OFFICIAL

CONNECTICUT REPORTS

Volume 304

PROCEEDINGS

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

MARCH, 2012—MAY, 2012

BY

THOMAS G. SMITH
Reporter of Judicial Decisions

PUBLISHED BY
THE STATE OF CONNECTICUT
2017

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ATTORNEY GENERAL

HON. GEORGE JEPSEN

NOTES

[1] Retired May 13, 2012, under constitutional limitation as to age.

* See General Statutes § 51-50i.

Unless otherwise indicated, the statute book referred to in this volume as the General Statutes is the Revision of 1958, revised to 2011; the Practice Book is the Connecticut Practice Book (Current Ed.) as supplemented by rules of court published in the Connecticut Law Journal.

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Reservation of questions to Supreme Court; whether defendant state board of education violated statute (§ 10-223e [h]) by authorizing

defendant commissioner of education to reconstitute defendant board of education of city of Bridgeport; action for declaratory rulings that § 10-223e (h) and conduct of state board were unconstitutional and that dissolution of local board of education violated requirements of § 10-223e (h) because state board did not require local board to complete necessary training contemplated by § 10-223e (c) (2) (M); whether failure of state board to require local board to undergo and complete training mandated by § 10-223e (h) rendered void state board's authorization to commissioner to reconstitute local board; whether mandatory training requirement in § 10-223e (h) could be waived by local board of education seeking reconstitution; claim that training requirement of § 10-223e (h) existed solely for protection of local board and therefore could be waived by local board; claim that improper construction of training requirement elevated form over substance.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

MARIA PEREIRA ET AL. *v.* STATE BOARD OF EDUCATION ET AL.

ROBERT WALSH ET AL. *v.* STATE BOARD OF EDUCATION ET AL.

LAURAYNE FARRAR-JAMES ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF BRIDGEPORT ET AL.

(SC 18833)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.

Syllabus

Pursuant to statute (§ 10-223e [h]), the state board of education may authorize the commissioner of education to reconstitute a local or regional board of education, and the state board shall not grant such authority to the commissioner unless the board has required the local or regional board of education to complete the necessary training described in § 10-223e (c) (2) (M).

The plaintiffs brought three separate actions challenging the decision of the defendant state board of education, made pursuant to § 10-223e (h), to authorize the defendant commissioner of education to reconstitute the defendant board of education of the city of Bridgeport. The state board had designated the school district in Bridgeport a low achieving school district under § 10-223e (c) (1) for at least seven consecutive years due to the local board's failure to make acceptable progress toward benchmarks established by the state board and to make annual progress pursuant to the requirements of applicable federal laws pertaining to education. In 2010, some members of the local board had sought and

completed certain training sessions that were not mandated or required by the state board. In July, 2011, a majority of the local board passed a resolution requesting that the state board authorize the commissioner, pursuant to § 10-223e (h), to reconstitute the local board. The state board thereafter authorized the commissioner to reconstitute the local board, which resulted in the appointment of seven new members to the local board and the removal of all existing members from their positions. The plaintiffs thereafter brought three actions alleging certain statutory and constitutional violations. The plaintiffs sought, inter alia, declaratory rulings that § 10-223e (h) and the actions of the state board were unconstitutional and that the dissolution of the local board violated the requirements of § 10-223e (h). The trial court, pursuant to a stipulation of the parties, reserved for the advice of this court, inter alia, the question of whether the state board had violated § 10-223e (h) when it authorized the commissioner to reconstitute the local board. *Held*:

1. The failure of the state board to require the local board to undergo and complete the training mandated by § 10-223e (h) rendered void the state board's authorization to the commissioner to reconstitute the local board: the plain language of § 10-223e (h) states a mandatory procedure to be followed when the state board seeks to authorize reconstitution, and that statute directs the state board to require a local board of education to complete the training contemplated by § 10-223e (c) (2) (M) before the state board can authorize reconstitution of the local board; a review of § 10-223e (h) within the context of § 10-223e (c) (1) and (2), the function of which is to provide the state board with the appropriate tools to use in fulfilling its obligation of intensified supervision of low achieving schools and districts, supported the logical inference that the state board should pursue the remedial actions in § 10-223e (c) (2), with regard to the low achieving school or school district overseen by a local or regional board of education, before it pursues the drastic remedy of reconstituting the local or regional board of education under § 10-223e (h); moreover, the clear and specific reference in § 10-223e (h) to § 10-223e (c) (2) (M) indicated that the reconstitution remedy in subsection (h) was not meant to entirely supplant or to render superfluous the other, less drastic, remedies set forth in § 10-223e (c) (2).
2. This court's review of the legislative history and intent of § 10-223e supported the conclusion that the mandatory training requirement in § 10-223e (h) could not be waived by any party, including the local board of education seeking reconstitution: the legislative history of the statute demonstrated that reconstitution is an extreme remedy that is to be used only sparingly after it becomes apparent that other remedial measures have failed to produce results, that the provision requiring training prior to the authorization of reconstitution is intended to provide notice to the local board of education and its electors of the possibility of reconstitution, that the training itself serves a substantive and remedial purpose by providing the local board with an opportunity to prevent

its reconstitution by successfully completing training, that the state board does not have the authority to authorize reconstitution until if first requires the local board to undergo and complete training, and that the training provision of § 10-223e (h) was designed to circumscribe the state board's power and to continue this state's long-standing policy of preferring and preserving locally elected boards of education.

3. The defendants could not prevail on their alternative claim that the training requirement of § 10-223e (h) existed solely for the protection of the local board and, therefore, that the local board could choose to waive that protection: the training provision is a condition precedent to the state board's authority to authorize reconstitution, the failure to satisfy the training provision renders the state board powerless to authorize reconstitution, and, because the training provision concerns the scope of the legislature's grant of power to the state board, the local board, as a separate agent of the state and a body inferior to the legislature, could not alter the scope of the grant by waiving the training requirement provision of the statute; moreover, although statutory rights generally are waivable by the party who benefits from or is protected by the right, not every mandatory statutory provision may be waived, and a statutory right conferred on a private party but affecting the public interest may not be waived if such waiver contravenes the statutory policy; accordingly, because the training requirement of § 10-223e (h) embodies a public obligation that, through the act of the General Assembly, inures to the benefit of the citizens of the state as a whole, the local board, even as a democratically elected representative body of the electors of the city of Bridgeport, could not waive the provision, which existed for the benefit of the public and not for the protection of any particular individual or group.

4. The defendants could not prevail on their claim that this court should not construe the training requirement to be so important as to override a resolution of a local board of education seeking reconstitution by the state board, which was based on the defendants' contention that, once a local board has reached its own determination that it is operating ineffectively, has attempted to undergo its own training and has concluded that it would not benefit from the training contemplated by § 10-223e (h), imposing the training requirement on the local board would elevate form over substance: the statute's legislative history and the significant policy considerations germane to the state's education system compelled the conclusion that the training requirement is not a mere procedural technicality for the state board to overcome prior to authorizing the commissioner to reconstitute a local or regional board of education, the defendants' position would allow the state board to avoid its statutory obligation to work in cooperation with the local board before authorizing reconstitution, and acceptance of the notion that training is unimportant or futile would be equivalent to wholly disregarding the will of the legislature; moreover, the training requirement could not be

satisfied by evidence of participation in training by the local board on its own initiative, as it was clear from the language of the statute that the legislature intended that the state board would determine when it would require the local board to undergo and complete training, there was no exception to the training requirement for a situation in which the state board concluded that such training would be unnecessary or futile, and neither the statute nor the legislative history provided that the local board could make its own determination as to whether training or reconstitution is appropriate.

(*Two justices concurring separately in two opinions*; *one justice dissenting*)

Argued October 27, 2011—officially released February 28, 2012*

Procedural History

Actions seeking, inter alia, certain injunctive and declaratory relief in connection with the decision of the named defendant state board of education to authorize the defendant commissioner of education to reconstitute the named defendant board of education of the city of Bridgeport, brought to the Superior Court in the judicial district of Fairfield, where the cases were transferred to the judicial district of Waterbury, Complex Litigation Docket; thereafter, the court, *Agati*, *J.*, pursuant to the parties' stipulation, reserved certain questions of law for the advice of this court.

Norman A. Pattis, with whom was *Kevin Smith*, for the appellants in the first case (named plaintiff Maria Pereira et al.).

Michele C. Mount, with whom was *John Kardaras*, for the appellants in the second case (named plaintiff Robert Walsh et al.).

Josephine Smalls Miller, with whom, on the brief, was *Atiya Sample*, for the appellants in the third case (named plaintiff Laurayne Farrar-James et al.).

* February 28, 2012, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Mark F. Kohler, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Maura Murphy Osborne* and *Michael K. Skold*, assistant attorneys general, for the appellees (named defendant state board of education et al.).

John P. Bohannon, Jr., for the appellees (named defendant board of education of the city of Bridgeport et al.).

Steven D. Ecker, with whom, on the brief, was *Peter M. Haberlandt*, for the appellees (defendant Robert Trefry et al.).

John B. Orleans filed a brief for Bridgeport Education Fund, Inc., et al., as amici curiae.

Opinion

ZARELLA, J. The dispositive issue in this reservation is whether the state board of education (state board), violated General Statutes § 10-223e (h)[1] when it author-

[1] General Statutes § 10-223e (h) provides: "The State Board of Education may authorize the Commissioner of Education to reconstitute a local or regional board of education pursuant to subdivision (2) of subsection (d) of this section for a period of not more than five years. The board shall not grant such authority to the commissioner unless the board has required the local or regional board of education to complete the training described in subparagraph (M) of subdivision (2) of subsection (c) of this section. Upon such authorization by the board, the commissioner shall terminate the existing local or regional board of education and appoint the members of a new local or regional board of education for the school district. Such appointed members may include members of the board of education that was terminated. The terms of the members of the new board of education shall be three years. The Department of Education shall offer training to the members of the new board of education. The new board of education shall annually report to the commissioner regarding the district's progress toward meeting the benchmarks established by the State Board of Education pursuant to subsection (c) of this section and making adequate yearly progress, as defined in the state accountability plan prepared in accordance with subsection (a) of this section. If the district fails to show adequate improvement, as determined by the State Board of Education, after three years, the commissioner may reappoint the members of the new board of education or appoint new members to such board of education for terms of two years."

ized the commissioner of education (commissioner) to reconstitute the board of education of the city of Bridgeport (local board).[2] Specifically, we must determine whether the failure of the state board to require the local board to undergo and complete training, as mandated by § 10-223e (h), rendered void the state board's authorization to the commissioner to reconstitute the local board. In that connection, we also must address whether a resolution, which a majority of the local board passed, requesting that the state board authorize reconstitution of the local board resulted in a waiver of the state board's obligation to require training. We conclude that the state board's failure to require training rendered void its authorization of reconstitution under § 10-223e (h) and that the local board's resolution had no effect on the operation of the statute. We therefore answer the dispositive question in the affirmative.

