manifestly unsafe while, in the alternative, also contending that the particular product at issue could have been designed to be less unsafe. See *Bifolck* v. *Philip Morris, Inc.*, supra, 324 Conn. 435 ("Although the fact finder considers under either theory whether the risk of danger inherent in the challenged design outweighs the benefits of that design, these theories are not mutually exclusive. A plaintiff may consistently allege that a product had excessive preventable danger (reasonable alternative design) and that the product was too dangerous to market to the consumer irrespective of whether it could have been designed to be safer (manifestly unreasonable design)."). The majority does not appear to recognize that its holding in the present case deviates from the court's guidance in *Bifolck* and offers no rationale for this departure.

C

Third, as I have alluded to throughout this opinion, I am troubled by the majority's view that the only evidence that the jury was permitted to consider in assessing a potential reasonable alternative design

claim was the testimony of the plaintiffs' primary product design expert, Rosenzweig, and that the plaintiffs' case was not established unless Rosenzweig himself recited the talismanic words that the Ethicon TVT was a reasonable alternative design, use of which would have averted or reduced the risk of harm to Fajardo. This idea, that a jury in a product liability lawsuit is permitted to consider only a limited category of expert testimony regarding the design of medical devices and cannot take into account and draw reasonable inferences from other relevant expert evidence, such as scientific and medical studies and the testimony of treating physicians, even when that evidence was admitted without objection or limitation, is flatly inconsistent with established law. This aspect of the majority opinion encroaches on the autonomy of the jury and overlooks the realities of how expert witnesses are actually used, especially in complex civil cases.[26]

First, no one is arguing that expert testimony was not required in this case. The plaintiffs presented the testimony of a product design expert, Rosenzweig, whom they disclosed as an expert on safer alternatives to the Obtryx, and whom the trial court permitted to testify, over the objection of Boston Scientific. The plaintiffs also disclosed and presented the expert testimony of Richard W. Trepeta, a pathologist, who testified as to the material condition of the Obtryx that was implanted in Fajardo. As I previously discussed, Rosenzweig testified as to the design flaws in the Obtryx—

[26] In complex civil cases such as medical malpractice actions, it is not at all uncommon for plaintiffs to prove their case through the combined testimony of various experts and treating physicians. See, e.g., *Mather* v. *Griffin Hospital*, 207 Conn. 125, 136, 540 A.2d 666 (1988) (holding that causation was adequately established and that deficiencies in testimony of plaintiffs' primary expert were filled by testimony of other experts and hospital staff). To impose an artificial requirement that one single expert make one pronouncement that explicitly establishes breach and causation is legally groundless and could potentially wreak havoc on litigation of this sort.

heat sealing, detanging, a transobturator insertion—relative to the TVT, and he linked those differences to Fajardo's poor outcome. Although the majority worries that the jury was incapable of understanding the medical studies in evidence, contending that "the jury [did] not have the assistance necessary to reach an intelligent or correct decision"; footnote 20 of the majority opinion; the reality is that Rosenzweig made it about as basic as one can: "[T]he retropubic sling is better than the [Obtryx] transobturator sling."

For its part, Boston Scientific disclosed and presented experts of its own, some of whom verified that the TVT is the most well established vaginal sling and that the primary differences between the TVT and the Obtryx are the latter's heat-sealed middle, detanged edges, and transobturator approach.

As discussed, the plaintiffs also introduced the expert opinions of Fajardo's treating physicians via the testimony of Bercik, whom the plaintiffs also disclosed as an expert on product design and reasonable alternatives to the Obtryx, and the office notes of Hines. The expert opinion of a third physician, Tulikangas, was before the jury, as well. It is well established that a plaintiff's treating physicians may provide expert testimony within their realm of practice, without the need for formal expert certification or detailed disclosures. See Practice Book § 13-4 (b) (2) (defining expert disclosure requirements for treating physicians). Moreover, even physicians who are not formal product design experts may provide relevant testimony as to elements of product design to the extent that there is overlap with their professional experience. See, e.g., *Procaccini* v. *Lawrence + Memorial Hospital, Inc.*, supra, 175 Conn. App. 723 (causation testimony of physician disclosed as standard of care expert constituted " 'expert' " testimony, insofar as it reflected his medical expertise and experience, and, once admitted without objection or limita-

tion, was before jury to use for any purpose); see also *Allen* v. *C. R. Bard, Inc.*, Docket No. 11-cv-2031-LRR, 2017 WL 4127765, *2 (N.D. Iowa September 15, 2017) (treating physician may opine that product feature caused patient's injuries without offering improper opinion as to design defect). Indeed, courts in other vaginal mesh cases have concluded that surgeons who perform mesh removal procedures may thereby be qualified to opine as to the design of such devices. See, e.g., *Heatherly* v. *Boston Scientific Corp.*, Docket No. 2:13-cv-00702, 2018 WL 3797507, *4, *9 (S.D. W. Va. August 9, 2018).

So, the question is not whether expert testimony is normally required in a product liability action involving a medical device. Nor is there any question that the plaintiffs had to supply expert evidence to demonstrate that Fajardo's injuries were likely caused by certain defective design features of Boston Scientific's product and that there is some reasonable alternative design that is economically and technically feasible, use of which would have reduced the risk of harm to end-users, including Fajardo. The question, rather, is whether that evidence was required to take a very particular form. As I discussed in part I of this opinion, the majority has not pointed to any authority in support of its position that the plaintiffs' proof cannot be forged from the combined testimony of different design and materials experts, treating physicians, scientific studies, and other evidence of record, both direct and circumstantial. Nor is there some magic words requirement that an expert express his or her opinion using the precise legal jargon that an appellate court might employ. See, e.g., *State* v. *Nunes*, supra, 260 Conn. 672–73; *Struckman* v. *Burns*, 205 Conn. 542, 555, 534 A.2d 888 (1987). Truly complex design questions plainly require the testimony of design experts. The cases cited by the

majority say no more, no less.[27] But expert testimony is required when, and only when, the specific point to be established cannot be ascertained by a lay jury. Expert testimony must not be fetishized to the point where it

[27] Although the majority cites various cases—most of them from Iowa—regarding the need for expert testimony, none of those cases supports the position taken by the majority, which is that, in a case such as this, one single designated product design expert must testify clearly and unequivocally as to every element of the plaintiff's claim and every step in the logical process. Rather, the cited cases qualify the need for expert testimony in all sorts of ways and largely stand only for the unremarkable proposition that *some* expert testimony is necessary to establish *some* elements of *most* product design defect cases. See, e.g., *Water Pollution Control Authority* v. *Flowserve US, Inc.*, 782 Fed. Appx. 9, 15 (2d Cir. 2019) ("expert knowledge is *often* required in such circumstances" and holding that expert testimony was required as to specific technical aspects of plaintiff's particular claim (emphasis added)); *Willet* v. *Johnson & Johnson*, 465 F. Supp. 3d 895, 905 (S.D. Iowa 2020) ("Whether expert testimony is required ultimately depends on whether it is a fact issue upon which the jury needs assistance to reach an intelligent or correct decision. . . . Although Iowa law does not appear to require expert testimony for recovery in a products liability action, the plaintiff must supply sufficient evidence to satisfy the trial court that the jury, with its common knowledge, could reasonably find an alternative design to be practicable and feasible." (Citations omitted; internal quotation marks omitted.)); *Neilson* v. *Whirlpool Corp.*, Docket No. 3:10-cv-00140-JAJ-RAW, 2012 WL 13018693, *11 (S.D. Iowa January 3, 2012) ("An average juror has no understanding as to the actual design of the Whirlpool washer or any alternative designs which might reduce the risk of foreseeable harm. This is the exact type of case in which a jury needs assistance to reach an intelligent or correct decision. . . . Design defect cases *sometimes* involve technical, scientific issues which cannot be *fully* understood by the average juror without *some* expert assistance . . . ." (Emphasis added; internal quotation marks omitted.)); *Benedict* v. *Zimmer, Inc.*, 405 F. Supp. 2d 1026, 1032–33 (N.D. Iowa 2005) ("Although the . . . Restatement (Third) does not require expert testimony in every case, the plaintiff must rely on expert testimony in *many* cases. . . . Expert testimony as to the existence of a design defect is not required when the feasibility of a reasonable alternative design is obvious and understandable to laypersons. . . . Whether the device had a design defect, whether the foreseeable risks of harm the device posed could have been reduced or avoided by the adoption of a reasonable alternative design and whether the omission of such design rendered the device not reasonably safe are technical, scientific issues that cannot be *fully* understood by the average juror without *some* expert assistance." (Citations omitted; emphasis added.)). Critically, in each of these cases relied on by the majority, the plaintiffs had provided *no* admissible expert testimony whatsoever, and, so, unlike in the present case, the question before the court was simply whether the jury could identify a product defect and/or a reasonable alternative design without any expert assistance.

replaces our trust in the jurors' native intelligence and good sense.

Moreover, once the opinion testimony of a purported expert has been admitted without objection or limitation, it becomes part of the trial record, and it is inappropriate for either the trial court or this court to determine that it is off-limits for purposes of assessing the sufficiency of the evidence or an instructional request simply because that court, in hindsight, questions whether the witness was a proper expert, or the right species of expert. See, e.g., *State* v. *Carey*, 228 Conn. 487, 496, 636 A.2d 840 (1994) ("If [inadmissible] evidence is received without objection, it becomes part of the evidence in the case, and is usable as proof to the extent of the rational persuasive power it may have. The fact that it was inadmissible does not prevent its use as proof so far as it has probative value. . . . This principle is almost universally accepted. . . . The principle applies to any ground of incompetency under the exclusionary rules . . . [including] the expertness qualification." (Internal quotation marks omitted.)); *Maurice* v. *Chester Housing Associates Ltd. Partnership*, 189 Conn. App. 754, 759 n.2, 208 A.3d 691 (2019) ("We note that it is not necessary for a party to ask that the court recognize the witness as an expert before asking the witness to provide an opinion. . . . The proponent of the expert simply must lay the necessary foundation before asking the witness a question that calls for an expert opinion. If there is no objection to the question, the witness may give the opinion. If there is an objection to the witness' qualifications or to whether the witness' testimony will assist the trier of fact, the court can then rule on the objection in the context of the specific questions asked." (Citation omitted.)).

The same principles apply with respect to research studies published in scientific and medical journals. The majority has failed to identify any authority indicat-

ing that, once a study has been admitted into evidence without objection or limitation, supported by the foundational testimony of an expert that the study is authoritative and that he or she relied on it in forming his or her opinions, the jury is barred from reading the study and drawing all reasonable conclusions therefrom. The studies at issue were admitted into evidence as full exhibits, without limitation. They contain statements of fact and opinion that the jury was entitled to consider as if the entire article had been read into the record verbatim. See Conn. Code Evid. § 8-3 (8);[28] see also, e.g., *Curran* v. *Kroll*, supra, 303 Conn. 864 ("Th[e] evidence was admitted in full, without limitation. In the absence of any limiting instruction, the jury was entitled to draw any inferences from the evidence that it reasonably would support."); *Procaccini* v. *Lawrence + Memorial Hospital, Inc.*, supra, 175 Conn. App. 724 ("[i]n the absence of any [limiting] instruction from the court, the evidence . . . was before the jury for it to use for any purpose").[29]

If the defendants wanted to limit the jury's consideration to certain portions of the articles, or wished to limit the jury's use of the contents of the articles, they should have asked to have the articles redacted or

[28] Section 8-3 (8) of the Connecticut Code of Evidence provides: "To the extent called to the attention of an expert witness on cross-examination or relied on by the expert witness in direct examination, a statement contained in a published treatise, periodical or pamphlet on a subject of history, medicine, or other science or art, recognized as a standard authority in the field by the witness, other expert witness or judicial notice [is not excluded by the hearsay rule]."

[29] The Appellate Court discussed this principle at some length in *Procaccini*, explaining how, even if expert evidence is offered strictly for one specific purpose, once it has been admitted in full, the jury may use it for any purpose. The onus is on the opposing party to seek a limiting instruction or otherwise object. See *Procaccini* v. *Lawrence + Memorial Hospital, Inc.*, supra, 175 Conn. App. 714–15, 723–24. The majority offers no reason why the same principle should not apply in the present case.

requested a limiting instruction.[30] See, e.g., *Filippelli* v. *Saint Mary's Hospital*, 319 Conn. 113, 135–36, 124 A.3d 501 (2015). They did not do so, and it is inconceivable to me that an appellate tribunal can now retroactively deem portions of those articles to be off-limits, or otherwise preclude the jury from using the contents of the articles to reach any conclusions supported by them, regardless of whether supplemented by expert testimony. If the defendants believed that the opinions contained in the articles required explanation, they had their opportunity to pursue that line of examination through witnesses at trial.[31]

Insofar as the trial court overlooked or opted not to consider any of this evidence, and restricted its consideration of the plaintiffs' requested charge to the universe of Rosenzweig's testimony,[32] that represents a legal error, rather than a factual finding to which we

[30] Similarly, if a party objects and the trial court is concerned that the jury would be confused or misled by examining the materials unaided by expert testimony, the court may decline to admit the materials. See, e.g., *Cross* v. *Huttenlocher*, 185 Conn. 390, 397, 440 A.2d 952 (1981). *Huttenlocher* is instructive because, in that case, the trial court properly declined to admit a medical study that addressed a drug similar, but not identical, to the one at issue and found side effects different from those alleged. See id., 398. The clear implication of this court's decision in *Huttenlocher* is that, had the study been more directly on point, as are the studies at issue in the present case, reading and drawing conclusions from the study would have been well within the purview of the jury.

[31] It bears emphasizing in this regard that Connecticut has a more liberal rule governing the use of scientific journal articles and other learned treatises than do many of our sister states. See, e.g., *Filippelli* v. *Saint Mary's Hospital*, supra, 319 Conn. 135–36. Specifically, once an expert witness has qualified an article as admissible under § 8-3 (8) of the Connecticut Code of Evidence, that article may be admitted as a full exhibit and, if not otherwise limited by the trial court, used by the jury for any purpose during its deliberations, despite "the danger of misunderstanding or misapplication by the jury . . . ." (Internal quotation marks omitted.) Id., 140; see E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 7.9.1, p. 469.

[32] Although it is impossible to know for certain what was said in chambers, the plaintiffs have represented that the trial court indicated that it was aware of but declined to consider certain potentially relevant evidence, such as the cited studies.

must defer, as the majority appears to believe. See footnote 13 of the majority opinion; see also, e.g., *Brown* v. *Robishaw*, 282 Conn. 628, 633, 922 A.2d 1086 (2007) (whether evidence presented reasonably supports particular request to charge is question of law subject to plenary review). Had the trial court excluded any of the evidence that I have cited, then that decision would be subject to deference and reviewable only for abuse of discretion. But once the evidence was admitted without limitation, the jury was free to consider it for any purpose, and it is inappropriate for the majority to direct otherwise.

D

Fourth, returning to where we began, I am concerned that the majority not only fails to construe the evidence in the light most favorable to the plaintiffs, as required by law, but also steps into the jury's role by making its own assessments of the strength of the plaintiffs' evidence and the credibility of their witnesses, ultimately downplaying any evidence that supports the requested instruction while highlighting conflicting evidence. Two examples illustrate this slippage.

First, the majority determines that Bercik cannot credibly opine as to the question of a reasonable alternative design merely because, although Bercik knew that the Obtryx was fabricated from the Marlex brand of type 1 microporous polypropylene, he was uncertain whether the TVT was made from the same brand of that material. See footnote 22 of the majority opinion. On the basis of this one statement, which a reasonable juror may deem wholly insignificant, the majority finds that Bercik "[knew] next to nothing about the design features of the Obtryx . . . ." Part II E of the majority opinion. The majority never explains why Bercik's lack of knowledge as to the brand of polypropylene used in the *TVT* says anything about his knowledge of the

design features of the *Obtryx*; nor does it tell us why the brand of plastic used would be relevant to any of the defects under discussion. Bercik is a surgeon, who implants slings into women and removes them when they have proven to be ineffective or defective. On the basis of that experience, he testified about his and several of his colleagues' strong preference for slings, such as the TVT, that use a retropubic approach. In combination with the other evidence of record, the jury reasonably might have found this testimony compelling and relevant, or not. But it is not this court's role to deem the testimony unimportant or unpersuasive, and certainly not on such arbitrary grounds.

Second, rather than taking at face value the medical research in evidence that indicated that the Ethicon TVT is the gold standard treatment for female incontinence, that the TVT has a lower rate of complications, and that the "TVT should remain the midurethral sling procedure of choice," the majority dwells at length on other evidence that arguably called into question whether the TVT is, in fact, a superior product. I understand that the plaintiffs did not demonstrate the superiority of the TVT or the defectiveness of the Obtryx to the satisfaction of the majority. The only question before us, however, is whether there was some minimal quantum of evidence from which the jury reasonably could have been persuaded of those allegations. Clearly there was.

It is not our role to make assessments of this nature under these circumstances. Our only proper role, given the procedural posture in which this case reaches us, is to assess whether there was sufficient evidence from which a reasonable, properly instructed jury could have found that the Obtryx is defective because its design renders it unreasonably dangerous and there is a feasible alternative design that would have reduced the risks of the types of injuries that Fajardo suffered. Before

the majority upholds the trial court's instructional error, it was compelled to marshal the evidence of record in the manner that *best* supported the requested instruction, and only then to explain why that evidence, so construed, was legally insufficient. I do not believe it has done so.

IV

There is evidence in the record from which the jury reasonably could have found that (1) the Ethicon TVT is a feasible, federally approved, and widely used product that was a suitable candidate to treat Fajardo's condition, (2) the Obtryx differs from the Ethicon TVT primarily with respect to the former's heat-sealed middle section, detanged edges, and transobturator approach, (3) those particular features of the Obtryx tend to increase its stiffness and have been linked to higher incidences of the injuries that Fajardo suffered relative to the TVT, and (4) according to Rosenzweig, the plaintiffs' primary design expert, those features are defects—their increased risks outweigh any benefits—that were responsible for Fajardo's injuries. If the jury had been instructed in accordance with *Bifolck* and had found for the plaintiffs on that theory, it is inconceivable to me that, on this record, we would have concluded that there was insufficient evidence and overturned the verdict. In my view, no more was necessary to warrant a reasonable alternative design instruction and put the issue before the jury. Accordingly, I respectfully concur in part and dissent in part.

# ELVIRA R. GONZALEZ ET AL. *v.* O & G INDUSTRIES, INC., ET AL.
## (SC 20422)

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

*Syllabus*

The plaintiffs sought to recover damages for personal injuries sustained in an explosion that occurred at a natural gas fueled power plant as a result of the defendants' alleged negligence. Prior to construction of the power plant, the defendant K Co., which received approval to build and operate the power plant, entered into an agreement with the defendant O Co., pursuant to which O Co. agreed to serve as the general contractor for the construction project. K Co. also entered into a contract for management and administrative services with the defendant P Co. Prior to completion of the construction project, and before the power generating equipment could be started, the natural gas fuel supply pipelines had to be cleared of construction debris. O Co. and its subcontractors chose to perform "gas blow" procedures over the course of two days in order to clear the debris. The procedure involves the flow of natural gas through the pipes at a higher pressure than during normal operation, whereby the force of the gas propels the debris through the pipes until it is ejected through a nozzle. On the second day of the gas blow procedures, two procedures were conducted with certain irregularities. Most significantly, and unlike with the prior gas blow procedures, the discharge nozzle was oriented horizontally, rather than vertically. Because of this, by the time the second gas blow procedure began, natural gas remained trapped and mixed with air in a partially enclosed area into which the nozzle discharged the gas. During the second gas blow procedure, the natural gas also flowed through the pipes at an unusually high pressure, and, as a result, heated debris ignited the accumulated natural gas and oxygen, causing the explosion. The plaintiffs, two injured individuals and one of their spouses, alleged that the defendants were strictly liable insofar as they engaged in an ultrahazardous activity that caused the plaintiffs' injuries. The plaintiffs also alleged that their injuries were caused by the defendants' negligence. The plaintiffs' claims were resolved in O Co.'s favor, after which the plaintiffs sought relief only from K Co. and P Co. Following an evidentiary hearing, the trial court rendered judgment for K Co. and P Co. on the plaintiffs' strict liability claims, reasoning that the plaintiffs had failed to satisfy their burden of establishing that the gas blow procedure was abnormally dangerous. Thereafter, K Co. and P Co. filed motions for summary judgment with respect to the plaintiffs' negligence claims, which the trial court granted. In granting those motions, the trial court concluded, inter alia, that no

reasonable jury could find that K Co. and P Co. exercised sufficient control over O Co.'s performance of the gas blow procedures, and, therefore, they were not vicariously liable for O Co.'s alleged negligence. The plaintiffs thereafter appealed from the trial court's judgment in favor of K Co. and P Co. *Held*:

1. The plaintiffs could not prevail on their claim that the trial court incorrectly concluded that the gas blow procedure was not an abnormally dangerous activity in rendering judgment for K Co. and P Co. on the plaintiffs' strict liability claims, as this court, relying on prior case law and the factors set forth in § 520 of the Restatement (Second) of Torts for determining whether an activity is abnormally dangerous, determined that the gas blow procedure at issue was not abnormally dangerous: even though the harm resulting from a gas blow procedure is likely to be severe, the inherent risk that any harm will occur from conducting the procedure is generally low, and the gas blow procedures in the present case were not a regular and ongoing part of the power plant's operation but were conducted only during a specific phase of the construction process and in a relatively uninhabited area; moreover, although the gas blow procedure, which entails the flow of natural gas at higher than normal pressure in large quantities, is not a procedure that is used commonly and added little value to the construction of the power plant given the availability of alternative methods to clear the fuel supply pipelines, the risk and severity of potential harm from the procedure would have been materially reduced if the procedures had been performed utilizing certain precautions that are widely known and generally employed in the construction of natural gas fueled power plants, namely, proper orientation and positioning of the discharge nozzle and careful control of the pressure and volume of gas; furthermore, the plaintiffs' reliance on the dangerous nature of natural gas, by itself, was unavailing, as the dangerous nature of an instrumentality must be considered alongside the circumstances and conditions of its use.

2. The plaintiffs could not prevail on their claim that the trial court had improperly granted K Co.'s and P Co.'s motions for summary judgment with respect to the plaintiffs' negligence claims, as that court correctly concluded that K Co. and P Co. did not exercise sufficient control over the performance of O Co. or its subcontractors in conducting the gas blow procedures so as to overcome the general rule that an employer is not vicariously liable for the torts of its independent contractor:

a. K Co. and P Co. did not exercise sufficient contractual control over the gas blow procedures to establish the existence of a legal duty, as O Co. had exclusive contractual control over the construction of the power plant and the performance of the gas blow procedures: the agreement between K Co. and O Co. specified that the construction of the power plant was a "turnkey" project, the term "turnkey" was a well-defined type of contract in the construction industry that indicated the parties' intention that O Co. would have full contractual control over the construc-

tion of the power plant up to the point of substantial completion, and there was no evidence to indicate that the project had been substantially completed prior to the performance of the gas blow procedures and resulting explosion; moreover, certain other provisions of the agreement between K Co. and O Co. that acknowledged K Co.'s general right to suspend performance of the work and that imposed certain duties on P Co. did not establish that K Co. and P Co. effectively retained control over the construction project, as those provisions could not be construed to create a right of K Co. and P Co. to control the means and methods of O Co.'s performance of its work.

b. The plaintiffs could not prevail on their claim that, even in the absence of any contractual control, K Co. and P Co. exercised control over the gas blow procedures by assuming control of or interfering with O Co.'s performance of those procedures: there was no merit to the plaintiffs' claim that H, who was an employee of P Co. representing K Co. on the construction site, exercised control over the gas blow procedures on behalf of K Co. and P Co., as H did no more than exercise K Co.'s contractual right to monitor, inspect, and coordinate the various construction tasks performed by O Co., its subcontractors, and K Co., and supervision of a construction task to ensure that it is ultimately completed according to an employer's requirements does not demonstrate control for purposes of imposing vicarious liability; moreover, contrary to the plaintiffs' claims, K Co. and P Co. did not exercise control over the gas blow procedures on the basis of a conversation that Y, an employee of a company that contracted with K Co. to take responsibility of the power plant once it was constructed, had with B, the supervisor of the gas pipeline safety unit of the Department of Public Utility Control, the failure of K Co. and P Co. to take the precautions that were discussed in that conversation, and the refusal of K Co. and P Co. to follow B's recommendation that O Co. clean the fuel supply pipelines with a noncombustible substance, as Y had no contractual authority regarding the power plant until its completion and had no authority over O Co., and, to the extent that the plaintiffs claimed that Y's actions could be attributable to K Co. and construed as instructing O Co. to reject B's recommendation, such actions would not inform the determination of control given that the Department of Public Utility Control had no jurisdiction over the power plant.

3. This court declined to review the plaintiffs' claims that K Co. and P Co. were vicariously liable for O Co.'s negligence on the ground that O Co. was engaged in an intrinsically dangerous activity and that K Co. and P Co. were directly negligent, as those claims was inadequately briefed; the plaintiffs' analysis of the first claim was minimal and conclusory given the complexity of that claim, and the plaintiffs' treatment of the issue presented by their second claim was conclusory, lacking meaningful analysis of the limited legal authority cited.

Argued January 13—officially released December 30, 2021*

* December 30, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Procedural History*

Action to recover damages for, inter alia, personal injuries sustained as a result of the defendants' alleged negligence, brought to the Superior Court in the judicial district of Hartford, and transferred to the Complex Litigation Docket, where the named plaintiff et al. was removed from the case, James McVay was added as a plaintiff, and the plaintiff James L. Thompson II et al. filed a revised complaint; thereafter, the case was tried to the court, *Sheridan*, *J.*; judgment in part for the defendant Kleen Energy Systems, LLC, et al.; subsequently, the court, *Moukawsher*, *J.*, granted the motions for summary judgment filed by the defendant Kleen Energy Systems, LLC, et al., and rendered judgment thereon, from which the plaintiff James L. Thompson II et al. appealed. *Affirmed.*

*James J. Healy*, with whom were *Joel T. Faxon*, *Eric P. Smith*, and *Timothy P. Pothin*, for the appellants (plaintiff James L. Thompson II et al.).

*Thomas A. Plotkin*, with whom were *John W. Bradley*, *Jr.*, and, on the brief, *Joseph B. Burns*, for the appellee (defendant Kleen Energy Systems, LLC).

*William J. Scully*, with whom were *Lorinda S. Coon* and, on the brief, *Jessica M. Scully*, for the appellee (defendant Power Plant Management Services, LLC).

*Opinion*

McDONALD, J. Almost twelve years ago, an explosion occurred at a natural gas fueled, power generating facility under construction in Middletown. The devastating blast and ensuing fire took the lives of six construction employees and injured nearly thirty more. Several of the victims and their families brought this tort action

against the owner of the power plant, the owner's administrative agent, the general contractor, and others. The plaintiffs claimed that the general contractor's oversight during construction caused the tragedy, and that the owner and administrative agent were liable for that oversight under theories of strict liability for abnormally dangerous activities and negligence. After their claims against the general contractor were resolved in the contractor's favor, the plaintiffs sought relief from the defendant owner and administrative agent. The plaintiffs' two theories of tort liability were bifurcated. With respect to the plaintiffs' strict liability claims, the defendants asserted that they were not strictly liable because the procedure that caused the explosion was not abnormally dangerous. Following an evidentiary hearing, the trial court agreed and rendered judgment for the defendants with respect to the strict liability claims. Then, the defendants sought summary judgment with respect to the plaintiffs' negligence claims, asserting that they were not liable in negligence because it was the general contractor, not the owner or administrative agent, which exercised control over the procedure that caused the explosion. The court agreed, granting the defendants' motions for summary judgment with respect to the negligence claims. The plaintiffs appealed, and we must decide whether tort remedies are available to the plaintiffs following this tragic event.

The record reveals the following facts, which the trial court reasonably could have found, and procedural history relevant to our resolution of this appeal. In 2002, the defendant Kleen Energy Systems, LLC, received approval to build and operate a natural gas fueled, electrical power generating facility (power plant) in Middletown. In 2007, Kleen Energy entered into an "Engineering, Procurement and Construction Agreement" with the named defendant, O & G Industries, Inc., under

which O & G agreed to serve as the general contractor for the construction of the power plant. Kleen Energy also entered into a "Contract for Project Management and Administrative Services," which was subsequently amended and restated, with the defendant Power Plant Management Services, LLC (PPMS). Because Kleen Energy had no employees of its own, it hired PPMS "to provide management, administrative and other support services required to manage and administer the [power plant] and [Kleen Energy's] business on a day to day basis, and to perform certain other tasks and duties relating to the [power plant] and [Kleen Energy's] business . . . ."[1]

By early 2010, the construction of the power plant was nearing completion. At this point, before the power generating equipment could start up, the manufacturer of the gas turbines required that the natural gas fuel supply pipelines be cleared of construction debris. This was required because foreign material, such as welding slag, rust, and dirt, which is often introduced into the piping during the earlier phases of construction, could damage the gas turbines.

To clear this debris from the natural gas fuel supply pipelines, O & G and its subcontractors performed a procedure commonly referred to as a "gas blow."[2] In

[1] Specifically, the trial court found that "PPMS was required to conduct all of [Kleen Energy's] accounting and bookkeeping functions, [to] monitor the performance of third parties who were under contract with [Kleen Energy], and to support [Kleen Energy] in the completion of certain construction phase requirements. The construction phase requirements included assisting with efforts to secure permits, coordinating the delivery of oil and chemicals to support operational testing, performing construction walkdowns and providing assessments to [Kleen Energy], and auditing O & G's progress, quality, and safety on the construction site."

[2] Specifically, Richard Audette, the project director for the Kleen Energy project at O & G and the most senior O & G employee on-site at the time of the gas blow procedures, testified that the subcontractor Keystone Construction & Maintenance Services, Inc., managed the gas blow procedures, while the subcontractor Bluewater Energy Solutions, Inc., exercised oversight. Audette further testified that his understanding of the collabora-

connection with this procedure, natural gas flows through the piping at a higher pressure than during normal operation, and the force of the gas then propels the debris through the pipe until it is ejected through an open-ended pipe called a "nozzle." The gas blow procedure has been a common practice in the construction of power plants since before World War II. Although there are other procedures that can be used to clear construction debris from natural gas fuel supply pipelines, it has been estimated that gas blows have been employed in the construction of 60 to 70 percent of the natural gas fueled power plants that have been constructed in the last twenty-five years.

For Kleen Energy's power plant, about 2000 feet of natural gas fuel supply pipeline needed to be cleared over two days. The pipelines were cleared in segments corresponding with discharge nozzles located in eight places throughout the length of the piping. On January 30, 2010, O & G and several subcontractors conducted the first series of gas blow procedures, which cleared approximately three-quarters of the piping without incident. Early in the morning, on February 7, 2010, several gas blow procedures were conducted, again without incident. For all these gas blow procedures, the discharge nozzles had been oriented vertically, so that the natural gas vented upward into the atmosphere without obstruction.

Later that morning, two gas blow procedures were conducted with certain irregularities. Most significantly,

tion involved in the procedure was that O & G was "prepared" to start the gas blow procedure "with the assistance of" the two subcontractors but that O & G had "the responsibility, basically, at the end of the day, to make sure this activity occur[ed] . . . ." (Internal quotation marks omitted.) Furthermore, e-mail communications between O & G and Kleen Energy employees reflect that O & G requested Kleen Energy to order the natural gas that two of its subcontractors would need for the procedures. As the owner, Kleen Energy was contractually responsible for placing the order for natural gas.

and unlike with the prior gas blow procedures, the discharge nozzle was oriented horizontally during these gas blow procedures. As a result, when these gas blow procedures began, the natural gas discharged from the nozzle across a courtyard into an area partially enclosed between two large structures and surrounded by other power generation equipment, including propane heaters. In addition, four small metal pipes were located in the path of the exhaust from the discharge nozzle.

The first gas blow lasted for two minutes, the longest one that morning. The natural gas used for this gas blow traveled out of the discharge nozzle and into the partially enclosed area, where it was trapped, unable to dissipate quickly. In addition, the weather conditions at the time—the temperature outside was approximately 26 degrees Fahrenheit—likely further slowed the dissipation of the natural gas. As a result, by the time the second gas blow began, approximately five minutes after the conclusion of the first gas blow, natural gas remained trapped and mixed with air in the partially enclosed area into which the nozzle discharged.

The second gas blow lasted for approximately forty-five seconds. The natural gas flowed through the piping at an unusually high pressure—five times the pressure recommended for the procedure by the gas turbine manufacturer. Given this high pressure, the solid debris was expelled from the discharge nozzle at a high velocity. After the debris was expelled from the discharge nozzle, it struck the small metal pipes located in the courtyard, acquiring heat from the glancing blow. The heated debris was then carried by the discharge exhaust into the partially enclosed area, where natural gas had been trapped from the prior gas blow. The heated debris ignited the accumulated natural gas and oxygen. As a result, an explosion occurred, killing six employees and injuring twenty-seven others.

In 2013, the plaintiffs—two employees who were on the construction site engaged in work unrelated to the gas blow procedure when they were injured by the explosion, and one of their spouses[3]—filed the operative complaint in the present action against the defendants Kleen Energy and PPMS, as well as O & G.[4] Specifically, the plaintiffs alleged that (1) the defendants were strictly liable because the injuries of the plaintiff employees were caused by the defendants' engaging in an "ultrahazardous activity," and (2) those injuries were caused by the defendants' negligence related to the gas blow procedure. The trial court subsequently granted O & G's motions for summary judgment and rendered judgment thereon in its favor. See *Gonzalez* v. *O & G Industries, Inc.*, 322 Conn. 291, 300, 140 A.3d 950 (2016). On appeal, we affirmed the trial court's judgment, concluding that O & G was entitled to immunity as a " 'principal employer' " under General Statutes § 31-291 because it had paid workers' compensation benefits to the two plaintiff employees. Id., 293–95, 319.

In 2015, following an evidentiary hearing, the trial court rendered judgment for the remaining defendants regarding the plaintiffs' strict liability claims. After considering our decision in *Caporale* v. *C. W. Blakeslee & Sons, Inc.*, 149 Conn. 79, 85, 175 A.2d 561 (1961), as well

[3] Specifically, James L. Thompson II alleged that he suffered a head injury, multiple sprains, strains, and contusions, tinnitus, sleep insomnia, and post-traumatic stress disorder. Carol M. Thompson, his wife, alleged loss of consortium. James McVay alleged that he suffered lacerations on his face, loss of hearing, injury to his right knee, lumbar strain, cervical spondylosis, whiplash, and post-traumatic stress disorder. Nine plaintiffs—injured employees and their spouses—have been removed since the original 2010 complaint was filed.

[4] Several other parties have been named as defendants in the present case, including O & G's subcontractors and the manufacturer of the gas turbines. However, none of these additional defendants is involved in the present appeal. We hereinafter refer to Kleen Energy and PPMS as the defendants.

as the six factor test set forth in § 520 of the Restatement (Second) of Torts, the trial court reasoned that the plaintiffs failed to satisfy their burden of establishing that the gas blow procedure was "abnormally dangerous." Thus, the trial court concluded, the gas blow procedure did not support a claim of strict liability.

In 2019, the defendants moved for summary judgment with respect to the plaintiffs' negligence claims. The defendants contended that no reasonable jury could find that they exercised sufficient control over the gas blow procedure to support the existence of a duty of care owed to the plaintiffs, and, as a result, they were not vicariously liable for O & G's negligence during the gas blow procedure. The trial court agreed and granted the defendants' separately filed motions, reasoning that Kleen Energy ceded total control over the project to O & G in the contract between them. The court further reasoned that no reasonable jury could conclude that the defendants exercised control over O & G's performance of the gas blow procedure. The plaintiffs appealed to the Appellate Court from the trial court's judgment on the strict liability claims and its granting of the defendants' motions for summary judgment on the negligence claims, and the appeal was transferred to this court.

The plaintiffs raise three issues on appeal. First, the plaintiffs contend that the trial court improperly rendered judgment in favor of the defendants on the plaintiffs' strict liability claims. Specifically, the plaintiffs claim that the gas blow procedure is an abnormally dangerous activity and that, as a result, strict liability should apply pursuant to *Caporale* and § 520 of the Restatement (Second). The defendants disagree and contend that the court correctly concluded that the gas blow procedure is not abnormally dangerous.

Second, the plaintiffs contend that the trial court improperly granted the defendants' motions for sum-

mary judgment with respect to the plaintiffs' negligence claims. Specifically, the plaintiffs claim that the record supports a claim of negligence under a theory of vicarious liability because a reasonable jury could find that the defendants exercised control over the gas blow procedure. The defendants disagree, contending that the court correctly concluded that no reasonable jury could find that they exercised control over the gas blow procedure.

Third, the plaintiffs raise two additional arguments to support their contention that the trial court improperly granted the defendants' motions for summary judgment with respect to the plaintiffs' negligence claims. Specifically, the plaintiffs assert that their negligence claims survive under a theory of vicarious liability, regardless of the control issue, because an employer is liable for the torts that result from its independent contractor's engaging in an "intrinsically dangerous" activity. In addition, the plaintiffs assert that their negligence claims survive under a theory that the defendants were directly negligent. The defendants disagree. Kleen Energy contends that Connecticut law does not recognize the "intrinsically dangerous" exception to the general rule that an employer is not vicariously liable for the torts of its independent contractor. The defendants assert that the record does not support a claim of direct negligence.

We agree with the defendants with respect to the first issue and conclude that the gas blow procedure is not an abnormally dangerous activity and that the plaintiffs cannot maintain a strict liability claim. We also agree with the defendants with respect to the second issue and conclude that no reasonable jury could find that the defendants exercised control over the gas blow procedure. Finally, we decline to review the plaintiffs' two additional negligence arguments because we conclude that those arguments are inadequately briefed.

I

We first consider the plaintiffs' contention that the trial court improperly rendered judgment with respect to the strict liability claims by concluding that the gas blow procedure was not an abnormally dangerous activity. The plaintiffs assert that the gas blow procedure is analogous to activities that Connecticut courts have previously held to be abnormally dangerous, namely, conducting research with explosive chemicals, blasting, and pile driving. In addition, the plaintiffs assert that all six factors in § 520 of the Restatement (Second) support their contention that the gas blow procedure is abnormally dangerous. See 3 Restatement (Second), Torts § 520, p. 36 (1977). The defendants disagree, asserting that the court correctly concluded that the totality of the six factors established that the gas blow procedure was not abnormally dangerous.

We begin by setting forth the standard applicable to our review of the trial court's judgment with respect to the plaintiffs' strict liability claims. "[T]he scope of our appellate review depends [on] the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *FirstLight Hydro Generating Co.* v. *Stewart*, 328 Conn. 668, 677–78, 182 A.3d 67 (2018).

The plaintiffs' strict liability claim turns on whether the gas blow procedure is abnormally dangerous. "The issue of whether an activity is abnormally dangerous . . . is a question of law"; accordingly, our review of this issue is plenary. *Green* v. *Ensign-Bickford Co.*, 25

Conn. App. 479, 485, 595 A.2d 1383, cert. denied, 220 Conn. 919, 597 A.2d 341 (1991); see, e.g., 3 Restatement (Second), supra, § 520, comment (*l*), pp. 42–43 ("[w]hether the activity is an abnormally dangerous one is to be determined by the court . . . [because] [t]he imposition of strict liability . . . involves a characterization of the defendant's activity or enterprise itself, and a decision as to whether he is free to conduct it at all without becoming subject to liability for the harm that ensues even though he has used all reasonable care"). However, the trial court's judgment involved the resolution of disputed issues of fact because, as the court correctly noted, the determination of whether the gas blow procedure was abnormally dangerous was particularly fact intensive in this case. Accordingly, to the extent that such a determination relies on the court's findings of fact with respect to the gas blow procedure, our review of those factual findings "is limited to deciding whether such findings were clearly erroneous." (Internal quotation marks omitted.) *FirstLight Hydro Generating Co.* v. *Stewart*, supra, 328 Conn. 678.

In Connecticut, strict liability is imposed on a defendant who engages in an intrinsically dangerous, ultrahazardous, or abnormally dangerous activity.[5] "Under

[5] In the context of strict liability, these terms are effectively identical. Having not previously adopted the rule from the Restatement (Second), we have typically framed the inquiry by considering whether the activity is "intrinsically dangerous . . . ." *Caporale* v. *C. W. Blakeslee & Sons, Inc.*, supra, 149 Conn. 85; accord *Whitman Hotel Corp.* v. *Elliott & Watrous Engineering Co.*, 137 Conn. 562, 565, 79 A.2d 591 (1951). The first Restatement of Torts employed the term "ultrahazardous activity," which many courts still use. 3 Restatement, Torts § 520, p. 42 (1938); see id., §§ 519 through 524, pp. 41–53. The Restatement (Second) of Torts replaced this term with "[a]bnormally [d]angerous [a]ctivities." 3 Restatement (Second), supra, § 520, p. 36; see 4 Restatement (Second), Torts app. § 520, reporter's note, p. 65 (1981). As the trial court noted, "courts and litigants commonly use [these] terms all but interchangeably." For consistency, we employ the term "abnormally dangerous activity" in this context, except in instances of quoted material.

this doctrine, a plaintiff is not required to show that his loss was caused by the defendant's negligence. It is sufficient to show only that the defendant engaged in an ultrahazardous activity that caused the [plaintiff's] loss." *Green* v. *Ensign-Bickford Co.*, supra, 25 Conn. App. 482; see, e.g., *Whitman Hotel Corp.* v. *Elliott & Watrous Engineering Co.*, 137 Conn. 562, 566, 79 A.2d 591 (1951) (strict liability "does not make the failure to use reasonable care a condition of liability").

This court has had only two occasions to articulate these principles and to consider whether a particular activity is abnormally dangerous so as to support the imposition of strict liability, both of which predate the Restatement (Second). In *Whitman Hotel Corp.*, the defendant contractor and the defendant subcontractor employed blasts of dynamite to enlarge a river, and the concussive force of the explosions caused damage to the plaintiffs' nearby building. *Whitman Hotel Corp.* v. *Elliott & Watrous Engineering Co.*, supra, 137 Conn. 563–64. We held that the defendants were strictly liable, noting that exploding dynamite was a prototypical example of an "intrinsically dangerous" activity. Id., 565, 572–73. This was our first articulation of the rule for strict liability: "A person who uses an intrinsically dangerous means to accomplish a lawful end, in such a way as will necessarily or obviously expose the person of another to the danger of probable injury, is liable if such injury results, even though he uses all proper care." Id., 565. We also noted that the imposition of strict liability represents a judicial policy determination, informed by the circumstances of the activity. See id., 566–67. Under the doctrine of strict liability, the defendant "is not regarded as engaging in blameworthy conduct. . . . But common notions of fairness require that the defendant make good any harm that results even though his conduct is free from fault." (Internal quotation marks omitted.) Id., 567; see, e.g., 3 Restatement (Second),

supra, § 519, comment (d), p. 35 ("[Strict liability] is founded [on] a policy of the law that imposes [on] anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur. The defendant's enterprise, in other words, is required to pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character.").

We next considered the doctrine of strict liability for an abnormally dangerous activity in *Caporale*. In that case, the defendant subcontractor was engaged in pile driving operations for the construction of a highway, and the resulting vibrations damaged the plaintiffs' nearby cement buildings. *Caporale* v. *C. W. Blakeslee & Sons, Inc.*, supra, 149 Conn. 80. We held that the defendant was strictly liable because the particular circumstances and conditions of the pile driving operations involved a risk of probable injury, "even when due care was used," and because the risk was "actually anticipated" by the defendant before it commenced work. Id., 85–86. We refined the rule from *Whitman Hotel Corp.*: "To impose liability without fault, certain factors must be present: an instrumentality capable of producing harm; circumstances and conditions in its use which, irrespective of a lawful purpose or due care, involve a risk of probable injury to such a degree that the activity fairly can be said to be intrinsically dangerous to the person or property of others; and a causal relation between the activity and the injury for which damages are claimed. The defendant actor, even when [using] due care, takes a calculated risk which [the defendant], and not the innocent injured party, should bear." Id., 85.

Since we last addressed the issue of strict liability for abnormally dangerous activities in *Caporale* sixty years ago, other Connecticut courts, including the trial court in this case, have applied the rule for strict liability

and abnormally dangerous activities articulated in §§ 519 and 520 of the Restatement (Second) of Torts. Section 519 (1) provides: "One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm."[6] 3 Restatement (Second), supra, § 519 (1), p. 34. Section 520 lists six factors for the court to consider when determining whether an activity is abnormally dangerous: "(a) existence of a high degree of risk of some harm to the person, land or chattels of others"; "(b) likelihood that the harm that results from it will be great"; "(c) inability to eliminate the risk by the exercise of reasonable care"; "(d) extent to which the activity is not a matter of common usage"; "(e) inappropriateness of the activity to the place where it is carried on"; and "(f) extent to which its value to the community is outweighed by its dangerous attributes." Id., § 520, p. 36.

Comment (f) to § 520 of the Restatement (Second) elaborates on the nature of an abnormally dangerous activity in light of these factors: "In general, abnormal dangers arise from activities that are in themselves unusual, or from unusual risks created by more usual activities under particular circumstances. In determining whether the danger is abnormal, the factors listed in [c]lauses (a) to (f) of this [s]ection are all to be

[6] PPMS contends that "the doctrine of strict liability for an ultrahazardous activity cannot apply to a party who had no control over the activity." Thus, PPMS maintains, the control question is a threshold issue to the strict liability claim, as well as the dispositive issue to the negligence claim. The plaintiffs and Kleen Energy do not address whether the control question is a threshold question to the strict liability claim. The only express guidance provided by the Restatement (Second) on this question is to state that strict liability attaches to the party that "carries on" the abnormally dangerous activity. 3 Restatement (Second), supra, § 519 (1), p. 34. Because we conclude that the gas blow procedure is not abnormally dangerous, we need not decide whether the plaintiffs' strict liability claim could survive irrespective of our resolution of the control question.

considered, and are all of importance. Any one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily. . . . The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care. In other words, are its dangers and inappropriateness for the locality so great that, despite any usefulness it may have for the community, it should be required as a matter of law to pay for any harm it causes, without the need of a finding of negligence." Id., § 520, comment (f), pp. 37–38.

Although *Whitman Hotel Corp.* and *Caporale* are the only two cases from this court to consider the doctrine of strict liability for an abnormally dangerous activity, the Appellate Court has applied the rule from those cases, along with the rule articulated in the Restatement (Second), more recently. In *Green*, three chemists employed by the defendant, a manufacturer of explosives, were researching volatile chemicals for the development of a new product when an explosion occurred. See *Green* v. *Ensign-Bickford Co.*, supra, 25 Conn. App. 480–81. The explosion injured the plaintiff, who was located in his house nearly one mile away from the accident at the time. Id., 481. The court applied *Whitman Hotel Corp.*, *Caporale*, and the six factors in § 520 of the Restatement (Second); see id., 483, 486–87; and concluded that "the defendant's experiment with a highly explosive chemical created an unavoidable risk of damage . . . ." Id., 483. Specifically, the court noted that at least five of the six factors were satisfied: the use of highly volatile chemicals involved a great degree of risk and severe resulting harm, such risk was inherent

to the research and experimentation with the chemicals, the activity was not a matter of common usage, and the activity was inappropriate for the surrounding residential area. See id., 486–87. Accordingly, the court held that the chemical experimentation was abnormally dangerous and that the defendant was strictly liable. See id., 487.

Numerous Connecticut trial courts also have considered the rule for strict liability and abnormally dangerous activities articulated in *Whitman Hotel Corp.*, *Caporale*, and the Restatement (Second). See, e.g., *Ramsay* v. *Och-Ziff Capital Management Group, LLC*, Superior Court, judicial district of New Haven, Docket No. CV-10-6007285-S (September 8, 2010) (50 Conn. L. Rptr. 537). These courts have recognized that "Connecticut's appellate courts have applied the doctrine of strict liability for engaging in ultrahazardous or abnormally dangerous activities sparingly." Id., 538; see, e.g., *Levenstein* v. *Yale University*, 40 Conn. Supp. 123, 126, 482 A.2d 724 (1984) ("The courts in Connecticut and other jurisdictions [that] recognize the doctrine of strict liability for dangerous activities, impose it only in narrow circumstances. Typically, it has been found applicable when an activity, not regularly engaged in by the general public, is conducted in or near a heavily populated area, such that it necessarily subjects vast numbers of persons to potentially serious injury in the event of a mishap.").

We have not expressly adopted §§ 519 and 520 of the Restatement (Second) for the rule of strict liability for abnormally dangerous activities. Neither party, however, disputes that these sections govern the resolution of this issue. In addition, these provisions of the Restatement (Second) have been adopted by a growing majority of jurisdictions in the United States. See, e.g., *Arlington Forest Associates* v. *Exxon Corp.*, 774 F. Supp. 387, 389 (E.D. Va. 1991); see also, e.g., id., 389 n.3 (citing

cases). Most important, the Restatement (Second) factors and comments are consistent with the principles this court articulated in *Whitman Hotel Corp.* and *Caporale*, which have long governed the imposition of strict liability for abnormally dangerous activities in Connecticut. See, e.g., *Ramsay* v. *Och-Ziff Capital Management Group, LLC*, supra, 50 Conn. L. Rptr. 538 ("[t]he Restatement [Second] is consistent with Connecticut's [long-standing] law which focuses on the nature of the specific operation or activity involving a dangerous instrumentality, material or substance"). Accordingly, we evaluate the plaintiffs' claim that the gas blow procedure is abnormally dangerous pursuant to the principles articulated in *Whitman Hotel Corp.* and *Caporale*, alongside the six factors in § 520 of the Restatement (Second).[7]

We begin with the first and second factors in § 520 of the Restatement (Second). These factors consider the "existence of a high degree of risk of some harm to the person, land or chattels of others" and the "likeli-

[7] Section 20 of the Restatement (Third) of Torts, Liability for Physical and Emotional Harm, reframes the rule for strict liability in the context of abnormally dangerous activities. Specifically, it provides: "(a) An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.

"(b) An activity is abnormally dangerous if:

"(1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and

"(2) the activity is not one of common usage." 1 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 20, p. 229 (2010). The trial court, however, evaluated the plaintiffs' strict liability claim according to the six factor test articulated in § 520 of the Restatement (Second), and all parties to the present appeal agree that this is the applicable test. Accordingly, we evaluate the plaintiffs' strict liability claim pursuant to the Restatement (Second). Moreover, we note that the principal difference between the two Restatement revisions is the framework of the inquiry. The Restatement (Third) captures the same core substantive concerns as the Restatement (Second), as well as our decisions in *Whitman Hotel Corp.* and *Caporale*. As a result, the outcome of our analysis would be the same under the Restatement (Third) and the Restatement (Second).

hood that the harm that results from it will be great . . . .'' 3 Restatement (Second), supra, § 520 (a) and (b), p. 36. In other words, these factors concern the potential frequency and severity of harm resulting from the activity. Although all six factors must be weighed in relation to the others, these first two factors exist in a particularly close orbit. ''It is not enough that there is a recognizable risk of some relatively slight harm . . . . If the potential harm is sufficiently great, however, as in the case of a nuclear explosion, the likelihood that it will take place may be comparatively slight and yet the activity be regarded as abnormally dangerous.'' Id., § 520, comment (g), p. 38. Moreover, these two factors concern danger that is either actually anticipated or foreseeable. See, e.g., *Caporale* v. *C. W. Blakeslee Sons, Inc.*, supra, 149 Conn. 86 (noting that risk was ''actually anticipated by the defendant''); *Whitman Hotel Corp.* v. *Elliott & Watrous Engineering Co.*, supra, 137 Conn. 567 (strict liability relates to ''danger [that] may be foreseen by reasonable [people], as possible if not probable'' (internal quotation marks omitted)); 1 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 20 (b) (1), p. 229 (2010) (requiring risk to be ''foreseeable''); 3 Restatement (Second), supra, § 519 (2), p. 34 (requiring ''the kind of harm, the possibility of which makes the activity abnormally dangerous'').

We agree with the defendants that the first factor, regarding the inherent risk of some harm, weighs in their favor. According to the trial court's findings, approximately 60 to 70 percent of the natural gas fueled, electrical power plants constructed in the United States in the last twenty-five years have employed gas blow procedures to clear the fuel supply pipelines. Given that there are more than 700 gas fueled power plants in the United States, and that dozens of gas blows are often needed to clear the total length of piping for each power

plant, the trial court reasonably inferred that "thousands of separate gas blows have been conducted over the years." Against this history, only two instances of combustions had occurred during a gas blow procedure prior to the Kleen Energy explosion. Similar to the present case, in 2001, a gas blow was performed during the construction of a power generation station in Ohio, and the natural gas ignited when materials emitted from the discharge nozzle struck an obstruction. In 2003, a gas blow was performed during the construction of a power plant in California, and the natural gas ignited because the discharge nozzle was not properly grounded, resulting in the buildup of static electricity within the pipe. As the trial court noted, in both cases "deviations from generally accepted procedures for safely conducting a gas blow led to" the combustions. Accordingly, given the rare instances of combustion relative to the frequency with which the gas blow procedures have been employed, the inherent risk that some harm will occur is low.

The second factor, regarding the severity of the resulting harm, requires a more nuanced analysis. In general, when any harm occurs during a gas blow procedure, that harm is likely to be severe. Natural gas will burn rather than explode at relatively low pressures and quantities, which is why it is used in residential settings for cooking food and heating water. The gas blow procedure at issue in this case, however, necessarily involves pressures and quantities of natural gas that are so high that, if any harm occurs, it is likely to occur in the form of an explosion or a massive combustion. As the trial court noted, when natural gas ignites during a gas blow procedure, "[a]n intense, high temperature explosion results, producing a blast wave that can have dramatic effects in terms of damage to property and injury to persons." In this case, an individual located approximately 1500 feet from the power plant testified that the

force of the explosion shook the building he was in, dislodged hanging light fixtures, knocked small items off shelves, and knocked picture frames off the walls. This is analogous to the plaintiff in *Green*, who was "lifted . . . upward from his bed and [thrown] . . . across the room" following an explosion nearly one mile away. *Green* v. *Ensign-Bickford Co.*, supra, 25 Conn. App. 481. At first glance, the inherent severity of any resulting harm appears to weigh in favor of the plaintiffs.

The plaintiffs also contend that the second factor weighs heavily in their favor because the rule regarding abnormally dangerous activities expressly contemplates a situation when the risk of harm may be relatively low, yet the severity of the resulting harm tips the balance in favor of imposing strict liability. Specifically, the plaintiffs point to comment (g) to § 520 of the Restatement (Second), which provides in relevant part: "If the potential harm is sufficiently great, however . . . the likelihood that it will take place may be comparatively slight and yet the activity be regarded as abnormally dangerous. . . ." 3 Restatement (Second), supra, § 520, comment (g), p. 38.

Similarly, the plaintiffs point to *McLane* v. *Northwest Natural Gas Co.*, 255 Or. 324, 327–28, 467 P.2d 635 (1970), for the proposition that the inherent volatility of natural gas renders its use abnormally dangerous. In that case, natural gas escaped from a storage unit on the defendant's property, causing an explosion that killed the decedent. Id., 326–27. Applying state common law, as well as the six factor test from § 520 of the Restatement (Second), the Supreme Court of Oregon concluded that the storage of large amounts of natural gas was an abnormally dangerous activity that supported the imposition of strict liability. See id., 328–29, 331. The court "view[ed] natural gas as of the same nature as an explosive" because natural gas is "suffi-

ciently volatile to be capable of great harm and [because] . . . the danger of explosion and/or fire from its storage in large quantities cannot be completely eliminated by the use of reasonable care." Id., 328. The court acknowledged that the risk of an explosion or a fire is low when care is used and agreed "that miscarriage is not frequent"; however, the court reasoned, "when miscarriage does occur, it can be lethal." Id., 329; see, e.g., *Siegler* v. *Kuhlman*, 81 Wn. 2d 448, 454, 502 P.2d 1181 (1972) ("[g]asoline is always dangerous whether kept in large or small quantities because of its volatility, inflammability and explosiveness"), cert. denied, 411 U.S. 983, 93 S. Ct. 2275, 36 L. Ed. 2d 959 (1973). The plaintiffs contend that *McLane* supports their claim that the gas blow procedure involves such severe resulting harm that it is an abnormally dangerous activity.

Comment (g) to § 520 of the Restatement (Second), however, instructs courts to consider the risk and severity of harm in close relation to the fifth factor, which concerns the "inappropriateness of the activity to the place where it is carried on"; 3 Restatement (Second), supra, § 520 (e), p. 36; because "[s]ome activities . . . necessarily involve major risks unless they are conducted in a remote place or to a very limited extent." Id., § 520, comment (g), p. 38. Similarly, the court in *McLane* expressly agreed with the Restatement (Second) that the "character of the locality" is material to the imposition of strict liability, overruling its prior ruling to the contrary. *McLane* v. *Northwest Natural Gas Co.*, supra, 255 Or. 328–29.

Turning to this factor, the trial court in the present case found that the power plant was constructed in a rural area zoned for industrial use. The property was bordered by the Connecticut River on one side and surrounded by mostly vacant, wooded land for approximately one-half mile on the other three sides. Within this radius was a cluster of fewer than ten homes and

another electrical generating station. Within a one mile radius of the power plant was the Connecticut Valley Hospital and approximately seventy dwellings. In light of these factual findings, the court concluded that the "relatively uninhabited and rural surroundings" were an appropriate location for the construction of the power plant and the associated gas blow procedure.

The plaintiffs assert that, contrary to the trial court's factual findings, the one mile radius surrounding the power plant contained at least 214 dwellings and almost 3000 people, rendering it "[p]redominantly residential," "mixed-use," and inappropriate for the gas blow procedure. (Internal quotation marks omitted.) On the basis of this record, however, we cannot conclude that the industrial and rural location was wholly inappropriate for the power plant or the attendant gas blow procedure. Moreover, these facts are distinguishable from the facts in *Green*, in which the Appellate Court relied on the fact that the chemical experimentation occurred "in a residential area." *Green* v. *Ensign-Bickford Co.*, supra, 25 Conn. App. 487. As the trial court here noted, the fact that the gas blow procedure was conducted in a rural and industrial area "significantly diminish[ed] the 'degree of risk' to a point where the likelihood of serious harm to large numbers of persons or widespread damage to property [was] not present." In addition, unlike the chemical experimentation in *Green* v. *Ensign-Bickford Co.*, supra, 480, gas blow procedures are not a regular or ongoing part of the power plant's operation; rather, they are conducted "to a very limited extent"; 3 Restatement (Second), supra, § 520, comment (g), p. 38; only during a specific phase of the construction process.

Considered together, although the second factor, regarding the inherent severity of the resulting harm, weighs in favor of imposing strict liability, this factor must be informed by the first factor, regarding the fairly

low risk that any harm will occur, as well as the fifth factor, regarding the appropriateness of the location. We conclude that the totality of these three factors weighs in favor of the defendants' argument that the gas blow procedure is not abnormally dangerous.

We next consider the fourth and sixth factors, both of which weigh in favor of the plaintiffs' claim. The fourth factor concerns the "extent to which the activity is not a matter of common usage . . . ." Id., § 520 (d), p. 36. Comment (i) to § 520 of the Restatement (Second) explains that "[a]n activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community." Id., § 520, comment (i), p. 39. The comment further explains that, although blasting or using explosives may be employed regularly for excavation or construction, these activities are "not carried on by any large percentage of the population, and therefore [they are] not a matter of common usage." Id., p. 40. As the trial court correctly noted, the general public does not typically use natural gas at such high pressures, in such large quantities, or for such an industrial purpose as the gas blow procedure entails. Accordingly, this factor clearly weighs in favor of the plaintiffs' assertion that the gas blow procedure is abnormally dangerous.

The sixth factor concerns the "extent to which [the activity's] value to the community is outweighed by its dangerous attributes." Id., § 520 (f), p. 36. As the trial court correctly noted, "the activity to be valued is not the construction of the [power plant], but the gas blow procedure conducted during the construction of the [power plant]." Although the natural gas fuel supply pipelines needed to be cleared as part of the construction of the power plant, the gas blow procedure provided relatively little value given that it was only one of several methods available to clear the piping. For example, Karl Baker, the supervisor of the gas pipeline

safety unit within the Department of Public Utility Control,[8] reported and subsequently testified that the power plants within the department's jurisdiction typically use inert substances with no potential to combust, such as nitrogen, compressed air, or water, to clear fuel supply pipelines.[9] We agree with the trial court's conclusion that the gas blow procedure added little value to the construction of the power plant given the availability of alternative methods to clear the fuel supply pipelines, and that any such value did not outweigh the small but severe risk of harm inherent to the procedure. This factor weighs in favor of the plaintiffs' assertion that the gas blow procedure is abnormally dangerous.

The third factor, however, carries particular significance in the six factor balancing test, and it weighs heavily in favor of the defendants' assertion that the gas blow procedure is not abnormally dangerous. This factor concerns the "inability to eliminate the risk by the exercise of reasonable care . . . ." 3 Restatement

[8] "The legislature . . . designated the [Public Utilities Regulatory Authority within the Department of Energy and Environmental Protection] as the replacement for the Department of Public Utility Control, effective July 1, 2011." *Kleen Energy Systems, LLC* v. *Commissioner of Energy & Environmental Protection*, 319 Conn. 367, 370 n.1, 125 A.3d 905 (2015). However, at all relevant times, Baker's position as the supervisor of the gas pipeline safety unit did not change. For convenience, we hereafter refer to both the Public Utilities Regulatory Authority and the Department of Public Utility Control as the department.

[9] The plaintiffs contend that the availability of alternative procedures to clear the fuel supply pipelines involving inert substances is "vital" to the entirety of the abnormally dangerous activity determination. We disagree. Throughout the briefing, all parties characterize the "activity" in question as the gas blow procedure, the procedure that was employed in this case. The availability of alternative procedures involving inert substances would be relevant only if the activity were characterized as the defendants' clearing the fuel supply piping generally. The plaintiffs, however, do not articulate the inquiry in those terms. Accordingly, like the trial court, we consider these alternative procedures only with respect to the sixth factor, regarding the gas blow procedure's value to the community, and not with respect to the other five factors.

(Second), supra, § 520 (c), p. 36. Comment (h) to § 520 of the Restatement (Second) explains: "It is not necessary . . . that the risk be one that no conceivable precautions or care could eliminate. What is referred to here is the *unavoidable risk remaining in the activity, even though the actor has taken all reasonable precautions in advance and has exercised all reasonable care* in his operation, so that [the actor] is not negligent." (Emphasis added.) Id., § 520, comment (h), p. 39; see, e.g., *Arlington Forest Associates* v. *Exxon Corp.*, supra, 774 F. Supp. 390 ("Absolute safety is not required [under § 520 of the Restatement (Second)]. Rather, the risk must be reducible by due care to a point where the likelihood of harm is no longer high."); *New Meadows Holding Co.* v. *Washington Water Power Co.*, 102 Wn. 2d 495, 501, 687 P.2d 212 (1984) (third factor "addresses itself to the question of whether, through the exercise of ordinary care, the risk inherent in an activity can be reduced to the point where it can no longer be characterized as a 'high degree of risk' "). In other words, this factor requires the court to consider: After reasonable care and precautions are employed, is there some lingering, unavoidable feature of the activity—perhaps a high risk of harm, an inherent severity of any resulting harm, or a dangerous character of the instrumentality—that justifies the imposition of strict liability?

Although all six factors in § 520 of the Restatement (Second) are important to the determination of whether an activity is abnormally dangerous, the third factor is particularly significant because it captures the key difference between strict liability and ordinary negligence. A negligence claim succeeds if, among other things, the actor failed to exercise reasonable care. The distinguishing feature of a strict liability claim is that the actor is liable *regardless* of whether the actor exercised reasonable care. Accordingly, when determining whether

a claim is well suited to the strict liability framework, it is crucial to inquire whether the exercise of reasonable care would have materially reduced the risk of harm, the severity of any resulting harm, or the otherwise dangerous attributes of the activity or instrumentality. If so, then the claim is better suited to the negligence framework so that liability hinges on whether the actor actually employed reasonable care. If not, then the claim is better suited to the strict liability framework because "there is reason to regard the danger as an abnormal one" when "safety cannot be attained by the exercise of due care . . . ." 3 Restatement (Second), supra, § 520, comment (h), p. 38; see, e.g., *Caporale* v. *C. W. Blakeslee & Sons, Inc.*, supra, 149 Conn. 84 (explaining that dangerous instrumentality and circumstances "create, in combination, an intrinsically dangerous operation or activity . . . [and] [i]n bringing them together, albeit for a lawful purpose and with due care, one acts at his peril"); *Whitman Hotel Corp.* v. *Elliott & Watrous Engineering Co.*, supra, 137 Conn. 566 (explaining that "the failure to use reasonable care" is not "a condition of liability").

Our emphasis of this factor is consistent with other courts' application of the six factor balancing test. See, e.g., *Arlington Forest Associates* v. *Exxon Corp.*, supra, 774 F. Supp. 390 ("Central to the determination of whether an activity is abnormally dangerous is whether it could be made safe through the exercise of reasonable care. . . . If an activity can be performed safely with ordinary care, negligence serves both as an adequate remedy for injury and a sufficient deterrent to carelessness. Strict liability is reserved for selected uncommon and extraordinarily dangerous activities for which negligence is an inadequate deterrent or remedy." (Citations omitted; footnote omitted.)); *Philip Morris, Inc.* v. *Emerson*, 235 Va. 380, 406, 368 S.E.2d 268 (1988) (strict liability was inappropriate when defendants "had

the ability to eliminate the risk of injury by exercising reasonable care"); see also, e.g., *Liss* v. *Milford Partners, Inc.*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X07-CV-04-4025123-S (September 29, 2008) (46 Conn. L. Rptr. 439, 442) ("the exercise of due care would have perhaps prevented any [harm]; an intrinsically dangerous activity would have . . . resulted in such [harm] notwithstanding the exercise of due care").

Here, the trial court found that, "if certain well-known precautions are taken, it is very unlikely that natural gas combustion or explosion will occur during a gas blow procedure." Specifically, the court found that two precautions, either together or independently, would have significantly reduced the likelihood of ignition or combustion of the natural gas during the gas blow procedure, namely, properly orienting the discharge nozzle and carefully controlling the pressure and volume of natural gas employed during the procedure. The court found that these precautions were widely known and generally employed in the construction of natural gas fueled power plants prior to the Kleen Energy explosion.

First, properly orienting and positioning the discharge nozzle would have significantly and materially reduced the risk of harm. The trial court found that "[t]he discharge pipe should be oriented vertically, it should terminate outdoors, in an open, well ventilated area, at least ten feet above any nearby structure, it should discharge into an area that is free from any obstructions, it should discharge [into] an area that is free from any sources of sparks (such as electrical equipment), and it should be grounded to prevent the buildup of any static electricity." In the three instances in which explosions or combustions have resulted from a gas blow procedure, some combination of these precautions was not taken. In the 2001 incident in Ohio,

the area into which the natural gas was discharged contained an obstruction. In the 2003 incident in California, the discharge nozzle was not properly grounded, allowing static electricity to accumulate. In the present case, although the discharge nozzle was properly grounded, it was improperly positioned horizontally so that the natural gas discharged into a partially enclosed area containing numerous obstructions, including metal pipes, electrical equipment, and large nearby structures. Indeed, this was distinguishable from the gas blow procedures previously employed at the power plant, which had occurred without incident.

Second, carefully controlling the pressure and volume of natural gas employed during the procedure would have minimized the velocity of the discharged debris and the amount of dispersed natural gas, which, in turn, would have materially reduced the risk of harm, the severity of any resulting harm, and the generally dangerous attributes of the natural gas. The trial court found that the manufacturer of the gas turbines typically specifies the pressure of natural gas required to conduct the gas blow procedure to ensure that no debris would remain in the piping. Such pressure is measured by the "cleaning force ratio," which is a comparison to normal operational pressure. In this case, the manufacturer of the gas turbines recommended a cleaning force ratio of 2.0, meaning that the force of the natural gas used to expel the debris from the piping should be twice the force that would be generated by the natural gas flowing through the piping under normal operating conditions. The court also found that "[t]he manufacturer's recommended . . . 'cleaning force ratio' should not be exceeded. An unnecessarily high [cleaning force ratio] increases the velocity of the debris in the gas discharge and increases the likelihood that the discharged debris will, as a result of friction, generate and retain sufficient

thermal energy to initiate combustion within the cloud of dispersing gas."

It was calculated that the cleaning force ratio at the discharge nozzle during the gas blow procedure that caused the explosion was 10.0. This means that the natural gas flowed through the piping at ten times the force that it would flow through the piping during normal operation, which was five times higher than the manufacturer's recommendation for the gas blow procedure. Because of this unusually high pressure of natural gas, the solid debris was propelled from the discharge nozzle at a correspondingly high velocity, approximately 1400 feet per second. In turn, this unusually high velocity increased the likelihood that the debris would acquire enough thermal energy to ignite the natural gas, which was what caused the explosion in this case. Accordingly, the trial court found that limiting the pressure of natural gas to correspond with the cleaning force ratio would have better controlled the velocity of the discharged debris and reduced the likelihood of combustion.

In addition, the trial court noted that the volume of natural gas can be minimized further by carefully choosing between two variations of the gas blow procedure. The variation of the procedure employed in this case was a "continuous" blow, meaning that the discharge nozzle remained completely open to allow the natural gas to flow freely through it. Another variation of the procedure, known as a "puff blow," involves pressurizing the length of pipe with natural gas while the discharge nozzle is closed, then closing the valve supplying the natural gas, and then opening the discharge nozzle quickly, allowing the gas to vent from the discharge nozzle in a short burst. This variation requires less natural gas per blow and, accordingly, requires less time and space for the discharged natural gas to disperse to a safe concentration. Because the

continuous blow requires a greater volume of natural gas to accomplish the same result, the court found that this method "increases the time and area required for the gas to fully disperse and reach concentrations where combustion will not occur."

The trial court relied on expert testimony regarding the "basic science" of combustion and "the physical characteristics of natural gas" in reaching these conclusions. The court also credited the testimony of six witnesses who had experience conducting gas blow procedures and found that each witness testified "that gas blows can be done safely if reasonable care is exercised and certain precautions are observed. . . . No witness with experience conducting gas blows testified that the procedure involved a 'high degree' of risk of harm *when reasonable safety precautions are put in place*." (Emphasis added.) Thus, we agree with the trial court's factual finding that the exercise of reasonable care would have materially reduced the risk of harm to the point where the gas blow procedure could have been conducted safely.

Our conclusion, as well as our particular emphasis on this factor, is supported by *Whitman Hotel Corp.* and *Caporale*. In *Whitman Hotel Corp.*, we reasoned that, even in the prototypical strict liability context of exploding dynamite, "it is essential that it appear that the dynamite was discharged under such circumstances that it, in fact, necessarily or obviously exposed the person or property of another to the danger of probable injury." *Whitman Hotel Corp.* v. *Elliott & Watrous Engineering Co.*, supra, 137 Conn. 566. We then expanded on this language in *Caporale*: "The words 'necessarily,' 'obviously' and 'probable' imply that, *even if due care is employed*, there is an *unavoidable* risk of damage." (Emphasis added.) *Caporale* v. *C. W. Blakeslee & Sons, Inc.*, supra, 149 Conn. 84. However, dynamite and pile driving, in their respective circumstances, are distinguishable from the gas blow procedure that we are considering

because the exercise of reasonable care would have materially reduced the risk of harm and the potentially dangerous nature of the natural gas.

We find further support for our conclusion in *CNG Producing Co.* v. *Columbia Gulf Transmission Corp.*, 709 F.2d 959 (5th Cir. 1983). In that case, the plaintiffs' offshore oil platform required repairs, which entailed a blowdown operation to vent natural gas from the platform's metering station. Id., 960–61. The natural gas was released through two pipes, one of which was pointed up toward an overhanging heliport so that the discharged natural gas accumulated in the partially enclosed area. See id., 961. A spark from an exhaust fan ignited the accumulated natural gas, resulting in an explosion and fire. Id. The plaintiffs brought an action against the defendants, the companies that maintained the metering station, one of which was also a purchaser of the platform's natural gas. See id., 960–61. On appeal, the Fifth Circuit, applying Louisiana state law and a standard very similar to that of the Restatement (Second), held that the blowdown procedure was not ultrahazardous, reasoning that, "if the gas had been vented away from the platform, where the gas would have had no place to accumulate and where no possible ignition source existed, these venting operations would have been performed without any risk." Id., 962. In other words, the court emphasized that "the activity of venting gas is likely to cause damage *only* when there is substandard conduct on someone's part." (Emphasis in original.) Id.

Although the blowdown procedure in *CNG Producing Co.* is not identical to the gas blow procedure employed here, both procedures involved the high-pressure discharge of natural gas, a flammable and potentially dangerous substance. In both procedures, natural gas was improperly allowed to accumulate in partially enclosed areas that were littered with obstructions and potential ignition sources. Finally, as to both procedures, reason-

able precautions from prevailing industry practices and the basic science of combustion would have minimized the risk of gas accumulation and ignition, which, in turn, would have significantly reduced the risk of harm. As both the Fifth Circuit and the trial court in the present case concluded, the explosions did not result from any substantial and unavoidable risk attendant to the procedures; rather, the explosions resulted from the failure to employ reasonable, industry standard precautions when handling a potentially dangerous gas.

The plaintiffs nonetheless contend that a significant risk remains even after the precautions noted by the trial court are employed, emphasizing the inherently dangerous attributes of natural gas. Specifically, the plaintiffs point to expert testimony that "the presence of three elements can cause a fire or explosion—a fuel source, an ignition, and air"—and that, "even with utmost caution, the natural gas still will 'continuously [mix] with air on the way out' of the [discharge nozzle], and that expelled gas will at some point reach the level of air-gas mixture that could spark an explosion."

We are not persuaded, however, because *Caporale* foreclosed the plaintiffs' reliance on the dangerous nature of natural gas alone. In that case, we explained that strict liability requires more than just a "dangerous instrumentality"; rather, strict liability applies when a potentially dangerous instrumentality "was used under such circumstances and conditions as necessarily and obviously to expose the person or property of another to probable injury even [when] due care [is] taken." *Caporale* v. *C. W. Blakeslee & Sons, Inc.*, supra, 149 Conn. 83–84. In other words, we reasoned that the dangerous nature of the instrumentality must be considered alongside the circumstances and conditions of its use. See id., 83–85. This reasoning is consistent with the six factors in § 520 of the Restatement (Second). The first two factors, concerning risk of harm and severity of

potential harm, together measure the dangerous nature of the instrumentality. The other four factors measure the various circumstances and conditions that must inform the danger, including the location of the activity, the common usage of the activity, and the effect of reasonable care. Accordingly, in this case, the potentially dangerous nature of natural gas is not dispositive. We must consider what danger natural gas presents in the circumstances of the gas blow procedure when reasonable care is used.

As the trial court noted, the "cause of the explosion . . . was not a hazard intrinsic to the procedure itself or outside the control of those persons conducting the procedure; it was a failure to use proper care in conducting the procedure." Positioning the discharge nozzle vertically into a well ventilated area would have materially reduced the risk of harm by removing obstructions that the expelled debris could have struck to trigger ignition. Minimizing the pressure and volume of natural gas used during the procedure would have materially reduced the risk and severity of harm by decreasing the velocity of the expelled debris and, as a result, the likelihood that the debris would ignite the natural gas. Each precaution would have further reduced the risk and severity of harm by preventing the dangerous accumulation of natural gas to fuel any fire that might have ignited. In other words, reasonable precautions would have materially reduced the risk of harm, the severity of any resulting harm, and the generally dangerous attributes of natural gas.