I

The following undisputed facts and procedural history are relevant to our analysis. The state board has

[2] Specifically, the primary question reserved for this court's advice is: "Did the state board . . . violate . . . § 10-223e (h) in its decision to authorize the commissioner . . . to reconstitute the [local board]?"

Four other questions are presented in the reservation: (1) whether § 10-223e (h) violates article tenth, § 1, of the constitution of Connecticut; (2) whether § 10-223e (h) violates article sixth, § 4, of the constitution of Connecticut; (3) whether § 10-223e (h) violates article first, §§ 1, 4 and 20, of the constitution of Connecticut; and (4) whether the local board had the legal power or authority to adopt a resolution requesting its reconstitution by the state board.

Because we decide the issues presented by the reservation solely on a statutory basis, we do not reach the constitutional questions. See, e.g., *In re Shanaira C.*, 297 Conn. 737, 754, 1 A.3d 5 (2010) ("we must be mindful that [t]his court has a basic judicial duty to avoid deciding a constitutional issue if a nonconstitutional ground exists that will dispose of the case" [internal quotation marks omitted]). Moreover, we need only address the question of whether the local board had the authority to request that the state board authorize reconstitution to the extent that it is germane to our statutory analysis of § 10-223e (h).

designated the school district of the city of Bridgeport (local school district) a low achieving school district under § 10-223e (c) (1)[3] for at least seven consecutive years. The local school district also has failed to make acceptable progress toward benchmarks established by the state board, pursuant to § 10-223e (a) and (c), and has failed to make adequate yearly progress pursuant to the requirements of the federal No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, codified as amended at 20 U.S.C. § 6301 et seq. (2006 & Sup. III 2009), for at least two consecutive years while being designated as a low achieving school district. Students at virtually all levels in the local school district generally underperform on proficiency tests offered in recent years. Specifically, in the 2009–2010 school year, only 66.5 percent of students in the local school district in grades three through eight were proficient in mathematics and only 53.5 percent were proficient in reading, as measured by the Connecticut Mastery Test. Similarly, for the same period, only 32.3 percent of students in grade ten were proficient in mathematics and only 39.5 percent were proficient in reading, as measured by the Connecticut Academic Performance Test.

The local board was established by the charter of the city of Bridgeport (charter), with all the powers of and duties imposed on boards of education under Connecticut and federal laws. See Bridgeport Charter, c. 15, § 2.

[3] General Statutes § 10-223e (c) (1) provides in relevant part: "Any school or school district identified as in need of improvement pursuant to subsection (a) of this section and requiring corrective action pursuant to the requirements of the [federal] No Child Left Behind Act . . . shall be designated and listed as a low achieving school or school district and shall be subject to intensified supervision and direction by the State Board of Education."

General Statutes § 10-223e (a) provides in relevant part: "In conformance with the [federal] No Child Left Behind Act . . . the Commissioner of Education shall prepare a state-wide education accountability plan, consistent with federal law and regulation. Such plan shall identify the schools and districts in need of improvement, require the development and implementation of improvement plans and utilize rewards and consequences."

Pursuant to the charter, the local board consists of nine members, who must be electors of the city of Bridgeport and serve four year terms. Id., § 1 (a). Elections for the local board are staggered so that, every two years, either four or five members of the local board are elected. See id., § 1 (b) and (c). The charter further provides that, in the event of any vacancy in the membership of the local board, the remaining members will elect a new member, of the same political party as the vacated member, for the balance of the term. Id., § 1 (d).

Prior to August 5, 2011, the local board was composed of Barbara Bellinger, the president, Leticia Colon, the vice president, Delores Fuller, the secretary, and Nereyda Robles, Thomas Cunningham, Thomas Mulligan, Maria Pereira, Bobby Simmons and Sauda Baraka. All members were elected by the electors of the city of Bridgeport. In 2011, four local board members, namely, Bellinger, Fuller, Robles and Cunningham, were at the end of their four year terms, and their positions were set to be filled no later than the November, 2011 Bridgeport municipal general election. The other five members, namely, Colon, Mulligan, Pereira, Simmons and Baraka, had another two years remaining on their terms as of 2011.

In 2010, some members of the local board had sought and completed certain training offered by the Connecticut Association of Boards of Education. The first training session, which was held on March 5, 2010, focused on the roles and responsibilities of the local board and its members, and provided certain tools and techniques for holding more productive local board meetings. All local board members except Simmons and Baraka attended this session. The second training session, which was held on October 5, 2010, focused on the state Freedom of Information Act and Robert's Rules of Order. All members except Simmons, Baraka and Robles attended this session. Neither of these training sessions was mandated or required by the state board.

Beginning in January, 2011, and continuing through July 5, 2011, local elected officials in the city of Bridgeport consulted with either or both the chairman of the state board, Allan B. Taylor, and then acting commissioner of education, George A. Coleman, regarding the possibility of the state board reconstituting the local board following a formal request by the local board. Local board members Simmons, Baraka and Pereira were not aware of, informed of or asked to participate in these communications any time prior to July 1, 2011.

On Friday, July 1, 2011, at 4:55 p.m., a notice of a special meeting of the local board, to take place on Tuesday, July 5, 2011, at 6 p.m., was issued by Fuller. The agenda for the special meeting, as provided in the notice, included a discussion and vote on two resolutions concerning requests and recommendations to the state board. Copies of both resolutions were attached to the notice. The local board convened the special meeting on July 5, 2011, with all nine members present. By a vote of six to three, the local board passed the resolution concerning the reconstitution request (resolution), with local board members Baraka, Pereira and Simmons voting against it. The resolution provided, inter alia, that the local board (1) was unable to function effectively, (2) could not properly and effectively oversee the local school district and meet its improvement plan, and (3) had received training to help it function more effectively as a board but that this training had not enabled it to meet its responsibilities and, further, that additional training would not be helpful.[4] In light

[4] Specifically with regard to training, the resolution provided: "WHEREAS, the [local board] has received training in the skills needed to function effectively as a [b]oard of [e]ducation, but such training has not enabled the [local] [b]oard to carry out its statutory responsibilities, and the [local board] does not believe that further training would be productive or would enable [it] to carry out those responsibilities . . . ."

The resolution concluded by stating: "NOW THEREFORE BE IT RESOLVED that the [local board] hereby requests that the [s]tate [b]oard, acting pursuant to the . . . General Statutes, including, but not limited to

of these circumstances, the resolution requested that the state board authorize the commissioner, pursuant to § 10-223e (h), to reconstitute the local board.

The following day, July 6, 2011, the state board held its regularly scheduled monthly meeting, which was open to the public. After the meeting was called to order, the state board voted unanimously to add the local board resolution to its agenda. During the meeting, the state board received public comment regarding the resolution and then voted, five to four, to authorize the commissioner to reconstitute the local board. On July 14, 2011, Coleman sent a letter to Bellinger, the local board's president, copying all other local board members and giving notice of his intention to reconstitute the local board pursuant to the authority granted to him by the July 6, 2011 vote of the state board. On August 5 and 16, 2011, Coleman appointed seven new members to the local board: Robert Trefry; Kenneth Moales, Jr.; Michelle Black Smith-Tompkins; David Norton; Jaqueline Kelleher; Judith Bankowski; and Hernan Illingworth (reconstituted board). The effect of these appointments was to remove all previous members of the local board from their positions. By operation of § 10-223e (h), the members of the reconstituted board retain their positions for at least three years, during which time no local elections will be held for positions on the local board.

Shortly after Coleman's July 14, 2011 letter to the local board, former local board members Pereira and Simmons filed an action in the Superior Court against the state board, Coleman, Bill Finch, the mayor of the city of Bridgeport, John Ramos, the superintendent of

. . . § 10-223e (h), authorize the [c]ommissioner . . . to reconstitute the [local board] in accordance with statutory authority, and that the [s]tate [b]oard take such other statutorily authorized actions as may enable the Bridgeport public schools to fulfill their statutory and constitutional responsibilities."

schools for the city of Bridgeport, former local board members Bellinger, Colon, Fuller, Robles, Cunningham and Mulligan, and reconstituted board members Trefry, Moales, Smith-Tompkins, Norton, Kelleher, Bankowski and Illingworth. Around the same time, Robert Walsh, George Pipkin and Pertrinea Cash-Deedon, electors of the city of Bridgeport who had submitted over 3000 petition signatures in order to qualify as candidates for the local board, filed an action in the Superior Court against the defendants in the *Pereira* case, as well as Santa I. Ayala, Democratic registrar of voters of the city of Bridgeport, and Alma L. Maya, the town clerk of the city of Bridgeport. Also around the same time, Laurayne Farrar-James and Shavonne Davis, residents of the city of Bridgeport, Barbara Pouchet, resident of the city of Bridgeport and potential candidate for the local board, and Bakara, former member of the local board, filed an action in the Superior Court against the local board, Ramos, Bellinger, the state department of education, Coleman and Taylor.[5]

The complaints in all three actions alleged state statutory and constitutional violations, and one or more of the complaints sought, inter alia, (1) a declaratory ruling that § 10-223e (h) is unconstitutional under the state constitution, (2) a declaratory ruling that the acts of the defendants were in violation of the state constitution, (3) a declaratory ruling that the dissolution of the local board was in violation of the requirements of § 10-223e (h), with the effect that the reconstituted board had been improperly seated, (4) a writ of mandamus ordering that Ayala, the Democratic registrar, and Maya, the town clerk, accept the petitions of candidates for

[5] Due to the posture of the case as it reaches us in this reservation, we have somewhat simplified the procedural history. In particular, we focus on the nature of the parties and their claims as they existed at the time the reservation came to this court. Additionally, for simplicity, we hereinafter refer to the three sets of plaintiffs collectively as the plaintiffs. Similarly, we refer to all defendants collectively as the defendants.

the local board and place them on the ballot for the Bridgeport municipal elections in 2011, (5) a temporary injunction precluding the state board, Ramos, Coleman and Taylor, among others, from taking any further action with regard to reconstituting the local board, (6) an order requiring Pereira, Simmons and Baraka to be restored as members of the local board, (7) compensatory and punitive damages, and (8) any other legal or equitable relief to which they were entitled.[6]

The three cases then were transferred to the judicial district of Waterbury, Complex Litigation Docket. Recognizing the need for an expeditious resolution of the underlying issues, the parties requested that the trial court reserve the action for the advice of this court pursuant to Practice Book § 73-1.[7] Our analysis of the issues raised by the reservation follows.