Given that the activity involved a flammable substance, we recognize that some small risk of harm inherently remained. However, the significant reduction in the risk and severity of harm as a result of reasonable, industry standard precautions, paired with the appropriateness of the location, decisively outweigh the small remaining risk, the uncommon nature of the activity,

and the small value to the community. Accordingly, we conclude that the gas blow procedure was not abnormally dangerous and that the plaintiffs cannot maintain a strict liability claim against the defendants.

II

We next consider the plaintiffs' contention that the trial court improperly granted the defendants' motions for summary judgment with respect to the plaintiffs' negligence claims. Specifically, the plaintiffs assert that the court incorrectly concluded that the defendants were not vicariously liable for O & G's negligence because no reasonable jury could find that the defendants exercised control over O & G's and its subcontractors' performance of the gas blow procedure. The defendants contend that the court correctly concluded that they did not exercise sufficient control over O & G or its subcontractors to overcome the general rule that an employer is not vicariously liable for the torts of its independent contractor.

Because this issue presents a different procedural posture than the prior issue, we begin with the standard of review. "The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the

memorandum of decision of the trial court." (Citations omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018).

Furthermore, "[t]he essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." (Internal quotation marks omitted.) *Pelletier* v. *Sordoni/Skanska Construction Co.*, 286 Conn. 563, 593, 945 A.2d 388 (2008). The plaintiffs' claim concerns the duty element, specifically, whether the defendants owed any duty to the plaintiffs given the employer and independent contractor relationship between Kleen Energy and O & G. "If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from the defendant." (Internal quotation marks omitted.) *Maffucci* v. *Royal Park Ltd. Partnership*, 243 Conn. 552, 567, 707 A.2d 15 (1998). "The issue of whether a defendant owes a duty of care is an appropriate matter for summary judgment because the question is one of law." *Pion* v. *Southern New England Telephone Co.*, 44 Conn. App. 657, 660, 691 A.2d 1107 (1997). Accordingly, "[t]he existence of a legal duty is a question of law over which we exercise plenary review." *Pelletier* v. *Sordoni/Skanska Construction Co.*, supra, 578.

The record, viewed in the light most favorable to the plaintiffs, establishes that O & G and two of its subcontractors performed the gas blow procedure. See footnote 2 of this opinion. The question of whether the defendants are nevertheless vicariously liable for any negligence that occurred during the procedure on the part of O & G or its subcontractors turns on the nature of the relationship between the defendants and O & G. "Vicarious liability is based on a relationship between the parties . . . under which it has been determined as a matter of policy that one person should be liable for the act of the other. Its true basis is largely one of

public or social policy under which it has been determined that, irrespective of fault, a party should be held to respond for the acts of another." (Internal quotation marks omitted.) *Alvarez* v. *New Haven Register*, *Inc.*, 249 Conn. 709, 720, 735 A.2d 306 (1999).

Connecticut law has recognized two distinct types of agents: employees and independent contractors. We have "adopted the definition that [a]n independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work." (Internal quotation marks omitted.) *Darling* v. *Burrone Bros.*, *Inc.*, 162 Conn. 187, 195, 292 A.2d 912 (1972). In other words, an "independent contractor contracts to produce a given result by methods under his own control." *Aisenberg* v. *C. F. Adams Co.*, 95 Conn. 419, 421, 111 A. 591 (1920). In contrast, an "employee contracts to produce a given result, subject to the lawful orders and control of his employer in the means and methods used in that employment." Id. "The fundamental distinction between an employee and an independent contractor depends [on] the existence or nonexistence of the right to control the means and methods of work." (Internal quotation marks omitted.) *Darling* v. *Burrone Bros.*, *Inc.*, supra, 195–96. Accordingly, "[i]f the contract provides that the employer retains no control over the details of the work, but leaves to the other party the determination of the manner of doing it, without subjecting [the other party] to the control of the employer, the party undertaking the work is a contractor and not a mere employee." Id., 195.

The legal principles governing the liability of an employer for the torts of its agents are well established. An employer is vicariously liable "for the wilful torts of his [employee] committed within the scope of . . . employment and in furtherance of [the employer's] busi-

ness." *Pelletier* v. *Bilbiles*, 154 Conn. 544, 547, 227 A.2d 251 (1967). This is because "a fundamental premise underlying the theory of vicarious liability is that an employer exerts control, fictional or not, over an employee acting within the scope of employment, and therefore may be held responsible for the wrongs of that employee. . . . It is as a result of this control that the theory of vicarious liability allows employers to be subject to liability for the physical harm caused by the negligent conduct of their employees acting within the scope of employment." (Citations omitted.) *Jagger* v. *Mohawk Mountain Ski Area, Inc.*, 269 Conn. 672, 693 n.16, 849 A.2d 813 (2004). In contrast, "[a]s a general rule, an employer is not [vicariously] liable for the negligence of its independent contractors. . . . The explanation for [this rule] most commonly given is that, [because] the employer has no power of control over the manner in which the work is to be done by the [independent] contractor, it is to be regarded as the contractor's own enterprise, and [the contractor], rather than the employer, is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it." (Citations omitted; internal quotation marks omitted.) *Pelletier* v. *Sordoni/Skanska Construction Co.*, 264 Conn. 509, 517–18, 825 A.2d 72 (2003).

Although the plaintiffs refer to O & G as an independent contractor, this characterization is not dispositive of the question of whether the defendants are vicariously liable. Despite the general rule that an employer is not vicariously liable for the negligence of its independent contractor, we have often explained that there are exceptions to that rule. "If the work contracted for [is] unlawful, or such as may cause a nuisance, or is intrinsically dangerous, or in its nature is calculated to cause injury to others, or if the [employer] negligently employ[s] an incompetent or untrustworthy contractor,

*or if* [*the employer*] *reserve*[*s*] *in* [*the*] *contract general control over the contractor or his servants, or over the manner of doing the work, or if* [*the employer*] *in the progress of the work assume*[*s*] *control or interfere*[*s*] *with the work*, or if [the employer] is under a legal duty to see that the work is properly performed, [then] the [employer] will be responsible for [the] resultant injury. . . . So, too, the [employer] . . . will be liable for injury [that] results from his own negligence." (Citations omitted; emphasis altered; internal quotation marks omitted.) Id., 518. The plaintiffs' claim of vicarious liability relies on this control exception, which provides that an employer will be vicariously liable for the negligence of its independent contractor if the employer (1) retains contractual control over the means or methods of the work, or (2) exercises actual control over the means or methods of the contractor's performance.[10] See id.

Thus, the defendants' liability for the tortious conduct committed during the gas blow procedure hinges on the degree of control the defendants exercised over O & G's performance of the procedure. "The word 'control' has no legal or technical meaning distinct from that given in its popular acceptation . . . and refers to

[10] We note that the control exception appears to be definitional in this case: If the defendants retained sufficient control over O & G to satisfy this exception, then, by definition, O & G would be properly classified as an employee, not an independent contractor. Compare *Aisenberg* v. *C. F. Adams Co.*, supra, 95 Conn. 421 (employee is "subject to the lawful orders and control of his employer," whereas independent contractor employs "methods under his own control"), with *Pelletier* v. *Sordoni/Skanska Construction Co.*, supra, 264 Conn. 518 (employer is liable for negligence of independent contractor if employer had contractual or actual control over independent contractor). In other words, the classification of an agent as either an independent contractor or an employee for the purposes of vicarious liability requires us to consider the same core issue as the control exception: whether the employer had control over the agent's means or methods to complete the work. Because the plaintiffs refer to O & G as an independent contractor, we focus our inquiry on the control exception.

the power or authority to manage, superintend, direct or oversee." (Internal quotation marks omitted.) *Mozeleski* v. *Thomas*, 76 Conn. App. 287, 294, 818 A.2d 893, cert. denied, 264 Conn. 904, 823 A.2d 1221 (2003). An employer's partial control over the work may be enough to establish the existence of a duty. See, e.g., *Pelletier* v. *Sordoni/Skanska Construction Co.*, supra, 286 Conn. 599; *Van Nesse* v. *Tomaszewski*, 265 Conn. 627, 631, 829 A.2d 836 (2003). However, the employer "may exercise a limited degree of control or give the [independent] contractor instructions on minor details without destroying the independent character of the contractor." *Mozeleski* v. *Thomas*, supra, 293. "[When] the evidence on the question as to who had control of the area or instrumentality causing the injury is such that the mind of a fair and reasonable [person] could reach but one conclusion as to the identity of the person exercising control, the question is one for the court, but, if honest and reasonable [people] could fairly reach different conclusions on the question, the issue should properly go to the jury." (Internal quotation marks omitted.) *Van Nesse* v. *Tomaszewski*, supra, 631.

A

We first consider whether Kleen Energy or PPMS retained contractual control over O & G's performance of the gas blow procedures. See, e.g., *Pelletier* v. *Sordoni/Skanska Construction Co.*, supra, 264 Conn. 518 (employer is vicariously liable "if [the employer] reserve[s] in [the] contract general control over the contractor or his servants, or over the manner of doing the work" (internal quotation marks omitted)). The express terms of the "Engineering, Procurement and Construction Agreement" between Kleen Energy and O & G substantially inform this analysis. At various points in the agreement, Kleen Energy and O & G agreed that O & G would maintain full care and responsibility for the power plant until "substantial completion," a construction mile-

stone triggered by certain conditions defined in the agreement, at which point care and responsibility for the power plant would revert to Kleen Energy. Most instructive is § 2.1 of the agreement, regarding the scope of O & G's performance, which provides: "[O & G] shall fully perform all the [w]ork . . . all on a lump sum, fixed price, *turnkey basis* . . . ." (Emphasis added.) The article in the agreement defining the various stages of completion provides in relevant part: "Upon [s]ubstantial [c]ompletion, [Kleen Energy] shall have care, custody and control of the [f]acility. . . ." Section 16.1 of the agreement, within the article concerning risk of loss, provides: "[O & G] shall have the full responsibility for care, custody and control of the [f]acility, the [f]acility [s]ite and the [w]ork . . . and shall bear the risk of loss of the [f]acility and the [w]ork in each case until [s]ubstantial [c]ompletion, at which time risk of loss shall pass to [Kleen Energy]." Consistent with these provisions, the agreement also specifies that "[Kleen Energy] shall furnish to [O & G] full and unrestricted access to the [f]acility [s]ite and all necessary rights of way and easements . . . ." Likewise, the parties agreed that O & G will be "fully and solely responsible to [Kleen Energy] for the acts and omissions of [O & G's] subcontractors, vendors, and [p]ersons either directly or indirectly employed by any of them . . . ."

The turnkey nature of the agreement between Kleen Energy and O & G carries particular significance because, as the trial court explained, it indicates the parties' intention that "O & G would handle all construction of the power plant and would hand [Kleen Energy] a completed and operational power plant." Other courts have noted that "[a turnkey] contract has a certain well-defined meaning in law and in fact." (Internal quotation marks omitted.) *Chapman & Cole* v. *Itel Container International B.V.*, 865 F.2d 676, 681 (5th Cir.), cert. denied sub nom. *Urquhart & Hassell* v. *Chapman &*

*Cole*, 493 U.S. 872, 110 S. Ct. 201, 107 L. Ed. 2d 155 (1989). Black's Law Dictionary defines an "engineering, procurement, and construction contract," also termed a "turnkey contract," as "[a] [fixed price], schedule-intensive construction contract—typical in the construction of single-purpose projects, such as energy plants—in which the contractor agrees to a wide variety of responsibilities, including the duties to provide for the design, engineering, procurement, and construction of the facility; to prepare start-up procedures; to conduct performance tests; to create operating manuals; and to train people to operate the facility." Black's Law Dictionary (11th Ed. 2019) p. 406. In a turnkey agreement, "the contractor agrees to complete the work of the building and installation to the point of readiness for operation or occupancy." (Internal quotation marks omitted.) *Chapman & Cole* v. *Itel Container International B.V.*, supra, 681. Upon completion, the owner can simply "turn the key" to use the newly constructed facility; (internal quotation marks omitted) *Zenergy, Inc.* v. *Performance Drilling Co., LLC*, 603 Fed. Appx. 289, 293 n.7 (5th Cir. 2015); but, until that point, the contractor generally "assumes all risks incident to the creation of [the] fully completed facility . . . and must bear the risk for all loss . . . ." (Citation omitted; internal quotation marks omitted.) *Chapman & Cole* v. *Itel Container International B.V.*, supra, 681; see, e.g., *Hawaiian Independent Refinery, Inc.* v. *United States*, 697 F.2d 1063, 1065 n.4 (Fed. Cir.) ("A [turnkey] job is defined as a job or contract in which the contractor agrees to complete the work of building and installation to the point of readiness for operation or occupancy. . . . Up to that point, the contractor assumes all risks." (Citation omitted; internal quotation marks omitted.)), cert. denied, 464 U.S. 816, 104 S. Ct. 73, 78 L. Ed. 2d 86 (1983).

Here, the agreement specified that it was a "turnkey" project. Although the agreement did not define the term

"turnkey," it is a well-defined type of contract in the construction industry, particularly in the construction of power plants. Moreover, other substantive provisions of the agreement reinforce the turnkey nature of the agreement. For example, as we previously discussed, certain provisions in the agreement specified that O & G would have "the full responsibility for care, custody and control of the [f]acility . . . until [s]ubstantial [c]ompletion, at which time risk of loss shall pass to [Kleen Energy]," and that, "[u]pon [s]ubstantial [c]ompletion, [Kleen Energy] shall have care, custody and control of the [f]acility." Thus, there is no genuine dispute that O & G had full contractual control over and responsibility for the construction of the power plant up to the point of substantial completion.

The plaintiffs point to no evidence that would raise a genuine dispute that substantial completion had not been reached at the time of the gas blow procedure and resulting explosion. Accordingly, and consistent with the express provisions of the agreement, we conclude that O & G, and not Kleen Energy, had contractual control over and responsibility for the performance of the activities attendant to the construction of the power plant, including the gas blow procedures. This falls squarely within the circumstance in which "the contract provides that the employer retains no control over the details of the work, but leaves to the other party the determination of the manner of doing it, without subjecting [the other party] to the control of the employer . . . ." *Darling* v. *Burrone Bros., Inc.*, supra, 162 Conn. 195. Accordingly, the trial court correctly emphasized that, because of the unambiguous, turnkey nature of the agreement, there was no genuine issue of material fact regarding whether O & G had contractual control of the gas blow procedure. Our review of the record likewise persuades us that fair and reasonable minds could reach only one conclusion: Given O & G's exclu-

sive contractual control over the construction of the power plant, the defendants did not exercise sufficient control over the gas blow procedure to establish the existence of a legal duty.

Despite these contractual provisions, the plaintiffs nevertheless claim that other provisions of the agreement between Kleen Energy and O & G establish that Kleen Energy effectively retained control over the construction of the power plant. Specifically, the plaintiffs point to § 14.1 of that agreement, which provides in relevant part that "[Kleen Energy] may at any time . . . suspend performance of the [w]ork . . . by giving written notice to [O & G]." The plaintiffs also claim that certain provisions of the agreement between Kleen Energy and PPMS establish that PPMS had contractual control over the gas blow procedures. Specifically, the plaintiffs point to exhibit C of that agreement, which articulates the services PPMS would provide and lists one responsibility as "[a]udit [O & G's] key processes—[s]afety, [q]uality, [m]aterial [r]eceiving, etc."

We are not persuaded that these provisions destroy the independent nature of O & G's work. Kleen Energy's general right to suspend, pursuant to its agreement with O & G, cannot be construed to create a right for Kleen Energy "to control the means and methods" of O & G's performance of the work. (Internal quotation marks omitted.) *Darling* v. *Burrone Bros., Inc.*, supra, 162 Conn. 196. Likewise, any contractual duty imposed on PPMS by that provision of its agreement with Kleen Energy is too general to entail control over the "means and methods" of O & G's performance of the gas blow procedures. (Internal quotation marks omitted.) Id.

B

The plaintiffs also contend that, notwithstanding the terms of the agreements between Kleen Energy, O & G, and PPMS, the defendants in fact exercised control

over the gas blow procedures, which satisfies the control exception. See, e.g., *Pelletier* v. *Sordoni/Skanska Construction Co.*, supra, 264 Conn. 518 (employers are vicariously liable if they "assume control or interfere with the work" (internal quotation marks omitted)). To support this argument, the plaintiffs identify two essential facts: the various activities of Gordon Holk, a PPMS employee representing Kleen Energy on the construction site, and the interactions between the defendants and Baker. The defendants contend that none of these facts creates a genuine issue of material fact as to whether Kleen Energy or PPMS exercised control over the gas blow procedures.

We first consider the plaintiffs' argument with respect to Holk. The following additional facts are relevant to this argument. Four key individuals were involved in communications surrounding the gas blow procedures: Holk, the lead PPMS employee on the site, who represented Kleen Energy; Andrew Pike, a member of the board of members of Kleen Energy; Lou Kesselman, a senior O & G employee and the O & G manager of the project; and C.J. Meeske, a contact with the supplier of natural gas used to conduct the gas blow procedure. In December, 2009, approximately six weeks before the first day of gas blow procedures, Pike e-mailed various O & G and subcontractor employees with instructions to include Holk "on *all* issues (regardless of materiality) as soon as such arise. As [Kleen Energy's] representative, [Holk] is the principal contact for *all* third-party activity associated with Kleen Energy." (Emphasis in original.) The e-mail concluded: "Effectively, [Holk] should be considered the gatekeeper of all Kleen [Energy] related activity."

The same day, Holk e-mailed various Kleen Energy and O & G employees, requesting "some details" about the gas blow procedures and explaining that he "need[ed] to approximate the amount of gas [O & G] will need

and when." Subsequently, at the end of December, 2009, an O & G employee e-mailed Holk a document titled "Gas Blow Procedure," and Holk responded that he would "look [it] over" because it "may be the first time your boys may be turning valves."

At the same time, Kesselman e-mailed Holk, requesting that PPMS and Kleen Energy order the specific quantity of natural gas O & G would need for the gas blow procedure. Holk forwarded the e-mail to Pike, who, copying Holk, forwarded the e-mail to Meeske, the contact with the supplier of natural gas, and those three individuals exchanged a series of e-mails in January, 2010, discussing the issue. Specifically, Meeske sent a reply e-mail, questioning whether the specified quantity of natural gas requested would be sufficient to clear the debris given the dimensions of the pipes. Holk responded to Meeske: "We discussed this internally and all of us non-O & G folks believe this was way too low. But the smart one at O & G think[s] this is enough. . . . I would like to do exactly what O & G wants and let them live and learn." Around the same time, a document titled "Responsibility Matrix for Meeting Date 1/19/10" identified Holk as the "[r]esponsible [i]ndividual" for, among other activities, the gas blow procedures.

Soon thereafter, around the end of January, 2010, and a few days before the first day of gas blow procedures, Holk e-mailed Kesselman to inform O & G that "[w]e have gas nominated for Saturday [January 30, 2010]. Blow baby blow." In early February, 2010, after the first day of gas blow procedures but before the second day, Kesselman, copying Pike, e-mailed Holk again to request that he order natural gas for the second set of gas blow procedures. Holk e-mailed Meeske to order the natural gas, then subsequently confirmed to Kesselman: "We have gas for [the designated days]. [You're] clear to

blow." This second set of gas blow procedures took place on February 7, 2010, and caused the explosion.

The plaintiffs point to these details to support their contention that Holk exercised control over the gas blow procedures on behalf of Kleen Energy and PPMS. Specifically, they note that Holk was designated as the " 'gatekeeper' " for the project by Kleen Energy, as well as the " '[r]esponsible [i]ndividual' " on the " 'Responsibility Matrix,' " he stated that he had to " 'look . . . over' " the procedure before ordering the natural gas, he then communicated O & G's order of natural gas to the supplier and was skeptical that it would be sufficient to complete the procedure, he provided "formal clearance" for O & G to conduct the gas blow procedures, and he "cheer[ed], '[b]low baby blow.' " (Emphasis omitted.) The plaintiffs contend that these facts establish that Holk was "an essential actor in the process."

We disagree. Even if we view these facts in the light most favorable to the plaintiffs, Holk's involvement in the gas blow procedure is entirely consistent with Kleen Energy's contractual right to oversee O & G's work. Specifically, § 2.14.1 of the agreement between Kleen Energy and O & G provides in relevant part: "The [w]ork may be monitored and inspected at any time during working hours by [Kleen Energy], its duly authorized agents, servants, and employees. Such right to monitor and inspect, however . . . shall not create the right to stop or otherwise materially impede the [w]ork or relieve [O & G] of any of its responsibilities hereunder . . . ."

We have previously held that the presence of an employer representative at a construction site does not demonstrate sufficient control to overcome the general rule that an employer is not liable for the torts of its independent contractor. In *Darling*, the president of a corporation hired the defendant independent contrac-

tor to excavate a ditch to accommodate a storm drain. See *Darling* v. *Burrone Bros., Inc.*, supra, 162 Conn. 189. The president of the corporation was present at the job site and instructed an employee of the independent contractor regarding the placement and depth of the ditch, and he periodically inspected the work to ensure satisfactory performance. Id., 193. We reasoned that the president's involvement "signifie[d] no more than the furnishing of specifications for the job. It [did] not demonstrate control of the manner and means of accomplishing the digging. It [was] apparent that [the employer's president] did no more than exercise his right to supervise the general result and also the immediate results, from time to time, as the work progressed." Id. We derived a generally applicable rule from this case: "[When a representative of the employer] has no authority to interfere with the manner of operation, he has no effect on the determination of the one in control." Id., 194; see, e.g., *Archambault* v. *Soneco/Northeastern, Inc.*, 287 Conn. 20, 56, 946 A.2d 839 (2008) (noting that employer's representative "had overall responsibility for safety on the work site" but reasoning that he did not "[retain] direct control over" independent contractor's work).

This rule is consistent with Holk's involvement in the gas blow procedure. Holk did no more than exercise Kleen Energy's contractual right to monitor, inspect, and coordinate the various construction tasks performed by O & G, its subcontractors, and Kleen Energy. Specifically, Pike's e-mail instructing the representatives of all the entities to include Holk in communications involving Kleen Energy cannot be construed to create a right for Holk to control the means and methods of O & G's performance of the gas blow procedures. Rather, this reasonably demonstrates only that the project involved many different actors, performing a variety of functions, and that Kleen Energy wanted to establish

clear lines of communication to ensure smooth collaboration. In addition, the plaintiffs contend that the " 'Responsibility Matrix' " memorialized Holk's responsibility for the gas blow procedures. However, even if we accept the plaintiffs' characterization of this document, this does not rise to the level of control required to establish vicarious liability *as a matter of law*. As we explained in *Darling*, supervision of a construction task to ensure that it is ultimately completed according to the employer's requirements is not enough to establish control over the means and methods of the contractor's performance of that task.[11] See *Darling* v. *Burrone Bros., Inc.*, supra, 162 Conn. 193; see also, e.g., *Archambault* v. *Soneco/Northeastern, Inc.*, supra, 287 Conn. 56. Furthermore, Holk's skepticism about O & G's requested quantity of natural gas and his e-mails "clear[ing]" O & G to conduct the gas blow procedures do not demonstrate sufficient control over the procedure as a matter of law. Even if we construe Holk's conduct in the light most favorable to the plaintiffs, these facts certainly do not demonstrate greater control than the conduct of the employer's representative in *Darling*, who provided precise instructions to the contractor during excavation of a ditch, which we held did not establish sufficient control as a matter of law to support

[11] We note that *Archambault* and *Darling* both involved appeals following jury verdicts, not the granting of summary judgment motions. *Archambault* v. *Soneco/Northeastern, Inc.*, supra, 287 Conn. 29; *Darling* v. *Burrone Bros., Inc.*, supra, 162 Conn. 189. However, the existence of a duty of care is always a question of law. See, e.g., *Pion* v. *Southern New England Telephone Co.*, supra, 44 Conn. App. 660. In addition, with respect to vicarious liability, "the question as to who had control of the area or instrumentality causing the injury" is one of law for the court to determine when "the mind of a fair and reasonable [person] could reach but one conclusion . . . ." (Internal quotation marks omitted.) *Van Nesse* v. *Tomaszewski*, supra, 265 Conn. 631. Those cases reveal that, outside the context of summary judgment, the court must consider the record in order to determine how to instruct the jury with respect to the legal questions of duty and control. Id. Because those cases involve challenges to the court's determination of the same legal questions at issue in this case, they are applicable here.

vicarious liability. *Darling* v. *Burrone Bros., Inc.*, supra, 193; see footnote 11 of this opinion.

All of these activities are consistent with the principle that an employer "may exercise a limited degree of control or give the [independent] contractor instructions on minor details without destroying the independent character of the contractor." *Mozeleski* v. *Thomas*, supra, 76 Conn. App. 293. There is no genuine issue of material fact with respect to Holk's involvement in the gas blow procedures. We agree with the trial court that no reasonable jury could conclude that Holk had substantive control over the means or methods involved in O & G's performance of the gas blow procedures.

We next consider the plaintiffs' argument with respect to Baker, the supervisor of the gas pipeline safety unit of the department. See footnote 8 of this opinion. The following additional facts are relevant to this argument. At the time of the explosion, the department generally regulated the rates, performance, and safety of public service companies. In addition, the gas pipeline safety unit "exercise[d] regulatory safety authority over interstate natural gas transmission companies and intrastate natural gas distribution companies in Connecticut." In late January, 2010, Baker requested a phone call from Kleen Energy after he became aware that Kleen Energy planned to introduce natural gas into its pipelines for the gas blow procedures without first introducing nitrogen, contrary to the customary practice of the gas industry. Robert Haley, a senior employee of the NAES Corporation, which had contracted with Kleen Energy to take responsibility for the operation of the power plant upon completion, spoke with Baker about the planned gas blow procedures.

Baker recalled the substance of his conversation with Haley in a report he prepared for the department soon after the explosion, as well as in subsequent testimony.

During his conversation with Haley, Baker expressed concern about the planned gas blow procedure and explained that cleaning operations "are normally conducted using [nitrogen, compressed air, or water] to avoid creating a combustible natural gas/air mixture . . . ." Baker testified that he and Haley spoke "about how [the department does] things in the gas industry. [Haley] explained how they do things in the power industry. They didn't . . . line up." Baker further testified that the "gas industry" does not employ natural gas to clear fuel supply pipelines because "using a flammable substance to clean pipe versus an inert substance adds some additional danger to the operation." Baker testified that Haley explained that "this is how they do it in the power business; they do it all over the world this way. They've done tons of power plants, and this is just the way it's done, and they've done it safely." Baker and Haley spoke about various precautions, including minimizing personnel on the construction site, removing ignition sources, and introducing nitrogen into the piping beforehand. Haley then sent an e-mail to various PPMS and O & G individuals to inform them that he had spoken with Baker. Subsequently, Baker and Haley held a similar conversation after the first day of gas blow procedures but before the second day. For his part, Haley testified that he could not recall the identity of the department employee with whom he spoke or the substance of their conversation, and that he did not convey Baker's guidance to Kleen Energy, PPMS, or O & G.

The plaintiffs contend that Kleen Energy and PPMS exercised control over the gas blow procedures because of Haley's conversation with Baker, the failure of Kleen Energy and PPMS to take the precautions that Haley and Baker discussed, and their refusal to follow Baker's recommendation that O & G clean the fuel supply pipelines with a noncombustible substance. We are not per-

suaded, however, because Haley was not an employee of Kleen Energy or PPMS. He was an employee of the NAES Corporation, an entity that is not a party to this appeal, had no contractual authority regarding the power plant until its completion, and had no authority whatsoever over O & G. The plaintiffs assert, in a cursory fashion, that Haley acted on Kleen Energy's behalf during construction because his e-mail address and signature referenced Kleen Energy, but these facts are insufficient to render Haley's actions legally attributable to Kleen Energy.

Moreover, to the extent that the plaintiffs contend that Haley's actions could be attributable to Kleen Energy and construed as instructing O & G to defy Baker's warnings, we are not persuaded that such actions would inform the determination of control given that the department had no jurisdiction over the power plant. The gas pipeline safety unit's "jurisdiction over natural gas end[ed] at the connection to an [end user] of natural gas because, at this point, the gas is no longer involved in transportation." Consequently, and as the plaintiffs concede, the department's gas pipeline safety unit had no jurisdiction over the transmission of natural gas through the power plant's fuel supply pipelines. In addition, Kleen Energy was not subject to the department's ratemaking, performance, and safety regulatory authority because it is a federally designated wholesale generator, which is specifically exempt from the statutory definition of a "public service company" within the department's jurisdiction. The plaintiffs contend that "[j]urisdiction, or lack thereof, does not change the fact that Kleen [Energy] was warned that its plans were unsafe but chose to [execute them] anyway." (Internal quotation marks omitted.) We fail to see how this informs the control determination. It was not within Kleen Energy's contractual power to interfere with the means or methods of O & G's performance of construc-

tion activities. As the trial court reasoned, Baker's warnings did not put "[Kleen Energy] or [PPMS] in charge of the gas blow. There is simply no genuine dispute that O & G was building the plant." Accordingly, we conclude that the trial court properly granted the defendants' motions for summary judgment.

III

Finally, the plaintiffs make two additional arguments to support their contention that summary judgment with respect to their negligence claims was improper. First, the plaintiffs contend that, regardless of our determination of the control question, the defendants are nevertheless vicariously liable for O & G's negligence because O & G was engaged in an intrinsically dangerous activity, which satisfies a distinct exception to the general rule that an employer is not liable for the torts of its independent contractor. Second, the plaintiffs contend that, notwithstanding the level of control the defendants exercised over O & G, their negligence claims survive because the defendants were directly negligent. The defendants disagree. Kleen Energy asserts that Connecticut law does not recognize the intrinsically dangerous exception articulated in the Restatement (Second) of Torts, and both defendants assert that the record does not support a claim of direct negligence. For the following reasons, we decline to review both arguments as inadequately briefed.

"We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the rela-

tionship between the facts of the case and the law cited." (Citation omitted; internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016).

We first consider the plaintiffs' argument that summary judgment with respect to their negligence claims was improper because the gas blow procedure satisfies the "intrinsically dangerous" exception to the general rule that an employer is not vicariously liable for the negligence of its independent contractor. As we noted, there are several exceptions to that general rule, including when the employer retains contractual control or exercises actual control over the contractor's performance of the work; see part II of this opinion; and when the work contracted for "is intrinsically dangerous . . . ." (Internal quotation marks omitted.) *Pelletier* v. *Sordoni/Skanska Construction Co.*, supra, 264 Conn. 518; see, e.g., *Taylor* v. *Conti*, 149 Conn. 174, 178, 177 A.2d 670 (1962) ("[when an employer] contracts for work to be done of such a character that, even if the work is duly performed, it would naturally, if not necessarily, expose others to probable injury unless preventive measures are taken by [the employer], [then the employer] is liable for that injury if, while chargeable with knowledge that the work is of such a character, [the employer] negligently fails to take preventive measures"). We have also noted that the latter exception is similarly expressed in § 413 of the Restatement (Second) of Torts.[12] See, e.g., *Pelletier* v. *Sordoni/Skanska*

[12] Section 413 of the Restatement (Second) of Torts provides: "One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer

"(a) fails to provide in the contract that the contractor shall take such precautions, or

"(b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions." 2 Restatement (Second), Torts § 413, pp. 384–85 (1965).

*Construction Co.*, supra, 286 Conn. 597–98. The plaintiffs contend that, pursuant to our case law and § 413 of the Restatement (Second), the gas blow procedure was intrinsically dangerous and, therefore, the defendants are vicariously liable for O & G's negligence.[13] Thus, the plaintiffs contend, rendering summary judgment as to their negligence claims on a theory of vicarious liability was improper.

We decline to review this issue on the ground that it is inadequately briefed. The plaintiffs' analysis of the issue is minimal and conclusory given the complexity of the claim raised. Section 413 of the Restatement (Second), on which the plaintiffs rely, is only one section out of a series concerning the issue of employer liability in an independent contractor relationship. Specifically, comment (a) to § 413 cross-references § 416 of the Restatement (Second). See 2 Restatement (Second), Torts § 413, comment (a), p. 385 (1965). Comment (a) to § 416, in turn, emphasizes that that section is informed by § 427, which restates the same essential rule but applies in contexts when "the danger involved in the work calls for a number of precautions, or involves a number of possible hazards, as in the case of blasting . . . ." Id., § 416, comment (a), p. 395; see id., § 427, p. 415. In addition, comment (d) to § 427 emphasizes that

[13] Comment (b) to § 427 of the Restatement (Second) notes that this rule "is commonly expressed by the courts in terms of liability of the employer for negligence of the contractor in doing work which is 'inherently' or 'intrinsically' dangerous." 2 Restatement (Second), Torts § 427, comment (b), p. 416 (1965). We use the term "intrinsically dangerous activity" in part III of this opinion to refer to an activity that supports the exception to the general rule that an employer is not vicariously liable for the negligence of its independent contractor. We briefly note that the parties do not address, and therefore we do not consider, the substantive interplay between the "abnormally dangerous" activities that support a claim of strict liability pursuant to § 520 of the Restatement (Second), which we have previously termed "intrinsically dangerous"; see footnote 5 of this opinion; and the "intrinsically dangerous" activities that give rise to employer liability in negligence pursuant to §§ 413 and 427 of the Restatement (Second).

that section must be read alongside § 426 of the Restatement (Second). See id., § 427, comment (d), p. 417. Comment (a) to § 426 explains that an employer is protected from vicarious liability if the independent contractor committed " 'collateral negligence,' " or "negligence in the operative detail of the work . . . ." Id., § 426, comment (a), p. 414.

The plaintiffs do not discuss the nuanced applicability of these various provisions. Their references to §§ 413, 416 and 427, and to comment (c) to §§ 413 and 427, are conclusory and lack meaningful analysis. See, e.g., *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 748, 183 A.3d 611 (2018). This issue accounts for only one page of their thirty-five page brief. See, e.g., *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 124, 956 A.2d 1145 (2008) (litigant "devote[d] little more than [one] page of her [total briefing] to the discussion of her claim, limiting her argument to . . . bare assertion"). Furthermore, even if we were to agree with the plaintiffs that the gas blow procedure is intrinsically dangerous in satisfaction of that exception to the general rule precluding employer liability, such a conclusion would establish only the duty element of the negligence claims. The plaintiffs' brief does not discuss any impropriety in the trial court's conclusion that, regardless of the duty element, the plaintiffs failed to raise a genuine issue of material fact with respect to the causation element of their negligence claims. Accordingly, we cannot fully and fairly evaluate the merits of the plaintiffs' argument, and we decline to consider it.

The plaintiffs' second additional argument is that their negligence claims survive summary judgment, notwithstanding the employment relationship between the defendants and O & G, because the defendants were directly negligent. The plaintiffs point to three facts in support of their direct negligence claim: (1) the defendants ordered the natural gas required for the gas blow

procedure; (2) PPMS did not conduct "safety audits" as required; and (3) the defendants ignored warnings about the danger of the gas blow procedure from Baker, the supervisor of the gas pipeline safety unit. See part II of this opinion. The plaintiffs contend that "[t]he unsafe gas blows never would have happened without" the defendants' commission of those three acts.

As with the first additional argument, the plaintiffs' treatment of this issue is conclusory, lacking meaningful analysis of the limited legal authority cited. The plaintiffs assert only that the defendants were negligent in ordering the natural gas and permitting O & G to employ the gas blow procedure. The plaintiffs do not connect those actions to the foreseeability of the harm or the policy considerations that inform the duty inquiry. See, e.g., *Pelletier* v. *Sordoni/Skanska Construction Co.*, supra, 286 Conn. 593–94 ("Duty is . . . imperative to a negligence cause of action. . . . [O]ur threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant. . . . The final step in the duty inquiry . . . is to make a determination of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results." (Internal quotation marks omitted.)). Likewise, the plaintiffs do not provide any authority or analysis to raise a genuine issue of material fact with respect to the causation element. Accordingly, we cannot fully and fairly evaluate the merits of this issue, and we decline to consider it.

The judgment is affirmed.

In this opinion the other justices concurred.

# CECILIA PFISTER ET AL. *v.* MADISON BEACH HOTEL, LLC, ET AL.
## (SC 20478)

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

*Syllabus*

The plaintiffs sought a permanent injunction precluding the defendant owner and defendant operator of a hotel located in a residential zone in the town of Madison, from hosting a series of free, weekly outdoor concerts on a grassy strip of land in a town park that is immediately adjacent to the hotel property. The hotel predates the enactment of the Madison zoning regulations, and, therefore, its operation was grandfathered and is permitted as a preexisting, nonconforming use in the residential zone. In addition, because the park existed in the residential zone prior to a 1979 revision to the town zoning regulations that requires a landowner to obtain a special exception to establish a park in a residential zone, it was grandfathered and is permitted as a preexisting, nonconforming use. The hotel scheduled, organized, and funded the concerts, and obtained the requisite permits from the town to host them. The plaintiffs alleged, inter alia, that the defendants, by hosting the concerts, had violated the town zoning regulations because the use of the park for concerts was an illegal expansion of the hotel's preexisting, nonconforming use of the hotel property. The trial court, relying on *Crabtree Realty Co.* v. *Planning & Zoning Commission* (82 Conn. App. 559), granted the plaintiffs' request for a permanent injunction. The trial court reasoned that, because the hotel could not host the concerts on the hotel property without illegally expanding that property's nonconforming use, it could not host the concerts on the grassy strip in the park without also violating the use restrictions applicable to the hotel property. The defendants appealed to the Appellate Court, which reversed the trial court's judgment, concluding, inter alia, that the trial court had improperly considered the restrictions applicable to the hotel property in evaluating the legality of the hotel's use of the grassy strip to host the concerts. The Appellate Court determined that the permitted uses of the grassy strip included all of the permitted uses of a park under the applicable zoning regulations, including free outdoor concerts. On the granting of certification, the plaintiffs appealed to this court. *Held*:

1. The plaintiffs could not prevail on their claim that the Appellate Court had improperly applied plenary review to the trial court's determination that the hotel's use of the grassy strip of land in the park illegally expanded the hotel's nonconforming use of the hotel property: the trial court's determination was predicated on the application of an incorrect legal standard, as *Crabtree Realty Co.* was not persuasive authority,

and, even if it were, it did not support the trial court's determination, which ostensibly was based on a theory that the defendants' hosting of the concerts, in contributing to the hotel's business, annexed the grassy strip to the hotel; accordingly, because the trial court's factual findings were predicated on a misapprehension of the law, the court did not make the requisite findings necessary to conclude that the hosting of the concerts on the grassy strip violated the town zoning regulations, and the court's decision to grant the permanent injunction could not stand.