[6] The myriad claims of the various plaintiffs have been condensed and simplified for purposes of this reservation.

[7] Practice Book § 73-1 provides in relevant part: "(a) Any reservation shall be taken to the supreme court or to the appellate court from those cases in which an appeal could have been taken directly to the supreme court, or to the appellate court, respectively, had judgment been rendered. Reservations in cases where the proper court for the appeal cannot be determined prior to judgment shall be taken directly to the supreme court.

"(b) All questions presented for advice shall be specific and shall be phrased so as to require a Yes or No answer.

"(c) Before any question shall be reserved by any court, counsel shall file in that court a stipulation which shall clearly and fully state the question or questions upon which advice is desired; that their present determination by the appellate court having jurisdiction would be in the interest of simplicity, directness and economy in judicial action, the grounds for such allegation being particularly stated; that the answers to the questions will determine, or are reasonably certain to enter into the final determination of the case; and that the parties request that the questions be reserved for the advice of the appellate court having jurisdiction. The stipulation shall also designate the specific pleadings in the trial court case file which are necessary for the presentation of the question or questions sought to be reserved and shall state the undisputed facts which are essential for determination of the question or questions sought to be reserved. . . .

* * *

"(e) The court will not entertain a reservation for its advice upon questions of law arising in any action unless the question or questions presented are

II

A

The resolution of this reservation, and the underlying case, is determined by the language and application of § 10-223e (h). Specifically, we must decide whether a statutory provision in § 10-223e (h) mandating that the state board require a local board of education to undergo and complete certain training before the state board authorizes reconstitution of that local board can be waived.[8] The plaintiffs claim that the statute's provisions are mandatory and that the state board lacked the authority to authorize reconstitution of the local board because it failed to follow the statute. Additionally, the plaintiffs claim that the authority on which the defendants rely in seeking to extend the doctrine of waiver to the facts of this case is unpersuasive and that, even if waiver can apply, no grounds exist for finding that the local board waived the state board's obligation under the statute. The defendants respond that the local board may and did waive the state board's obligation to require the local board to undergo and complete training before the state board authorized reconstitution.[9] We conclude that the statute's provisions are man-

such as are, in the opinion of the court, reasonably certain to enter into the decision of the case, and it appears that their present determination would be in the interest of simplicity, directness and economy of judicial action. . . ."

[8] The defendants do not dispute that the plain language of § 10-223e (h) directs the state board to require the local board to participate in training before the state board can authorize reconstitution. Furthermore, the defendants do not argue in their briefs that the state board complied or substantially complied with this statutory mandate to require training. Indeed, during oral argument, counsel for the defendants conceded that, in the absence of waiver, the statute requires strict compliance. The defendants do advance an argument with regard to the apparent futility of requiring training in the present case. We address this argument in part III of this opinion.

[9] We pause to address the issue of whether the defendants' waiver argument is properly before this court, as such an argument is not found explicitly in the questions in this reservation. We believe the argument falls within the scope of the first question of the reservation, namely, whether the state board violated § 10-223e (h) when it authorized the commissioner to

datory and not waivable, and, therefore, that the state board improperly authorized the reconstitution of the local board.

The proper application of § 10-223e (h) presents a question of statutory interpretation, over which our review is plenary. See, e.g., *Connecticut Podiatric Medical Assn.* v. *Health Net of Connecticut, Inc.*, 302 Conn. 464, 471, 28 A.3d 958 (2011). We are guided by well established principles of statutory construction. See id.

We begin with the foundational principle that, when interpreting statutes, "[o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance

reconstitute the local board. If the statutory provision is not waivable, the state board violated the statute by failing to provide training. Conversely, if the provision is waivable, and waivable by a local board of education, the state board did not violate the statute, provided that the waiver actually occurred. We acknowledge the plaintiffs' argument, advanced in their reply brief and during oral argument, that the issue of waiver is not properly before this court because it is an issue of fact, not included in the stipulated facts in this reservation. Nevertheless, our determination of whether the provision is waivable, and by whom, is a matter of pure statutory interpretation. The only issue of fact is whether the local board's resolution serves as a proper and effective waiver. Because we conclude, as a matter of law, that the waiver doctrine is inapplicable to the present case, we need not reach the factual question of whether the local board effectively waived the training requirement.

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.) *Grady* v. *Somers*, 294 Conn. 324, 333, 984 A.2d 684 (2009).

We first consider the relevant language of General Statutes § 10-223e (h): ''The State Board of Education may authorize the Commissioner of Education to reconstitute a local or regional board of education pursuant to subdivision (2) of subsection (d) of this section for a period of not more than five years. *The board shall not grant such authority to the commissioner unless the board has required the local or regional board of education to complete the training described in subparagraph (M) of subdivision (2) of subsection (c) of this section*. . . .'' (Emphasis added.) The plain language of the statute conveys a mandatory procedure to be followed if the state board should choose to authorize reconstitution, particularly through the use of the phrase ''shall not grant such authority to the commissioner unless . . . .'' General Statutes § 10-223e (h); see *Wiseman* v. *Armstrong*, 295 Conn. 94, 101, 989 A.2d 1027 (2010) (''[d]efinitive words, such as must or shall, ordinarily express legislative mandates of nondirectory nature . . . [and] the word shall creates a mandatory duty when it is juxtaposed with [a] substantive action verb'' [citation omitted; internal quotation marks omitted]). ''The test to be applied in determining whether a statute is mandatory or directory is whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates to a matter of substance or a matter of convenience. . . . If it is a matter of substance, the statutory provision is mandatory. If, however, the legislative provision is designed to secure order, system and dispatch in

the proceedings, it is generally held to be directory, especially [when] the requirement is stated in affirmative terms unaccompanied by negative words. . . .

"The legislature, rather than phrasing the [statutory provision] in affirmative terms unaccompanied by negative words, as is often done with directory provisions . . . instead chose . . . negative phrasing . . . . The legislature's use of such negative terminology suggests that it intended [the statutory provision] to be mandatory." (Citations omitted; internal quotation marks omitted.) *Santiago* v. *State*, 261 Conn. 533, 540–41, 804 A.2d 801 (2002); see also *Stewart* v. *Tunxis Service Center*, 237 Conn. 71, 78, 676 A.2d 819 (1996) ("[t]he legislature's use of such negative terminology suggests that it intended [the statutory provision] to be mandatory"). In other words, the statutory language supports the conclusion that the state board may not authorize reconstitution until it has required the local board to undergo and complete the training described in § 10-223e (c) (2) (M).

Because it is necessary to our understanding of the training requirement, we also review § 10-223e (c).[10]

[10] General Statutes § 10-223e (c) provides in relevant part: "(2) Notwithstanding any provision of this title or any regulation adopted pursuant to said statutes, except as provided in subdivision (3) of this subsection, in carrying out the provisions of subdivision (1) of this subsection, the State Board of Education shall take any of the following actions to improve student performance and remove the school or district from the list of schools or districts designated and listed as a low achieving school or district pursuant to said subdivision (1), and to address other needs of the school or district: (A) Require an operations audit to identify possible programmatic savings and an instructional audit to identify any deficits in curriculum and instruction or in the learning environment of the school or district; (B) require the local or regional board of education for such school or district to use state and federal funds for critical needs, as directed by the State Board of Education; (C) provide incentives to attract highly qualified teachers and principals; (D) direct the transfer and assignment of teachers and principals; (E) require additional training and technical assistance for parents and guardians of children attending the school or a school in the district and for teachers, principals, and central office staff members hired by the district; (F) require the local or regional board of education for the school or district

Generally, § 10-223e (c) sets forth the state board's obligation to supervise low achieving schools or school districts, and provides the various mechanisms that the state board can use to improve the conditions of those schools and school districts. Section 10-223e (c) (1) uses strong, presumptively mandatory language in describing the role that the state board occupies with regard to low achieving schools and districts: "Any school or school district identified as in need of improvement . . . *shall* be designated and listed as a low achieving school or school district and *shall* be subject to intensified supervision and direction by the State Board of Education." (Emphasis added.) General Statutes § 10-223e (c) (1). The second part of subsection (c) lists thirteen separate actions, or any combination thereof, that the state board "shall" undertake "to

to implement model curriculum, including, but not limited to, recommended textbooks, materials and supplies approved by the Department of Education; (G) identify schools for reconstitution, as may be phased in by the commissioner, as state or local charter schools, schools established pursuant to section 10-74g, innovation schools established pursuant to section 10-74h, or schools based on other models for school improvement, or for management by an entity other than the local or regional board of education for the district in which the school is located; (H) direct the local or regional board of education for the school or district to develop and implement a plan addressing deficits in achievement and in the learning environment as recommended in the instructional audit; (I) assign a technical assistance team to the school or district to guide school or district initiatives and report progress to the Commissioner of Education; (J) establish instructional and learning environment benchmarks for the school or district to meet as it progresses toward removal from the list of low achieving schools or districts; (K) provide funding to any proximate district to a district designated as a low achieving school district so that students in a low achieving district may attend public school in a neighboring district; (L) direct the establishment of learning academies within schools that require continuous monitoring of student performance by teacher groups; (M) require local and regional boards of education to (i) undergo training to improve their operational efficiency and effectiveness as leaders of their districts' improvement plans, and (ii) submit an annual action plan to the Commissioner of Education outlining how, when and in what manner their effectiveness shall be monitored; or (N) any combination of the actions described in this subdivision or similar, closely related actions. . . ."

improve student performance and remove the school or district from the list of schools or districts designated and listed as a low achieving school or district . . . and to address other needs of the school or district . . . .'' General Statutes § 10-223e (c) (2). Specifically, this list of actions includes the training provision referenced in § 10-223e (h): ''[The state board shall] require local and regional boards of education to (i) undergo training to improve their operational efficiency and effectiveness as leaders of their districts' improvement plans . . . .'' General Statutes § 10-223e (c) (2) (M). The plain language of § 10-223e (c), like that of § 10-223e (h), denotes a mandatory and affirmative obligation on the part of the state board to pursue one or more remedial actions to remove the low achieving designation from schools and districts. Significantly, all of these actions focus on improving local operations through providing training, aid and other supervisory techniques, without granting the state board the authority to alter or affect the constitution of a local board of education. Simply put, by referencing the training provision of § 10-223e (c) (2) (M) in § 10-223e (h), the legislature has highlighted the importance of this one action, in a series of many, that the state board shall pursue in its capacity of supervising and improving low achieving schools and districts.

Particularly significant to an understanding of the operation of § 10-223e (h) is the relevant language of General Statutes § 10-223e (d): ''The State Board of Education *shall monitor* the progress of each school or district designated as a low achieving school or district pursuant to subdivision (1) of subsection (c) of this section *and provide notice* to the local or regional board of education for each such school or district of the school or district's progress toward meeting the benchmarks established by the State Board of Education pursuant to subsection (c) of this section. If a district fails

to make acceptable progress toward meeting such benchmarks established by the State Board of Education and fails to make adequate yearly progress pursuant to the requirements of the No Child Left Behind Act . . . for two consecutive years while designated as a low achieving school district, the State Board of Education, *after consultation with the Governor and chief elected official or officials of the district*, may . . . notwithstanding the provisions of chapter 146, any special act, charter or ordinance, grant the Commissioner of Education the authority to reconstitute the local or regional board of education for such school district in accordance with the provisions of subsection (h) of this section." (Emphasis added.)

Thus, when § 10-223e (h) is analyzed in the context of § 10-223e (c) (1) and (2), the logical inference is that the state board should pursue the remedial actions in § 10-223e (c) (2), with regard to the low achieving school or school district overseen by a local or regional board of education, before it pursues the seemingly severe remedy of reconstituting that local or regional board under § 10-223e (h). The clear and specific reference in § 10-223e (h) to § 10-223e (c) (2) (M) suggests that the reconstitution remedy in § 10-223e (h) is not meant to entirely supplant or to render superfluous the other, less drastic, remedies set forth in § 10-223e (c) (2). See, e.g., *Brown & Brown, Inc.* v. *Blumenthal*, 297 Conn. 710, 726, 1 A.3d 21 (2010) ("[w]e cannot countenance a reading of a statute that would render it superfluous"). Indeed, the apparent function of § 10-223e (c) is to provide the state board with the appropriate tools to use in fulfilling its obligation of intensified supervision of low achieving schools and districts. By specifically singling out and referencing subparagraph (M) of § 10-223e (c) (2) in § 10-223e (h), it could reasonably be concluded that the legislature intended to underscore the importance of this specific remedial

action with respect to local boards of education that oversee low achieving schools or districts.[11] Accordingly, on the basis of the plain statutory language, we conclude that § 10-223e (h) mandates that the state board require a local board of education to complete the training contemplated under § 10-223e (c) (2) (M) before the state board can authorize its reconstitution.

None of the parties disputes the mandatory nature of the training requirement in § 10-223e (h).[12] Rather, the defendants contend that the training requirement can be waived, which would allow the state board to authorize reconstitution without first providing training. Section 10-223e (h) is silent as to whether the training requirement can be waived. Additionally, we cannot find, and neither party has provided us with, any other relevant statutory provision pertaining to the waiver of this requirement. Cf., e.g., General Statutes § 10-184b ("[n]otwithstanding any provision of the general statutes or public or special act granting the Commissioner of Education the authority to waive provisions of the general statutes, the Commissioner of Education shall not limit the authority of parents or guardians to provide for equivalent instruction"). The defendants argue, however, that compliance with § 10-223e (h), like any other mandatory statutory provision, can be waived by a local board of education and that the state board can properly

[11] We note that the training provision in § 10-223e (c) (2) (M), when employed outside the context of reconstitution under § 10-223e (h), is not necessarily mandatory, as it is but one of many actions that the state board can take with respect to low achieving schools and districts. Nevertheless, the fact that the legislature chose to incorporate by reference that sole provision of § 10-223e (c) (2) (M) in § 10-223e (h) suggests, if not compels, the conclusion that training is a precondition to the state board's authority to authorize the reconstitution of a local or regional board of education.

[12] See footnote 8 of this opinion. We reiterate that the defendants do dispute whether this training is a mere formality, that is, whether satisfactory completion of the training would have any effect on the state board's ultimate decision to authorize reconstitution. We analyze this argument in more detail in part III of this opinion.

rely and act on that waiver to authorize reconstitution without requiring the statutorily mandated training.[13]

We cannot confidently conclude, on the basis of the language of the statute alone, whether the provision is waivable, and we previously have held that mandatory statutory provisions sometimes may be waived. See, e.g., *Stewart* v. *Tunxis Service Center*, supra, 237 Conn. 80. In light of this ambiguity, we consult the pertinent extratextual sources to discern legislative intent. See, e.g., *McCoy* v. *Commissioner of Public Safety*, 300 Conn. 144, 150–51, 12 A.3d 948 (2011) ("[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]).

Before proceeding, we pause briefly to reiterate the issue before the court in this reservation and, thus, the scope of our holding. The statutory scheme at issue in this reservation is embodied in § 10-223e, which, as we subsequently explain in more detail, represented a change in Connecticut's administration of public education. Through § 10-223e, the legislature expanded the state board's involvement in the quotidian affairs of low achieving schools and school districts. The state board now has the authority to make administrative and policy determinations for these schools and districts; see General Statutes § 10-223e (c); authority that formerly was

[13] We note that the defendants raised the argument of waiver for the first time in their brief before this court, and, for that reason, the plaintiffs were limited to responding to this argument in their reply brief and at oral argument. The plaintiffs' principal arguments focus instead on the fact that (1) the state board lacked statutory authority to authorize reconstitution because it failed to require the local board to undergo training, and (2) there was no substantial compliance with the training requirement by virtue of the local board's partial participation in discretionary training, which the local board itself sought.

only within the purview of local or regional boards of education. The dispositive issue raised by this reservation, however, concerns not the shift in power from local boards of education to the state board under § 10-223e generally. Instead, the parties have asked us to determine the very narrow question of the specific process that the legislature intended under § 10-223e (h), a more recent addition to § 10-223e. See Public Acts 2010, No. 10-111, § 21 (amending General Statutes [Sup. 2010] § 10-223e by adding, inter alia, subsection [h]). We therefore focus primarily on the legislative intent and policy behind subsection (h), as informed by the legislature's decision to initially restrict to the General Assembly the power to reconstitute local boards.[14] See

[14] The dissent attempts to paint a different picture through citations to various statistics and social science data demonstrating the poor performance of the local school district. We do not debate that the local school district has faced and continues to face difficulty in achieving a minimum level of satisfactory performance in recent years. Indeed, the parties have stipulated to that fact. Nevertheless, the dissent's reliance on this data—which, we note, the parties did not include in their stipulated facts—is otherwise irrelevant. The plaintiffs are not seeking a determination about whether the local board qualified for reconstitution under § 10-223e on the basis of the underperformance of the local school district. Instead, they have asked us to determine whether the state board followed the requirements of § 10-223e (h) when it authorized reconstitution. Thus, the statistics and social science data on which the dissent relies do nothing to contextualize the issue beyond the parties' stipulation. To the extent that the dissent relies on these data to suggest that the issue before this court is the broader policy issue of whether and when the state board should reconstitute local or regional boards of education, the dissent improperly expands the scope of this reservation. See, e.g., *Phelps Dodge Copper Products Co.* v. *Groppo*, 204 Conn. 122, 136 n.10, 527 A.2d 672 (1987) (this court will decline to address claim that is outside issue presented by reserved question).

Additionally, we note that the dissent relies on these statistics to "help explain why barring local boards of education from waiving the training provision would frustrate the purpose of § 10-223e." We disagree. As evidenced by the language of the statute and the legislative history on which both the majority and dissent rely, one of the purposes of the statute is to provide training and other assistance to local boards of education in order to improve the performance of local schools and school districts. Thus, contrary to the dissent's reasoning, barring local boards from waiving the training provision furthers, rather than frustrates, the statute's purpose.

Public Acts, Spec. Sess. June, 2007, No. 07-3, § 32, codified at General Statutes (2008 Sup.) § 10-223e (d).

With that in mind, we turn first to remarks made by legislators during the House floor debate concerning the proposed amendment to § 10-223e that would provide the state board with a mechanism to authorize reconstitution of underperforming local or regional boards of education.[15] Representative Marilyn Giuliano, noting that reconstituting a local board of education was a "significant usurpation of powers," inquired into the procedures and "exact criteria that would give the commissioner such full-blown powers to dissolve a *duly-elected*, *by the people*, [b]oard of [e]ducation . . . ." (Emphasis added.) 53 H.R. Proc., Pt. 14, 2010 Sess., p. 4581. Responding directly to this inquiry, Representative Andrew M. Fleischmann stated that "the commissioner would first have to find that he had a school board that was overseeing a school district that was a low-achieving district consistently for several years, *and that the board was actually an impediment to moving forward with reforms*. . . . [I]f that's happening, and I'm not sure if it's happening in Connecticut . . . [*t*]*he members of the board can be retrained by the* [*s*]*tate* [*d*]*epartment of* [*e*]*ducation. And if after that training that board continues to be an impediment to execution of reforms*, *then and only then would the commissioner consider reconstituting that board* . . . ." (Emphasis added.) Id., pp. 4581–82. Representative Vincent J. Candelora raised a similar question, to which Representative Fleischmann provided a virtually identical response, underscoring the fact that the state board could authorize the reconstitution of the local board only after the local board completed the training

[15] These remarks occurred prior to the vote on the proposed legislation in the House of Representatives. It appears that the Senate did not debate this aspect of the proposed legislation before the Senate voted on it.

required by the state board for this specific purpose.[16] 53 H.R. Proc., Pt. 15, 2010 Sess., p. 4675, remarks of Representatives Candelora and Fleischmann.