2. There was no merit to the plaintiffs' claims that the Appellate Court misapplied the actual use doctrine in concluding that the concerts were a permitted use of the park and that the defendants were required to prove that the park was actually used for concerts prior to the enactment of the special exception requirement in 1979; the Appellate Court correctly determined that the park was irrevocably and actually committed to its use as a park prior to the 1979 enactment of the special exception requirement and that the defendants' use of the park to host free concerts was within the bounds of the permissible uses of the park, as defined in the town zoning regulations.

3. The plaintiffs could not prevail on their claim that the Appellate Court incorrectly concluded that the concerts were permitted under the town zoning regulation that limits the use of parks to active and passive recreational activities insofar as the trial court unequivocally found that the concerts, although free, were commercial rather than recreational in nature: the commercial nature of the concerts was irrelevant to the legal determination regarding the permissible uses of the park, and the trial court's focus on that issue was misguided; moreover, the trial court's analysis improperly made the permissibility of hosting a concert in the park turn on the subjective intent of the host, in violation of the zoning principle that zoning may be used only to regulate the use of land, not the user.

Argued February 22, 2021—officially released January 5, 2022*

*Procedural History*

Action seeking, inter alia, a permanent injunction prohibiting the named defendant et al. from hosting a certain concert series, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Ecker*, *J.*; judgment for the named plaintiff et al., from which the named defendant et al. appealed to the Appellate Court, *Alvord*, *Moll* and *Bishop*, *Js.*, which reversed the trial court's judgment

* January 5, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

and remanded the case with direction to deny the plaintiffs' request for a permanent injunction, and the named plaintiff et al., on the granting of certification, appealed to this court. *Affirmed.*

*Scott T. Garosshen*, with whom was *Karen L. Dowd*, for the appellants (named plaintiff et al.).

*Damian K. Gunningsmith*, with whom were *David S. Hardy* and, on the brief, *Drew J. Cunningham*, for the appellees (named defendant et al.).

*Opinion*

KELLER, J. The plaintiffs Cecilia Pfister, Margaret P. Carbajal, Katherine Spence, Emile J. Geisenheimer, Susan F. Geisenheimer, Henry L. Platt, Douglas J. Crowley, and 33 MBW, LLC,[1] appeal from the judgment of the Appellate Court reversing the judgment of the trial court, which granted the plaintiffs' request for a permanent injunction prohibiting the defendants Madison Beach Hotel, LLC, and Madison Beach Hotel of Florida, LLC,[2] from hosting a summer concert series at a public park adjacent to the Madison Beach Hotel (hotel). The plaintiffs claim that the Appellate Court incorrectly concluded that the trial court had abused its discretion in granting the injunction because the concerts do not violate the Madison zoning regulations. We disagree and, accordingly, affirm the judgment of the Appellate Court.

[1] Schutt Realty, LLC, was a named plaintiff in this action but subsequently withdrew its claims. We therefore refer in this opinion to Pfister, Carbajal, Spence, Emile J. Geisenheimer, Susan F. Geisenheimer, Platt, Crowley, and 33 MBW, LLC, as the plaintiffs.

[2] The town of Madison also was named as a defendant in this action, but the trial court dismissed the plaintiffs' claims against it for failure to exhaust administrative remedies. The plaintiffs did not appeal that ruling to the Appellate Court, and, as a result, the town of Madison did not participate in that appeal and is not a participant in this appeal. We therefore refer in this opinion to Madison Beach Hotel, LLC, and Madison Beach Hotel of Florida, LLC, as the defendants and individually by name when appropriate.

The opinion of the Appellate Court sets forth the following relevant facts and procedural history. "Madison Beach Hotel, LLC, is the owner of the [hotel] and the real property on which the hotel is situated, 86 and 88 West Wharf Road in Madison (hotel property). Madison Beach Hotel of Florida, LLC, is the operating entity for the hotel. The hotel sits in an R-5 [district].[3] The hotel property has existed in Madison, albeit under different management, since before the adoption of the town's zoning regulatory scheme on April 10, 1953. Accordingly, the hotel's operation as a hotel and restaurant, which otherwise is not a permitted use in the residential zone in which it sits, was grandfathered as a preexisting nonconforming use.[4]

"In 2006, Madison Beach Hotel, LLC, purchased the hotel property and, thereafter, the hotel began operating as it exists today. Prior to this change in ownership, previous owners of the hotel property had received approval for a number of individual variances pertinent to the property to allow for, among other things, the hotel restaurant to operate year-round instead of . . . seasonally, and for renovations to expand the hotel size, to reduce the number of guest rooms, and to raise the roof. In 2008, in order to address enforcement difficul-

[3] "An R-5 district is a residential zoning district established by the Madison zoning regulations. The purpose of all residential zoning districts, according to the zoning regulations, is to 'set aside and protect areas to be used primarily for single family dwellings. It is intended that all uses permitted [in residential districts] be compatible with single family development . . . .' Madison Zoning Regs., § 3.1." *Pfister* v. *Madison Beach Hotel, LLC*, 197 Conn. App. 326, 329 n.2, 232 A.3d 52 (2020).

[4] "Under the Madison zoning regulations, a nonconforming use is defined as 'a [u]se of land, [b]uilding or [p]remises which is not a [u]se permitted by these [r]egulations for the district in which such land, [b]uilding or [p]remises is situated." Madison Zoning Regs., § 19. The zoning regulations also specify that '[a]ny non-conforming use or building lawfully existing at the time of the adoption of these regulations . . . may be continued . . . subject to the following regulations . . . [n]o non-conforming use shall be extended or expanded.' Id., §§ 12 and 12.3." *Pfister* v. *Madison Beach Hotel, LLC*, 197 Conn. App. 326, 329 n.3, 232 A.3d 52 (2020).

ties created by the numerous piecemeal variances that, at that time, were still applicable to the hotel property, the hotel applied for what it called a 'comprehensive variance,' which it claimed would, thereafter, be the sole authority governing the legal uses of the hotel property.

"After a public hearing, the Madison Zoning Board of Appeals (board) approved the hotel's variance application. The terms of this variance, as approved by the board, both expanded and reduced nonconformities that existed on the hotel property.[5] Furthermore, the variance placed 'additional conditions and modifications' on the hotel's operation and use of the hotel property. For example, the variance limited amplification of outdoor music played on the hotel property by prohibiting any amplification louder than that which can be plainly heard within fifty feet of the hotel property.

"In 2012, the hotel began sponsoring a summer concert series, known as the Grassy Strip Summer Concert Series (concert series), which consisted of one concert per week for approximately ten weeks each summer, with each concert lasting from 7 p.m. until approximately 9:30 p.m. In sponsoring the concert series, the hotel would schedule, organize, fund, and host the concerts on a strip of land located immediately adjacent to the hotel, known as the 'Grassy Strip.' The Grassy Strip is part of a town owned parcel of land called West Wharf Beach Park. Since 1896, the Grassy Strip and West Wharf Beach Park have been owned exclusively by the town and have been used as a park since prior

[5] "The variance certificate states in relevant part: 'The proposal would provide zoning-related benefits in that it would reduce nonconformities relating to coverage and to setbacks . . . reduce the number of hotel guest rooms and restaurant/lounge/bar seats, and remove unauthorized encroachments onto [t]own property. . . . Approval of the proposal as presented, and as modified by the conditions established herein, would provide a comprehensive means to defining and controlling the existing commercial use in a residential neighborhood.' " *Pfister* v. *Madison Beach Hotel, LLC*, 197 Conn. App. 326, 330 n.4, 232 A.3d 52 (2020).

to the enactment of the Madison zoning regulations. Like the hotel, the park is located in a residential zone . . . .'' (Footnotes in original.) *Pfister* v. *Madison Beach Hotel, LLC*, 197 Conn. App. 326, 328–30, 232 A.3d 52 (2020). ''As of 1974, parks were a permitted use of property in residential zones under the Madison zoning regulations. [In 1979], the zoning code [was] revised to add the requirement that, in order to establish a park in a residential zone, the land owner must obtain a special exception.[6] Because West Wharf Beach Park existed in the [residential] zone prior to the special exception requirement, it was grandfathered into this requirement [as a preexisting nonconforming use].'' (Footnote added.) Id., 330 n.5. Despite the special exception requirement, it remains a permitted use within the zone. See Madison Zoning Regs., §§ 3.11 and 4.1.

''The Grassy Strip is available for recreational use by any taxpaying citizen of Madison who files the appropriate facilities request form and pays the corresponding fees.[7] The evidence adduced at trial reveals that, each summer, the hotel obtains the requisite permits from the town and pays the requisite fees in order to

[6] Section 4.1 of the Madison Zoning Regulations provides in relevant part: ''Special [e]xception uses are those permitted by regulations as appropriate, harmonious, and desirable within a district so long as certain criteria are met. . . .''

[7] ''The Madison zoning regulations define a park as 'a tract of land reserved for active or passive recreational purposes and open to the public.' Madison Zoning Regs., § 19.

''The Beach and Recreation Commission is in charge of issuing permits for use of the town owned West Wharf Beach Park. The Administrative Procedures for the Use of Recreation Facilities states: 'Taxpaying Madison residents and [Madison] business owners (not employees of) are eligible to utilize the [town's recreation facilities, of which West Wharf Beach Park is one]. Permission for the use of all Beach and Recreation Department facilities must be obtained from the [b]each and [r]ecreation [d]irector . . . . All requests are to be submitted in writing on a 'Facility Request Form' with a live signature . . . by a Madison resident.' Rental fees and deposits are also required.'' *Pfister* v. *Madison Beach Hotel, LLC*, supra, 197 Conn. App. 331 n.6.

hold the concerts on the Grassy Strip. The hotel secures the town's showmobile,[8] uses its own electricity, hires and pays the bands, reimburses the town for providing police officers to direct traffic, and advertises the concert series to the public. Although the concerts take place on the Grassy Strip, the hotel also utilizes portable bars located on the porches of the hotel to serve beverages, and the hotel restaurant is open for business during the concerts. Accordingly, patrons who attend the concerts often travel back and forth between the hotel property and the Grassy Strip during the concert to buy food and beverages, and many attendees choose to watch the concert from the hotel's balconies and railings. Although attendance at the concerts has been estimated to average around 200 patrons per show, the evidence revealed that, for at least one of the concerts held in 2017, attendance reached close to 1000 attendees.

"Since 2012, there have been a number of complaints regarding the noise and the traffic created by the concert series, which the town and the hotel have worked together to alleviate. On June 19, 2015, the plaintiffs filed a complaint in the trial court against the defendants, alleging, among other things, that the defendants had violated § 12.3 of the [Madison] [Z]oning [R]egulations . . . by hosting outdoor concerts and, therefore, illegally extending and expanding nonpreexisting, nonconforming uses of the hotel property.[9] The defendants

[8] "In its memorandum of decision, the [trial] court found that '[t]he showmobile is a long rectangular trailer with retractable panels. It can be transformed hydraulically into an attractive, functional, open sided stage. The showmobile used by the hotel for the . . . [c]oncert [s]eries was purchased by the town in 2015. The hotel pays the town a rental fee for use of the showmobile on concert nights.' " *Pfister* v. *Madison Beach Hotel, LLC*, supra, 197 Conn. App. 331 n.7.

[9] "Section 12.3 of the Madison [Z]oning [R]egulations provides that '[n]o nonconforming use shall be extended or expanded.' " *Pfister* v. *Madison Beach Hotel, LLC*, supra, 197 Conn. App. 332 n.8.

disagreed, arguing that the use restrictions imposed on the hotel property have no impact on their activities on the Grassy Strip. After a bench trial, the [trial] court rendered judgment [in favor of] the plaintiffs, granting their request for a permanent injunction that prohibits the defendants from organizing, producing, promoting, or sponsoring the . . . [c]oncert [s]eries . . . . "[10] (Footnotes in original; internal quotation marks omitted.) *Pfister* v. *Madison Beach Hotel, LLC*, supra, 197 Conn. App. 331–32.

In so doing, the trial court reasoned that, because the hotel could not host the concert series on the hotel property without illegally expanding that property's nonconforming use, it could not host the concert series on the Grassy Strip without also violating the use restrictions applicable to the hotel. Specifically, the court stated: "Once the concert series is seen for what it is—an activity produced by the hotel as part of its business operations—the legal analysis is relatively straightforward. The activity is illegal because it goes far beyond the preexisting, nonconforming use [of the hotel property] permitted under [§] 12.3 of the Madison Zoning Regulations . . . . The fact that the hotel has made arrangements . . . to locate the musical performance . . . on an adjacent property does not change the undeniable reality that the concert series substantially extends and expands the hotel's nonconforming use of [the hotel] property. Physically and operationally, the concerts are an integral component of the business activity at the hotel in virtually every respect. . . . In the same way that the hotel could not evade the illegality by purchasing or leasing the Grassy Strip from the town to hold concerts, it also cannot temporarily lease or

[10] The trial court denied all other injunctive relief sought by the plaintiffs and dismissed the plaintiffs' claim for a declaratory judgment as to the enforceability of the variance with respect to certain hotel operations and functions.

license [it] for the purpose, and with the effect, of enlarging its business operations; an annexation of adjacent land that enlarges the hotel's nonconforming use is illegal in the absence of a variance or zone change." (Citation omitted.) The trial court cited *Crabtree Realty Co.* v. *Planning & Zoning Commission*, 82 Conn. App. 559, 845 A.2d 447, cert. denied, 269 Conn. 911, 852 A.2d 739 (2004), as legal support for the theory that the hotel's use of the Grassy Strip effectively annexed that property to the hotel, thus permitting the trial court to treat the two properties as one for purposes of its analysis.

On appeal to the Appellate Court, the defendants claimed that the trial court incorrectly concluded that (1) "the use restrictions applicable to the hotel property are also binding on the actions taken by the hotel on the Grassy Strip," and (2) *Crabtree Realty Co.* supported that determination.[11] *Pfister* v. *Madison Beach Hotel, LLC*, supra, 197 Conn. App. 332–33. The Appellate Court agreed with both claims. See id., 333. Applying plenary review to the trial court's decision to grant the permanent injunction, the Appellate Court explained that the decision violated a fundamental tenet of land use law, namely, that "zoning power may only be used to regulate the use, not the user of the land . . . ." (Citation omitted; internal quotation marks omitted.) Id., 334, quoting *Reid* v. *Zoning Board of Appeals*, 235 Conn.

[11] "The defendants [also claimed] that the [trial] court's permanent injunction prohibiting them from organizing, producing, promoting, or sponsoring the concert series constitute[d] a violation of their rights under the first and fourteenth amendments to the United States constitution." *Pfister* v. *Madison Beach Hotel, LLC*, supra, 197 Conn. App. 333 n.12. Because the Appellate Court was able to resolve the appeal on the basis of the Madison zoning regulations and general principles of land use law, it declined to reach the merits of this claim. Id. On appeal to this court, the defendants renew their constitutional claim as an alternative basis for affirming the Appellate Court's judgment. Because we too resolve this appeal on the basis of the Madison zoning regulations and land use principles, we need not, and therefore do not, address this claim.

850, 857, 670 A.2d 1271 (1996). Specifically, the Appellate Court stated that the trial court "erred in considering the restrictions applicable to the hotel property when evaluating the legality of the hotel's use of the Grassy Strip. In its memorandum of decision, the [trial] court cites no basis, either in the [Madison] zoning regulations or in precedent, to justify disregarding the use-user distinction that serves as a cornerstone of land use law." *Pfister* v. *Madison Beach Hotel, LLC*, supra, 341.

The Appellate Court further stated that "the proper inquiry for determining the legality of a use of a parcel of land is that set forth by the defendants: (1) What is the parcel being used? (2) What are the permissible uses of the parcel at issue under the law? (3) Is the parcel at issue being used for a permissible use under the law?" Id. Applying this analytical framework, the Appellate Court determined that the parcel being used was the Grassy Strip and that the permitted uses of that parcel include all of the permitted uses of a park under the Madison zoning regulations, including free outdoor concerts. Id., 343.

In reaching its determination, the Appellate Court rejected the plaintiffs' contention that *Crabtree Realty Co.* permitted the court to treat the Grassy Strip as hotel controlled property for purposes of determining whether the hotel's use of the park unlawfully expanded the hotel's nonconforming use of the hotel property. Id., 336–37. The Appellate Court explained that "*Crabtree Realty Co.* is readily distinguishable from the present case because the second parcel in *Crabtree Realty Co.* was a vacant lot of private property that was exclusively leased by the owner of the first parcel. The court in *Crabtree Realty Co.* stated that the [planning and zoning] commission in that case was entitled to deny the plaintiff's [site plan] application because the proposed use of [the vacant second parcel] would have added

new land to the plaintiff's nonconforming use of [its own parcel]. . . . The court in *Crabtree Realty Co.* also stated that the trial court properly upheld the [planning and zoning] commission's determination that the use would result in an illegal expansion of a nonconforming use because the proposed use of [the vacant second parcel] would result in a physical change of the property under the plaintiff's control . . . .

"In the present case, the second parcel at issue, the Grassy Strip, is not a vacant private lot leased [or otherwise controlled] by the defendants for future use but, instead, is a public tract of land operating as a park and owned by the town.[12] Although the hotel has received permits to use the Grassy Strip, these licenses granted to the hotel by the Madison Beach and Recreation Department do not grant the hotel the same possessory interest in the Grassy Strip as the lease in *Crabtree Realty Co.* granted to that landowner." (Citations omitted; emphasis omitted; footnote in original; internal quotation marks omitted.) Id., 337–38. The Appellate Court additionally explained that, "[c]ontrary to the conclusion of the [trial] court, the hotel's use of its own resources to support and sponsor a free concert series

[12] "From June 13, 2012, to June 13, 2013, the defendants had a reciprocal license agreement with the town during which time the town licensed the Grassy Strip . . . to the hotel. Throughout the trial court proceedings in this case, this agreement was referred to as a lease. The agreement, however, functioned as a license and did not convey actual ownership of the Grassy Strip to the hotel. [A] license in real property is a mere privilege to act on the land of another, which does not produce an interest in the property. . . . [It] does not convey a possessory interest in land . . . . *Murphy, Inc.* v. *Remodeling, Etc., Inc.*, 62 Conn. App. 517, 522, 772 A.2d 154, cert. denied, 256 Conn. 916, 773 A.2d 945 (2001). The agreement between the hotel and the town was for a term of one year and did not terminate the town's ongoing ownership of the Grassy Strip. In fact, the agreement itself expressly stated that the town retained ownership in the land and merely granted exclusive rights of use to the hotel for a set term. The agreement terminated in 2013 [before the commencement of this action] and, accordingly, is no longer operative." (Internal quotation marks omitted.) *Pfister* v. *Madison Beach Hotel, LLC*, supra, 197 Conn. App. 338 n.14.

does not transform the Grassy Strip into part of the [hotel] property; nor does it expand the hotel's use of [the hotel] property impermissibly." Id., 339.

Lastly, the Appellate Court rejected the plaintiffs' contention that, "because there is no evidence of concerts having ever occurred on the Grassy Strip, their occurrence improperly expands the nonconforming use status applicable to the park." Id., 342. The court explained that "the 'actual use' requirement for qualifying as a nonconforming use refers to the use of the parcel as a whole in the manner intended to be grandfathered"; (emphasis omitted) id.; and that it is undisputed that the West Wharf Beach Park was intended to be used, and actually was used, as a park at the time of the change in the Madison zoning regulations, resulting in its nonconformity. Id., 342–43. The court further stated: "It makes no difference whether a particular recreational use—in this case, concerts—has occurred in this particular park before, because [the] definition of a 'park' [in the Madison zoning regulations] has no enumerated list of permissible activities. The Madison zoning regulations define a park only as 'a tract of land reserved for active or passive recreational purposes and open to the public.' Madison Zoning Regs., § 19. Because the West Wharf Beach Park has been reserved for active and passive recreational purposes and open to the public since prior to 1953, the use of the park to host a free public concert series is well within the bounds of the park's nonconforming use. The property's classification as a park, and not merely the actual prior uses of the park, is what was grandfathered into the zoning scheme." (Emphasis omitted; footnote omitted.) *Pfister* v. *Madison Beach Hotel, LLC*, supra, 197 Conn. App. 343.

This court granted the plaintiffs' petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court properly apply plenary review to

the trial court's judgment?" (2) "Did the Appellate Court properly apply the 'actual use' doctrine in relation to the nonconforming use at issue in this case?" And (3) "[d]id the Appellate Court correctly conclude that a zoning regulation that limits use of a park to 'recreational purposes' allowed the concerts at issue in this case to occur?" *Pfister* v. *Madison Beach Hotel, LLC*, 335 Conn. 923, 923–24, 233 A.3d 1090 (2020). We answer each question in the affirmative.

I

We begin with the plaintiffs' claim that the Appellate Court improperly applied plenary review to the trial court's finding that the hotel's use of the Grassy Strip illegally expanded the hotel's nonconforming use of the hotel property. The plaintiffs argue, inter alia, that the trial court's determination as to whether an illegal expansion of a nonconforming use has occurred is a question of fact reviewable only for clear error. The plaintiffs further argue that the Appellate Court compounded its error by applying plenary review to the trial court's finding regarding on which property the illegal activity occurred. Finally, the plaintiffs argue that the Appellate Court incorrectly determined that *Crabtree Realty Co.* does not support the trial court's decision to treat the Grassy Strip as hotel property for purposes of determining whether the hotel violated the nonconforming use restrictions applicable to the hotel. The plaintiffs argue, contrary to the determination of the Appellate Court, that *Crabtree Realty Co.* "held that . . . a trier of fact may consider the combined effects of activities on two lots when deciding if a new activity illegally expands a nonconforming use [on one of the lots]."

The defendants respond that the Appellate Court properly applied plenary review to the trial court's determination that the hotel's use of the Grassy Strip

constituted an illegal expansion of the hotel's nonconformity because that determination was predicated on an erroneous view of the law, namely, that *Crabtree Realty Co.* supported treating the Grassy Strip as an extension of the hotel property for purposes of its analysis. The defendants maintain that whether the trial court applied the correct legal standard is a quintessential question of law subject to de novo review. The defendants further maintain that, to the extent that this court disagrees with the Appellate Court that *Crabtree Realty Co.* is not controlling, this court should overrule *Crabtree Realty Co.* because (1) "there is and was no support for the 'combined effects' analysis" employed therein, (2) a more recent decision of the Appellate Court, *Thomas* v. *Planning & Zoning Commission*, 98 Conn. App. 742, 911 A.2d 1129 (2006), rejected that very analysis, (3) sister state courts uniformly reject that analysis, and (4) *Crabtree Realty Co.* "is contrary to the principle that zoning power is concerned with uses not users of land, and it creates substantial uncertainty in zoning law."

The following legal principles guide our analysis of the plaintiffs' claim. "A party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate remedy at law. . . . A prayer for injunctive relief is addressed to the sound discretion of the court and the court's ruling can be reviewed only for the purpose of determining whether the decision was based on an erroneous statement of law or an abuse of discretion." (Internal quotation marks omitted.) *Wallingford* v. *Werbiski*, 274 Conn. 483, 494, 877 A.2d 749 (2005).

"Determining the appropriate standard of review is a question of law, and as a result, it is subject to plenary review." *Crews* v. *Crews*, 295 Conn. 153, 161, 989 A.2d 1060 (2010). We thus exercise plenary review of the Appellate Court's determination to apply a plenary stan-

dard of review to the trial court's decision in the present case. It is axiomatic that whether the trial court applied an incorrect legal standard in deciding whether the hotel's concert series violated the Madison zoning regulations is also a question of law subject to this court's plenary review. See, e.g., *Hartford Courant Co.* v. *Freedom of Information Commission*, 261 Conn. 86, 96–97, 801 A.2d 759 (2002).

In concluding that the hotel illegally had expanded the nonconforming use of the hotel property, the trial court cited just one case, *Crabtree Realty Co.*, which it determined stood for the proposition that it properly could consider the use restrictions applicable to the hotel in determining whether the hotel's use of the Grassy Strip violated those restrictions, ostensibly under a theory that the concert series, in boosting the business of the hotel, annexed the Grassy Strip to the hotel. The plaintiffs similarly rely on *Crabtree Realty Co.* for this proposition, citing no other case. We conclude that *Crabtree Realty Co.* is not persuasive authority and that, even if it were, we agree with the Appellate Court that it does not support the trial court's determination. Because the trial court's factual findings were predicated on a misapprehension of the law, it did not make the requisite findings necessary to conclude that the concert series violated the Madison zoning regulations.[13] Accordingly, the trial court's decision to grant the permanent injunction cannot stand. See, e.g., *Francis* v. *Fonfara*, 303 Conn. 292, 301, 33 A.3d 185 (2012) ("misapplication of the law . . . constitutes an abuse

[13] In part III of this opinion, we consider and reject the plaintiffs' contention that the trial court's finding that the commercial nature of the concert series violated the Madison zoning regulations applicable to West Wharf Beach Park is an independent basis for sustaining the trial court's decision to grant the permanent injunction and that the Appellate Court incorrectly concluded that the trial court's analysis in this respect was mere dictum not supported by any case law, regulation, or legal analysis. See *Pfister* v. *Madison Beach Hotel, LLC*, supra, 197 Conn. App. 340 n.16.

of discretion"); *Milford Paintball, LLC* v. *Wampus Milford Associates, LLC*, 117 Conn. App. 86, 92, 978 A.2d 118 (2009) (remanding case for new trial when trial court's findings were dependent on erroneous view of the law).

In *Crabtree Realty Co.*, an automobile dealership leased an adjacent parcel of land for the purpose of constructing twenty additional parking spaces for its customers and employees. *Crabtree Realty Co.* v. *Planning & Zoning Commission*, supra, 82 Conn. App. 561. Both properties—the dealership property and the adjacent parcel—were located in a general business district in which off-street parking was a permitted use, but an automobile dealership was not. Id., 563. The defendant planning and zoning commission denied the dealership's site plan application on the ground that "construction of parking spaces on adjoining property would enlarge rather than intensify [the dealership's] existing nonconforming use of its own property." Id., 562. After the trial court affirmed the planning and zoning commission's decision, the dealership appealed to the Appellate Court, claiming that, under *Zachs* v. *Zoning Board of Appeals*, 218 Conn. 324, 589 A.2d 351 (1991),[14] the planning and zoning commission incorrectly had determined that the proposed parking lot constituted an illegal expansion rather than a permissible intensification of the dealership's nonconforming use of the dealership property.[15] *Crabtree Realty Co.* v. *Planning &*

[14] In *Zachs*, this court held that, in deciding whether an activity illegally expands the scope of a nonconforming use, consideration should be given to three factors: "(1) the extent to which the current use reflects the nature and purpose of the original use; (2) any differences in the character, nature and kind of use involved; and (3) any substantial difference in effect upon the neighborhood resulting from differences in the activities conducted on the property." *Zachs* v. *Zoning Board of Appeals*, supra, 218 Conn. 332.

[15] "We have previously held that a mere increase in the amount of business done pursuant to a nonconforming use is not an illegal expansion of the original use. *Helicopter Associates, Inc.* v. *Stamford*, 201 Conn. 700, 716, 519 A.2d 49 (1986); *Guilford* v. *Landon*, 146 Conn. 178, 183, 148 A.2d 551 (1959). There must be a change in the character of the existing use in order

*Zoning Commission*, supra, 82 Conn. App. 561–63. Acknowledging that "the case law governing expansion of nonconforming uses is not entirely consistent"; id., 564; the court concluded that "this inconsistency can best be addressed by heeding the oft-repeated observation that [t]he legality of an extension of a nonconforming use is essentially a question of fact. . . .

"From this vantage point, [this court agreed] with the trial court that the [planning and zoning] commission was entitled to deny the [dealership's] application because the proposed use of [the adjacent parcel] would have added new land to the [dealership's] nonconforming use of [its own property]." (Citations omitted; internal quotation marks omitted.) Id. The court further reasoned that, "[b]ecause the proposed use of [the adjacent parcel] would result in a physical change of the property under the [dealership's] control, the [planning and zoning] commission reasonably could decide that granting the [dealership's] proposed use of [of the adjacent parcel] would result in the illegal expansion of its preexisting nonconforming use." Id., 565–66.

In reaching its decision, the court in *Crabtree Realty Co.* relied on a line of cases in which it was held that the addition of new property to a nonconforming property expanded the existing nonconformity. See id., 564. In the present case, however, as the Appellate Court explained, under no reasonable construction of the law can it be said that the hotel's periodic use of the Grassy Strip, under a permit granted to it by the town,[16] added

to bring it within the prohibition of the zoning ordinance." (Internal quotation marks omitted.) *Zachs* v. *Zoning Board of Appeals*, supra, 218 Conn. 331.

[16] As previously indicated; see footnote 12 of this opinion; the town licensed the Grassy Strip to the hotel from June 13, 2012, to June 13, 2013. The concerts at issue in this appeal, however, were held pursuant to a town issued permit allowing the hotel to utilize the park for a specified number of hours on the day of the concerts in accordance with all rules and regulations applicable to such use.

to the hotel property within the meaning of those cases.[17] See *Pfister* v. *Madison Beach Hotel, LLC*, supra, 197 Conn. App. 338–39; see also, e.g., *Clean Corp.* v. *Foston*, 33 Conn. App. 197, 203, 634 A.2d 1200 (1993) ("[u]nlike a lease, a license in real property is a mere privilege to act on the land of another, which does not produce an interest in the property"). Accordingly, we find no merit in the plaintiffs' contention that *Crabtree Realty Co.* "dealt with the precise issue here" and "held that, as part of the factual *Zachs* test, a trier of fact may consider the combined effects of activities on two lots when deciding if a new activity illegally expands a nonconforming use [on one of the lots]." The court in *Crabtree Realty Co.* held no such thing. In deciding whether the planning and zoning commission properly had determined that the new parking lot illegally expanded the dealership's nonconforming use of its own property, the Appellate Court accepted the planning and zoning commission's finding that the newly leased lot added to the property under the dealership's

[17] In *Crabtree Realty Co.*, the court cited *Hyatt* v. *Zoning Board of Appeals*, 163 Conn. 379, 383–84, 311 A.2d 77 (1972), and *Raffaele* v. *Planning & Zoning Board of Appeals*, 157 Conn. 454, 457, 462, 254 A.2d 868 (1969), as support for its conclusion that the planning and zoning commission properly had determined that the addition of the adjacent parcel to the dealership property constituted an illegal expansion of the dealership's nonconforming use of the dealership property. See *Crabtree Realty Co.* v. *Planning & Zoning Commission*, supra, 82 Conn. App. 564–66. Both of those cases, however, unlike the present case, involved an actual physical enlargement of the aspect of the use or structure that was nonconforming. Specifically, in *Hyatt*, a nonconforming grocery store sought to construct an entirely new store on its property to be used in addition to the existing nonconforming store. See *Hyatt* v. *Zoning Board of Appeals*, supra, 381. In *Raffaele*, a nonconforming country club sought to extend an existing nonconforming parking lot "by constructing retaining walls of rock in what is now Long Island Sound and filling behind such retaining walls"; (internal quotation marks omitted) *Raffaele* v. *Planning & Zoning Board of Appeals*, supra, 456; so that "the land reclaimed by filling behind the proposed retaining walls would enlarge and become a part of the club's land . . . ." Id., 457. Suffice it to say that these cases bear no resemblance to the present case and do not support the trial court's conclusion that the Grassy Strip could be treated as hotel property for purposes of its nonconforming use analysis.

control and, on the basis of that finding, concluded that the planning and zoning commission reasonably could have found that the proposed parking lot would illegally expand the nonconforming use of that property. See *Crabtree Realty Co.* v. *Planning & Zoning Commission*, supra, 82 Conn. App. 564 ("we agree with the trial court that the [planning and zoning] commission was entitled to deny the [dealership's site plan] application because the proposed use of [the adjacent parcel] *would have added new land to the* [*dealership's*] *nonconforming use*" (emphasis added)); id., 565–66. ("[b]ecause the proposed use of [the adjacent parcel] *would result in a physical change of the property under the* [*dealership's*] *control*, the [planning and zoning] commission reasonably could decide that granting the [dealership's] proposed use of [the adjacent parcel] would result in the illegal expansion of its preexisting nonconforming use" (emphasis added)).

Even if *Crabtree Realty Co.* were factually similar, however, it is not persuasive authority. As the defendants argue, the dealership's sole contention in *Crabtree Realty Co.* was that the planning and zoning commission incorrectly determined, *as a factual matter*, that the proposed parking lot constituted an illegal expansion rather than a permissible intensification of the nonconforming dealership property.[18] See id., 562. As a result, the Appellate Court was not required to—nor did it—consider whether the planning and zoning commission had the legal authority to deny a site plan application for a permitted use (parking) merely because it would be used in connection with a nonconforming use. Two years later, however, in *Thomas* v. *Planning & Zoning*

[18] See *Zachs* v. *Zoning Board of Appeals*, supra, 218 Conn. 331 (whether nonconforming use has been illegally expanded is question of fact for fact finder); id. ("[w]e have previously held that a mere increase in the amount of business done pursuant to a nonconforming use is not an illegal expansion of the original use" (internal quotation marks omitted)).

*Commission*, supra, 98 Conn. App. 748–51, the Appellate Court squarely addressed that question and concluded that a planning and zoning commission could not deny a permit for a permitted use on the ground that the permit was sought in connection with a nonconforming use.

The facts of *Thomas* are nearly identical to those of *Crabtree Realty Co*. In *Thomas*, a manufacturing company operating as a nonconforming business in a residential zoning district applied for permission to construct twenty parking spaces behind its manufacturing plant. Id., 744. An abutting landowner opposed the application on the ground that the proposed additional parking on the manufacturer's property would constitute an illegal expansion of the company's nonconforming use of that property, even though off-street parking was a permitted use in the district. Id. Specifically, the landowner argued that, "because the parking lot is used in connection with a nonconforming manufacturing use on the property, the use of the parking lot itself is nonconforming." Id., 748. After the defendant planning and zoning commission approved the application, the landowner appealed to the trial court, which dismissed the appeal. Id., 744. The Appellate Court subsequently affirmed the trial court's judgment, concluding that the planning and zoning commission properly had approved the application because the proposed parking lot was a permitted use within the district. Id., 751; see id., 750 ("The [landowner's] argument fails for a number of reasons. . . . [T]he existing parking lot conforms to the town's [zoning] regulations; it is not a nonconforming use. The expansion of the existing parking lot is not an expansion of a nonconforming use and, consequently, [the applicable zoning regulation, which prohibits the expansion of nonconforming uses], does not apply."); see also *Pfister* v. *Madison Beach Hotel, LLC*, supra, 197 Conn. App. 335 n.13 ("[i]n *Thomas*, the court

held that the [zoning] regulation governing the illegality of expanding nonconformities was inapplicable to an alteration on a property that constitutes a permitted use within the zoning code").

We are persuaded by the reasoning in *Thomas*, which accords with several bedrock principles of land use law, including that "[a] permitted use is not a nonconforming use"; *Melody* v. *Zoning Board of Appeals*, 158 Conn. 516, 519, 264 A.2d 572 (1969); "[z]oning is concerned with the use of specific existing buildings and lots, and not primarily with their ownership"; *Abbadessa* v. *Board of Zoning Appeals*, 134 Conn. 28, 32, 54 A.2d 675 (1947); and "[t]he designation of a particular use of property as a permitted use establishes a conclusive presumption that such use does not adversely affect the district and precludes further inquiry into its effect on traffic, municipal services, property values, or the general harmony of the district." *Beit Havurah* v. *Zoning Board of Appeals*, 177 Conn. 440, 443, 418 A.2d 82 (1979); see also R. Fuller, 9B Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 52:1, p. 220 ("[t]he prohibition of expansion of nonconforming uses applies only to the aspect of the use or structure which is nonconforming"). We also agree with the Appellate Court that "the import of [*Thomas'*] holding is closer to the issue presented to us . . . than that of *Crabtree Realty Co.*"; *Pfister* v. *Madison Beach Hotel, LLC*, *supra*, 197 Conn. App. 335 n.13; in that both cases involve whether the owner of a nonconforming property has the same right as any other taxpaying citizen who files the appropriate application to utilize land for a permitted use. The plaintiffs' attempt to distinguish *Thomas* is unavailing. Specifically, the plaintiffs argue that *Thomas* is inapplicable because it is a "conforming use case" involving a request to undertake a permitted activity on a nonconforming property, whereas the present case involves a request to undertake a prohibited

activity—the concert series—on a nonconforming property. (Emphasis omitted.) The plaintiffs' argument is unpersuasive for the simple reason that it assumes the very facts at issue in parts II and III of this opinion, namely, whether the hotel's concert series is a permitted activity in West Wharf Beach Park. For the reasons set forth hereinafter, we conclude that it is.

## II

The plaintiffs claim that the concerts are not a permitted activity and that the Appellate Court misapplied the "actual use" doctrine, an element of the test for determining the existence of a nonconforming use, in concluding that it was. Specifically, the plaintiffs argue that "the Appellate Court wrongly held that these concerts could continue despite no evidence that concerts of any kind had actually occurred on the nonconforming Grassy Strip prior to the zone change, never mind commercial concerts." (Emphasis omitted.) Although the plaintiffs concede that parks in Madison were used for concerts prior to the adoption of the special permit requirement, and continue to be used for them to this day, they argue that the actual use doctrine required the defendants to prove that West Wharf Beach Park was actually used for concerts prior to 1979, which they failed to do.