In addition to the foregoing remarks, we find elucidating certain relevant testimony and remarks from an education committee hearing regarding the proposed amendment to § 10-223e. During the hearing, Mark K. McQuillan, the commissioner of education at the time of the hearing in 2010, testified regarding the need for amending § 10-223e to permit the state board to authorize the reconstitution of local and regional boards of education in certain, limited circumstances. Conn. Joint Standing Committee Hearings, Education, Pt. 4, 2010 Sess., p. 1046. In discussing his understanding of the proposed amendment, McQuillan stated that reconstitution would follow the "process outlined in the legislation [and] *would be very sparingly used*"; (emphasis added) id.; and that it would be used "in a process that . . . would involve [the Connecticut Association of Boards of Education] and would be one that would be administered . . . *with a measured but deliberate insistence that things change*." (Emphasis added.) Id., p. 1049. Following McQuillan's testimony, Representative Fleischmann, a cochairman of the education committee, noted: "There's a tension between trying to get things done and respecting the *will of the people* in

[16] The following colloquy ensued between Representatives Candelora and Fleischmann:

"[Representative Candelora]: . . . [O]nce a school is deemed to be low achieving, as I read this, the mechanism would be that the commissioner would send that board of education to complete a training course. *If* that board of education completes that training course, as I read this, it seems that the commissioner *could* then sort of monitor, but would still have the ability to recommend reconstitution of that board of education. Am I correct in that?

* * *

"[Representative Fleischmann]: . . . I believe that power resides in the [s]tate [b]oard of [e]ducation, but I think the rest of the characterization was accurate." (Emphasis added.) 53 H.R. Proc., Pt. 15, 2010 Sess., p. 4675.

democracy. And one of the concerns . . . would be taking a body that had been elected by the folks in a given town and dispersing them . . . and, instead, giving the power, essentially, to [the commissioner] and the [s]tate board." (Emphasis added.) Id. In response to Representative Fleischmann's concerns, McQuillan agreed that "it is very, very important that . . . the *democratic-elected officials* remain in the positions if they are prepared and demonstrate the capacity to do the leadership." (Emphasis added.) Id. McQuillan explained that, "when we look at the question of reconstituting a board, it isn't simply throwing them all out or suggesting that everyone has to leave. . . . [*I*]*t would involve a process of having a procedure in place* . . . ." (Emphasis added.) Id., pp. 1049–50. Thereafter, McQuillan summarized the envisioned operation of the proposed amendment by stating that, "*in rare instances*—and I'm saying 'in rare instances,' not the general pattern—we have found that it would be necessary to have [the] authority" to reconstitute a local board.[17] (Emphasis added.) Id., p. 1051.

During the same education committee hearing, Representative Deborah Heinrich raised her own concern about providing the state board with the authority to reconstitute local boards of education: "I'm a little confused about how one can reconstitute an elected board. And maybe I'm missing something in here, but *the people* elected their board and so then . . . the [s]tate [d]epartment of [education] would then turn around and say, [y]ou're no longer elected?" (Emphasis added.) Id., pp. 1137–38. Shortly thereafter, Representative Paul Davis questioned Richard Murray, a member of the board of directors of the Connecticut Association of Boards of Education, whether it was "[that associa-

[17] McQuillan did not state, during this hearing, whether he or the state board considered the local board to be one of the "rare instances" in which reconstitution would be appropriate.

tion's] position . . . [that it] feel[s] okay with some sort of language that would permit the [c]ommissioner to [reconstitute a local board]?" Id., p. 1139. Murray responded: "I think *in extreme circumstances*."[18] (Emphasis added.) Id.

From the foregoing testimony and remarks, we distill three general principles of legislative intent behind § 10-

[18] The dissent criticizes our reliance on legislative history as selective and "flawed," in part because "[we rely] to a significant extent on the statements of legislators who actually voted against the [proposed legislation adding subsection (h) to § 10-223e]." As the foregoing analysis demonstrates, we give the most weight to the remarks of Representative Fleischmann, a cochairman of the education committee and the legislator who introduced the bill amending § 10-223e to add subsection (h). Doing so accords with this court's previous treatment of legislative history. See, e.g., *Manchester Sand & Gravel Co.* v. *South Windsor*, 203 Conn. 267, 275, 524 A.2d 621 (1987) ("[t]he statement of the legislator who reported the bill out of committee carries particular weight and deserves careful consideration"). So too does our reliance on other statements made during the floor debate in the House of Representatives. E.g., id., 276 ("[s]tatements made on the floor of the house, although not controlling, may be judicially noticed and are a strong indication of legislative intent"). Additionally, "[a]lthough the comments of opponents of a bill ordinarily are entitled to less weight than those of its proponents, there are instances in which we have found them to be relevant." *Cotto* v. *United Technologies Corp.*, 251 Conn. 1, 12 n.7, 738 A.2d 623 (1999); see, e.g., *Washington* v. *Meachum*, 238 Conn. 692, 713–14, 680 A.2d 262 (1996) (relying on statements of Senators opposed to bill to discern legislative intent). This case is one of those instances. The legislative history of § 10-223e (h) on which we rely in this opinion demonstrates that both the legislators in support of and the legislators in opposition to the proposed legislation spoke about (1) the importance of preserving locally elected boards of education, and (2) the specific process of reconstitution envisioned by subsection (h), namely, that the state board would consider authorizing reconstitution only after it had required the local board of education to undergo training. Thus, while we agree with the dissent that legislative history can be manipulated, we dismiss the dissent's accusation that we have done so in the present case. The dissent's criticism in this regard, through its references to the dissent in *State* v. *Courchesne*, 262 Conn. 537, 597, 816 A.2d 562 (2003) (*Zarella*, *J.*, dissenting), which was authored by the author of this opinion, is unwarranted. We do not understand how our reliance on the statements of legislators who expressed identical concerns, regardless of being in favor of or opposed to the enactment of § 10-223e (h), reasonably could be viewed as manipulating the legislative history. Indeed, our opinion canvasses the legislative debate and remarks concerning

223e (h). First, remarks of various representatives coupled with the testimony of McQuillan make clear that reconstitution is an extreme remedy, to be used only sparingly *after* it becomes apparent that other remedial measures have failed to produce results. Second, the testimony and remarks track the plain language of the statute, which mandates that the state board require a local board of education to undergo and complete training before the state board authorizes reconstitution of the local board. It also appears that certain legislators anticipated that the state board would reassess its initial decision to pursue reconstitution after the local board successfully completes training.[19] In other words, the legislators and McQuillan both appeared to view the proposed statute as a new grant of authority to the state board, but one that was predicated on the state board first requiring the local board to undergo and complete training, as contemplated by § 10-223e (c) (2) (M). Third, any time that a legislator expressed concern over the ramifications of allowing the state board to authorize reconstitution of a local board of education, that concern was grounded specifically in the usurpation of local democratic will. In other words, there was a concern that reconstitution, especially one without any procedural check in place, would trample on the rights of the people who had duly and democratically elected their representatives to the local board. Little concern, if any, was expressed regarding the rights of the local boards of education or the members of those boards. Indeed, there apparently was no discussion about whether local boards could seek out reconstitution or could waive the state board's obligation to require training.

the nature of § 10-223e (h). We therefore reject the dissent's claim that we have selectively and incorrectly relied on legislative history.

[19] This legislative intent is further supported by the structure of § 10-223e (c) (2) and its relationship to § 10-223e (h), as we noted previously in this opinion.

On the basis of the foregoing principles, we conclude that the legislature intended the training provision to serve the following purposes. First, requiring training prior to authorizing reconstitution provides notice to a local board of education—and, theoretically, to the electors of that local board—that the state board is considering authorizing reconstitution. Second, and related to the first, the training itself serves a substantive and remedial purpose, by providing the local board of education with an opportunity to prevent its reconstitution by successfully completing training and thereby demonstrating to the state board that it can operate effectively and that the extreme measure of reconstitution is unnecessary. Viewed this way, the training provision is premised on the importance of maintaining the continued local operations of a democratically elected board of education, as well as on providing certain due process protections.[20] Third, and most importantly, the state board does not have the authority to authorize reconstitution until it first requires the local board to undergo and complete training in accordance with § 10-223e (c) (2) (M). When viewed together, these principles share a common thread, namely, that the legislature intended that the state board would follow a clear, transparent and deliberate process if it decides to authorize reconstitution of an underperforming local board of education. Such a process would put members of a local board, the local electors of that board and the citizens of this state on notice that the state board is considering reconstitution. Thus, all of these parties would be aware of both the process and time frame in which reconstitution potentially could occur.

[20] This notion is further supported by comparison to the state board's role in monitoring low achieving schools or school districts pursuant to § 10-223e (c). During the course of its monitoring, the state board is obligated to "provide notice to the local or regional board of education for each [low achieving] school or district of the school or district's progress toward meeting the benchmarks established by the State Board of Education pursuant to subsection (c) of [§ 10-223e]." General Statutes § 10-223e (d).

In that connection, we highlight the concern, expressed by numerous legislators and other interested parties,[21] that granting the state board the authority to reconstitute local boards of education represented a significant enlargement of the power previously held by the state board. As McQuillan testified, prior to the enactment of § 10-223e (h), the state board could not alter or interfere with the specific composition of a local or regional board of education. As the legislative history of § 10-223e (h) demonstrates, that provision was envisioned as a specific, narrow grant of power to the state board to remove the last vestige of local control over low achieving schools and school districts. The legislative history is replete with references to the potentially far-reaching ramifications of allowing the state board to reconstitute democratically elected local boards of education and supports the conclusion that the training provision of § 10-223e (h) is intended to circumscribe the state board's power. Put differently, the legislature intended that the state board would acquire the power to authorize reconstitution *if and only if* the state board first satisfied the training requirement provision. With this understanding of the legislative history and intent, we cannot accept the proposition that a statutory provision, in the form of a condition precedent, meant to ensure transparency, could be waived, even by a local board of education.

Additionally, the legislative history makes clear that, to the extent that the training provision serves a protec-

[21] For example, both the Connecticut Association of Boards of Education and the Middletown Federation of Teachers, American Federation of Teachers Local 1381, submitted written testimony regarding the 2010 proposed legislation amending § 10-223e, in which they expressed concern with the granting of reconstitution authority to the state board and the commissioner. See Conn. Joint Standing Committee Hearings, supra, pp. 1358–59, written testimony of Ann Lohrand, President of the Middletown Federation of Teachers, American Federation of Teachers Local 1381; id., p. 1320, written testimony of the Connecticut Association of Boards of Education.

tive function as well, it does not exist only for the protection of the local board of education, as the defendants contend. Rather, the protection benefits the local electors of that local board and the democratic process as a whole. See, e.g., 53 H.R. Proc., Pt. 14, 2010 Sess., p. 4581, remarks of Representative Giuliano (noting that it would be "[a] significant usurpation of powers" to "dissolve a *duly-elected*, *by the people*, [b]oard of [e]ducation" [emphasis added]).[22] Certainly, the training requirement confers some benefit on and protection to a local board of education. Nevertheless, it is apparent that the training requirement was meant to serve as a check on the state board's power, with an added benefit that it serves as a protection of the democratic will of the people who elected their local boards of education.[23] Accordingly, the legislative history supports the conclusion that the legislature did not intend the training requirement to be waivable by any party, including a local board of education seeking reconstitution.

Our conclusion is further buttressed by the longstanding policy in Connecticut of local, rather than state, control over schools and school districts, as evidenced in the statutory scheme governing local and regional boards of education. See *Interlude*, *Inc.* v. *Skurat*, 266 Conn. 130, 143, 831 A.2d 235 (2003) ("[i]n determining the legislative intent of a particular statute,

[22] We are cognizant that Representative Giuliano ultimately voted against the proposed legislation in 2010. We rely on her remarks merely to show that the legislature was aware of the full implications of § 10-223e (h). Ultimately, the legislature passed the proposed legislation and provided the state board with a means to authorize the reconstitution of local boards of education, notwithstanding the concerns voiced by Representative Giuliano. That does not, however, negate the veracity of these concerns; reconstitution of a local board of education remains a significant usurpation of power. Indeed, the defendants appear not to argue to the contrary.

[23] We acknowledge the defendants' arguments that not every local board of education in this state is elected. We do not perceive this as contradicting the remarks of the legislators who were concerned with protecting those local boards of education whose members are democratically elected.

we also look to other relevant statutes governing the same or similar subject matter, for it is well established that we consider the statutory scheme as a whole and presume that the legislature intended to create a harmonious body of law'' [internal quotation marks omitted]). As we noted previously, the state board is obligated to utilize various tools under § 10-223e (c) (2) to improve performance in low achieving schools and school districts. The significance of the reference in § 10-223e (h) to the training requirement in § 10-223e (c) (2) (M), as a prerequisite to the state board's authority to reconstitute a local board of education, should not be ignored. Rather than provide the state board with unfettered power to authorize reconstitution, the legislature explicitly tied the state board's power to its existing obligation under § 10-223e (c) (2) to supervise low achieving schools and districts while attempting to preserve their local composition. With the exception of reconstitution, the statutory scheme sets forth a framework in which the state board must work in conjunction with local schools and boards. Thus, these statutory provisions seek to promote local control, allowing the state board to authorize reconstitution only after working with the local school or board of education to improve its performance. In that regard, the reference in § 10-223e (h) to § 10-223e (c) (2) (M) can easily be understood as signaling the legislature's preference that the state board pursue the cooperative remedial and supervisory options under § 10-223e (c) (2) prior to eliminating all local control through reconstitution. We reiterate that such a reading is supported by the relevant legislative history.

We cannot ignore the fact that the foundational issue, both with regard to § 10-223e (h) and the operation of the state board and local boards of education, is how to provide students with the best possible education.[24]

[24] We also agree with Justice Harper's reasoning with regard to the importance of local control over education. According to Justice Harper, local

The underpinning of the statutory scheme in § 10-223e is the obligation of the state board to ensure that each child has at least "a suitable program of educational experiences . . . ." General Statutes § 10-4a (1). Nevertheless, the relevant statutes concerning the respective duties of the state board and local boards of education also demonstrate a clear policy of defining a supervisory role for the state board separate and distinct from local boards, which, by their very nature, are most responsive to the needs of the local school district and the will of the local population. For example, General Statutes § 10-220 (a) provides in relevant part that "[e]ach local or regional board of education shall maintain good public elementary and secondary schools . . . [and] implement the educational interests of the state," and § 10-220 (b) provides in relevant part that "[t]he board of education of each local or regional school district shall, *with the participation of parents*, *students*, *school administrators*, *teachers*, *citizens*, [*and*] *local elected officials* . . . prepare a statement of educational goals for such local or regional school district. . . ." (Emphasis added.) General Statutes § 10-220 (b); see also General Statutes § 10-220 (e) ("Each local and regional board of education shall establish a school district curriculum committee. The committee shall recommend, develop, review and approve all curricul[a] for the local or regional school district."); General Statutes § 10-4g (a) ("[t]he State Board of Education shall develop and distribute to all local and regional boards of education a model program to encourage the participation of parents and the community in the local or regional educational system"); General Statutes § 10-4g (b) ("[t]he State Board of Education shall develop a program to encourage local and regional boards of education to

control over education fosters a beneficial and symbiotic relationship between the parents, students and local school administrators, a relationship that should not be lightly disregarded.

develop and implement plans to involve parents of students in the educational process in that district and to increase community involvement in the schools"); General Statutes § 10-221 (a) ("[local and regional] [b]oards of education shall prescribe rules for the management, studies, classification and discipline of the public schools"); General Statutes § 10-221 (b) ("each local and regional board of education shall develop, adopt and implement written policies concerning homework, attendance, promotion and retention").

In sum, "[t]he state's responsibility for education is distributed through the . . . statutory framework. The state board is charged with the broad and general power to supervise and control the educational interests of the state." (Internal quotation marks omitted.) *New Haven* v. *State Board of Education*, 228 Conn. 699, 703, 638 A.2d 589 (1994). Section 10-220 "delegates the duty to provide and administer public education to local and regional boards of education." Id., 703–704; see also *West Hartford Education Assn., Inc.* v. *DeCourcy*, 162 Conn. 566, 573, 295 A.2d 526 (1972) ("The chief function of local boards of education is to serve as policy maker *on behalf of the state and for the local community* on educational matters. The state has had a vital interest in the public schools from the earliest colonial times. . . . Article VIII, § 1, of the Connecticut constitution provides that '[t]here shall always be free public elementary and secondary schools in the state. The [G]eneral [A]ssembly shall implement this principle by appropriate legislation.' Obviously, the furnishing of education for the general public is a state function and duty. . . . By statutory enactment *the legislature has delegated this responsibility to the local boards who serve as agents of the state in their communities. . . . Our statutes have conferred on the local board broad power and discretion over educational policy*." [Citations omitted; emphasis added.]).

Indeed, this court has noted that the state board and local boards of education occupy distinct roles within the administration of Connecticut's public education system.[25] General Statutes § 10-4 (a) prescribes the role of the state board as one of "general supervision and control . . . ." Local boards of education, by contrast, must "fulfill the educational interests of the state by meeting certain mandates. . . . Public education mandates include the following: adequate and reasonable pupil transportation for those students who need transportation . . . special education services sufficient to meet the individualized needs of certain children in the locality . . . and the [minimum expenditure requirement]. If the local board of education fails or is unable to implement the educational interests of the state by carrying out these mandates, the state board may conduct an investigation, hold an administrative hearing pursuant to the Uniform Administrative Procedure Act [General Statutes § 4-166 et seq.], order appropriate

[25] The preference for local control of education also is manifest in the remarks that Representative Lawrence F. Cafero, Jr., made prior to voting on the legislation granting the state board the authority to reconstitute local boards of education: "[W]e take [great] pride . . . here in New England, and Connecticut in particular, about *local control*. Citizens electing their representatives on a state level and certainly on a local level; their mayors and first selectman, their legislative body *and most importantly, their board of education*.

"The referendum that people mostly have is at the polling booth. If they believe their [b]oard of [e]ducation is failing . . . [t]hey could vote them out . . . . That's democracy." (Emphasis added.) 53 H.R. Proc., Pt. 15, 2010 Sess., pp. 4631–32.

Like Representative Giuliano, Representative Cafero ultimately voted against the bill. Although that may weaken the force of Representative Cafero's argument with regard to whether reconstitution itself is a proper power to grant the state board, it does not alter the fact that his view of Connecticut's educational administration coincides with the policy embodied in the statutory scheme. Indeed, although Representative Fleischmann clarified or corrected some of Representative Cafero's statements, he did not challenge Representative Cafero's emphasis on the importance of local control. See generally id., pp. 4633–35, remarks of Representative Fleischmann. It does not appear that any representatives disagreed with the overall preference for local control of education in Connecticut.

remedial steps, and, if necessary, enforce its order in the Superior Court." (Citations omitted.) *New Haven* v. *State Board of Education*, supra, 228 Conn. 704–705. As our analysis in *New Haven* underscores, prior to the enactment of § 10-223e (h), the state board possessed a variety of tools to ensure that local boards of education were fulfilling their statutory obligations. As we have noted, however, the state board previously lacked the power to authorize the drastic remedy of removing a locally elected board of education through reconstitution.

In that regard, the reconstitution authority found in § 10-223e (h) is an exception to the general rule that local educational matters are managed by local boards of education comprised of locally elected members. Even local boards of education overseeing low achieving schools and districts do not lose their local autonomy entirely simply because they are subject to additional supervision and direction by the state board pursuant to § 10-223e (c). Rather, the operation of the cooperative and remedial actions contemplated by § 10-223e (c) (2) provide for a combination of local and state control. Only if the state board chooses to exercise the extreme remedy of reconstitution will a local board of education be entirely supplanted by state appointed board members.[26]

We are nonetheless cognizant that the statutory scheme embodied in § 10-223e altered the respective roles of the state board and local boards of education with respect to low achieving schools and districts. In that regard, we agree with the dissent that § 10-223e, when first enacted without subsection (h), represented a sea change in educational policy in this state. Section

[26] Even this might not always be the case, as § 10-223e (h) allows the state board to appoint former members of a local board of education to the newly reconstituted board.