The defendants respond, inter alia, that the plaintiffs' claim is predicated on a fundamental misunderstanding of the law governing nonconforming uses. Specifically, the defendants argue that, in all of the cases cited in the plaintiffs' appellate brief, the landowners were seeking to use their property in a manner categorically prohibited under the zoning regulations such that the courts were required to identify and delineate the precise scope of the nonconforming use being claimed and that, in the present case, by contrast, parks are not only a permitted use in a residential zone, but the Madison

zoning regulations specifically define the type of activities that may occur in them. The defendants maintain that, because concerts clearly fall within the scope of those permitted activities, there was no need for them to "catalogue each of the innumerable ways that the public has recreated in [West Wharf Beach Park] in the past to determine . . . the scope of [the] permissible uses of the park . . . ." We agree with the defendants.

"[T]he accepted policy of zoning . . . is to prevent the extension of nonconforming uses . . . and that it is the indisputable goal of zoning to reduce nonconforming to conforming uses with all the speed justice will tolerate. . . . Nevertheless, the rule concerning the continuance of a nonconforming use protects the right of a user to continue the same use of the property as it existed before the date of the adoption of the zoning regulations." (Citations omitted; internal quotation marks omitted.) *Helbig* v. *Zoning Commission*, 185 Conn. 294, 306, 440 A.2d 940 (1981). A nonconforming use has been defined as "an 'existing use' the continuance of which is authorized by the zoning regulations." *Melody* v. *Zoning Board of Appeals*, supra, 158 Conn. 519. We previously have held that "[t]o be a nonconforming use the use must be actual. It is not enough that it be a contemplated use [or] that the property was bought for the particular use. The property must be so utilized as to be irrevocably committed to that use." (Internal quotation marks omitted.) *Lebanon* v. *Woods*, 153 Conn. 182, 197, 215 A.2d 112 (1965). "[T]o be irrevocably committed to a particular use, there must have been a significant amount of preliminary or preparatory work done on the property prior to the enactment of the zoning regulations which unequivocally indicates that the property was going to be used for that particular purpose." *Karls* v. *Alexandra Realty Corp.*, 179 Conn. 390, 399, 426 A.2d 784 (1980).

We have also held that, "[f]or a use to be considered nonconforming under . . . Connecticut case law, [the] use must possess two characteristics. First, it must be lawful and second, it must be in existence at the time that the zoning regulation making the use nonconforming was enacted." (Emphasis omitted.) *Helicopter Associates, Inc.* v. *Stamford*, 201 Conn. 700, 712, 519 A.2d 49 (1986). "For there to be an existing use, premises must be so utilized as to be known in the neighborhood as employed for a given purpose. Such utilization combines two factors: (1) the adaptability of the land for the purpose; [and] (2) the employment of it within that purpose. . . . [W]e have unequivocally stated that neither the extent, quantity nor quality of the use is prescribed by the known in the neighborhood test." (Citations omitted; internal quotation marks omitted.) Id., 713. "[T]he party claiming the benefit of a nonconforming use . . . [bears] the burden of proving a valid nonconforming use in order to be entitled to use the property in a manner other than that permitted by the zoning regulations." *Cummings* v. *Tripp*, 204 Conn. 67, 82–83, 527 A.2d 230 (1987).

In the present case, not only are parks a permitted use in a residential zone by special exception; see *Burlington* v. *Jencik*, 168 Conn. 506, 509, 362 A.2d 1338 (1975) (explaining "the distinction among special permits, exceptions and variances" and noting that "[a] variance is authority extended to the owner to use his property in a manner forbidden by the zoning enactment, *while an exception allows him to put his property to a use which the enactment expressly permits* (emphasis added; internal quotation marks omitted)); 9B R. Fuller, supra, § 52:1, p. 220 ("[t]he prohibition of expansion of nonconforming uses applies only to the aspect of the use or structure which is nonconforming"); but the plaintiffs readily concede that West Wharf Beach Park was known in the neighborhood as a park

and was utilized as such prior to the enactment of the special permit requirement. The plaintiffs also concede that Madison parks historically were and continue to be used for holding outdoor concerts. Their sole contention is that, even if concerts are a permitted use of Madison parks generally, the actual use component of the nonconforming use test required the defendants to prove that concerts were actually held in West Wharf Beach Park prior to 1979.

As we have explained, however, to establish a valid nonconforming use, the party claiming it need only prove that the land was irrevocably committed to that use prior to the enactment of the zoning regulations. See *Karls* v. *Alexandra Realty Corp.*, supra, 179 Conn. 399. By this, it is merely meant that the party must prove that the claimed nonconformity was not merely contemplated but actually existed when the change in the zoning regulations occurred. See, e.g., *Sherman-Colonial Realty Corp.* v. *Goldsmith*, 155 Conn. 175, 183, 230 A.2d 568 (1967). Applying this principle in *Sherman-Colonial Realty Corp.*, this court concluded that the trial court correctly determined that the plaintiff landowners failed to establish that their land was irrevocably committed to use as a subdivision when "[t]here [was] nothing in the record to indicate that [they] actually used the property or expended any money in physically changing the nature of the undeveloped land [for that purpose] . . . ." Id. This court stated that "[t]he mere filing of maps for the subdivision of a parcel of real estate does not necessarily immunize the subject property from the operative effect of subsequent subdivision regulations. Otherwise, a property owner, by the process of map filing, could completely foreclose a zoning authority from ever taking any action with respect to the land included in the map, regardless of how urgent the need for regulation might be." (Internal quotation marks omitted.) Id.; see also *Corsino* v. *Grover*, 148 Conn. 299,

314, 170 A.2d 267 (1961) ("the filing of a map showing lots in a proposed [subdivision] cannot create a nonconforming use").

Similarly, in *Wallingford* v. *Roberts*, 145 Conn. 682, 146 A.2d 588 (1958), this court concluded that the trial court correctly determined that the defendant landowners had failed to establish that their land, located in a rural district, was actually used as a trailer park prior to the effective date of the zoning regulations. Id., 684. This court explained that the evidence established that the landowners had purchased the land with full knowledge that trailer parks were not a permitted use in the district under the newly adopted zoning regulations and that, "the day before the regulations were to become effective, the [landowners] caused five trailers to be moved onto the property." Id., 683–84. This court concluded that the trial court had correctly determined that "the belated effort of the [landowners] in moving the five trailers onto their land, within twenty-four hours of the time when the regulations were to become operative, did not create an existing nonconforming use." Id., 684; see also *Wing* v. *Zoning Board of Appeals*, 61 Conn. App. 639, 645, 767 A.2d 131 (keeping horses on residential property was not valid nonconforming use when "[t]here [was] no indication in the record that horses were ever kept on the . . . property prior to [the effective date of the relevant zoning regulations] . . . [and a] horse was specifically brought onto the property in an attempt to create a nonconforming use"), cert. denied, 256 Conn. 908, 772 A.2d 602 (2001).

As the Appellate Court concluded, however, there is simply no question that West Wharf Beach Park was irrevocably and indisputably committed to its use as a park long before the enactment of the special exception requirement. See *Pfister* v. *Madison Beach Hotel, LLC*, supra, 197 Conn. App. 342–43. We further agree with that court that the hotel's use of the park to host a free

public concert series is well within the bounds of the park's permitted uses as defined in the Madison zoning regulations. See id., 343; see also *Bauer* v. *Waste Management of Connecticut, Inc.*, 234 Conn. 221, 237, 662 A.2d 1179 (1995) ("because the [zoning] commission enacted a ninety foot height limitation, [the defendant's nonconforming] use of [a] landfill to that height is expressly permitted by the . . . zoning regulations").

In arguing to the contrary, the plaintiffs cite several cases that they contend "[define] actual use on a granular level, not via broad-brush analysis of what could have been (but never was) done before." All of the cited cases, however, primarily involve whether a nonconforming use has been *expanded*, not whether it existed in the first instance.[19] Such a determination requires application of the criteria set forth in *Zachs* v. *Zoning Board of Appeals*, supra, 218 Conn. 332. To the extent that the *Zachs* analysis strikes the plaintiffs as granular, this undoubtedly is because it requires consideration of a wide cross section of factors, including "(1) the extent to which the current use reflects the nature and purpose of the original use; (2) any differences in the character, nature and kind of use involved; and (3) any substantial difference in effect upon the neighborhood resulting from differences in the activities conducted on the property." Id. Notably, the plaintiffs have not requested that such an analysis be performed with respect to West Wharf Beach Park and the concert series.

[19] See, e.g., *Bauer* v. *Waste Management of Connecticut, Inc.*, supra, 234 Conn. 236 (whether vertical expansion of nonconforming landfill was permissible intensification or illegal expansion of landfill's nonconforming use); *Helicopter Associates, Inc.* v. *Stamford*, supra, 201 Conn. 716–18 (whether using heliport for unlimited number of flights illegally expanded heliport's preexisting, nonconforming use); *DeFelice* v. *Zoning Board of Appeals*, 130 Conn. 156, 158, 32 A.2d 635 (1943) ("whether the erection and utilization of [a] wet sand classifier would amount to an extension of [the nonconforming] use"); *Woodbury Donuts, LLC* v. *Zoning Board of Appeals*, 139 Conn. App. 748, 754, 57 A.3d 810 (2012) (whether year-round use of nonconforming seasonal restaurant constituted illegal expansion of nonconforming use).

We note, finally, that the granularity of any actual use analysis necessarily depends on the nature and scope of the use being claimed. If the preexisting use were an amusement park, for example, it is the amusement park and all that an amusement park entails that would be grandfathered into the zoning scheme. In such a case, the court would not be required to inventory the buildings, amusement rides, and entertainment offerings in determining whether the use exists. Similarly here, then, because West Wharf Beach Park was grandfathered into the zoning scheme as a park, a citizen wanting to use the park is not required to prove that any park activity within the realm of possibility that is commonly known to take place in parks occurred in *this park* prior to the enactment of the zoning regulations. "[I]n defining the words 'existing use,' [what] we mean [is] a utilization of the property so that it may be known in the neighborhood as being employed for a given purpose; that neither the extent nor the quantity nor the quality of the use which may be permitted to continue is prescribed by those words; and that it is only required that the use must have existed. *The court is not generally required to speculate as to the number of acts or business transactions necessary to constitute an existing use*." (Emphasis added.) *Melody* v. *Zoning Board of Appeals*, supra, 158 Conn. 520–21. To the extent that a town or neighboring landowner contends that a particular activity on the property is not within the scope of the original nonconforming use because the activity is inconsistent with the nature and purpose of such use, the burden is on the town or landowner to prove that an illegal expansion of the nonconformity has occurred, which is done through application of the *Zachs* factors.[20] See *Cummings* v. *Tripp*, supra, 204

[20] The plaintiffs cite *Wing* for the proposition that, "although the defendants seek a broader framing of actual use, existing law is that the granular framing controls" because, in that case, the fact that the property was used for some livestock prior to the enactment of the new zoning regulations "did not open the door to any and all livestock after." The plaintiffs misunder-

Conn. 95 ("plaintiffs bore the burden of establishing that the defendants' activities amounted to an illegal extension of a nonconforming use"). As we have explained, the plaintiffs have failed to do so.

To summarize, the right asserted by the hotel was the right to use West Wharf Beach Park as a park within the meaning of the Madison zoning regulations. For the reasons previously set forth, we conclude that the Appellate Court correctly determined that West Wharf Beach Park was irrevocably and actually committed to its use as a park prior to 1979 and that the permissible uses of the park necessarily include all of the permitted

stand the analysis employed in *Wing*, which clearly supports the analysis employed herein. In *Wing*, the landowners claimed a preexisting right to keep a horse on one tenth of an acre of nonwetlands property when the zoning regulations required three acres of such property per horse. *Wing* v. *Zoning Board of Appeals*, supra, 61 Conn. App. 641 n.2, 642–43. The Appellate Court held that the trial court properly had determined that no such right existed because there was no evidence that a horse had ever been kept on the property prior to the date the zoning regulations took effect. Id., 645–46. Because they could not establish an actual prior use of horses on the property, the landowners claimed that horses were a permissible extension of their preexisting nonconforming right to keep a sheep and a pygmy goat on the property. Id., 646–47. Applying a *Zachs* analysis, the Appellate Court rejected the landowners' claim, stating that they were "not merely seeking an intensification of a legal nonconforming use, but a change in the character of the use. . . . [T]he animals that were deemed legal nonconforming uses can be kept on the [landowners'] property. The addition of other kinds of large animals, including the horses, constitutes an unlawful extension of the prior use." (Citation omitted.) Id., 647. As we indicated, however, the plaintiffs in the present case do not claim that the concert series constitutes an unlawful extension of West Wharf Beach Park's preexisting, nonconforming use *as a park* under *Zachs*, undoubtedly because concerts fall comfortably within the permitted uses of a park set forth in the Madison zoning regulations. Knowing that such a claim would be unavailing, and having failed to convince us that the trial court properly treated the park as hotel property for purposes of determining whether the concerts violated the hotel's nonconforming use of the hotel property, the plaintiffs now argue that the defendants, as part of their burden, were required to prove that concerts actually occurred in West Wharf Beach Park prior to the enactment of the special exception requirement in order for concerts to have been grandfathered into that requirement. For the reasons previously discussed, however, we are not persuaded by this argument.

active and passive recreational uses of a park under the Madison zoning regulations, including a free summer concert series.

## III

We turn, then, to the plaintiffs' claim that the Appellate Court incorrectly concluded that the Madison zoning regulation that limits the use of a park to all passive and active recreational purposes allows the concerts at issue in this appeal. See footnote 7 of this opinion. The plaintiffs contend that the trial court unequivocally found that, although the concerts may be free to the public, they are commercial activities from the perspective of the hotel, and, as such, they are not a permitted recreational use of West Wharf Beach Park. The plaintiffs maintain that the dictionary definition of the word "recreational" supports the trial court's interpretation of the zoning regulations and, by extension, its finding that the concerts are not recreational in nature and, therefore, are not permitted in West Wharf Beach Park.

The defendants respond that the plaintiffs' argument fails on a number of fronts, including that the Madison zoning regulations make no distinction between commercial and noncommercial recreational activities; they simply provide that parks may be used for any recreational purpose, passive or active. The defendants further contend that the plaintiffs' interpretation of the zoning regulations is untenable because it makes the permissibility of a free concert in West Wharf Beach Park turn on the subjective intent or motives of the person or persons hosting the concert, in violation of the principle that zoning may be used to regulate only the use of land, not the user. We agree with the defendants.

The following additional facts and procedural history are relevant to our analysis of this claim. In rejecting the plaintiffs' claims on appeal, the Appellate Court

explained that the commercial intent behind the concert series was irrelevant and that the trial court's focus on that issue was misguided: "The fact that the hotel stands to benefit, financially or otherwise, from the concerts held on the Grassy Strip has no bearing on the legal determination regarding the permissible uses of the Grassy Strip by a Madison citizen under the zoning regulations. The [trial] court states in its memorandum of decision that, '[w]ith each concert . . . the hotel . . . generates goodwill, and draws to its doorstep hundreds of potential future customers for the hotel's lodging, banquet, and other services. Whatever other interests may be served by the concert series (promoting town spirit, supporting arts and entertainment, and so forth), the event is plainly a commercial activity, which generates direct and indirect economic benefits for the hotel as a business enterprise.' . . .

"The [trial] court additionally states, albeit in dict[um], that the commercial nature of the concerts creates an illegal nonconformity on the Grassy Strip. Notably, there is no prohibition of commercial events on town property codified anywhere in the Madison zoning regulations.[21] The [trial] court's determination, however, is not rooted in the permissible uses of a town owned park under the zoning regulations; rather, the court explains that, even if other Madison citizens would be permitted to hold a musical performance on the Grassy Strip, the hotel cannot do so 'in a manner that temporar-

[21] "Within the Madison Administrative Procedures for the Use of Recreational Facilities, which are not a part of the zoning regulations, it states that 'Madison facilities cannot be used for individual or corporate personal enterprise where admission fees are charged or where selling a product/service is the purpose of the gathering [(i.e., investment seminars)] . . . .' . . . As the undisputed record reflects, no admission fees were charged for entry to the concerts, and the defendants' stated purpose for the concert series was to provide a form of free recreational entertainment to the public on the Grassy Strip." (Emphasis omitted.) *Pfister* v. *Madison Beach Hotel, LLC*, supra, 197 Conn. App. 340 n.17.

ily annexes the town's property to extend [its own] (nonconforming) commercial activities using the town's land.' The [trial] court's emphasis on the commercial nature of the defendants' events, however, serves only to prevent a specific citizen, the hotel, from using a town owned space in a manner available to other citizens." (Footnote in original; footnote omitted.) *Pfister* v. *Madison Beach Hotel, LLC*, supra, 197 Conn. App. 339–341. The Appellate Court further observed that "the [trial] court's assertion that the hotel's use of the Grassy Strip violates the nonconforming use *of the park* [separate and apart from its nonconforming use of the hotel property] is only discussed briefly in [a footnote at the end of] the memorandum of decision. The [trial] court [states]: 'Due to the commercial nature of the concerts as they are produced by the hotel, this activity also violates the Madison zoning regulations applicable to West Wharf [Beach] Park, because commercial activities of this nature are not a permitted use in [a residential] zone, park or no park.' " (Emphasis in original.) Id., 340 n.16. The Appellate Court concluded that, because this statement by the trial court was "not supported by any case law, regulation, or legal analysis," it was "mere dictum." Id.

On appeal, the plaintiffs argue that the trial court's statement was not dictum and that the Appellate Court erred in failing to conclude that it constituted a separate and independent basis for sustaining the trial court's legal determination that the concert series violated the prohibition against the expansion of nonconforming uses contained in § 12.3 of the Madison Zoning Regulations, albeit as applied to the park rather than the hotel property. We are not persuaded.

We agree fully with the Appellate Court's analysis of this issue. We would only add that, even if a single sentence in a footnote at the end of the trial court's forty-four page memorandum of decision, addressing

an entirely new question pertaining to the lawful uses of the park, reasonably could be construed as more than dictum, the analysis contained therein is untenable, as it would make the permissibility of hosting a free concert in West Wharf Beach Park turn on the subjective intent of the host, in clear violation of "[t]he basic zoning principle that zoning regulations must directly affect land, not the owners of land . . . ." (Citation omitted; internal quotation marks omitted.) *Reid* v. *Zoning Board of Appeals*, supra, 235 Conn. 857; see also id. ("the identity of a particular user of land is irrelevant to zoning" (internal quotation marks omitted)); id. ("zoning power may only be used to regulate the use, not the user of the land" (internal quotation marks omitted), quoting T. Tondro, Connecticut Land Use Regulation (2d Ed. 1992) p. 88; *Dinan* v. *Board of Zoning Appeals*, 220 Conn. 61, 66–67 n.4, 595 A.2d 864 (1991) (identity of particular user of land is irrelevant to zoning). Not only would this standard require that courts become mind readers, but it would also likely spell the end of many free recreational activities across the state, such as yoga in the park, if the individual or group sponsoring the event did so in the hope of generating good will and attracting new clients to their brick and mortar studios, classrooms, or businesses. The Appellate Court concluded, and we agree, that such a standard is not compelled by any reasonable construction of the Madison zoning regulations or case law.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

# KARL KLASS *v.* LIBERTY MUTUAL INSURANCE COMPANY (SC 20451)

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

*Syllabus*

Pursuant to statute (§ 38a-316e (a)), "when a covered loss for real property requires the replacement of an item or items and the replacement item or items do not match adjacent items in quality, color or size, the insurer shall replace all such items with material of like kind and quality so as to conform to a reasonably uniform appearance."

The plaintiff, whose real property was insured under a homeowners insurance policy issued by the defendant insurance company, filed in the trial court an application to compel appraisal following damage to the roof of his home. The defendant had accepted that the damage to the roof was a covered loss under the policy and issued an estimate to replace the slopes of the roof that had missing shingles. Thereafter, the plaintiff's contractor provided an estimate that contemplated replacement of the entire roof in order to match the front and rear roof slopes, which was more costly than the defendant's estimate. As a result of the parties' different estimates, the plaintiff notified the defendant that he was demanding appraisal under the policy, which provided that any dispute as to "amount of loss" is to be resolved by a panel comprised of a disinterested appraiser selected by each party and an umpire selected by those appraisers. The trial court initially denied the plaintiff's application to compel appraisal, but, after the plaintiff filed a motion to reargue and reconsider, and the court granted that motion, the court rendered judgment granting the plaintiff's application. The defendant appealed, claiming, inter alia, that the dispute between the parties was ultimately a coverage dispute and that it was therefore improper for the trial court to compel appraisal before it resolved the legal issue regarding the coverage dispute. *Held*:

1. The trial court did not abuse its discretion in granting the plaintiff's motion to reargue and reconsider, as the court's decision to grant the motion implied that it agreed with the plaintiff that the court's initial denial of the plaintiff's application to compel appraisal was in error.
2. The defendant could not prevail on its claim that the trial court had improperly granted the plaintiff's application to compel appraisal: when an insurer concedes the existence of a covered peril to an insured's premises, issues concerning the extent of the insurer's obligation under § 38a-316e (a) to replace adjacent, undamaged items to achieve a reasonably uniform appearance are a component of the amount of loss and are, therefore, part of the appraisal process, as the legislative history

of the statute reflected that the legislature intended to codify the existing insurance industry practice of restoring damaged property to a comparable preloss condition and contemplated that the determination of matching would be subjective, made on a case-by-case basis, and resolved through the appraisal process, and case law from other jurisdictions was consistent with that approach; in the present case, the defendant conceded that the damage to the plaintiff's roof was a covered loss under the policy, and the parties' dispute regarding how many shingles needed to be replaced in order to make the plaintiff whole was a factual dispute that fell within the scope of the policy's appraisal clause.

Argued March 25, 2021—officially released January 11, 2022*

*Procedural History*

Action for an order to compel the defendant to proceed with an appraisal pursuant to a homeowners insurance policy issued by the defendant, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Hiller J.*, granted the application and rendered judgment ordering the defendant to proceed with an appraisal, from which the defendant appealed. *Affirmed.*

*John A. Donovan III*, with whom, on the brief, were *Anthony J. Antonellis*, *Kathleen C. Schaub* and *Brendan L. Labbe*, for the appellant (defendant).

*Michael J. LeMoult*, with whom were *Jon D. Biller* and *Brianna M. Kastukevich*, for the appellee (plaintiff).

*Karen L. Dowd* and *Brian S. Goodman*, pro hac vice, filed a brief for the National Association of Public Insurance Adjusters as amicus curiae.

*Jason Cieri* filed a brief for United Policyholders as amicus curiae.

*January 11, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Opinion*

McDONALD, J. Connecticut's insurance law provides that, "[w]hen a covered loss for real property requires the replacement of an item or items and the replacement item or items do not match adjacent items in quality, color or size, the insurer shall replace all such items with material of like kind and quality so as to conform to a reasonably uniform appearance." General Statutes § 38a-316e (a) (matching statute). The principal issue in this case is whether a dispute as to the extent of an insurer's replacement obligation under the matching statute is a question properly relegated to the appraisal arbitral process or a question of coverage to be resolved by the court in the first instance before appraisal may proceed. The defendant, Liberty Mutual Insurance Company, appeals from the trial court's judgment granting the application of the plaintiff, Karl Klass, to compel appraisal with regard to such a dispute. We affirm the trial court's judgment.

The record reveals the following undisputed facts and procedural history. In 2018, the plaintiff contacted his insurer, the defendant, to report damage to the roof of his home. The defendant sent a representative to examine the loss, who—consistent with the plaintiff's observation—noticed a few shingles missing from the dwelling portion of the rear slope of the roof. The representative concluded that the missing shingles were consistent with wind damage, a covered loss under the homeowners policy of the plaintiff. The defendant accepted coverage and issued an estimate to replace the rear slopes of both the dwelling roof and the attached garage roof. The plaintiff's contractor inspected the roof and provided an estimate that contemplated replacement of the plaintiff's entire roof, dwelling and attached garage, at nearly double the cost of the defendant's estimate.

As a result of the parties' different repair estimates, the plaintiff notified the defendant that he was demanding appraisal under his homeowners policy. The policy provides that a dispute as to "amount of loss" is to be resolved by a panel comprised of a disinterested appraiser selected by each party and an umpire selected by those appraisers, effectively an arbitration panel.[1] See *Covenant Ins. Co.* v. *Banks*, 177 Conn. 273, 279–80, 413 A.2d 862 (1979) (holding that appraisal clause in insurance policy constituted " 'written agreement to arbitrate' " and, thus, was governed by arbitration statutes).

In a written reply, the defendant took the position that the plaintiff was not entitled to invoke the appraisal process in the absence of a "competing" estimate (i.e., one that addressed the claim for which the defendant had accepted coverage). The defendant stated that any dispute regarding the matching of the front and rear roof slopes was a question of coverage rather than an issue for appraisal. Nevertheless, citing its interest in amicably resolving the dispute, the defendant agreed to appoint an appraiser to investigate the loss while reserving its right to contest the appraisal panel's authority to decide an issue of coverage.

The defendant's appraiser thereafter inspected the plaintiff's roof and issued a report concluding that, " 'given the roof configuration, it is reasonable to conclude that the shingles along the [east facing] (rear) slopes and ridge caps of the residence and garage can be replaced such that a reasonable uniform appearance of the roof covering is maintained.' " The defendant cited these conclusions in a letter it thereafter sent to the plaintiff denying "coverage" for the front slopes of the plaintiff's roof. The defendant noted that its adjust-

[1] The appraisal clause in the defendant's policy essentially mirrors the one in the standard form set forth in General Statutes § 38a-307.

ment of the claim—providing for the replacement of the entire rear slopes of both the dwelling and garage roofs—exceeded the requirements of the matching statute. In light of its denial of "coverage" for the front roof slopes, it contended that there was no valuation issue remaining for the appraisal process.

The plaintiff subsequently filed an application to compel appraisal in the Superior Court pursuant to General Statutes §§ 38a-307 and 52-410, casting the dispute between the parties as one concerning the amount of loss under the subject policy. The defendant filed an objection to the application, characterizing the dispute as one involving coverage, which, as a purely legal issue, must be resolved by the courts before an appraisal can proceed. In support of that proposition, the defendant cited a Second Circuit case, *Milligan* v. *CCC Information Services Inc.*, 920 F.3d 146 (2d Cir. 2019). The plaintiff then filed a motion requesting that the trial court order that any purported coverage dispute does not preclude the parties from moving forward with an appraisal, citing *Giulietti* v. *Connecticut Ins. Placement Facility*, 205 Conn. 424, 534 A.2d 213 (1987), as support.

The trial court initially issued a summary decision denying the plaintiff's application to compel appraisal, citing *Milligan* for the proposition that "the issue of coverage [must] be decided before the court makes a determination whether an appraisal is required." The plaintiff filed a motion to reargue and reconsider, contending that the trial court had overlooked controlling precedent—namely, this court's decision in *Giulietti*—and had misapprehended *Milligan*. The defendant objected to the plaintiff's motion, arguing that the plaintiff failed to demonstrate that there was some decision or principle of law that had been overlooked that would have controlling effect on the case. The trial court granted the plaintiff's motion to reargue and reconsider, and,

following supplemental briefing, issued an order directing the parties to proceed to appraisal. In reaching its decision, the trial court explained that it had misapprehended *Milligan* and concluded that *Milligan* simply confirms that appraisers cannot make coverage determinations. In light of that conclusion, the court rendered judgment granting the plaintiff's application to compel appraisal. The defendant appealed from the trial court's judgment to the Appellate Court, and we thereafter transferred the appeal to this court. See General Statutes § 51-199 (c) and Practice Book § 65-1.

The defendant raises three claims on appeal. First, it claims that the trial court improperly granted the plaintiff's motion to reargue and reconsider following its initial denial of the plaintiff's application to compel appraisal. Second, it contends that the dispute between the parties is ultimately a coverage dispute, and, thus, it was improper for the trial court to compel appraisal before the legal issue regarding the coverage dispute was resolved by the court. Finally, to resolve the purported coverage dispute, the defendant asks this court to adopt an interpretation of the matching statute that would limit the scope of replacement to, at most, the rear slopes of the plaintiff's roof.

We conclude that the trial court properly granted the plaintiff's application to compel appraisal. Because that conclusion rests in large part on our determination that the dispute between the parties is an appraisable dispute not involving coverage, we need not address the defendant's claims relating to resolution of coverage disputes.

## I

The defendant's contention that the trial court improperly granted the plaintiff's motion to reargue and reconsider merits little discussion. We review the adjudication of a motion to reargue and reconsider for an abuse

of discretion; see *Weiss* v. *Smulders*, 313 Conn. 227, 261, 96 A.3d 1175 (2014); which means that "every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done." (Internal quotation marks omitted.) *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 698, 41 A.3d 1013 (2012).

"[T]he purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . It also may be used to address [alleged inconsistencies in the trial court's memorandum of decision as well as] claims of law that the [movant] claimed were not addressed by the court. . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple [or to present additional cases or briefs which could have been presented at the time of the original argument] . . . ." (Internal quotation marks omitted.) *Hudson Valley Bank* v. *Kissel*, 303 Conn. 614, 624, 35 A.3d 260 (2012); see *Rider* v. *Rider*, 200 Conn. App. 466, 486 n.14, 239 A.3d 357 (2020).

The trial court did not abuse its discretion in granting the plaintiff's motion to reargue and reconsider. In its initial decision denying the plaintiff's application to compel appraisal, the trial court cited the Second Circuit's decision in *Milligan* for the proposition that coverage determinations must precede appraisal; *Milligan* v. *CCC Information Services, Inc.*, supra, 920 F.3d 152; without responding to the plaintiff's contention that this court stated a different rule in *Giulietti* and that *Milligan* should not be interpreted to conflict with *Giulietti*. The trial court's decision to grant reconsideration implies that it agreed with the plaintiff that it had overlooked *Giulietti* and that its prior order was in error.

"If a court believes that it has made a mistake, there is little reason, in the absence of compelling circumstances to the contrary, to stick slavishly to a mistake." *Beeman* v. *Stratford*, 157 Conn. App. 528, 540, 116 A.3d 855 (2015).

II

We therefore consider the defendant's claim that the trial court improperly granted the plaintiff's application to compel appraisal. The defendant makes several arguments regarding the propriety of this decision, all of which rest on the premise that the dispute between the parties is one pertaining to the legal question of coverage.[2] Although not expressly stated, we interpret the trial court's summary order as an implicit rejection of that premise. In its final decision, the trial court cited *Milligan* as holding "that appraisers cannot make coverage determinations [or decide] questions of law."[3] The only dispute on which the plaintiff sought appraisal was the extent of the defendant's replacement obligation pursuant to the matching statute. The trial court thus would not have ordered the parties to proceed to appraisal unless it viewed the dispute as a factual determination that did not pertain to coverage. Therefore, the threshold, and ultimately dispositive, issue before us is whether a dispute as to the scope of an

[2] For example, the defendant argues that, if we conclude that the appraisal panel has the authority to decide this coverage dispute, the courts should review the decision de novo, and that this court should resolve this coverage dispute by interpreting the statutory terms "adjacent items" and "reasonable uniform appearance" in § 38a-316e (a) to determine its replacement obligation to the plaintiff under the matching statute.

[3] The parties agreed, and the law is well settled, that—in the absence of a statutory provision to the contrary—coverage is a legal question for the courts. See, e.g., *Duane Reade, Inc.* v. *St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190, 203 (2d Cir. 2010); *Johnson* v. *Nationwide Mutual Ins. Co.*, 828 So. 2d 1021, 1025–26 (Fla. 2002); *Quade* v. *Secura Ins.*, 814 N.W.2d 703, 706 (Minn. 2012); *Clark* v. *Sputniks, LLC*, 368 S.W.3d 431, 436 (Tenn. 2012); *Factory Mutual Ins. Co.* v. *Citizens Ins. Co. of America*, 288 Wis. 2d 730, 736, 709 N.W.2d 82 (App. 2005).

insurer's replacement obligation under the matching statute is a question of coverage to be resolved by the courts or a question of the amount of loss to be resolved by the appraisal panel. We conclude that it is the latter.

With regard to the standard of review, although the plaintiff is correct that whether the insurance policy manifests the parties' intent to arbitrate a matter is generally a question of fact subject to review for clear error; see *A. Dubreuil & Sons, Inc.* v. *Lisbon*, 215 Conn. 604, 608–609, 577 A.2d 709 (1990); the legal obligation at issue in the present case is one engrafted by operation of law as a result of the legislature's enactment of the matching statute. See *Garcia* v. *Bridgeport*, 306 Conn. 340, 351, 51 A.3d 1089 (2012). The relevant question in this case, therefore, is whether the legislature considered determinations like the one before us as a question relating to the amount of loss to be determined in the appraisal process or, alternatively, by a court when determining an insurer's coverage responsibilities. This is a question of law subject to plenary review. See, e.g., *Financial Consulting, LLC* v. *Commissioner of Ins.*, 315 Conn. 196, 209, 105. A.3d 210 (2014); *Nelson* v. *State*, 99 Conn. App. 808, 813, 916 A.2d 74 (2007).

Our analysis begins with the statutory text. See General Statutes § 1-2z (permitting court to consider extratextual sources only when statutory text is ambiguous or construction yields absurd or unworkable result). The matching statute provides in relevant part: "When a covered loss for real property requires the replacement of an item or items and the replacement item or items do not match adjacent items in quality, color or size, the insurer shall replace all such items with material of like kind and quality so as to conform to a reasonably uniform appearance. . . ." General Statutes § 38a-316e (a). Plainly, the text of the statute does not resolve the dispute before us. The statute does not explicitly indicate whether the resolution of matching disputes

are to be decided by the courts in the first instance or by an appraisal panel; nor does it expressly characterize the scope of an insurer's replacement obligation as a question of coverage or one relating to amount of loss. By making a "covered loss" the precondition to an insurer's replacement obligation, however, the statute appears to suggest that the replacement obligation is of a different nature than the coverage obligation. Moreover, the guideposts for the making of such decisions—"adjacent" and "reasonably uniform appearance"—are strongly indicative of factual judgments based on visual inspection rather than legal determinations. General Statutes § 38a-316e (a); see *Welles* v. *East Windsor*, 185 Conn. 556, 560, 441 A.2d 174 (1981) (stating that "[t]he term 'adjacent' has no fixed meaning but must, instead, be interpreted in light of the relevant surrounding circumstances" and is "[n]ecessarily relative"); Webster's Ninth New Collegiate Dictionary (1985) p. 1290 (defining "uniform" as "presenting an unvaried appearance of surface, pattern, or color").

Because the text of the statute does not unambiguously answer the question before us, we look to extratextual sources for guidance. See, e.g., *Mayer* v. *Historic District Commission*, 325 Conn. 765, 775, 160 A.3d 333 (2017) ("[w]hen a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter" (internal quotation marks omitted)). We begin with the legislative history of the matching statute, which is instructive in two respects. First, it reflects that the legislature intended to codify the existing insurance industry practice. See 56 H.R. Proc., Pt. 8, 2013 Sess., pp. 2402–2403, remarks of Representative Robert W. Megna. Apparently, some insurers had not been following industry practice and were replacing

only damaged portions of covered property without regard to whether the property was restored to a comparable preloss condition. See id., p. 2403, remarks of Representative Megna; Conn. Joint Standing Committee Hearings, Insurance and Real Estate, Pt. 4, 2013 Sess., pp. 1115, 1119, remarks of Phil Flaker, public insurance adjuster. Second, that history reveals that the legislature contemplated that matching would be a "subjective" determination made on a case-by-case basis; 56 H.R. Proc., supra, pp. 2418–19, remarks of Representative Megna; with disputes resolved through the appraisal process. Representative Megna, the primary sponsor of the bill, explained that, if the insured and insurer disagree over the necessary scope of replacement, "they have a process in most policies called *the appraisal process*. They can—they can start that process going if they contest it."[4] (Emphasis added.) Id., p. 2422. The legislative history is devoid of any contrary indication that the legislature viewed the extent of an insurer's replacement obligation as a coverage issue or disputes as to matching as matters to be resolved by courts in the first instance.

The conclusion supported by the text of the statute and by its legislative history is consistent with case law from other jurisdictions. Other courts that have addressed this issue—whether applying their version of a matching statute or recognizing industry practice—

[4] Representative Megna contemplated a situation factually similar to the one before us: "[I]f a—a claim is [made] today, you could have an insurance company representative come out and say, you know, I'm just going to replace one piece of siding, I don't care that the other siding is [twenty] years old and faded by the sun. They could actually make that argument now. It's not common practice so they can do that. If they do and the homeowner or the business owner wants to contest it, they have a process in most policies called the appraisal process. They can—they can start that process going if they contest it." 56 H.R. Proc., supra, p. 2422. The National Association of Public Insurance Adjusters filed an amicus curiae brief in support of the plaintiff, in which it confirmed that matching determinations have been routinely performed as a part of the appraisal process.

have treated similar disputes as within the purview of appraisal. For instance, in *In re Pottenburgh* v. *Dryden Mutual Ins. Co.*, 55 Misc. 3d 775, 48 N.Y.S.3d 885 (2017), following a vandalism incident that gave rise to a covered loss under the homeowners policy of the insured, the insurer submitted an estimate for replacement of the siding on the garage wall that had been vandalized, while the insured submitted an estimate for replacement of the siding on all of the garage walls. Id., 776–77. The insured's estimate for full replacement was based on the lack of availability of siding for installation on the vandalized wall that would match the faded color of the undamaged siding on the remaining walls. Id., 777. The insurer refused to participate in the appraisal process on the ground that the dispute was one regarding the scope of coverage, i.e., the insured sought payment for components of the home that were not "covered" because they did not sustain direct physical damage from the vandalism incident. Id. The trial court concluded that the disagreement between parties was an appraisable dispute. The court noted that the insurer had not denied liability for damages sustained by the vandalism incident. Id., 778. Rather, "the basis for [the insurer's] objections to an appraisal is limited to the extent of work required to repair the damage caused by the vandalism incident. Such disputes are factual questions that fall squarely within the scope of the policy's appraisal clause . . . ." (Citations omitted; internal quotation marks omitted.) Id.