10-223e shifted control and administration of underperforming schools and districts away from a purely local framework to one of increased state intervention. What is clear, however, is that the legislature, in granting the state board these additional powers under § 10-223e, did not initially provide the state board with reconstitution authority. Instead, the statute initially limited reconstitution authority to the General Assembly. See Public Acts, Spec. Sess., June, 2007, No. 07-3, § 32, codified at General Statutes (2008 Sup.) § 10-223e (d). Only after the state failed to qualify for federal Race to the Top funding did the legislature amend § 10-223e by adding subsection (h) to grant the state board the authority to reconstitute a local board of education. See, e.g., 53 H.R. Proc., Pt. 14, 2010 Sess., p. 4554, remarks of Representative Fleischmann ("the amendment that stands before us [which includes granting the state board reconstitution authority] is essentially Connecticut's Race to the Top education reform legislation for the year"). It is therefore apparent that the legislature did not intend that the state board's reconstitution authority would supersede the existing, comprehensive statutory scheme that provided for other means of supervising and intervening in local educational issues.[27]

[27] The dissent argues otherwise, stating that the state board properly could "reconstitute a local board of education *in a manner that affords the locality no notice whatsoever*"; (emphasis added) footnote 27 of the dissenting opinion; notwithstanding the clear legislative intent that the state board should authorize reconstitution only if a procedure for doing so is in place. See Conn. Joint Standing Committee Hearings, supra, pp. 1049–50, remarks of Representative Fleischmann ("[W]hen we look at the question of reconstituting a board, it isn't simply throwing them all out . . . . [I]t would involve a process of having a procedure in place . . . ."). We also reject this argument because it frustrates one of the purposes of the training requirement that we have identified, namely, to provide notice. The dissent's reasoning in this regard would require us to read the training provision language as being unconnected from the reconstitution authority language in the statute, contrary to our principles of statutory interpretation. See, e.g., *Historic District Commission* v. *Hall*, 282 Conn. 672, 684, 923 A.2d 726 (2007) ("Legislative intent is not to be found in an isolated sentence; the whole statute must be considered. . . . In construing [an] act . . . this court makes every

In light of the foregoing discussion, we conclude that the legislature did not intend § 10-223e (h) to supplant Connecticut's long-standing policy of preferring and preserving locally elected boards of education.[28] Although the balance of that control has shifted in

part operative and harmonious with every other part insofar as it possible . . . ." [Citation omitted; internal quotation marks omitted.]).

Moreover, subsection (h) is not "a statutory amendment that construes and clarifies a prior statute [and therefore] operates as the legislature's declaration of the meaning of the original act." *Darak* v. *Darak*, 210 Conn. 462, 471, 556 A.2d 145 (1989). Subsection (h) constitutes a recent grant of power to the state board that the legislature did not initially confer under the original framework of § 10-223e. Indeed, the dissent's recitation of the genesis of subsection (h) supports this conclusion. For that reason, the dissent's primary focus on the legislative history of § 10-223e prior to the enactment of subsection (h), rather than on the legislative history surrounding subsection (h), is misplaced. Nor could it be reasonably argued that the failure to provide reconstitution authority was an initial oversight by the legislature, subsequently corrected with the addition of subsection (h). Indeed, the legislative history on which the dissent relies suggests that one of the principal reasons why the legislature amended § 10-223e by adding subsection (h)—as part of an omnibus education reform bill that concerned, inter alia, charter schools and local governance councils—was to secure federal funding. See Public Acts 2010, No. 10-111, §§ 11, 21; see also part I of the dissenting opinion.

[28] We note that the defendants and the dissent also focus on the statutory and constitutional roles of the state to provide adequate educational opportunities. We wholly agree with their understanding of educational policy in this state. Indeed, as the dissent notes, the low achieving schools in Bridgeport are a matter of statewide concern. At its core, this case raises issues directly concerning the students in the Bridgeport public schools. We are fully cognizant of the dire situation in Bridgeport, and are sensitive to the importance of providing its students, and students throughout this state, with adequate educational opportunities.

Nevertheless, to the extent that the defendants and the dissent rely on either article eighth, § 1, of the Connecticut constitution or the plurality's reasoning in *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 990 A.2d 206 (2010) (*Connecticut Coalition*), as informing whether a local board of education can waive the state board's obligation to provide training prior to the authorization of reconstitution under § 10-223e (h), that reliance is misplaced. Specifically, in *Connecticut Coalition*, the plurality concluded that "article eighth, § 1, entitles Connecticut public school students to an education suitable to give them the opportunity to be responsible citizens able to participate fully in democratic institutions, such as jury service and voting. A constitutionally adequate

recent years with regard to low achieving schools and school districts, we remain unconvinced that the legislature intended to allow the state board to authorize reconstitution of an elected local board of education in any manner other than that specified by the statute. As we noted previously, in simplest terms, the training provision represents the legislature's intent that, in the rare event that a local board of education should be reconstituted, reconstitution would occur in a methodical, deliberate and transparent manner. This provides the local electors, local board and other citizens of the state with notice of the process and the time frame in which reconstitution potentially could occur.

B

Notwithstanding the foregoing, the defendants rely on the proposition that both constitutional and statu-

education also will leave Connecticut's students prepared to progress to institutions of higher education, or to attain productive employment and otherwise contribute to the state's economy. To satisfy this standard, the state, *through the local school districts*, must provide students with an objectively 'meaningful opportunity' to receive the benefits of this constitutional right." (Emphasis added.) Id., 314–15. The plurality expressly clarified the limits of its reasoning: "We emphasize that our conclusion . . . is not intended to supplant local control over education . . . [or to] deprive parents [of] a true say in their children's education. We are cognizant of the risks and separation of powers concerns attendant to intensive judicial involvement in educational policy making . . . and emphasize that our role in explaining article eighth, § 1, is to articulate the broad parameters of that constitutional right . . . and to leave their implementation to the expertise of those who work in the political branches of state and local government, informed by the wishes of their constituents." (Citation omitted; internal quotation marks omitted.) Id., 317 n.59. Thus, we do not find support in either article eighth, § 1, of the Connecticut constitution or the reasoning of the plurality in *Connecticut Coalition* for the proposition that the state board has the constitutional authority to reconstitute a local board of education by any means other than those enumerated in § 10-223e (h). We therefore also disagree with the dissent's focus on the general statutory and constitutional educational obligations of the state board and local boards of education as being determinative of whether the training requirement in § 10-223e (h) can be waived. The legislature's decision to delineate a specific process that must be followed for reconstitution *is* its expression of how the state board can further the educational policy in this state.

tory rights are waivable.[29] E.g., *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 57, 970 A.2d 656, cert. denied sub nom. *Bridgeport Roman Catholic Diocesan Corp.* v. *New York Times Co.*, 558 U.S. 991, 130 S. Ct. 500, 175 L. Ed. 2d 348 (2009); *New Haven* v. *Local 884, Council 4, AFSCME, AFL-CIO*, 237 Conn. 378, 385, 677 A.2d 1350 (1996). The defendants claim that "[t]he object of [§ 10-223e (h)] is not about the performance of any individual board member but the ability of the local board, as an agent of the state in providing education, to make adequate progress. . . . *Training is thus a requirement the local board as a collective body, not its individual members, may waive.*" (Citations omitted; emphasis added.) We therefore read the defendants' waiver argument to mean that the training requirement in § 10-223e (h) exists solely for the protection of the local board, and, for that reason, the board may choose to waive that protection.

In order to adequately address and dispose of the defendants' argument, we begin by briefly reviewing the doctrine of waiver, with particular focus on the principles espoused in the cases on which the defendants rely. "Waiver is the intentional relinquishment or abandonment of a known right or privilege. *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461

[29] We note that the defendants do not provide any other legal authority for their waiver argument. Moreover, the legislative history is devoid of any mention of waiver with regard to the training requirement. At no time during the legislative debates was the issue of waiver raised, including by McQuillan. Nor was any suggestion made that the state board could forgo the training requirement if it received a waiver from a local board of education. Although we do not suggest that waiver is only applicable when there is precedent or legislative history on point; see footnote 33 of this opinion; in the present case, an utter lack of authority to the contrary and the clear legislative intent compel the conclusion that the legislature did not intend that this provision would be waivable. Cf. *Forest Walk, LLC* v. *Water Pollution Control Authority*, 291 Conn. 271, 284, 968 A.2d 345 (2009) ("[i]n the absence of any indication of legislative intent, we cannot engraft additional requirements onto an otherwise silent provision").

(1938); *C. R. Klewin Northeast, LLC* v. *Bridgeport*, [282 Conn. 54, 86, 919 A.2d 1002 (2007)]. As a general rule, both statutory and constitutional rights and privileges may be waived. *New Haven* v. *Local 884, Council 4, AFSCME, AFL-CIO*, [supra, 237 Conn. 385]. Waiver is based [on] a species of the principle of estoppel and [when] applicable it will be enforced as the estoppel would be enforced. . . . Estoppel has its roots in equity and stems from the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed . . . . Waiver does not have to be express . . . but may consist of acts or conduct from which waiver may be implied. . . . In other words, waiver may be inferred from the circumstances if it is reasonable to do so." (Internal quotation marks omitted.) *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 292 Conn. 57–58. Finally, only the party who benefits from or is protected by the right may waive that right. See 28 Am. Jur. 2d 662, Estoppel and Waiver § 196 (2011) ("[w]aiver is generally applicable to all *personal* rights and privileges" [emphasis added]); see also id., § 200, p. 667 ("Parties may not waive statutory rights where a question of public policy is involved. Likewise, a law established for a public reason cannot be waived or circumvented by a private act or agreement."). Thus, as a threshold matter, in addressing the defendants' waiver argument, we must determine (1) whether the training provision constitutes a right, which would render the waiver doctrine applicable, and (2) if the training provision constitutes a right, the nature of that right and the party or parties who benefit from or are protected by the right.

We begin by noting that the state board is a statutorily created state agency; see General Statutes § 10-1 et seq.; and, therefore, is a body of limited authority that can act only pursuant to specific statutory grants of power.

See, e.g., *Ethics Commission* v. *Freedom of Information Commission*, 302 Conn. 1, 8, 23 A.3d 1211 (2011). "It is well established that an administrative agency possesses no inherent power. Its authority is found in a legislative grant, beyond the terms and necessary implications of which it cannot lawfully function." (Internal quotation marks omitted.) Id.; see also *Kinney* v. *State*, 213 Conn. 54, 60 n.10, 566 A.2d 670 (1989) ("administrative agencies . . . must act strictly within their statutory authority" [citation omitted]); *State* v. *White*, 204 Conn. 410, 419, 528 A.2d 811 (1987) ("agencies must . . . act according to . . . strict statutory authority"). In the absence of a grant of authority from the legislature, any action taken by an agency is "void." (Internal quotation marks omitted.) *Stern* v. *Connecticut Medical Examining Board*, 208 Conn. 492, 498, 545 A.2d 1080 (1988).