The Supreme Court of Minnesota similarly characterized the extent of the insurer's replacement obligation to ensure matching "as mere incidents to a determination of the amount of loss or damage, [which] are appropriate to resolve in an appraisal in order to ascertain the amount of loss." (Internal quotation marks omitted.) *Cedar Bluff Townhome Condominium Assn., Inc.* v. *American Family Mutual Ins. Co.*, 857 N.W.2d 290,

293 (Minn. 2014); see id. (reviewing appraisal panel's determination as to whether insurer was obligated to replace siding on only sides of building damaged by hail, which was covered loss under policy, or on all sides to ensure matching); see also *Auto-Owners Ins. Co.* v. *Summit Park Townhome Assn.*, 100 F. Supp. 3d 1099, 1104 (D. Colo. 2015) (holding that, while appraisers cannot resolve parties' legal issues, they can make factual conclusions, such as "address[ing] the cost of replacing undamaged property to achieve matching"); *State Farm Lloyds* v. *Johnson*, 290 S.W.3d 886, 891 (Tex. 2009) ("Sometimes it may be unreasonable or even impossible to repair one part of a roof without replacing the whole. The policy provides that [the insurer] will pay reasonable and necessary costs to 'repair or replace' damaged property, and repair or replacement is an 'amount of loss' question for the appraisers." (Footnote omitted.)); *Edelman* v. *Certain Underwriters at Lloyds, London*, Massachusetts Superior Court, Docket No. 1784CV02471 (May 7, 2019) ("to the extent the [insurer] disputes the amount of matching loss . . . a reference proceeding [namely, appraisal] may be appropriate"). The defendant cites no case law adopting a contrary view.[5]

[5] The defendant cites cases holding that questions of causation (i.e., how much of the damage to the affected property was caused by a covered event) present an issue of coverage. We view this determination to be an entirely distinct question from the one raised in the present case. Moreover, there is a split of authority on the question of whether causation is a matter of coverage; compare *Quade* v. *Secura Ins.*, 814 N.W.2d 703, 706 (Minn. 2012) (holding that appraiser's evaluation of "amount of loss" requires consideration of causation), with *Rogers* v. *State Farm Fire & Casualty Co.*, 984 So. 2d 382, 391–92 (Ala. 2007) (limiting appraiser's duty to determining monetary value of property damage and, accordingly, deciding that appraisers cannot make determinations as to causation); and the present case does not provide us with the occasion to weigh in on that debate. We note that, although we rely on one case that decided the causation question, *State Farm Lloyds* v. *Johnson*, supra, 290 S.W.3d 891, we rely on it only for the Texas Supreme Court's acknowledgment that the determination of whether replacement must extend beyond the damaged items is an amount of loss question for appraisers.

In this regard, we observe that the defendant's own conduct in this case was consistent with insurance industry practice and supports the propriety of having appraisers decide the extent of the insurer's replacement obligation to ensure matching of adjacent items. The defendant's own appraiser reached a conclusion on the very issue that the defendant claims is a legal question that is improper for resolution by appraisers. The report by the defendant's appraiser stated that the purpose of his examination of the plaintiff's property was to "determine the scope of damage to the roof . . . ." He noted that, on the basis of his examination, both sides of the roof presumably were not visible from the ground at the same time and, in light of that fact, reached a conclusion that replacement of only the damaged rear sides of the roofs and the roof ridges "would [not] compromise the uniform appearance of the roof covering." The defendant's posture in this case also undermines its position that the present dispute raises a question of law. The defendant argued in its trial brief that the parties' dispute turned on the judicial construction of " 'reasonable uniform appearance' " but then argued in its appellate brief that the dispute turns on construction of " 'adjacent.' " None of the defendant's briefs, however, offered a definition for either term. At oral argument before this court, the defendant proffered a definition of "adjacent," but one suited to resolution of the present case, not a universally applicable definition.

The defendant's reliance on *Kamansky* v. *Liberty Mutual Ins. Co.*, Superior Court, judicial district of Hartford, Docket No. CV-18-6094809-S (April 30, 2019) (68 Conn. L. Rptr. 449), to support its position is misplaced. The court in *Kamansky* was faced with a question of pure statutory construction, presented in a declaratory judgment action, as to whether an insurer's obligation to replace "all such items" was limited to "adjacent"

items or extended to all items of the same kind as the damaged item, adjacent or not, so as to create a reasonably uniform appearance.[6] Id. This question could be—and ultimately was—resolved without reference to specific facts, and the court's construction applied universally.

It appears to us that, at bottom, the defendant's underlying concern is that § 38a-316e (a) employs terms that afford too much discretion to decide what is "adjacent" and what is necessary to create a "reasonably uniform appearance." In response to that concern, we note that the appraisal panel's umpire, in exercising their discretion to make the matching determination in this case, ultimately may agree with the defendant's appraiser that the defendant's obligation extends only to the rear sides of the roofs and the roof ridges. Alternatively, the umpire may conclude that the defendant is required to repair the plaintiff's entire roof. Regardless, it seems to us that the necessarily fact intensive, case-by-case inquiry inherent in the task of matching requires that appraisers be afforded discretion in making matching determinations. We further note that, if the statutory terms are too elastic, the defendant's recourse is with the legislature. See, e.g., *Neighborhood Assn., Inc.* v. *Limberger*, 321 Conn. 29, 45, 136 A.3d 581 (2016) ("[t]o the extent that the plaintiff's concerns arise from the expansive definitions in the act, its recourse lies with the legislature").

We conclude that, when an insurer concedes the existence of a covered peril to an insured's premises, issues

[6] The defendant misconstrues the trial court's decision in *Kamansky* as concluding that the undamaged sides of the insured's house were not "adjacent" to the damaged side. In *Kamansky*, the insured conceded that the undamaged garage sides were not "adjacent" to the damaged side. *Kamansky* v. *Liberty Mutual Ins. Co*, supra, 68 Conn. L. Rptr. 451. Therefore, the issue of whether nondamaged sides were "adjacent" to the damaged garage siding was not before the court.

concerning the extent of the insurer's obligation to replace adjacent, undamaged items to achieve a reasonably uniform appearance are a component of the "amount of loss" and are, therefore, part of the appraisal process. Here, the defendant concedes that the damage to the plaintiff's roof resulting from wind damage was a covered loss under the homeowners policy of the plaintiff. The parties' disagreement regarding how many shingles need to be replaced—whether it be only the missing shingles, the rear slopes of the garage and dwelling roofs, or the entire roof—in order to make the plaintiff whole is a factual dispute that falls within the scope of the insurance policy's appraisal clause.

The judgment is affirmed.

In this opinion the other justices concurred.

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## JPMORGAN CHASE BANK, NATIONAL ASSOCIATION *v.* ROBERT J. VIRGULAK ET AL.
## (SC 20403)

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

*Syllabus*

The plaintiff bank, J Co., sought to foreclose a mortgage on certain real property owned by the defendant T. T's husband, R, had executed and delivered to J Co. a promissory note for a loan on December 11, 2006. T was not a signatory on the note. On the same date, T signed a mortgage deed for her property, which recited that it was given to secure a note dated December 11, 2006, that was signed by T as the borrower. The mortgage deed did not reference R. J Co. commenced its foreclosure action after the note went into default. J Co. subsequently withdrew the foreclosure action as to R, as he had been granted an unconditional discharge of the debt associated with the note in a separate bankruptcy proceeding. Thereafter, another bank, M Co., was substituted as the plaintiff, and it filed an amended complaint in which it sought, inter alia, a judgment of foreclosure and equitable reformation. The trial court rendered judgment for T on M Co.'s foreclosure and reformation claims, concluding that M Co. did not sustain its burden of proving, by clear

and convincing evidence, that it was entitled to the equitable remedy of reformation of the mortgage deed. M Co. appealed to the Appellate Court, which affirmed the trial court's judgment. On the granting of certification, M Co. appealed to this court. *Held*:

1. The Appellate Court properly upheld the trial court's decision declining M Co.'s request to reform the mortgage deed executed by T to reference the fact that it was given to secure a note executed by R, as this court could not conclude that the absence of a finding by the trial court that the parties intended the mortgage deed signed by T to secure R's note was clearly erroneous: the language of the mortgage deed, the circumstances surrounding the negotiation of the mortgage, and the conduct of the parties in relation to the mortgage deed and the note did not necessarily support M Co.'s claim that the parties intended the mortgage deed to secure the note signed by R, as the language of the mortgage deed did not mention R or any note executed by him, there was no evidence that M Co. or its predecessors in interest ever spoke with T prior to her execution of the mortgage deed or required her to secure the note as a condition of R's receipt of the net loan proceeds from the note, T did not attend the closing, and R used most of the proceeds he received to pay off credit cards that were his exclusive responsibility; moreover, although the mortgage deed referenced a note with the same date and in the same amount as the note that R signed, which M Co. claimed must be the note T agreed to secure, the evidence presented with respect to this issue fell short of the very high burden required to demonstrate mutual mistake, as M Co.'s immediate predecessor in interest acknowledged that T did not borrow any money from it or J Co., M Co. conceded that the mortgage deed was not intended to secure any note signed by T, and M Co. failed to present any testimony regarding whether J Co. intended T's signature on the mortgage deed to secure the note signed by R.
2. The Appellate Court properly upheld the trial court's determination that M Co. was not entitled to foreclose the mortgage executed by T because T was not a borrower on the note; there was no merit to M Co.'s claim that foreclosure was the proper equitable relief on the grounds that it was undisputed that T entered into a mortgage transaction and common sense dictated that she intended her property interest to serve as security for the note contemporaneously executed by R, as the mortgage deed, as executed, was a nullity because it secured a nonexistent debt, and, accordingly, this court could not conclude that M Co. was entitled to foreclose a mortgage for a debt for which T was not responsible and that was not referenced in the mortgage deed.

Argued October 22, 2020—officially released January 11, 2022*

*January 11, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Procedural History*

Action to foreclose a mortgage on certain real property owned by the defendant Theresa Virgulak, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the plaintiff withdrew the action as to the named defendant; thereafter, Manufacturers and Traders Trust Company was substituted as the plaintiff; subsequently, the case was tried to the court, *Hon. David R. Tobin*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment in part for the defendant Theresa Virgulak, from which the substitute plaintiff appealed to the Appellate Court, *Sheldon* and *Keller*, *Js.*, with *Bear*, *J.*, dissenting, which affirmed the trial court's judgment, and the substitute plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

*Brian D. Rich*, with whom, on the brief, was *Laura Pascale Zaino*, for the appellant (substitute plaintiff).

*Alexander H. Schwartz*, for the appellee (defendant Theresa Virgulak).

*Jeffrey Gentes* and *J.L. Pottenger, Jr.*, and *Chaarushena Deb*, *Sophie Laing*, *Zaria Noble*, *Stefanie Ostrowski* and *Emily Coady*, law student interns, filed a brief for the Housing Clinic of the Jerome N. Frank Legal Services Organization as amicus curiae.

*Opinion*

MULLINS, J. The plaintiff, Manufacturers and Traders Trust Company (M&T Bank),[1] appeals from the judg-

[1] "The named plaintiff, JPMorgan Chase Bank, National Association . . . is no longer a party in this matter . . . [after filing] a motion to substitute Hudson City Savings Bank as the plaintiff, which the [trial] court granted on August 18, 2015. On August 9, 2016, M&T Bank filed a motion to substitute itself as the plaintiff, noting that it was the successor by merger to Hudson City Savings Bank. That motion was granted on August 15, 2016." *JPMorgan Chase Bank, National Assn.* v. *Virgulak*, 192 Conn. App. 688, 691 n.1, 218 A.3d 596 (2019). For convenience, we refer to M&T Bank as the plaintiff in this opinion.

ment of the Appellate Court in favor of the defendant Theresa Virgulak.[2] On appeal, the plaintiff claims that the Appellate Court improperly affirmed the judgment of the trial court because (1) the trial court improperly declined the plaintiff's request to reform a mortgage deed to reference that the mortgage deed executed by the defendant was given to secure a note executed by her husband, Robert J. Virgulak (Robert), and (2) even if the trial court properly denied the request to reform the mortgage deed, it incorrectly determined that the plaintiff was not entitled to foreclose the mortgage executed by the defendant because the defendant was not a borrower on the note. We disagree with the plaintiff and affirm the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following relevant facts and procedural history. "On or about December 11, 2006, Robert . . . executed and delivered to JPMorgan Chase Bank, National Association (JPMorgan Chase), a note for a loan in the principal amount of $533,000 (note). The defendant was not a signatory on the note. On the same date, the defendant signed a document titled 'Open-End Mortgage Deed' (mortgage [deed]) for residential property she owns at 14 Bayne Court in Norwalk (property). The mortgage [deed] recited that it was given to secure a note dated December 11, 2006, and recited that the note was signed by the defendant as [the] '[b]orrower' in the amount of $533,000. The term '[b]orrower' is defined in the mortgage deed as '[Theresa Virgulak, married].' The mortgage [deed] did not reference Robert. The defendant did not sign any guarantee.

[2] The original summons and complaint also listed the named defendant, Robert J. Virgulak, and the Department of Revenue Services as defendants. Subsequently, the named plaintiff, JPMorgan Chase Bank, National Association, withdrew the action against Robert J. Virgulak. Additionally, the Department of Revenue Services was defaulted for failure to plead. Therefore, in the interest of simplicity, we refer to Theresa Virgulak as the defendant.

"On or about February 1, 2010, after JPMorgan Chase failed to receive payments in accordance with the terms of the note, the note went into default and JPMorgan Chase elected to accelerate the balance due. On January 3, 2011, notices of default were sent to both the defendant and Robert, and, in February, 2013, JPMorgan Chase commenced this foreclosure action against the couple. The action sought to foreclose the mortgage that JPMorgan Chase claimed to have on the property. In September, 2014, JPMorgan Chase withdrew the foreclosure action against Robert, as he had filed for bankruptcy and been granted an unconditional discharge of the debt.

"Thereafter, JPMorgan Chase filed a motion to substitute party plaintiff, stating that it had assigned the subject mortgage deed and note to Hudson City Savings Bank (Hudson). This motion was granted by the [trial] court on August 18, 2015.

"On September 25, 2015, the defendant filed a motion for summary judgment, arguing that Hudson was precluded from foreclosing the mortgage. In particular, she argued that she had not defaulted under the terms of the note because she was never a party to a promissory note with [Hudson] or any of its predecessors in interest. The motion was denied by the court on January 14, 2016, on the basis of the court's determination that an issue of material fact remained with respect to whether the mortgage deed provided reasonable notice to third parties that the defendant was securing Robert's obligation." *JPMorgan Chase Bank, National Assn.* v. *Virgulak*, 192 Conn. App. 688, 692–93, 218 A.3d 596 (2019).

"On August 9, 2016, the plaintiff, M&T Bank, into which Hudson had merged, filed a motion to substitute itself as the party plaintiff and requested leave to amend the complaint in order to add two additional causes of

action. The court granted the motion on August 15, 2016. In the first count of the plaintiff's three count amended complaint, the plaintiff sought a judgment of foreclosure against the [defendant]. In the second count, it sought equitable reformation of the note in order to include the defendant as a borrower on the note. In the third count, the plaintiff pleaded that the defendant had been unjustly enriched because (1) the proceeds of the note were used to pay off loans [that] she was obligated to pay and (2) she had free use of the subject property without satisfying the terms of the mortgage [deed], which she had executed.

"On December 1, 2016, the defendant filed an amended answer denying the essential allegations of the amended complaint regarding her liability for the debt and the claim of unjust enrichment. She also set forth eight special defenses." (Footnote omitted.) Id., 693–94.

"The parties tried the case before the court on December 6, 2016. The plaintiff presented three witnesses, including Wilkin Rodriguez, a mortgage banking research officer at JPMorgan Chase, the defendant, and Robert. After the plaintiff rested, the defendant did not present additional evidence; she relied instead on the testimony and exhibits introduced during cross-examination of the witnesses called by the plaintiff." Id., 694. The trial court ordered the parties to submit posttrial briefs.

"On April 12, 2017, the court issued its memorandum of decision. The court found in favor of the defendant on the foreclosure and reformation counts of the complaint. In particular, the court stated, among other things, that '[t]he court finds that the plaintiff has not sustained its burden of proving, by clear and convincing evidence, that it [was] entitled to the equitable remedy of reformation of the mortgage deed[3] . . . . Accord-

[3] The trial court explained the following in its memorandum of decision: "[I]n the second count of its complaint, the plaintiff seeks reformation of the [note] but not the mortgage deed. However, on page 7 of its posttrial brief . . . the plaintiff concedes: 'Quite simply, there is . . . no support

ingly, the court finds the issues on the second count for [the defendant] and against the plaintiff. [Because] the plaintiff failed to present any authority to the court [that] would allow the plaintiff to prevail on the first count [foreclosure claim] in the absence of reformation of the mortgage deed, the court [also] finds the issues on the first count for [the defendant] and against the plaintiff.'

"The court then proceeded to address the plaintiff's unjust enrichment claim, noting that the defendant had been benefited in several respects as a result of the loan that Robert had obtained . . . . The court ultimately determined that [Hudson's] responses to the requests for admissions precluded any recovery on [the plaintiff's] unjust enrichment claim, except for the property tax payments that the defendant conceded that she owed to the plaintiff."[4] (Footnote added; footnote omit-

for any notion that the mortgage [deed] was ever intended to secure a note executed by [the defendant].' According to the [posttrial] brief, it is now the plaintiff's position that the mortgage deed should be reformed 'to reference the fact that the mortgage [deed] executed by [the defendant] was to secure the note executed by Robert.' " (Citation omitted; footnote omitted.)

In its posttrial brief, the plaintiff asserted that the trial court should consider its new position that the mortgage deed, rather than the note, should be reformed because, "in an equitable proceeding such as a mortgage foreclosure, the trial court may consider equitable principles, even though they may not have been specifically pleaded, and may consider all relevant circumstances to [e]nsure that complete justice is done." (Internal quotation marks omitted.)

Even though the plaintiff did not plead in its complaint that it was entitled to reformation of the mortgage deed, the trial court considered that claim and ultimately concluded that "the plaintiff has not sustained its burden of proving, by clear and convincing evidence, that it is entitled to the equitable remedy of reformation of the mortgage deed . . . ." (Citation omitted.) The defendant does not assert that it was improper for the trial court or the Appellate Court to consider reforming the mortgage deed instead of the note, so we also consider that claim.

[4] In its response to the defendant's request for admissions, Hudson, the plaintiff's predecessor in interest, admitted, inter alia, that the defendant did not borrow any money from Hudson or JPMorgan Chase and did not owe them any money. See *JPMorgan Chase Bank, National Assn.* v. *Virgulak*, supra, 192 Conn. App. 715–16. Approximately two weeks after trial, the

ted.) Id., 695–97. Thereafter, the plaintiff appealed from the judgment of the trial court to the Appellate Court.

On appeal to the Appellate Court, the plaintiff claimed, inter alia, that the trial court (1) improperly failed to exercise its discretion to consider the plaintiff's foreclosure claim as independent from its other claims and failed to grant the plaintiff the equitable remedy of foreclosure, (2) improperly declined to reform the mortgage deed, and (3) incorrectly concluded that Hudson's admissions limited the plaintiff's recovery under its unjust enrichment count. See id., 691–92. The Appellate Court affirmed the judgment of the trial court. Id., 722. It concluded, inter alia, that the trial court (1) "did not ignore the plaintiff's claim for foreclosure"; id., 700–701; (2) properly "declined to grant foreclosure of the mortgage without reformation because it determined that the mortgage [deed], as executed, was a nullity because it secured a nonexistent debt"; id., 703; see id., 705; (3) did not abuse its discretion by declining to reform the mortgage deed because the plaintiff did not meet its burden of proving by clear and convincing evidence that the mortgage deed did not conform to the parties' agreement; see id., 706; and (4) "did not abuse its discretion in limiting the award under the unjust enrichment count to the property taxes owed to the plaintiff." Id., 721.

We granted the plaintiff's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court properly uphold the trial court's decision declining the plaintiff's request to reform the mortgage deed to reference the fact that the mortgage [deed] executed by the defendant was given to secure a note executed by [Robert]?" And (2) "[i]f the answer to the

plaintiff filed a motion seeking to withdraw and amend the responses to the defendant's request for admissions, which the court ultimately denied. See id., 695–96.

first certified question is 'yes,' did the Appellate Court properly uphold the trial court's determination that the plaintiff was not entitled to foreclose the mortgage executed by the defendant because the defendant is not a borrower on the note?" *JPMorgan Chase Bank, National Assn.* v. *Virgulak*, 333 Conn. 945, 219 A.3d 375 (2019). Additional facts will be set forth as necessary.

I

We first consider whether the Appellate Court properly affirmed the judgment of the trial court declining to grant reformation of the mortgage deed. The plaintiff asserts that the trial court improperly did not find that the parties intended for the mortgage deed signed by the defendant to secure the note signed by Robert. Therefore, the plaintiff contends, the mortgage deed should be reformed to reflect the parties' true agreement. The defendant counters that the trial court properly refused to reform the mortgage deed on the basis of the court's factual findings. We agree with the defendant.

"Reformation is appropriate only when the [contract] executed by the parties does not reflect the agreement the parties actually intended. . . . Reformation is not granted for the purpose of alleviating a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties . . . ." (Internal quotation marks omitted.) *ARS Investors II 2012-1 HVB, LLC* v. *Crystal, LLC*, 324 Conn. 680, 692–93, 154 A.3d 518 (2017).

"A cause of action for reformation of a contract rests on the equitable theory that the instrument sought to be reformed does not conform to the real contract agreed [on] and does not express the intention of the parties and that it was executed as the result of mutual mistake, or mistake of one party coupled with actual

or constructive fraud, or inequitable conduct on the part of the other. . . . Equity evolved the doctrine because an action at law afforded no relief against an instrument secured by fraud or as a result of mutual mistake. . . . The remedy of reformation is appropriate in cases of mutual mistake—that is where, in reducing to writing an agreement made or transaction entered into as intended by the parties thereto, through mistake, common to both parties, the written instrument fails to express the real agreement or transaction. . . . In short, the mistake, being common to both parties, effects a result [that] neither intended." (Citations omitted; internal quotation marks omitted.) *Lopinto* v. *Haines*, 185 Conn. 527, 531–32, 441 A.2d 151 (1981). Additionally, "[w]here fraud is absent, it must be established that both parties agreed to something different from what is expressed in writing, and the proof on this point should be clear so as to leave no room for doubt." (Emphasis omitted; internal quotation marks omitted.) Id., 535. There is no allegation of fraud in this case.

"We have stated the standard of proof for reformation in different ways but all with the same substantive thrust: evidence should be clear, substantial and convincing." (Internal quotation marks omitted.) Id., 534. "This is the quality of the evidence required in cases of this type." Id., 535. "The burden of proof on the issue of reformation is [on] the party seeking it." Id.

Here, the plaintiff had to establish the parties' clear agreement that the defendant's mortgage deed was intended to secure the note executed by Robert. As this court has recognized, "the trier is the judge of credibility and, specifically . . . what the terms of the agreement were [is] a question of fact for the trier. . . . This court is limited to corrections of errors of law . . . ." (Citations omitted; footnote omitted.) Id., 536. The question of whether, on the facts found, the court has held the

plaintiff, who had the burden of proof on the reformation issue, to the correct standard becomes one of law and is reviewable. See id.

In the present case, the plaintiff does not assert that the trial court improperly required it to prove the parties' agreement by clear and convincing evidence. Instead, on appeal, the plaintiff challenges the trial court's determination regarding the terms of the agreement between the parties, which is a factual determination subject to the clearly erroneous standard of review. See id.

The trial court noted that the parties stipulated to the following facts: "On or about December 11, 2006, Robert executed and delivered to [JPMorgan] Chase a note in the principal amount of $533,000 . . . . [The defendant] did not sign the note. The note was not timely paid, [it] went into default on or about February 1, 2010, and [JPMorgan Chase] elected to accelerate the balance due on the note. The present foreclosure action was commenced by [JPMorgan] Chase in February, 2013, at which time it held the note executed by Robert. . . .

"On January 24, 2011, Robert filed for protection under chapter 7 of the [United States] Bankruptcy Code, listing the note as an unsecured debt. The filing listed no real property owned by Robert. . . . [O]n April 26, 2011, Robert was granted an unconditional discharge from the bankruptcy court for his obligations under the note.

"[The defendant] signed [the mortgage deed] on December 11, 2006, which recited that it was given to secure a note dated December 11, 2006, signed by [the defendant] as the '[b]orrower,' in the amount of $533,000. The term '[b]orrower' is defined in the mortgage deed as 'Theresa Virgulak, married.' . . . [The defendant] has never signed a [guarantee] of Robert's obligations under the note." (Footnote omitted.)

The trial court heard evidence from the parties over the course of a one day trial. The plaintiff introduced into evidence a copy of the note and mortgage deed. The trial court made the following findings.

The trial court found that the note was signed only by Robert, above a signature line labeled "Robert J. Virgulak," and that the note does not contain a signature line with the defendant's name. The trial court further found that "[t]he note . . . recites the obligations of the '[b]orrower' and does not otherwise define that term. However, page 3 of the note bears the signature of 'Robert J. Virgulak—[b]orrower.' The note does not bear [the defendant's] signature, nor does it indicate in any way that any person, other than Robert, is obligated under the terms of the note." (Citation omitted.)

The trial court explained that Rodriguez admitted that JPMorgan Chase's files did not include any originals or copies of any note signed by the defendant. Rodriguez did authenticate a United States Department of Housing and Urban Development Settlement Statement (HUD-1A form), a Transfer of Servicing Disclosure Statement, a Truth in Lending Statement, and a Notice of Right To Cancel, which were all signed by the defendant. None of these mortgage documents references the note executed by Robert.

The trial court also relied on the defendant's testimony.[5] At trial, the defendant testified that she had lived at the property for thirty-four years and had owned it for the last thirty years. The defendant further testified that she signed the mortgage deed at Robert's request. She admitted that she signed the HUD-1A form, the Transfer of Servicing Disclosure Statement, the Truth in Lending Statement, and the Notice of Right To Can-

[5] The trial court elucidated that "[it] has . . . consider[ed] all of the testimony given by Robert and [the defendant] to the extent that their credibility is at issue."

cel, but testified that she had not read the documents before signing them and that she signed them in Robert's presence only. The plaintiff presented no evidence to dispute this testimony.

The trial court explained that the defendant further testified that she had agreed that the proceeds of the subject note would be used to pay off a prior mortgage on the property but that she did not receive any portion of the $155,236.22 shown as paid to the "[b]orrower." The defendant explained that Robert managed the family's bills and paid all real estate taxes. The defendant further testified that she and Robert did not file joint tax returns or have credit cards in their names. The defendant also denied that she had signed any guarantees of Robert's debts.

The trial court also relied on Robert's testimony at trial.[6] He testified that, in his loan application, he included the value of the property, even though he knew that the property was solely in the defendant's name. Robert also testified that he had considered both he and the defendant jointly responsible for the prior mortgages on the property. Robert further testified that he had received the entire $155,236.22 in funds disbursed to the borrower at the closing. Robert explained that he used some of those funds to improve the kitchen and bathroom at the property. Robert testified that he paid the obligations under the note, real estate taxes and property insurance up until the time he filed for bankruptcy in 2010. Robert further testified that, since that time, he has not made any payments under the note or for real estate taxes but did reinstate the property insurance. According to Robert, the defendant has occupied the property since 2006 but has not made mortgage payments or paid property taxes.

[6] See footnote 5 of this opinion.

During cross-examination, Robert testified that the majority of the documents relating to the mortgage were given to him, not the defendant. He further testified that the defendant was not present at the closing held at the attorney's office. Robert explained that all communications regarding the mortgage were sent to him, not the defendant. Robert also explained that he used $109,070.48 of the proceeds of the note to pay off credit cards that were his exclusive responsibility and that approximately $35,000 of it was used to improve the kitchen and bathroom at the property. Robert also testified that JPMorgan Chase "required that the prior mortgages be paid off as a condition of granting the loan."

The trial court ultimately found: "The documents in evidence and the testimony of the witnesses leave many gaps in the factual record. It is not clear [whether] Robert spoke with any individual representing [JPMorgan] Chase prior to applying for the mortgage. There was no mortgage commitment listing the terms under which [JPMorgan] Chase was prepared to close the loan and what role, if any, [it] intended [the defendant] to play in the transaction. The [HUD-1A form] lists only one disbursement to a law firm—the $525 paid to Bove & Milici. Although Robert testified that the closing took place in John Milici's office, he did not testify as to whether Milici was representing him, [JPMorgan] Chase, or both. There was no testimony as to who prepared or reviewed the closing documents. Both Robert and [the defendant] testified that [the defendant] did not attend the closing and that she signed the mortgage deed and four related documents at the family home. However, there was no explanation of how the mortgage [deed] came to bear the signatures of two witnesses, one of whom, [Milici], also purported to take [the defendant's] acknowledgement.

"The records authenticated by . . . Rodriguez are silent as to any understanding [that JPMorgan] Chase

may have had with [the defendant] regarding her responsibility for the loan being made to Robert. Those records did not include a mortgage commitment letter or closing instructions, both of which typically would describe the transaction in detail and contain a checklist of documents required to be executed prior to disbursement of the proceeds of the loan."

On the basis of the foregoing, the trial court concluded: "The court finds that the plaintiff has not sustained its burden of proving, by clear and convincing evidence, that it is entitled to the equitable remedy of reformation of the mortgage deed . . . . Accordingly, the court finds the issues on the second count for [the defendant] and against the plaintiff." (Citation omitted.)

In a well reasoned opinion, the Appellate Court affirmed the judgment of the trial court, explaining that, "[a]s the [trial] court correctly noted, even with the various documents admitted into evidence at trial and the testimony of the witnesses, many gaps were left in the factual record." *JPMorgan Chase Bank, National Assn.* v. *Virgulak*, supra, 192 Conn. App. 714. We agree. Principal among those gaps is that the mortgage deed identifies a "[n]ote" but does not explicitly identify the note signed by Robert. In other words, the plaintiff failed to produce clear and convincing evidence of the particular debt obligation that was being secured by the mortgage deed executed by the defendant. Indeed, in its posttrial brief, the plaintiff conceded that the parties never intended the mortgage deed to secure a note signed by the defendant.[7] There was no evidence produced or elicited by the plaintiff that required the trial court to find that the defendant intended the mortgage as security for Robert's loan.

[7] In its response to the defendant's request for admissions, Hudson also conceded that the defendant never borrowed any money from Hudson or JPMorgan Chase. See footnote 4 of this opinion.

On appeal to this court, the plaintiff does not assert that any of the trial court's findings of fact are clearly erroneous or that the trial court incorrectly required that mutual mistake be shown by clear and convincing evidence. Instead, we understand the plaintiff's claim on appeal to be that the Appellate Court improperly affirmed the judgment of the trial court because the trial court failed to find, but should have found, that the parties—and the defendant in particular—intended the mortgage deed to secure Robert's note.

It is well established that "[a] contract is to be construed according to what may be assumed to have been the understanding and intention of the parties. . . . The intention of the parties is a question of fact to be determined from the language of the contract, the circumstances attending its negotiation, and the conduct of the parties in relation thereto. . . . The trial court's finding of fact with respect to intent is reversible on appeal only if the court's finding was clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Voll* v. *Lafayette Bank & Trust Co.*, 223 Conn. 419, 426, 613 A.2d 266 (1992). We cannot conclude that the absence of a finding by the trial court that the parties intended the mortgage deed signed by the defendant to secure Robert's note was clearly erroneous.

In the present case, the language of the contract does not support the plaintiff's claim that the defendant's mortgage deed was intended to secure the note executed by Robert. Indeed, the language of the mortgage deed does not mention Robert or any note executed by him.

The circumstances attending the negotiation of the mortgage also do not necessarily support the plaintiff's claim that the parties intended the defendant's mortgage deed to secure Robert's note. There is no evidence that the plaintiff or its predecessors in interest ever

spoke with the defendant prior to her execution of the mortgage deed, or required her to secure the note as a condition of Robert's receiving the funds. The trial court also pointed to the undisputed fact that the defendant did not attend the closing and to the lack of evidence as to whether JPMorgan Chase, or its representative, was present.

Furthermore, the conduct of the parties in relation to the mortgage deed and the note also does not necessarily support the plaintiff's claim that the defendant and JPMorgan Chase intended the defendant's signature on the mortgage deed to secure the note signed by Robert. The trial court found that Robert received all of the net loan proceeds from the note and used most of those funds to pay off credit cards that were his exclusive responsibility. The plaintiff failed to introduce any evidence of communications with the defendant regarding the note and mortgage deed.

The trial court was not persuaded that the parties to the mortgage deed intended it to secure the note signed by Robert. As we have explained, this is a factual finding left to the trial court that can be overturned only if it is clearly erroneous. On the basis of the evidence in the present case, we cannot conclude that the Appellate Court improperly affirmed the judgment of the trial court.

On appeal to this court, the plaintiff does not challenge the absence of a finding by the trial court that the parties intended the mortgage deed signed by the defendant to secure Robert's note as clearly erroneous or assert that the trial court applied the wrong standard in making its factual finding. Instead, the plaintiff asserts that, because the defendant signed a mortgage deed that referenced a note with the same date and in the same amount as the note that Robert signed, the trial court incorrectly determined that the plaintiff did

not meet its high burden of showing that the defendant intended the mortgage deed to secure the note executed by Robert. The plaintiff essentially asserts that common sense dictates that the defendant intended to sign the mortgage deed to secure a note and that there is no other reason to sign a mortgage deed. From there, the plaintiff argues that the note Robert executed on the same day that the defendant signed the mortgage deed must be the note the defendant agreed to secure.

The question before this court, however, is not whether a fact finder could reasonably have concluded that the defendant intended the mortgage deed to secure a note signed by Robert but, rather, whether the trial court's conclusion that it could not make such a finding was clearly erroneous. We conclude that it was not because, as the trial court correctly noted, the evidence presented on that specific question fell short of the very high burden required to demonstrate mutual mistake. Indeed, Hudson, the plaintiff's predecessor in interest, admitted that the defendant did not borrow any money from Hudson or JPMorgan Chase, and the plaintiff conceded that the mortgage deed was not intended to secure any note signed by the defendant. Further, the plaintiff failed to present any testimony regarding whether JPMorgan Chase itself intended the defendant's signature on the mortgage deed to secure the note signed by Robert. Because of this lack of evidence, we cannot conclude that the trial court's inability to find that the parties intended the mortgage deed signed by the defendant to secure Robert's note was clearly erroneous.

This court repeatedly has warned that the power of courts to reform written instruments is one that should be exercised cautiously. See, e.g., *Lopinto* v. *Haines*, supra, 185 Conn. 539 ("[t]his standard of proof should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is

loose, equivocal or contradictory" (internal quotation marks omitted)); see also, e.g., *Philippine Sugar Estates Development Co., Ltd.* v. *Philippine Islands*, 247 U.S. 385, 391, 38 S. Ct. 513, 62 L. Ed. 1177 (1918) (stating that reformation will not be granted "unless the proof of mutual mistake [is] of the clearest and most satisfactory character" (internal quotation marks omitted)); cf. 1 Restatement (Second), Contracts § 155, comment (c), p. 410 (1981) ("[b]ecause experience teaches that mistakes are the exception and not the rule . . . [c]are is all the more necessary when the asserted mistake relates to a writing, because the law of contracts . . . attaches great weight to the written expression of an agreement").

In the present case, it is undisputed that Robert received an unconditional discharge of his obligations under the note through the bankruptcy proceeding in 2011. The defendant was not obligated under the terms of that note, and the plaintiff is not seeking reformation of that note. Moreover, the parties stipulated, and the trial court specifically found, that the defendant was not a guarantor of the note executed by Robert. Instead, the plaintiff is effectively attempting to make the defendant a surety responsible for Robert's debt in the event of default. See, e.g., *Bernd* v. *Lynes*, 71 Conn. 733, 736, 43 A. 189 (1899) ("the contract of a surety is a collateral engagement for another, as distinguished from an original and direct agreement for the party's own act" (internal quotation marks omitted)). We cannot conclude that the trial court's refusal to use its equitable power to reform the mortgage deed was improper under these circumstances.

To be sure, identifying the obligation secured by a mortgage deed is not a technical or scrivener's error. Reforming the mortgage deed in the manner sought by the plaintiff without establishing that the change effects the original intention of the parties changes the defen-

dant's obligations and creates a new contract between her and the plaintiff. This court has cautioned that "[a]n obstacle to reformation [that] we find insurmountable arises from the fundamental principle that there can be no reformation unless there is an antecedent agreement upon which the minds of the parties have met. The relief afforded in reforming an instrument is to make it conform to the previous agreement of the parties." *Hoffman* v. *Fidelity & Casualty Co. of New York*, 125 Conn. 440, 443, 6 A.2d 357 (1939). Consequently, "a definite agreement on which the minds of the parties have met must have [preexisted] the instrument in question." Id. It is axiomatic that a "court cannot supply an agreement [that] was never made, for it is [a court's] province to enforce contracts, not to make or alter them." Id. The issue here is whether it was clearly erroneous for the trial court not to find that a prior agreement existed between JPMorgan Chase and the defendant that the defendant would execute the mortgage deed in order to secure Robert's debt.

We recognize that the fact the mortgage deed and note have matching dates and refer to matching amounts could have allowed the trial court to infer that the transactions are related. However, based on the other evidence presented, which suggests that the defendant did not intend to secure Robert's debt, and the absence of any direct evidence that either party did intend the mortgage deed to secure a note executed by Robert, we cannot conclude that the absence of a finding by the trial court that JPMorgan Chase and the defendant intended for the defendant to execute the mortgage deed in order to secure Robert's note was clearly erroneous.

In its brief, the plaintiff posits the rhetorical question, what other reason would the defendant have to sign the mortgage deed if not to secure Robert's note? This question and the speculative answer it may yield, how-

ever, do not provide anything like dispositive evidence of the parties' respective intentions here. The defendant had no burden to demonstrate what other purpose or intent motivated her to sign the mortgage deed. It is the plaintiff, as the party seeking reformation, that must prove the preexisting agreement that it seeks to effectuate, and it must do so by clear and convincing evidence. It did not do so to the satisfaction of the trial court, and we cannot conclude that the trial court's findings in this regard were clearly erroneous.

We cannot conclude, on the basis of the evidence before the trial court, that the absence of a finding by the court that the parties intended the mortgage deed signed by the defendant to secure the note signed by Robert was clearly erroneous. Thus, we conclude that the Appellate Court properly upheld the trial court's decision to decline to reform the mortgage deed.

II

We next consider whether the Appellate Court properly affirmed the judgment of the trial court determining that the plaintiff was not entitled to foreclose the mortgage executed by the defendant because the defendant is not a borrower on the note. On appeal, the plaintiff contends that, even if this court concludes that the Appellate Court properly upheld the trial court's denial of the request for reformation, the plaintiff is nevertheless entitled to foreclose. The plaintiff argues that this is so because it is undisputed that the defendant entered into a mortgage transaction and common sense dictates that she intended her property interest to be security for the note contemporaneously executed by Robert. The plaintiff contends that, therefore, foreclosure is the proper equitable relief. The defendant counters that the plaintiff cannot foreclose the mortgage without reformation. We agree with the defendant.

As we noted previously, "[a] foreclosure action is an equitable proceeding. . . . The determination of what equity requires is a matter for the discretion of the trial court." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Angle*, 284 Conn. 322, 326, 933 A.2d 1143 (2007). Thus, on appeal, we employ the abuse of discretion standard. See, e.g., id.

"In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied." GMAC *Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 176, 73 A.3d 742 (2013), citing *Franklin Credit Management Corp.* v. *Nicholas*, 73 Conn. App. 830, 838, 812 A.2d 51 (2002), cert. denied, 262 Conn. 937, 815 A.2d 136 (2003).

In the present case, it is undisputed that the defendant did not sign the promissory note. Instead, the defendant signed only the mortgage deed, and the mortgage deed does not indicate that it was entered into to secure the note executed by Robert. The mortgage deed mentions only a nonexistent promissory note for which the defendant alone is the borrower. Hudson, the plaintiff's predecessor in interest, conceded that the defendant was not a borrower on any note.

We find the Appellate Court's reasoning persuasive in resolving this claim. The Appellate Court reasoned: "In reviewing the [trial] court's memorandum of decision and subsequent rulings on the plaintiff's motions, it is clear that it declined to grant foreclosure of the mortgage without reformation because it determined that the mortgage [deed], as executed, was a nullity because it secured a nonexistent debt." *JPMorgan Chase Bank, National Assn.* v. *Virgulak*, supra, 192 Conn.

App. 703. Accordingly, like the Appellate Court majority, we cannot conclude that the plaintiff was entitled to foreclose a mortgage for a debt for which the defendant was not responsible and that was not referenced in the mortgage deed.

On the basis of the foregoing, we conclude that the Appellate Court correctly concluded that the trial court did not abuse its discretion and properly affirmed the judgment of the trial court.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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## JOANN RICCIO, EXECUTRIX (ESTATE OF THERESA RICCIO) *v.* THE BRISTOL HOSPITAL, INC. (SC 20529)

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

*Syllabus*

Pursuant to the accidental failure of suit statute (§ 52-592 (a)), "[i]f any action, commenced within the time limited by law, has failed one or more times to be tried on its merits . . . because the action has been . . . avoided or defeated . . . for any matter of form," the plaintiff may commence a new action for the same cause within one year after the determination of the original action.

Pursuant to this court's decision in *Plante* v. *Charlotte Hungerford Hospital* (300 Conn. 33), a plaintiff may bring a subsequent medical malpractice action pursuant to the matter of form provision of § 52-592 (a) only when the trial court finds that the failure in the first action to provide a legally sufficient opinion letter from a similar health care provider pursuant to statute (§ 52-190a (a)) was the result of mistake, inadvertence, or excusable neglect, rather than egregious conduct or gross negligence on the part of the plaintiff or his or her attorney.

The plaintiff, the executor of R's estate, filed a medical malpractice action against the defendant hospital, alleging that certain of its employees had negligently caused R's death. The trial court dismissed that action, concluding that the plaintiff's attorney, Z, had failed to file legally sufficient medical opinion letters with the plaintiff's complaint, as required by § 52-190a (a) and prior Appellate Court case law interpreting that

statutory provision, as those opinion letters did not disclose the professional qualifications of their authors. The plaintiff did not appeal from the trial court's judgment of dismissal but, instead, commenced the present action under § 52-592, which was based on the same malpractice claims asserted in her prior action, approximately five months after the statute of limitations expired. The trial court rendered judgment dismissing the action as time barred, concluding that § 52-592 did not apply because Z's failure to include in the opinion letters the qualifications of their authors was not a matter of form due to mistake, inadvertence, or excusable neglect. On the plaintiff's appeal, *held* that the trial court correctly concluded that § 52-592 did not save the plaintiff's otherwise time barred action, the plaintiff having failed to meet her burden of proving that Z's failure to file legally sufficient medical opinion letters in the first action was the result of a mistake, inadvertence, or excusable neglect, rather than egregious conduct or gross negligence: having reviewed the meanings of "gross negligence" and "egregious" in case law and dictionaries, and having reviewed cases in which courts were required to place an attorney's conduct on the spectrum between excusable neglect and gross negligence, including cases involving the matter of form provision in § 52-592, this court could not conclude, on the basis of the evidence in the record, that Z's lack of knowledge of and failure to comply with the requirement, established by two Appellate Court cases interpreting § 52-190a (a), that an opinion letter include the professional qualifications of its author was the result of a mistake, inadvertence, or excusable neglect, rather than egregious conduct or gross negligence; Z had been practicing medical malpractice law for more than ten years before he filed the plaintiff's first action, the adequacy of an opinion letter is one of the most frequently litigated pretrial issues in medical malpractice actions, the two Appellate Court cases of which Z was unaware were decided at least six years before the plaintiff's first action was filed, in the six year period after those two cases were decided, Z filed five medical malpractice actions in which he had failed to comply with the requirement established by those cases, and Z acknowledged that, prior to filing the plaintiff's first action, he had not read those Appellate Court cases; accordingly, this was not a situation in which Z inadvertently omitted necessary information from the opinion letters, as Z was completely unaware of the requirement to include the authors' qualifications in the letters, and even cursory research into the requirements for such opinion letters would have revealed this particular requirement.

Argued February 19, 2021—officially released January 13, 2022*

*January 13, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Procedural History*

Action to recover damages for the wrongful death of the plaintiff's decedent as a result of the defendant's alleged medical malpractice, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Morgan, J.*, granted the defendant's motion to dismiss and rendered judgment for the defendant, from which the plaintiff appealed. *Affirmed.*

*Joseph Peter Zeppieri*, with whom, on the brief, was *Kevin Ferry*, for the appellant (plaintiff).

*Michael G. Rigg*, for the appellee (defendant).

*Opinion*

McDONALD, J. The appeal in this medical malpractice action requires us to determine whether the trial court correctly concluded that the accidental failure of suit statute, General Statutes § 52-592,[1] did not save the otherwise time barred action of the plaintiff, Joann Riccio, executrix of the estate of Theresa Riccio, because her first medical malpractice action was dismissed due to her attorney's gross negligence for failing to file with her complaint legally sufficient medical opinion letters, as required by General Statutes § 52-190a (a) and two Appellate Court decisions interpreting that statute. Specifically, we must determine whether the plaintiff met her burden of proving that her attorney's admitted failure to know of two Appellate Court decisions, issued six years before she initiated the first

[1] General Statutes § 52-592 (a) provides in relevant part: "If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the action has been dismissed for want of jurisdiction, or the action has been otherwise avoided or defeated by the death of a party or for any matter of form . . . the plaintiff . . . may commence a new action . . . for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment."

action, was a mistake, inadvertence, or excusable neglect rather than egregious conduct or gross negligence. We agree with the trial court that the plaintiff has not met her burden and, therefore, affirm its judgment.

The record reveals the following relevant facts and procedural history. On May 3, 2018, the plaintiff filed a medical malpractice action (*Riccio I*) against the defendant, The Bristol Hospital, Inc., alleging that various doctors and nurses negligently caused the death of the decedent. The trial court dismissed *Riccio I* for lack of personal jurisdiction because the plaintiff failed to file with her complaint legally sufficient medical opinion letters as required by § 52-190a (a) and General Statutes § 52-184c. Specifically, the court in *Riccio I* held that, under *Lucisano* v. *Bisson*, 132 Conn. App. 459, 466, 34 A.3d 983 (2011), and *Bell* v. *Hospital of Saint Raphael*, 133 Conn. App. 548, 560–61, 36 A.3d 297 (2012), the submitted opinion letters were legally insufficient because neither disclosed the author's professional qualifications. The plaintiff did not appeal the court's dismissal of *Riccio I*.

On October 9, 2018, the plaintiff commenced this action (*Riccio II*) under the accidental failure of suit statute, § 52-592. In her complaint, the plaintiff alleged, among other things, that *Riccio I* was dismissed due to the plaintiff's "mere mistake or inadvertence" in failing to include the credentials of the experts in the opinion letters attached to the original complaint. The defendant moved to dismiss *Riccio II* for lack of subject matter jurisdiction, claiming, among other things, that the dismissal of *Riccio I* was not a "matter of form" within the meaning of § 52-592, and, thus, *Riccio II* could not be saved under the accidental failure of suit statute.

The trial court noted that the two year statute of limitations for a wrongful death action, having been

extended ninety days pursuant to § 52-190a (b), expired on May 11, 2018, and *Riccio II* was commenced approximately five months after the statute of limitations had expired. Thus, the court concluded that the action was time barred unless § 52-592 applied.

The trial court held an evidentiary hearing on the issue of whether § 52-592 applied to this action. During the hearing, the sole witness was one of the plaintiff's attorneys, Joseph Zeppieri. The court found that Zeppieri has been practicing law since 2006 and that, prior to attending law school, he practiced medicine for more than thirty years. Zeppieri has been involved in medical malpractice cases since his admission to the bar, and, since 2012, after *Lucisano* and *Bell* were decided, he has represented clients in five medical malpractice actions and has joined with other counsel in a sixth action.[2] The court also found that, prior to filing *Riccio I*, Zeppieri, by his own admission, had not read the Appellate Court's decisions in *Lucisano* or *Bell*. He only became aware of those decisions when the defendant filed its motion to dismiss in *Riccio I*. During the hearing, Zeppieri acknowledged that it was a mistake not to have been aware of controlling case law before commencing *Riccio I* but contended that his error was an "insubstantial technical mistake." No other evidence was introduced at the hearing.

The trial court ultimately rejected the plaintiff's contention that the failure to articulate the experts' credentials in their opinion letters was simply a matter of form due to mistake, inadvertence, or excusable neglect.[3]

[2] During the hearing, Zeppieri testified that, in all of those cases that he participated in since *Lucisano* and *Bell* had been decided, the expert opinion letters he filed did not include statements of the expert's qualifications. He also testified that all six cases went to verdict or settlement without the defendant's counsel raising a motion to dismiss based on the failure of the expert opinion letters to include the statement of qualifications.

[3] The trial court also rejected the plaintiff's argument that the failure to file legally sufficient medical opinion letters in *Riccio I* was a scrivener's error. It further rejected the plaintiff's contention that she met the intent

The court explained that, if Zeppieri had read *Lucisano* or *Bell*, he would have known that the opinion letters he solicited and obtained for *Riccio I* were legally insufficient and would render the action subject to dismissal. The court also noted that Zeppieri offered no explanation for his "misconduct." It reasoned: "The adequacy of a 'similar health care provider' opinion letter is one of the most frequently litigated pretrial issues in medical malpractice actions. Given the law in Connecticut at the time *Riccio I* was commenced, the plaintiff's counsel reasonably could not have believed that the opinion letters they supplied complied with § 52-190a. Counsel's admitted failure to read and comply with controlling appellate precedent, decided more than six years before *Riccio I* was filed, is egregious, inexplicable, and inexcusable conduct." The court then concluded: "[T]he court finds on the facts before it that the plaintiff's counsel's lack of diligence in knowing and complying with Appellate Court precedent is blatant and egregious conduct that was not intended to be condoned and sanctioned by the 'matter of form' provision of § 52-592. Simply put, the plaintiff's counsel's ignorance of the law in this case does not constitute excusable neglect. 'The familiar legal maxims, that everyone is presumed to know the law, and that ignorance of the law excuses no one, are founded [on] public policy and in necessity, and the idea [behind] them is that one's acts must be considered as having been done with knowledge of the law, for otherwise its evasion would be facilitated and the courts burdened with collateral

of the law because both experts were properly credentialed. The court explained that the plaintiff "filed no affidavits or other documentation in opposition to the motion to dismiss and offered no evidence at the [evidentiary hearing] as to the opinion letter authors' qualifications. Consequently, the court cannot determine whether the experts who authored letters in *Riccio I* were properly credentialed or whether the intent of § 52-190a was met, namely, protecting health care providers from frivolous malpractice actions."

inquiries into the content of men's [and women's] minds.' " The court explained that, because the plaintiff "failed to meet her burden of demonstrating that the dismissal of *Riccio I* was a matter of form, the plaintiff [could not] avail herself of the accidental failure of suit statute." Accordingly, the court dismissed *Riccio II*, concluding that the action was time barred.

On appeal, the plaintiff claims that the trial court incorrectly determined that the omission of the experts' qualifications in their letters was egregious conduct rather than a matter of form or a mistake. Specifically, the plaintiff argues that the court did not place Zeppieri's actions on the continuum of mistake, inadvertence, or excusable neglect, on the one hand, and dismissal for egregious conduct or gross negligence, on the other, as required by *Plante* v. *Charlotte Hungerford Hospital*, 300 Conn. 33, 50–51, 56, 12 A.3d 885 (2011). Rather, the plaintiff contends, the trial court improperly applied the legal maxims " 'that everyone is presumed to know the law, and that ignorance of the law excuses no one . . . .' " As a result, the plaintiff argues, the trial court essentially created a rule that the failure to know the law is per se gross negligence and could never be considered mistake, inadvertence, or excusable neglect.[4]

The defendant notes that "[t]he plaintiff bears the burden of proving that her failure to comply with § 52-190a was the result of 'mistake, inadvertence or excus-

[4] The plaintiff also contends that the trial court erred when it failed to consider whether the authors of the opinion letters were in fact similar experts or were qualified to testify at trial as part of its evaluation of whether the plaintiff's attorney's conduct was a mistake, inadvertence, or excusable neglect. On this point, the trial court explained, "the plaintiff's [counsel's] failure to provide this court with evidence as to the qualifications of the authors of the *Riccio I* opinion letters precluded the court from considering whether the authors are 'similar health care providers,' as defined by § 52-184c (b) [and] (c), or whether either might be otherwise qualified to testify at the trial of the action pursuant to § 52-184c (d)."

able neglect,' which is a factual question." The defendant contends that the trial court's finding that Zeppieri's ignorance of law was inexcusable was not clearly erroneous because (1) Zeppieri has been involved in medical malpractice actions since his admission to the bar in 2006, (2) *Lucisano* and *Bell* were issued more than six years before *Riccio I* was commenced, (3) in the six year period after *Lucisano* and *Bell* were decided, Zeppieri testified that he filed five medical malpractice actions in which he failed to comply with the requirements in *Lucisano* and *Bell*, and (4) prior to filing *Riccio I*, Zeppieri had not read *Lucisano* and *Bell*.[5]

We begin with the standard of review and relevant legal principles. "A determination of the applicability of § 52-592 depends on the particular nature of the conduct involved. . . . This requires the court to make factual findings, and [a] finding of fact will not be disturbed unless it is clearly erroneous. . . . [T]he question of whether the court properly applied § 52-592 presents an issue of law over which our review is plenary." (Citations omitted; internal quotation marks omitted.) *Estela*

[5] As an alternative ground for affirmance, the defendant contends that the opinion letters filed in *Riccio II* still do not comply with the requirements of § 52-190a. Specifically, the defendant contends that one of the opinion letters fails to satisfy the requirement that it state that "there appears to be evidence of medical negligence and [include] a detailed basis for the formation of such opinion." General Statutes § 52-190a (a). The defendant claims that the other opinion letter is deficient because it does not comply with § 52-184c (b) in that it "contains no information that would permit the court to determine that the author has relevant experience 'within the five-year period before the incident giving rise to the claim.' " Finally, the defendant contends that, to the extent that we conclude that those opinion letters are legally sufficient, partial dismissal is required because the opinion letters "fail to show that the authors are similar health care providers to anyone other than nurses and internists." The plaintiff contends that the defendant's alternative grounds for affirmance are not yet ripe and, therefore, should not be considered. The plaintiff also disagrees with the merits of those claims. Given our conclusion that the plaintiff's first action was not dismissed based on a matter of form, we need not reach the defendant's alternative grounds for affirmance.

v. *Bristol Hospital, Inc.*, 179 Conn. App. 196, 215, 180 A.3d 595 (2018).

As we have explained, "the accidental failure of suit statute can be traced as far back as 1862 . . . and is a savings statute that is intended to promote the strong policy favoring the adjudication of cases on their merits rather than the disposal of them on the grounds enumerated in § 52-592 (a). . . . We note, however, that this policy is not without limits. If it were, there would be no statutes of limitations. Even the saving[s] statute does not guarantee that all plaintiffs have the opportunity to have their cases decided on the merits. It merely allows them a limited opportunity to correct certain defects in their actions within a certain period of time." (Citations omitted; internal quotation marks omitted.) *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 355, 63 A.3d 940 (2013). We have previously explained that § 52-592 (a) is ambiguous regarding what constitutes a "matter of form"; *Plante* v. *Charlotte Hungerford Hospital*, supra, 300 Conn. 49; and have declined to adopt an extremely broad construction of the accidental failure of suit statute to the effect that " '[t]he phrase, "any matter of form," was used in [contradistinction] to matter of substance, as embracing the real merits of the controversy between the parties.' " Id., 50. Rather, we have emphasized that § 52-592 (a) "does not authorize the reinitiation of all actions not tried on . . . [their] merits" and that, "[i]n cases [in which] we have either stated or intimated that the any matter of form portion of § 52-592 would not be applicable to a subsequent action brought by a plaintiff, we have concluded that the failure of the case to be tried on its merits had not resulted from accident or even simple negligence." (Internal quotation marks omitted.) *Lacasse* v. *Burns*, 214 Conn. 464, 473, 572 A.2d 357 (1990).

In particular, with respect to similar health care provider opinion letters, "a plaintiff may bring a subsequent

medical malpractice action pursuant to the matter of form provision of § 52-592 (a) *only when the trial court finds as a matter of fact* that the failure in the first action to provide an opinion letter that satisfies § 52-190a (a) was the result of mistake, inadvertence or excusable neglect, rather than egregious conduct or gross negligence on the part of the plaintiff or his attorney." (Emphasis added.) *Plante* v. *Charlotte Hungerford Hospital*, supra, 300 Conn. 56. The plaintiff bears the burden of proving that the prior dismissal was the result of mistake, inadvertence, or excusable neglect and, therefore, a "matter of form" within the meaning of § 52-592. See *Ruddock* v. *Burrowes*, 243 Conn. 569, 576–77, 706 A.2d 967 (1998) ("[t]o enable *a plaintiff to meet the burden* of establishing the right to avail himself or herself of the statute, a plaintiff must be afforded an opportunity to make a factual showing that the prior dismissal was a 'matter of form' " (emphasis added)). In *Plante*, we emphasized the "case-sensitive nature of the inquiry under § 52-592 (a) . . . ." *Plante* v. *Charlotte Hungerford Hospital*, supra, 56 n.21; see also id., 57 n.21 ("a plaintiff seeking relief under the matter of form provision of § 52-592 (a) does so at his or her peril, given the *case-sensitive nature of the determination* that the failure as a matter of form was not based on 'egregious' conduct by the party or counsel" (emphasis added)). As the Appellate Court has aptly put it, "[t]he inquiry under § 52-592 . . . may be conceptualized as a continuum whereupon a case must be properly placed between one extreme of dismissal for mistake and inadvertence, and the other extreme of dismissal for serious misconduct or cumulative transgressions." *Skinner* v. *Doelger*, 99 Conn. App. 540, 554, 915 A.2d 314, cert. denied, 282 Conn 902, 919 A.2d 1037 (2007).

Relevant to this case, § 52-190a (a) requires that a plaintiff bringing a medical malpractice action include

an opinion letter of a similar health care provider stating that there is evidence of medical negligence. Specifically, the statute provides in relevant part: "No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death . . . in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint, initial pleading or apportionment complaint shall contain a certificate of the attorney or party filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant or for an apportionment complaint against each named apportionment defendant. To show the existence of such good faith, *the claimant or the claimant's attorney, and any apportionment complainant or the apportionment complainant's attorney, shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c*, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. . . ."[6] (Emphasis added.) General Statutes § 52-190a (a).

[6] The validity of the opinion letter under § 52-190a depends in part on whether the author of that letter qualifies as a "similar health care provider," which is defined in General Statutes § 52-184c (b) as one who "(1) [i]s licensed by the appropriate regulatory agency of this state or another state requiring the same or greater qualifications; and (2) is trained and experienced in the same discipline or school of practice and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim." See also General Statutes § 52-184c (c) (setting forth requirements for similar health care provider when defendant is certified as specialist).

In 2011, the Appellate Court held that "the language of § 52-190a, read in the context of § 52-184c, clearly and unambiguously requires that the qualifications of the opinion letter author be set forth" in the opinion letter. *Lucisano* v. *Bisson*, supra, 132 Conn. App. 468. That holding was reaffirmed several months later by the Appellate Court in *Bell* v. *Hospital of Saint Raphael*, supra, 133 Conn. App. 560–61. This court has not yet had occasion to address whether § 52-190a requires the qualifications of the opinion letter author to be included in the letter, and the parties in this appeal do not challenge the holdings of *Lucisano* and *Bell*. Accordingly, we express no opinion on the matter other than to note that the trial court was bound by those precedents.

Here, there is no dispute that, in *Riccio I*, the plaintiff's attorney did not comply with the requirement in *Lucisano* and *Bell* that the opinion letters contain a statement regarding the qualifications of the author. Zeppieri testified that he had not read the two Appellate Court decisions and became aware of them only when the defendant filed its motion to dismiss in *Riccio I*. The plaintiff characterizes this as excusable neglect, which would permit § 52-592 to save her cause of action. The defendant, on the other hand, contends it is gross negligence, which would preclude the application of § 52-592. The question we must decide is whether the trial court correctly determined that the plaintiff failed to establish that Zeppieri's admitted failure to know of two Appellate Court decisions, issued six years before plaintiff initiated the first action, was a mistake, inadvertence, or excusable neglect rather than egregious conduct or gross negligence.

We begin with the definitions of "gross negligence" and "egregious." Connecticut law "does not recognize degrees of negligence and, consequently, does not recognize the tort of gross negligence as a separate basis of liability." *Hanks* v. *Powder Ridge Restaurant Corp.*,

276 Conn. 314, 337, 885 A.2d 734 (2005). We have, however, defined gross negligence as "very great or excessive negligence, or as the want of, or failure to exercise, even slight or scant care or slight diligence . . . ." (Internal quotation marks omitted.) Id., 338; see also *C & H Electric, Inc.* v. *Bethel*, 312 Conn. 843, 869, 96 A.3d 477 (2014) ("[g]ross negligence requires conduct that 'betokens a reckless indifference to the rights of others' "); *Hanks* v. *Powder Ridge Restaurant Corp.*, supra, 352 (*Norcott, J.*, dissenting) ("[t]his court has construed gross negligence to mean no care at all, or the omission of such care [that] even the most inattentive and thoughtless seldom fail to make their concern, evincing a reckless temperament and lack of care, practically [wilful] in its nature" (internal quotation marks omitted)); 57A Am. Jur. 2d 296–97, Negligence § 227 (2004) (" 'Gross negligence' means more than momentary thoughtlessness, inadvertence or error of judgment; hence, it requires proof of something more than the lack of ordinary care. It implies an extreme departure from the ordinary standard of care, aggravated disregard for the rights and safety of others, or negligence substantially and appreciably greater than ordinary negligence." (Footnotes omitted.)). Similarly, "egregious" is defined as "[e]xtremely or remarkably bad; flagrant . . . ." Black's Law Dictionary (11th Ed. 2019) p. 652; see also American Heritage College Dictionary (4th Ed. 2007) p. 447 (defining "egregious" as "[c]onspicuously bad or offensive"); Webster's New International Dictionary of the English Language (2d Ed. 1953) p. 821 (defining "egregious" as "[c]onspicuous for bad quality; flagrant; gross; shocking").

Although not precisely the same procedural posture, in determining whether Zeppieri's conduct was egregious or amounted to gross negligence, we find instructive our decision regarding disciplinary dismissals in *Ruddock* v. *Burrowes*, supra, 243 Conn. 569, given that,

in the present case, Zeppieri was unaware of controlling appellate case law, which the trial court characterized as "misconduct." In *Ruddock*, this court determined that "[d]isciplinary dismissals do not, in all cases, demonstrate the occurrence of misconduct so egregious as to bar recourse to § 52-592." Id., 576. Rather, the court explained, whether the dismissal of a prior proceeding permitted a plaintiff recourse to the savings statute "*depends* [*on*] *the nature and the extent of the conduct that led to the disciplinary dismissal*." (Emphasis added.) Id., 570. Thus, not all negligence on the part of an attorney is per se gross negligence or egregious conduct because § 52-592 distinguishes between excusable neglect and gross negligence. Indeed, § 52-592 comes into play only when an error has been made, most often by an attorney. A trial court, therefore, must make factual findings and explain why the attorney's error is egregious or gross negligence and not excusable neglect. Cf. id., 577 ("We have not often decided that a plaintiff, after a dismissal under an applicable rule of practice, should be denied access to [§ 52-592 (a)] because the prior judgment was not a 'matter of form.' When we have done so, our decision has focused on *conduct other than mistake, inadvertence or excusable neglect*." (Emphasis added.)). In short, "the egregiousness of the conduct precipitating the dismissal must be examined in determining whether § 52-592 applies in a given instance."[7] *Vestuti* v. *Miller*, 124 Conn. App. 138, 144, 3 A.3d 1046 (2010).

[7] Indeed, cases have been remanded to the trial court for failure to appropriately weigh evidence and determine credibility resulting in an insufficient evidentiary basis for a case to be accurately placed on the § 52-592 continuum. For example, in *Vestuti* v. *Miller*, 124 Conn. App. 138, 3 A.3d 1046 (2010), the Appellate Court explained: "[T]he plaintiff should be afforded the opportunity to have the court determine this issue—that the judgment of nonsuit [was rendered] due to the mere inadvertence of the plaintiff's attorney—especially given the surrounding circumstances in which the plaintiff's attorney knew for months in advance the date of the mandatory pretrial conference and yet still failed to notify both the plaintiff of the conference and the presiding judge that she would not attend. Without the

With this background in mind, we turn to the cases in which we have placed an attorney's conduct on the spectrum of excusable neglect and gross negligence to determine the applicability of the accidental failure of suit statute. We have previously held that the failure to submit an opinion letter from a similar health care provider and the failure to submit any opinion letter at all constitutes gross negligence such that a plaintiff cannot make use of the accidental failure of suit statute. First, in *Plante*, this court upheld the trial court's determination that the failure to submit an opinion letter from a similar health care provider constituted gross negligence. *Plante* v. *Charlotte Hungerford Hospital*, supra, 300 Conn. 57. Specifically, this court stated: "[W]e agree with the hospital defendants that § 52-592 (a) did not permit the plaintiffs to bring [the] action against them after dismissal of the original action. The trial court found that the 'decision to engage . . . [the nurse expert] to review the file and to provide a written opinion of negligence is inexplicable. Even a cursory reading of § 52-190a would have revealed that . . . [the nurse expert] did not qualify as a similar health care provider.' . . . The trial court's finding is particularly apt given that [the nurse expert] is neither a physician nor a social worker, and even her psychiatric nursing experience was scant. . . . Thus, we agree with the trial court's determination that the 'plaintiffs' lack of diligence in selecting an appropriate person or persons to review the case for malpractice can only be characterized as blatant and egregious conduct [that] was never intended to be condoned and sanctioned by the "matter of form" provision of § 52-592.' " (Citation omit-

trial court appropriately weighing the evidence and determining credibility, there is an insufficient evidentiary basis for this case to be accurately placed on the § 52-592 continuum." Id., 146–47; see also *Ruddock* v. *Burrowes*, supra, 243 Conn. 578 (ordering trial court on remand to make findings of fact with respect to "the circumstances of the plaintiffs' claimed justification for nonappearance at the pretrial conference").

ted; emphasis omitted.) Id. Most recently, in *Santorso*, this court agreed with the trial court's finding that "[i]t [could not] be said that counsel's failure to file a good faith certificate and opinion letters in [the first action] was the result of mistake, inadvertence, or excusable neglect." (Internal quotation marks omitted.) *Santorso* v. *Bristol Hospital*, supra, 308 Conn. 358. The court found it particularly significant that, "because the plaintiff's counsel declined the court's invitation to explain the failure to comply with the requirements of § 52-190a (a), there is no record that might support a finding that [counsel's] conduct was due to [mistake, inadvertence, or excusable neglect], and the court must conclude that his action was deliberate." (Internal quotation marks omitted.) Id.

In related contexts, courts have held that the failure to know controlling law may constitute gross negligence. Rule 60 (b) of the Federal Rules of Civil Procedure is similar to § 52-592 in that it allows a court to vacate a "final judgment, order, or proceeding" within one year of the decision based on a finding of "mistake, inadvertence, surprise, or excusable neglect . . . ."[8] Federal courts have explained that, "[w]hile [r]ule 60 (b) (1) allows relief for 'mistake, inadvertence . . . or excusable neglect,' *these terms are not wholly open-ended. 'Gross carelessness is not enough. Ignorance of the rules is not enough, nor is ignorance of the law.'* "

[8] We acknowledge that rule 60 (b) of the Federal Rules of Civil Procedure pertains to opening judgments, including for cases that have been tried on the merits, and is not identical to § 52-592. Our discussion of rule 60 (b), and the various state court cases that follow, is intended to highlight the various situations in which courts have considered whether an attorney's negligence may constitute gross negligence or excusable neglect. See, e.g., *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 393–95, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993) (noting that, under rule 60 (b), attorney negligence can constitute excusable neglect and rejecting notion that attorney negligence is per se inexcusable neglect). Nothing in this opinion should be read to import the analytic framework from the rule 60 (b) context into an analysis under § 52-592.

(Emphasis added.) *Pryor* v. *U.S. Postal Service*, 769 F.2d 281, 287 (5th Cir. 1985); see also *Thompson* v. *E.I. DuPont de Nemours & Co.*, 76 F.3d 530, 533 (4th Cir. 1996) ("inadvertance, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect" (internal quotation marks omitted)); *United States* v. *Erdoss*, 440 F.2d 1221, 1223 (2d Cir.) ("[t]he law in this circuit is reasonably clear when a conscious decision has been made by counsel, ignorance of the law is not the sort of excusable neglect contemplated by [f]ederal [c]ivil [r]ule 60 (b)" (internal quotation marks omitted)), cert. denied sub nom. *Horvath* v. *United States*, 404 U.S. 849, 92 S. Ct. 83, 30 L. Ed. 2d 88 (1971); *Vaden* v. *Connecticut*, 557 F. Supp. 2d 279, 293 (D. Conn. 2008) ("[t]he Second Circuit has consistently declined to relieve a client . . . of the burdens of a final judgment [rendered] against him due to the mistake or omission of his attorney by reason of the latter's ignorance of the law or other rules of court" (internal quotation marks omitted)).

State courts have also held that ignorance of the law does not constitute excusable neglect in related contexts. See, e.g., *Madill* v. *Rivercrest Community Assn., Inc.*, 273 So. 3d 1157, 1160 (Fla. App. 2019) (" '[e]xcusable neglect cannot be based [on] an attorney's misunderstanding or ignorance of the law' "); *Whitefish Credit Union* v. *Sherman*, 367 Mont. 103, 109, 289 P.3d 174 (2012) ("[e]xcusable neglect requires some justification for an error beyond mere carelessness or ignorance of the law on the part of the litigant or his attorney"). Significantly, the Colorado Supreme Court has held that an attorney's ignorance of controlling case law constituted gross negligence. *People* v. *Barber*, 799 P.2d 936, 940 (Colo. 1990). The court explained that "[i]t is objectively unreasonable for the respondent to claim reliance on a federal district court decision with which this court expressly disagreed on the precise point of Colorado

law raised here." Id., 939. The court noted that the attorney's "contrary conclusion was based only on a cursory examination of the annotations to [the statute of limitations]. Even if we were to believe the respondent, given the time available and the urgings of his clients to proceed, legal research [that] was so obviously inadequate on a question of such magnitude would constitute gross negligence . . . ." Id., 940.

Here, Zeppieri acknowledged before the trial court that it was a mistake not to have been aware of controlling case law before commencing *Riccio I* but otherwise provided no explanation for his actions. The twenty page transcript that contains the entire evidentiary record on this issue indicates only that Zeppieri and the plaintiff's other attorney, Kevin Ferry, had not read *Lucisano* or *Bell* until it became an issue in this case. On cross-examination, Zeppieri explained: "I had not read [*Lucisano*], which had attached a new requirement to the statute that is not in the text of the statute. There's no requirement in [§ 52-190a] that the letter include that material. The requirement came only as a result of the Appellate Court's . . . decision in *Lucisano* . . . ." There is no testimony regarding whether Zeppieri had conducted any research or otherwise explaining why he was unaware of the two Appellate Court decisions. As a result, we agree with the trial court that Zeppieri failed to meet his burden of proving that the dismissal of *Riccio I* was the result of mistake, inadvertence, or excusable neglect. See *Ruddock* v. *Burrowes*, supra, 243 Conn. 576–77. In the absence of further explanation—such as the failure to uncover *Lucisano* and *Bell* despite diligent research—we agree with the trial court's determination that Zeppieri's admitted failure to know of controlling Appellate Court case law, decided six years before he initiated the action, constituted gross negligence. As in *Santorso*, in which the plaintiff's counsel failed to explain his

noncompliance with § 52-190a (a); see *Santorso* v. *Bristol Hospital*, supra, 308 Conn. 358; Zeppieri failed to explain his noncompliance with *Lucisano* and *Bell*. Accordingly, there is no evidence in the record from which to conclude that Zeppieri's failure to know of the controlling Appellate Court case law was an accident, inadvertence, or excusable neglect.

The plaintiff nevertheless contends that the trial court improperly applied the legal maxims " 'that everyone is presumed to know the law, and that ignorance of the law excuses no one . . . .' " We agree with the plaintiff that application of such legal maxims would violate the requirement in *Plante* that a court place an attorney's actions on the continuum of mistake, inadvertence, or excusable neglect, on the one hand, and dismissal for egregious conduct or gross negligence, on the other.[9] *Plante* v. *Charlotte Hungerford Hospital*, supra, 300 Conn. 50–51, 56. We disagree, however, that the trial court failed to place Zeppieri's conduct on the continuum. As the trial court found: (1) Zeppieri has practiced in the "complex, vigorously contested area of medical malpractice law" since his admission to the bar in 2006; (2) "[t]he adequacy of a 'similar health care provider' opinion letter is one of the most frequently litigated pretrial issues in medical malpractice actions"; (3) *Lucisano* and *Bell* were decided more than six years before *Riccio I* was commenced; (4) after *Lucisano*, there could be no doubt that the plaintiff was required to include "sufficient qualifications of the author in the opinion letter to demonstrate compliance with § 52-190a"; (5) in the six year period after *Lucisano* and *Bell* were decided, Zeppieri testified that he filed five

[9] We note that the plaintiff herself appears to advocate for a per se rule that the failure to know the law would never constitute egregious conduct or gross negligence. As with the legal maxims that "everyone is presumed to know the law" and "ignorance of the law excuses no one," we reject such an absolute rule, which is antithetical to the fact intensive inquiry § 52-592 demands.

medical malpractice actions in which he had failed to comply with the requirements in *Lucisano* and *Bell*; and (6) prior to filing *Riccio I*, Zeppieri had not read *Lucisano* and *Bell*. This is not a situation in which the plaintiff's counsel inadvertently omitted necessary information from the opinion letter. Zeppieri was completely unaware of the requirement to include the qualifications of the author of the letter. Even cursory research into the requirements of the similar health care provider opinion letter would have revealed this requirement. Section 52-592 is designed to aid the " 'diligent suitor' "; *Isaac* v. *Mount Sinai Hospital*, 210 Conn. 721, 733, 557 A.2d 116 (1989); not to excuse the failure of counsel to conduct a basic inquiry into the requirements of § 52-190a (a) and case law interpreting that provision, which we can only characterize as the failure to exercise even " 'slight diligence . . . .' " *Hanks* v. *Powder Ridge Restaurant Corp.*, supra, 276 Conn. 338.

Given the fact intensive nature of the inquiry under § 52-592 (a); *Plante* v. *Charlotte Hungerford Hospital*, supra, 300 Conn. 56–57 n.21; we need not decide whether different factual circumstances—such as counsel's failure to know of a decision from an appellate court released in closer proximity to the commencement of the first action or his failure to uncover controlling appellate precedent despite diligent research—might constitute excusable neglect and save the plaintiff's otherwise time barred action under § 52-592. As we explained in *Plante*, "a plaintiff seeking relief under the matter of form provision of § 52-592 (a) does so at his or her peril, given the *case-sensitive nature of the determination* that the failure as a matter of form was not based on 'egregious' conduct by the party or counsel."[10] (Emphasis added.) Id., 57 n.21.

[10] As she did before the trial court, the plaintiff also points to several other medical malpractice cases in which Zeppieri participated, wherein the similar health care provider opinion letters did not include statements concerning the author's qualifications. The plaintiff contends that, because these cases went to verdict or settlement without anyone raising a motion

We note that plaintiffs whose time barred actions are not saved by § 52-592 due to their attorney's gross negligence are not left without recourse. In certain circumstances, a plaintiff may have recourse in a legal malpractice action. Cf. *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 634 n.10, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962) ("[I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because [the] plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of [the] plaintiff's lawyer upon the defendant." (Emphasis omitted.)); *Friezo* v. *Friezo*, 281 Conn. 166, 196, 914 A.2d 533 (2007) ("incompetence is an insufficient reason to avoid imputing knowledge to the plaintiff, who could have sought appropriate legal redress by filing a malpractice claim against [her former attorney] but did not do so"), overruled in part on other grounds by *Bedrick* v. *Bedrick*, 300 Conn. 691, 17 A.3d 17 (2011). Because that issue is not before us, we express no opinion about whether this case might satisfy the separate legal malpractice standard.

The judgment is affirmed.

In this opinion the other justices concurred.

to dismiss based on the inadequacy of the opinion letters, this evinces the fact that these attorneys were also not aware of the requirement from *Lucisano* and *Bell*. We decline to speculate on why attorneys in separate medical malpractice actions may have chosen not to file a motion to dismiss. As the trier of fact, the trial court was free to reject Zeppieri's self-serving testimony that the only reason these attorneys had not filed motions to dismiss was because of their ignorance of the law. See, e.g., *Sun Val, LLC* v. *Commissioner of Transportation*, 330 Conn. 316, 330, 193 A.3d 1192 (2018) (" '[I]t is the quintessential function of the fact finder to reject or accept certain evidence, and to believe or disbelieve any expert testimony. . . . The trier may accept or reject, in whole or in part, the testimony of an expert offered by one party or the other.' ").

# STATE OF CONNECTICUT *v.* RAMON LOPEZ (SC 20601)

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

*Syllabus*

The defendant appealed from the judgment of the trial court revoking his probation. The defendant previously had been convicted of two felony offenses and received a suspended sentence and five years of probation. The conditions of the defendant's probation prohibited him from violating any state or federal criminal law and from possessing any "firearm," as that term was defined by statute (§ 53a-3 (19)). While the defendant was serving his term of probation, he was arrested and charged with criminal possession of a firearm after the police found an airsoft pellet gun in his residence while executing a search warrant. In light of that arrest, the defendant was charged with violating the conditions of his probation. The court held an evidentiary hearing, at which a detective, W, testified that the airsoft pellet gun functioned as intended by its manufacturer in that it used air to push round, plastic projectiles out of the barrel. In response to a question from the court, however, W could not say whether it was capable of discharging a projectile with enough velocity to "put a person's eye out." At the close of evidence, defense counsel moved for, inter alia, a finding of no violation of probation, claiming that the state had failed to establish that the airsoft pellet gun was a firearm within the meaning of § 53a-3 (19), which defines "firearm" in relevant part as "any . . . weapon . . . from which a shot may be discharged . . . ." The court denied that motion and, instead, found that the airsoft pellet gun was a firearm under § 53a-3 (19) because it was capable of discharging a shot, namely, a six millimeter pellet. Accordingly, the court concluded that the defendant had violated the conditions of his probation prohibiting him from violating the law and possessing a firearm, and rendered judgment revoking the defendant's probation, from which the defendant appealed. *Held* that the evidence was insufficient to support the trial court's factual finding that the airsoft pellet gun found in the defendant's residence was a firearm within the meaning of § 53a-3 (19), and, accordingly, this court reversed the trial court's judgment and remanded the case with direction to find no violation of probation and to render judgment in accordance with that finding: pursuant to this court's previous construction of the phrase "weapon . . . from which a shot may be discharged," as used in § 53a-3, the state, in order to prove that an instrument is a weapon capable of discharging a shot, must produce sufficient evidence to establish that it was designed for violence and that it was capable of inflicting death or serious bodily harm; in the present case, there was no evidence establishing the purpose

for which the airsoft pellet gun was designed, and, in the absence of such evidence, it was pure speculation as to whether it was a toy designed for recreational use or an instrument designed for violence; moreover, the state failed to present any evidence from which it reasonably could be inferred that the airsoft pellet gun in this case was capable of inflicting death or serious bodily harm, especially in light of W's inability to say whether it discharged its pellets at a velocity sufficient to injure a person by, for example, putting his or her eye out; accordingly, the trial court's factual finding that the airsoft pellet gun was a weapon capable of discharging a shot for the purpose of the definition of "firearm" under § 53a-3 (19) was clearly erroneous.

Argued December 15, 2021—officially released January 14, 2022*

*Procedural History*

Substitute information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, and tried to the court, *C. Taylor*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed; thereafter, the court, *Keegan*, *J.*, dismissed in part and denied in part the defendant's motion to correct an illegal sentence, and the defendant filed an amended appeal. *Reversed; judgment directed.*

*Jon L. Schoenhorn*, for the appellant (defendant).

*Brett R. Aiello*, deputy assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, *Elizabeth M. Moseley*, senior assistant state's attorney, and *Alexander Beck*, assistant state's attorney, for the appellee (state).

*Opinion*

ECKER, J. The primary issue in this appeal is whether the state presented sufficient evidence at a violation of probation hearing to establish that an airsoft pellet gun is a firearm within the meaning of the criminal posses-

* January 14, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

sion of a firearm statute, General Statutes § 53a-217.[1] The defendant, Ramon Lopez, claims that the airsoft pellet gun seized from his residence is not a "firearm," as defined by General Statutes § 53a-3 (19),[2] because it is not a "weapon . . . from which a shot may be discharged" but, rather, a recreational toy that dispenses plastic pellets. The state responds that an airsoft pellet gun is a firearm pursuant to *State* v. *Grant*, 294 Conn. 151, 161, 982 A.2d 169 (2009), which held that a BB gun is a firearm for purposes of § 53a-3 (19). We conclude that the evidence in the present case was insufficient to establish that the airsoft pellet gun found in the defendant's residence is a firearm, as defined by § 53a-3 (19), and, therefore, we reverse the judgment of the trial court.

The trial court found the following facts, which we supplement as needed with undisputed facts in the record. On November 7, 2003, the defendant was convicted of two counts of risk of injury to a child in violation of General Statutes (Rev. to 2003) § 53-21 (a) (1), a class C felony, and sentenced to two concurrent terms of eight years of incarceration, execution suspended, and five years of probation. The defendant's sentence was imposed consecutively to a seventeen year sentence he already was serving in a separate case for two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (5). The defendant was ordered to comply with the following relevant standard conditions of probation: (1) "Do not violate any criminal law of the United States, this state or any other state

[1] General Statutes § 53a-217 (a) (1) provides in relevant part that "[a] person is guilty of criminal possession of a firearm, ammunition or an electronic defense weapon when such person possesses a firearm, ammunition or an electronic defense weapon and . . . has been convicted of a felony committed prior to, on or after October 1, 2013 . . . ."

[2] General Statutes § 53a-3 (19) defines the term "firearm" as "any sawed-off shotgun, machine gun, rifle, shotgun, pistol, revolver or other weapon, whether loaded or unloaded from which a shot may be discharged . . . ."

or territory." And (2) "If you are on probation for a felony conviction . . . you must not possess, receive or transport any firearm or dangerous instrument as those terms are defined in [§] 53a-3 . . . ." As a special condition of the defendant's probation, the trial court also ordered that he must "[o]bey all laws of this state, any other state and all federal laws."

On October 27, 2017, the defendant was released from the custody of the Department of Correction and began serving his five year term of probation. Upon release, the defendant was informed of, and indicated that he understood, the conditions of his probation, including the standard condition prohibiting him, "as a convicted felon, from possessing, receiving, or transporting any firearm, as defined by . . . § 53a-3." Additionally, the defendant signed a firearm acknowledgment form, which provided: "I, [Ramon Lopez], acknowledge and understand that I am currently under a period of probation supervision, and in accordance with a specific [c]ourt order and/or . . . General Statutes [§§] 29-33, 29-36f, 29-36k, 53a-30, 53a-217, and/or 53a-217c, **I am ineligible to possess a firearm as a condition of my probation**." (Emphasis in original.)

On March 13, 2019, the Bristol Police Department received a report that the defendant was in possession of a gun at his place of employment. As part of their investigation, officers obtained a search warrant for the defendant's residence, where they seized the following items: (1) one black KWC airsoft pellet gun; (2) one silver Bearcat River .177 caliber BB gun; (3) a small plastic cup containing BBs; and (4) a letter addressed to the defendant at his residence. Thereafter, the defendant was arrested and charged with criminal possession of a firearm in violation of § 53a-217.[3]

[3] In February, 2020, the defendant pleaded guilty to one count of breach of the peace in the second degree in violation of General Statutes § 53a-181 and was sentenced to six months of incarceration.

In light of the defendant's arrest for alleged criminal conduct committed while on probation, the defendant was charged in the present case with a violation of the conditions of his probation under General Statutes § 53a-32, "in that he engaged in conduct constituting criminal possession of a firearm . . . ."[4] The defendant moved to dismiss the violation of probation charge, and the trial court heard oral argument on the defendant's motion at a violation of probation hearing. During oral argument, defense counsel claimed that the guns seized from the defendant's residence do not fall "under the definition of a firearm" because they shoot plastic pellets. The state opposed the defendant's motion, arguing that, pursuant to *State* v. *Grant*, supra, 294 Conn. 161, a BB gun is a firearm under § 53a-3 (19). The trial court denied the defendant's motion on the basis of the authority established in *Grant*.

At the evidentiary hearing on the violation of probation charge, the state adduced evidence that the defendant was on probation, the conditions of which included refraining from breaking the law or possessing firearms, when the airsoft pellet gun and the BB gun were seized from his residence. Scott Werner, a detective employed by the Bristol Police Department, testified as to the operability of the seized items. Werner explained that the airsoft pellet gun uses "air to push a [ball shaped] plastic projectile out of a barrel . . . ." Specifically, "the slide racks back and forth," creating "a small pressurized chamber that releases and pushes the projectile out." Werner tested the airsoft pellet gun and deter-

[4] The defendant was charged by long form information with one count of violating his probation, as follows: "Elizabeth Moseley, assistant state's attorney, accuses [the defendant] of violation of probation and charges that, on or about March 11, 2019, at around 12 [p.m.], in the area of 210 Redstone Hill Road in the city of Bristol . . . [the defendant] did violate the conditions of his probation, in that he engaged in conduct constituting criminal possession of a firearm and that this [led] to his arrest on March 14, 2019, in violation of . . . § 53a-32."

mined that it functioned as intended by the manufacturer because it discharged an airsoft pellet from the muzzle. Although Werner was unable to verify the velocity with which the plastic pellet was propelled, he testified that "it did leave with a velocity. It did not simply fall out [of] the barrel."

With respect to the BB gun, Werner explained that it "did not have all the pieces necessary" to fire a projectile, so he had to "contact the manufacturer, [which] then sent [him] the pieces . . . needed in order to make th[e] firearm fire." Specifically, the BB gun was missing a carbon dioxide canister and a cartridge to hold the BBs, both of which are proprietary in nature and necessary "to actually function th[e] gun."

On cross-examination, Werner explained that airsoft pellet guns differ from BB guns because they use a different type of ammunition. A BB gun, such as the one seized from the defendant's residence, can fire both plastic pellets and metal BBs, whereas an airsoft pellet gun can fire only airsoft pellets, which are "plastic round ball[s]." After redirect examination, the trial court asked Werner if he knew whether the airsoft pellet gun or the BB gun was capable of discharging "a projectile . . . with enough velocity . . . [to] be able to put a person's eye out . . . ." Werner responded: "I think that's a hard determination for me to make, to say put somebody's eye out. I can't say that, to be honest." Neither the state nor the defendant followed up on this line of questioning.

At the close of the state's evidence, defense counsel moved for a judgment of acquittal or a finding of no violation of probation, arguing that the state had failed to establish that the airsoft pellet gun or the BB gun seized from the defendant's residence was a firearm, as defined by § 53a-3 (19). Counsel contended that the BB gun "was not operable [and], therefore, not a fire-

arm," and, with respect to the airsoft pellet gun, "that a pellet gun is not a firearm." Alternatively, counsel argued that the evidence was insufficient to establish that the defendant was in possession of the items seized because he resided in a multifamily dwelling, and "the doctrine of nonexclusive possession would cast serious doubt as to whether . . . any firearm that was found in the house at that time exclusively was in the actual or constructive possession of [the defendant]." The state opposed the motion, claiming that it had met its burden of establishing, by a preponderance of the evidence, that the defendant was in criminal possession of a firearm pursuant to *State* v. *Grant*, supra, 294 Conn. 161. The trial court denied the defendant's motion.

At the conclusion of the evidence on the violation of probation charge, the trial court found "that the preponderance of the evidence in this matter show[ed] that the defendant did possess the seized items within his residence" and that the airsoft pellet gun "was, in fact, a firearm pursuant to § 53a-3 [19] and was capable of discharging a shot, specifically, six millimeter pellets." The trial court arrived at a different conclusion with respect to the BB gun, which the court found was not a firearm because it "was not capable of firing a shot, as required by statute, due to the fact that the weapon did not have the necessary cartridge . . . capable of holding a BB . . . ." Accordingly, the trial court determined that the defendant had engaged "in felonious conduct, criminal conduct while he was on probation by possessing a firearm [that] was capable of discharging a shot." The court concluded that the defendant consequently had violated the standard conditions of his probation requiring him to refrain from violating the law or possessing a firearm, as defined by § 53a-3 (19), as well as the special condition that required him to obey all the laws of this state. The trial court's conclusion that the defendant had violated the special and standard

conditions of his probation rested entirely on its finding that the defendant engaged in conduct constituting criminal possession of a firearm.

After finding that the defendant was not amenable to supervised probation, the trial court revoked the defendant's probation and sentenced him to 8 years of incarceration, execution suspended after 56 months, and 1273 days of probation. In addition to the preexisting conditions of probation, the trial court imposed the additional condition that the defendant is "not to possess any pellet guns, BB guns, zip guns, cap guns, or anything of that nature, or any firearm replicas, [or] anything that looks like a pistol, handgun, rifle, shotgun, assault weapon or the like." The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.[5]

On appeal, the defendant raises four claims: (1) the trial court's factual finding that the defendant possessed a firearm in violation of § 53a-217 was clearly erroneous because the evidence was insufficient to establish that

[5] After filing the present appeal, the defendant filed a motion to correct an illegal sentence pursuant to Practice Book § 43-22, claiming that the sentence imposed by the trial court was illegal because § 53a-217 is preempted by 15 U.S.C. § 5001, which defines airsoft pellet guns as "look-alike . . . firearm[s] . . . ." 15 U.S.C. § 5001 (c) (2018). The trial court dismissed the defendant's motion in part for lack of subject matter jurisdiction on the ground that the defendant's "argument [was] fully centered on the basis of the violation of probation [finding] and not the sentence." To the extent that defense counsel claimed during oral argument "that the defendant's sentence was disproportionate under the circumstances . . . and excessive in violation of the eighth amendment to the United States constitution," the trial court denied the defendant's motion because he had "failed to articulate and demonstrate that violation . . . ." The defendant thereafter amended the present appeal to include the dismissal in part and denial in part of his motion to correct an illegal sentence. In his briefs submitted to this court, however, the defendant does not challenge the disposition of his motion to correct an illegal sentence.

(a) the airsoft pellet gun seized from his residence was a "weapon . . . from which a shot may be discharged," as defined by § 53a-3 (19), and (b) he was in constructive possession of the airsoft pellet gun; (2) the defendant's probation was revoked on the basis of uncharged criminal conduct in violation of the due process clause of the fourteenth amendment because he was charged with possessing a firearm at his workplace but found guilty of possessing one at his residence; (3) § 53a-217 is unconstitutionally vague "because no reasonable person [would think] that a toy pellet gun that discharges six millimeter plastic pellets is, in fact, a 'firearm' "; and (4) the trial court abused its discretion in imposing an unduly harsh sentence because the defendant's conduct "fell far outside the 'heartland' of the offense of criminal possession of a firearm and was de minimis . . . ." For the reasons that follow, we agree with the defendant's claim that the evidence was insufficient to support the trial court's factual finding that the airsoft pellet gun seized from his residence was a "firearm," as defined by § 53a-3 (19), and we reverse the trial court's judgment on that ground.

The principles governing a trial court's factual finding regarding a violation of probation are well settled. "[A]ll that is required in a probation violation proceeding is enough to satisfy the court within its sound judicial discretion that the probationer has not met the terms of his probation. . . . It is also well settled that a trial court may not find a violation of probation unless it finds that the predicate facts underlying the violation have been established by a preponderance of the evidence at the hearing—that is, the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation. . . . In making its factual determination, the trial court is entitled to draw reasonable and logical inferences from the evidence. . . . Accord-

ingly, [a] challenge to the sufficiency of the evidence is based on the court's factual findings. The proper standard of review is whether the court's findings were clearly erroneous based on the evidence. . . . A court's finding of fact is clearly erroneous and its conclusions drawn from that finding lack sufficient evidence when there is no evidence in the record to support [the court's finding of fact] . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) *State* v. *Maurice M.*, 303 Conn. 18, 26–27, 31 A.3d 1063 (2011).

To determine whether the evidence was sufficient to establish that the defendant violated the conditions of his probation by possessing a firearm, we must examine the statutory definition of the term "firearm" in § 53a-3 (19). Statutory construction is a question of law over which we exercise plenary review. See, e.g., *State* v. *Grant*, supra, 294 Conn. 157; see also General Statutes § 1-2z.

Section 53a-3 (19) provides that " '[f]irearm' means any sawed-off shotgun, machine gun, rifle, shotgun, pistol, revolver or other *weapon*, *whether loaded or unloaded from which a shot may be discharged* . . . ." (Emphasis added.) Similarly, § 53a-3 (6) provides in relevant part that a "deadly weapon" is "any *weapon*, *whether loaded or unloaded*, *from which a shot may be discharged*, or a switchblade knife, gravity knife, billy, blackjack, bludgeon or metal knuckles. . . ." (Emphasis added.)

We have previously construed the meaning of the phrase "weapon . . . from which a shot may be discharged" in § 53a-3 and are guided by that precedent.

See, e.g., *Kasica* v. *Columbia*, 309 Conn. 85, 93–94, 70 A.3d 1 (2013) (observing that, when construing statutes, "we . . . are bound by our previous judicial interpretations of the language and the purpose of the statute"). In *State* v. *Hardy*, 278 Conn. 113, 896 A.2d 755 (2006), we addressed whether a "weapon . . . from which a shot may be discharged," as used in subdivision (6) of § 53a-3, requires "that a shot be discharged by gunpowder . . . ." (Internal quotation marks omitted.) Id., 115. In that case, the defendant, Raymond Hardy, was convicted of robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), an essential element of which is that the perpetrator or another participant in the robbery be "armed with a deadly weapon . . . ." Id., 119. "Evidence presented at trial established that the air pistol found in [Hardy's] apartment used carbon dioxide cylinders as a propellant and was designed to shoot .177 caliber pellets. . . . The state also submitted as a full exhibit the pistol's operating manual, which stated that the pistol was 'NOT A TOY. . . . MISUSE OR CARELESS USE MAY CAUSE SERIOUS INJURY OR DEATH. MAY BE DANGEROUS UP TO 400 YARDS . . . .' " (Emphasis in original.) Id., 117–18. The operating manual further specified "that the gun has an '8 Shot Revolver' mechanism that shoots .177 caliber 'Lead Airgun Pellet' ammunition. The gun is designed to shoot its ammunition at a muzzle velocity of at least 430 feet per second." Id., 118 n.4.

On appeal, Hardy challenged his conviction on the ground that the air gun used during the robbery was not a deadly weapon, as defined by § 53a-3 (6), because it was not a weapon from which a shot may be discharged. Id., 119. Hardy did "not claim that the air gun was not a weapon or that it did not fire shots. Instead, he claim[ed] that the 'discharge' of the weapon, as used in § 53a-3 (6), must take place through the use of gunpowder." Id., 120. We rejected Hardy's claim for two

reasons. First, we observed that the plain language of the statute "does not require that the shot be discharged by gunpowder." Id. Second, we relied on out-of-state case law concluding that "an air or pellet gun is both designed for violence and capable of causing death or serious bodily injury." Id., 122. We "recognize[d] that § 53a-3 (6) does not expressly define deadly weapons as instruments that are *designed* or *intended* to cause death or serious bodily injury, as the statutes in many other states do," but pointed out that "§ 53a-3 (6) was intended to encompass 'items *designed for violence*.' " (Emphasis in original.) Id., 126. "We therefore conclude[d] that, if a weapon from which a shot may be discharged is designed for violence and is capable of inflicting death or serious bodily harm, it is a deadly weapon within the meaning of § 53a-3 (6), regardless of whether the shot is discharged by gunpowder." (Footnote omitted.) Id., 127–28. In arriving at this conclusion, "[w]e recognize[d] that not all items capable of discharging a shot are weapons or designed for violence" and "that many guns that are capable of causing death or serious bodily injury were not designed for violence against persons. Nevertheless, such guns are designed for violence in the sense that they are intended to cause damage or injury to their intended target." Id., 127 n.12. Because the evidence adduced at trial was sufficient to establish "that the air pistol used by [Hardy] was designed for violence and was capable of causing death or serious bodily injury"; id., 128; we upheld Hardy's conviction. Id., 133.

Three years later, in *State* v. *Grant*, supra, 294 Conn. 151, we considered whether a BB gun was a " 'weapon, whether loaded or unloaded, from which a shot may be discharged' " for the purpose of the definition of a "firearm" in § 53a-3 (19). Id., 158. The sentence of the defendant, Lawrence Grant, was enhanced under General Statutes § 53-202k for using, or being armed with

and threatening the use of, a firearm in the commission of a felony on the basis of his use of a BB gun during an attempted robbery. Id., 152–53. At trial, the state produced evidence that the BB gun was "an operable Marksman Repeater spring-loaded air gun designed to shoot .177 caliber steel BBs" and "capable of discharging a shot that could cause serious bodily injury." Id., 156.

On appeal, Grant did not dispute that the BB gun was a "weapon" that fired a "shot" but claimed that it was not a firearm because it did "not discharge a shot by gunpowder . . . ." Id., 154. In light of "our analysis and construction of § 53a-3 (6) in *Hardy*," we rejected Grant's claim, reasoning that the "language defining 'deadly weapon' for purposes of § 53a-3 (6) . . . is identical to the language of § 53a-3 (19), [and] the legislature readily could have restricted the term 'firearm' in § 53a-3 (19) to those guns that use gunpowder to discharge their shots" but did not. Id., 160. Furthermore, the definitional language in § 53a-3 (6) and (19) is identical, and, "ordinarily, the same or similar language in the same statutory scheme will be given the same meaning." Id. We therefore held "that a BB gun does not fall outside the definitional purview of § 53a-3 (19) merely because it operates without gunpowder" and that Grant could not "prevail on his claim that the evidence adduced by the state was insufficient to establish that the BB gun . . . was a firearm for purposes of § 53a-3 (19) . . . ." Id., 161.

Although our case law establishes that an operable BB gun is a "weapon . . . from which a shot may be discharged" under § 53a-3 (6) and (19), it does not stand for the broad proposition that "*all* pellet guns are firearms as a matter of law." (Emphasis in original.) *State* v. *Hart*, 118 Conn. App. 763, 774, 986 A.2d 1058, cert. denied, 295 Conn. 908, 989 A.2d 604 (2010). Indeed, in *Hardy*, we explicitly recognized that "not all items

capable of discharging a shot are weapons or designed for violence." *State* v. *Hardy*, supra, 278 Conn. 127 n.12, citing *State* v. *Coauette*, 601 N.W.2d 443, 446–47 (Minn. App. 1999), review denied, Minnesota Supreme Court, Docket No. C4-98-2286 (Minn. December 14, 1999); see *State v. Coauette*, supra, 447 (paintball gun is not dangerous weapon). To prove that an item capable of discharging a shot is a "weapon" under § 53a-3 (6), the state must produce evidence to establish that it is "designed for violence" and "capable of inflicting death or serious bodily harm . . . ."[6] *State* v. *Hardy*, supra, 127–28; see id., 132 ("both deadly weapons and firearms are designed for violence and are capable of inflicting death or serious bodily injury"); Merriam-Webster's Collegiate Dictionary (10th Ed. 1993) p. 1338 (defining "weapon" as "something (as a club, knife, or gun) used to injure, defeat, or destroy" or "a means of contending against another"); Webster's Third New International Dictionary (1961) p. 2589 (defining "weapon" as "an instrument of offensive or defensive combat: something to fight with: something (as a club, sword, gun, or gre-

[6] Similarly, in *Nealy* v. *State*, Docket No. 01-18-00334-CR, 2019 WL 6869337 (Tex. App. December 17, 2019), the Court of Appeals of Texas held that "[a]n airsoft pistol is [neither] a 'firearm' nor . . . a 'deadly weapon' per se. . . . The [s]tate, however, may prove that an airsoft pistol is a deadly weapon by presenting evidence concerning its capabilities or use." (Citation omitted.) Id., *4. In *Nealy*, the state adduced evidence "that plastic pellets discharged from spring-loaded airsoft pistols like the 'black ops' [airsoft pellet gun possessed by the defendant] travel at 330 feet per second or [more than] 200 miles per hour, and . . . can cause serious bodily injury because the pellets they discharge can put someone's eye out." Id. Additionally, the "black ops airsoft pistol" contained a warning label "on its side [that read] 'warning—not a toy. Wear eye protection to prevent serious injury to eye.' " Id. On the basis of this evidence, the court held that the jury reasonably could have found that "the 'black ops' airsoft pistol was . . . capable of causing seriously bodily injury . . . ." Id.

The state cites *Nealy* in the present case in support of its claim that an airsoft gun is a firearm, but the case illustrates why, on this record, the state cannot prevail. As explained in the text of this opinion, the state failed to adduce any evidence of the capability, use, or intended purpose of the airsoft pellet gun seized from the defendant's residence.

nade) used in destroying, defeating, or physically injuring an enemy").

In the present case, there is no evidence in the record establishing either prong of this definition. There is no evidence of the purpose for which the airsoft pellet gun was designed. For example, the state did not introduce into evidence the operating manual, statements of purpose from the manufacturer's website, or expert testimony describing the use for which the airsoft pellet gun was intended.[7] Compare *State* v. *Hardy*, supra, 278 Conn. 118–19 (BB gun was deadly weapon in light of evidence that it was not toy and could cause serious injury or death), with *State* v. *Coauette*, supra, 601 N.W.2d 446–47 (paintball gun was not firearm because it was "designed for use in a game and . . . its projectiles are [liquid paint] capsules designed to burst on impact, rather than to pierce"). In the absence of such evidence, it is pure speculation whether the airsoft pellet gun is a toy designed for recreational use, as the defendant contends, or a weapon designed for violence and, therefore, a "firearm" under § 53a-3 (19). See, e.g., *State* v. *Bemer*, 340 Conn. , , A.3d (2021) (without evidence, fact finder "would have to resort to impermissible speculation").

Additionally, the state failed to present any evidence from which it reasonably could be inferred that the airsoft pellet gun in this case was capable of inflicting death or serious bodily harm. Although Werner testified that the airsoft pellet gun could discharge a six millimeter plastic pellet with velocity, there was no evidence as to the nature or degree of that velocity, or whether it was sufficient to cause physical injury, much less serious bodily harm. Cf. *State* v. *Grant*, supra, 294 Conn.

[7] Werner testified that the airsoft pellet gun "functioned as it is intended [by] the manufacturer" because it "discharge[d] an airsoft pellet from the muzzle," but he did not explain the intended purpose for which an airsoft pellet is discharged.

156 (state introduced evidence that BB gun "was capable of discharging a shot that could cause serious bodily injury"); *State* v. *Hardy*, supra, 278 Conn. 118 (state introduced evidence that BB gun " 'may cause serious injury or death' " (emphasis omitted)); *State* v. *Guzman*, 110 Conn. App. 263, 275–76, 955 A.2d 72 (2008) (state introduced evidence that " 'misuse or careless use [of the BB gun] may cause serious injury or death' "), cert.denied, 290 Conn. 915, 965 A.2d 555 (2009). Indeed, in response to a direct question from the trial court on this precise point, Werner was unable to say whether a projectile fired from the airsoft pellet gun could injure a person by, for example, "put[ting] [an] eye out." Given the lack of evidence, we are compelled to conclude on this record that the trial court's factual finding that the airsoft pellet gun was a "weapon" capable of firing a shot for the purpose of the definition of a "firearm" under § 53a-3 (19) was clearly erroneous.

The judgment is reversed and the case is remanded with direction to find no violation of probation and to render judgment accordingly.

In this opinion the other justices concurred.

# U.S. BANK, NATIONAL ASSOCIATION, TRUSTEE *v.* MARGIT MADISON ET AL.
## (SC 20493)

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

*Syllabus*

The defendant appealed from the judgment of strict foreclosure rendered by the trial court following the termination of a stay in the defendant's bankruptcy case. The trial court had ruled that the defendant lacked standing to raise a defense in the foreclosure action that she failed to identify as an asset of the estate in the schedule of assets that she filed in her bankruptcy case, which was being adjudicated while the foreclosure action was pending. The Appellate Court agreed with the trial court's ruling and affirmed the judgment of strict foreclosure. The defendant, on the granting of certification, appealed to this court, claiming that the Appellate Court improperly treated a defense to a foreclosure action as being the same as claims and counterclaims, which, under the United States Bankruptcy Code, are property of the bankruptcy estate that must be disclosed. *Held* that the defendant's appeal was dismissed on the ground that certification was improvidently granted, this court having determined, after examining the record and considering the parties' briefs and arguments, that there was no useful purpose in answering the certified question, the practical import of which was not apparent: the defendant's claim on appeal failed to characterize the Appellate Court's holding properly and to address the applicable legal issues, the parties' focus on whether the case law regarding nondisclosed claims and counterclaims in bankruptcy actions applied to nondisclosed defenses provided no useful guidance to this court on how to address the issues that arose from the Appellate Court's decision, and the parties failed to address whether a defense to a foreclosure proceeding is property under Connecticut law, whether the Appellate Court correctly concluded that, to the extent such a defense was not property, the defendant's failure to disclose constituted a misrepresentation of the property's value, and what remedy should follow from such a misrepresentation; moreover, because it dismissed the defendant's appeal, this court took no position as to the correctness of the Appellate Court's decision.

Argued October 18, 2021—officially released January 18, 2022*

*January 18, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Procedural History*

Action to foreclose a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the defendant Eric Demander, Jr., was defaulted for failure to appear; thereafter, the court, *Spader*, *J.*, granted the plaintiff's motion for summary judgment as to liability; subsequently, the court granted the plaintiff's motion for judgment of strict foreclosure and rendered judgment thereon; thereafter, following the termination of the named defendant's bankruptcy stay, the court, *Hon. Anthony V. Avallone*, judge trial referee, granted the plaintiff's motion to reenter the judgment and, exercising the powers of the Superior Court, rendered judgment of strict foreclosure, from which the named defendant appealed to the Appellate Court, *Keller*, *Elgo* and *Bright*, *Js.*, which affirmed the trial court's judgment, and the named defendant, on the granting of certification, appealed to this court. *Appeal dismissed.*

*Earle Giovanniello*, for the appellant (named defendant).

*Karl S. Myers*, pro hac vice, with whom was *Christa A. Menge*, for the appellee (plaintiff).

*Opinion*

D'AURIA, J. The named defendant, Margit Madison (defendant), appeals, upon our grant of her petition for certification,[1] from the judgment of the Appellate Court affirming the trial court's latest judgment of strict fore-

[1] We granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that the defendant did not have standing in a foreclosure action to raise a defense that she had failed to identify as an asset of the bankruptcy estate in the schedule of assets filed in her chapter 7 bankruptcy case adjudicated while the foreclosure case was pending?" *U.S. Bank National Assn.* v. *Madison*, 335 Conn. 941, 237 A.3d 2 (2020).

closure in favor of the plaintiff, U.S. Bank, National Association, as Trustee for MASTR Adjustable Rate Mortgage Trust 2007-1, Mortgage Pass-Through Certificates, Series 2007-1. The trial court had reentered judgment of strict foreclosure following the termination of the defendant's bankruptcy stay. In this court, the defendant challenges the Appellate Court's conclusion that the trial court properly ruled that she lacked standing in this foreclosure action to raise a defense that she had failed to identify as an asset of the bankruptcy estate in the schedule of assets she filed in her chapter 7 bankruptcy case, adjudicated while the foreclosure case was pending. The defendant argues more specifically that the Appellate Court improperly treated a defense to a foreclosure action as the same as claims and counterclaims, which constitute property of the estate under the United States Bankruptcy Code and, thus, must be disclosed.

After examining the entire record on appeal and considering the briefs and oral arguments of the parties, we have determined that the appeal in this case should be dismissed on the ground that certification was improvidently granted. Essentially, we can see no useful purpose in answering the certified question, which the practical import of answering is not apparent to us. Specifically, the claim on appeal not only fails to characterize the Appellate Court's holding properly but also fails to address the applicable legal issues. Contrary to the defendant's argument, the Appellate Court did not hold that a defense is equivalent to a claim or counterclaim and that it thus constitutes property of the estate that must be disclosed during a bankruptcy proceeding or otherwise remains property of the estate, thereby depriving the debtor of standing postbankruptcy. See *Assn. Resources, Inc.* v. *Wall*, 298 Conn. 145, 164–65, 2 A.3d 873 (2010) (discussing this rule in relation to nondisclosed claims). Although the Appellate Court dis-

cussed that issue, it ultimately held that the defendant's failure to disclose either in schedule A/B or schedule D that she disputed the plaintiff's claim, which was secured by the real property at issue, constituted a misrepresentation of the value of the real property: namely, that the defendant had no equity in the real property, a defense that clearly was an asset she was required to disclose. *U.S. Bank, National Assn.* v. *Madison*, 196 Conn. App. 267, 275–78, 229 A.3d 1104 (2020). The Appellate Court reasoned that to allow her to now raise this defense to the foreclosure action "would encourage selective disclosure by debtors and create an end run around the carefully crafted bankruptcy system, whereby a defendant could recoup an asset, the value of which inaccurately was disclosed to the trustee." Id., 278.

Before this court, the parties do not address the Appellate Court's analysis. Rather, both parties focus on whether the case law regarding nondisclosed claims and counterclaims in bankruptcy actions applies to nondisclosed defenses. As a result, the parties provide no useful guidance to this court on how to address the various issues that arise from the Appellate Court's decision. Most prominent, the scope of what constitutes property for Bankruptcy Court purposes is governed by state law. See, e.g., *In re Croft*, 737 F.3d 372, 374 (5th Cir. 2013 ("a debtor's property rights are determined by state law, while federal bankruptcy law applies to establish the extent to which those rights are property of the estate"). The parties fail to address whether, even if a defense does not fall within the scope of a claim or counterclaim; see *Folger Adam Security, Inc.* v. *DeMatteis/MacGregor JV*, 209 F.3d 252, 260 (3d Cir. 2000); *EMC Mortgage Corp.* v. *Atkinson*, 175 Ohio App. 3d 571, 575–76, 888 N.E.2d 456 (2008); a defense to a foreclosure proceeding is property under Connecticut law and thus constitutes property of the estate under the

Bankruptcy Code that must be disclosed or otherwise remains property of the estate, depriving the defendant of standing to raise the defense in the foreclosure action. There is very limited case law from other jurisdictions on this issue, and what law exists is not consistent and does not provide detailed analysis. Compare *In re Gainesville Venture, Ltd.*, 159 B.R. 810, 811 (Bankr. S.D. Ohio 1993) (holding that, in chapter 11 bankruptcy, where the debtor was limited partnership, "any causes of action or defenses" belonging to limited partnership were property of estate pursuant to 11 U.S.C. § 541), with *In re Larkin*, 468 B.R. 431, 435–36 (Bankr. S.D. Fla. 2012) (debtor's defenses to foreclosure were not estate property that trustee could settle or waive).

To the extent that such a defense is not property, the parties also fail to address whether the Appellate Court correctly concluded that the defendant's failure to disclose that she disputed the plaintiff's claim, secured by the real property at issue, constituted a misrepresentation of the real property's value, and, if so, what remedy should properly follow from such a misrepresentation. Our research indicates that this issue appears to arise infrequently, although a few courts have held that a debtor's failure to disclose that a claim secured by property is disputed may constitute a misrepresentation of the property's value if the defense may affect the value or equity of the property. See *Financial Federal Credit, Inc.* v. *Smith*, Docket No. CIV.A. H-04-4293, 2005 WL 2121556, *5 (S.D. Tex. August 31, 2005); *Wells Fargo Bank, N.A.* v. *Cavaliere*, Docket No. 19-P-329, 2020 WL 5823807, *2 (Mass. App. October 1, 2020) (decision without published opinion, 98 Mass. App. 1111, 155 N.E.3d 764). Cases we have identified are inconsistent on this point, however, and have provided limited analysis regarding what remedy to apply in such cases, with some courts holding that a debtor lacks

standing to raise any defense; *MidFirst Bank* v. *Brooks*, Docket No. 2008-UP-196, 2008 WL 9841165, *3 (S.C. App. March 20, 2008); and other courts holding that various equitable doctrines, such as judicial estoppel or res judicata, bar the debtor from attempting to alter the value of disclosed property postbankruptcy. See, e.g., *Bone* v. *Taco Bell of America, LLC*, 956 F. Supp. 2d 872, 880–86 (W.D. Tenn. 2013); *Caplener* v. *U.S. National Bank of Oregon*, 317 Or. 506, 519–20, 857 P.2d 830 (1993); cf. *Thompson* v. *Orcutt*, 257 Conn. 301, 310–18, 777 A.2d 670 (2001) (discussing application in foreclosure proceeding of unclean hands doctrine in connection with alleged bankruptcy fraud). As a result, it is unclear—and the parties have not addressed whether the trial court in the present case properly held that the defendant lacked standing to raise a defense in this foreclosure action—whether both the trial court and the Appellate Court reached the right result, barring the defense, but pursuant to the wrong doctrine, or whether some other outcome may have been appropriate under the applicable legal principles.

Perhaps in a future case that raises these issues, we will have an opportunity to clarify this area of the law. We can discern no useful purpose in reviewing this case further, however. In light of this, we dismiss this appeal and "take no position as to the correctness of the Appellate Court's opinion." *State* v. *Carter*, 320 Conn. 564, 567, 132 A.3d 729 (2016).

The appeal is dismissed.

In this opinion the other justices concurred.