That § 10-223e (h) conveys to the state board the power to authorize the reconstitution of a local or regional board of education is clear and not subject to debate, as the preceding analysis demonstrates. Section 10-223e (h) allows the state board itself to authorize reconstitution, *provided* that the state board first requires the local board of education to undergo and complete training. In order to determine whether the state board properly authorized reconstitution of the local board in the present case, we must identify the scope of the authority granted by the statute.

We briefly reiterate that the stated and overarching purpose of § 10-223e is to improve the quality of education available to students in Connecticut's public schools by the improving accountability and performance of schools and school districts. See General Statutes § 10-223e (a) ("In conformance with the No Child Left Behind Act . . . the Commissioner of Education shall prepare a state-wide education accountability plan . . . . Such plan shall identify the schools and districts

in need of improvement, require the development and implementation of improvement plans and utilize rewards and consequences."). Section 10-223e, and in particular § 10-223e (c) (2), contains various tools that the state board, in its supervisory role of educational matters, may utilize to fulfill this purpose. In light of the numerous options available to the state board prior to the enactment of § 10-223e (h), we construe the reconstitution authority delegated to the state board in § 10-223e (h) narrowly, so as not to supplant the other remedies already available to the state board. Cf. *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 404, 999 A.2d 682 (2010) ("the legislature, in amending or enacting statutes, always [is] presumed to have created a harmonious and consistent body of law" [internal quotation marks omitted]). This construction aligns with general principles of statutory construction concerning (1) the determination of the mandatory nature of a statute; see 3 J. Sutherland, Statutory Construction (7th Ed. Singer 2008) § 57:10, pp. 52–53 ("[when] a statute grants authority to do a thing and prescribes the manner of doing it, the rule is clear that the provision as to the manner of doing the thing is mandatory, even though the doing of it in the first place is discretionary"); id., § 57:12, p. 58 ("[a] statute which confers a new right, power, privilege or immunity, and prescribes a mode for its acquisition, preservation, enforcement or enjoyment is strictly construed and given mandatory effect"); and (2) statutes that confer authority to administrative agencies. See id., § 64:1, p. 449 ("[s]ince [agency] enabling legislation, through which all subordinate governmental instrumentalities must receive their authority, is a grant of sovereign power, it is subject to the usual rule of strict construction applicable to such grants"); id., § 65:2, pp. 508–509 ("[s]ince administrative agencies are purely creatures of legislation without inherent or common-law powers,

the general rule applied to statutes granting powers to them is that only those powers are granted which are conferred either expressly or by necessary implication").

Simply put, the state board cannot reconstitute a local board of education without first requiring the local board to undergo and complete training. Requiring training is therefore a condition precedent to the state board's ability to authorize reconstitution. In other words, the state board lacks the power to authorize reconstitution until it first has required the local board to undergo and complete the training contemplated by § 10-223e (c) (2) (M).[30] The legislature has limited the state board's power to authorize reconstitution to the

[30] We clarify that we are not addressing the state board's *jurisdiction* in the present case to authorize reconstitution but only whether the state board had the authority to do so. "[T]he issue of subject matter jurisdiction is distinct from the authority to act under a particular statute. Subject matter jurisdiction involves the authority of a court [or agency] to adjudicate the type of controversy presented by the action before it. . . . A court [or agency] does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Although related, the court's [or agency's] authority to act pursuant to a statute is different from its subject matter jurisdiction. The power of the court [or agency] to hear and determine, which is implicit in jurisdiction, is not to be confused with the way in which that power must be exercised in order to comply with the terms of the statute." (Internal quotation marks omitted.) *Southern New England Telephone Co.* v. *Dept. of Public Utility Control*, 261 Conn. 1, 3 n.2, 803 A.2d 879 (2002); see also *Tele Tech of Connecticut Corp.* v. *Dept. of Public Utility Control*, 270 Conn. 778, 791–92, 855 A.2d 174 (2004) ("[T]he mere fact that the procedures employed by the department [of public utility control (department)] . . . do not satisfy the requirements of [General Statutes] § 4-182 [c] does not mean that the department lacks jurisdiction to revoke the license, as the department's power to revoke emanates from [General Statutes] § 16-247g [g]. Therefore, it cannot be said that the department acted without jurisdiction merely because it failed to comply with § 4-182 [c]; instead, any failure to comply with § 4-182 [c] suggests that the department, in exercising its proper jurisdiction, failed to abide by the dictates of the law."). In the present case, the plaintiffs do not appear to be challenging the state board's subject matter jurisdiction, and we do not construe their arguments as such. Instead, the plaintiffs challenge, as unlawful, the state board's decision to authorize the reconstitution of the local board.

particular circumstance in which the state board has first required the local board of education to undergo and complete training.[31] Because the training provision defines the scope of the grant of power from the legislature to the state board, the local board of education, as a separate agent of the state, cannot alter the scope of this grant of power. See *Kinney* v. *State*, supra, 213 Conn. 60 n.10 ("administrative agencies . . . must act strictly within their statutory authority and cannot unilaterally modify, abridge or otherwise change . . . provisions because the act's enabling legislation does not expressly grant that power" [citation omitted]). It therefore follows that a local board cannot expand this grant of power by waiving the training obligation. This is an obligation that the legislature imposed on the state board and one that defines the scope of the legislature's grant of power to the state board. Only the legislature may alter the scope of its grant of power to the state board. Put differently, a waiver would alter the grant of power by allowing the state board to sidestep its legislatively mandated obligation to require training.[32]

Accordingly, we conclude, on the basis of the language and purpose of § 10-223e (h), and the relevant legislative history, that (1) the training provision is a

[31] In that connection, the statute speaks solely to the nature of the power granted to the state board regarding reconstitution of certain local boards of education and is silent as to whether a local board can waive the training requirement. This is so because the legislature, in delineating the scope of the grant of power to the state board, would not need to concern itself with the authority of local and regional boards of education.

[32] We note that the state board's obligation to require training would unlikely be considered an onerous one. Although, as we note in this opinion, there are no procedures or guidelines with respect to § 10-223e (h), whatever training is required under § 10-223e (h) is unlikely to be any significant impediment to reconstitution.

This does not, however, diminish the importance of the training requirement. We reject the dissent's mischaracterization of our reasoning here as stating that the requirement is only a "speed bump . . . ." Footnote 7 of the dissenting opinion.

condition precedent to the state board's authority to authorize reconstitution, (2) the failure to satisfy the training provision renders the state board powerless to authorize reconstitution, and (3) because the training provision concerns the scope of the legislature's grant of power to the state board, the local board, as a separate agent of the state and a body inferior to the legislature, could not alter the scope of the grant by waiving the provision. Cf. *Dufraine* v. *Commission on Human Rights & Opportunities*, 236 Conn. 250, 265, 673 A.2d 101 (1996) ("[A]n administrative agency, as a tribunal of limited jurisdiction, must act strictly within its statutory authority. . . . [Thus, the] trial court exceeded its authority under [General Statutes] § 46a-84 when it bypassed this required step in the complaint process [and required the administrative agency to act in a manner not authorized by statute]." [Citations omitted; internal quotation marks omitted.]); *State* v. *State Employees' Review Board*, 231 Conn. 391, 406–407, 650 A.2d 158 (1994) ("[T]he statutes governing the [state employees' review board (review board)] contain no provision for the review board to retain jurisdiction and monitor compliance with its orders. An administrative agency, as a tribunal of limited jurisdiction, must act strictly within its statutory authority. . . . [An administrative agency] possesses no inherent power. Its authority is found in a legislative grant, beyond the terms and necessary implications of which it cannot lawfully function. . . . Absent a grant of authority, any sanction meted out by the board is necessarily void. . . . Thus, the trial court's attempt to cure the problem that it perceived as a result of a lack of finality by ordering the review board to retain jurisdiction over [the] appeal *imposed an authority on the review board that its governing statutes do not contemplate*." [Citations omitted; emphasis added; internal quotation marks omitted.]).

While this completes our analysis of § 10-223e (h), we nevertheless address the defendants' claim that the training provision benefits the local board and, therefore, that the local board can choose to waive that benefit. We accept the defendants' premise insofar as it embodies the concept that statutory rights are generally waivable by the party who benefits from or is protected by the right. Nevertheless, to determine whether the particular right embodied in the training provision is waivable, we must determine the nature of the right itself. In our waiver jurisprudence, we have identified several specific circumstances in which the waiver doctrine may be appropriate.[33] The facts underlying the present case do not fit squarely within any of those circumstances. The only arguably relevant case that the defendants raise in support of their claim that "[e]ven if [the training provision is] characterized as a mandatory

[33] For example, "[a] criminal defendant has the capacity to waive many of his or her fundamental procedural rights. [A] defendant can waive the right to counsel . . . the right to remain silent . . . the right to be present during trial . . . and, by entering a guilty plea, the rights to trial by jury and to confrontation, and the right against self-incrimination." (Citations omitted; internal quotation marks omitted.) *New Haven* v. *Local 884, Council 4, AFSCME, AFL-CIO*, supra, 237 Conn. 385. Similarly, "[i]t is well established that [during trial] a party that fails to object timely to the introduction of evidence or fails to assert a privilege in connection with disclosed material is deemed to have waived such objection or privilege and may not subsequently resurrect it to protect that material from subsequent disclosure." *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 292 Conn. 58; see also *State* v. *Kitchens*, 299 Conn. 447, 476–82, 10 A.3d 942 (2011) (defendant can waive claim of error by failing to object to jury instructions). "The waiver doctrine [also] applies to arbitration because [w]e have made it clear that we will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, for a cause which was well known to them before or during the trial." (Internal quotation marks omitted.) *C. R. Klewin Northeast, LLC* v. *Bridgeport*, supra, 282 Conn. 87. Additionally, we have held that "statutory time limits may be waived." *New Haven* v. *Local 884, Council 4, AFSCME, AFL-CIO*, supra, 385–86. We also have applied the waiver doctrine in other circumstances, none of which is applicable to the present case. We therefore do not address them, although we clarify that this list is not intended to be comprehensive or to limit future application of the waiver doctrine.

requirement, it is subject to waiver, and the [local] [b]oard chose to waive it," is *Stewart* v. *Tunxis Service Center*, supra, 237 Conn. 71. In that case, we held that the statutory time limit in General Statutes § 31-300 pertaining to the 120 day period within which workers' compensation decisions shall be issued, was mandatory but waivable. Id., 73–74. A closer examination of our holding in *Stewart*, however, reveals that it does not stand for the general proposition, advanced by the defendants, that any mandatory statutory provision can be waived. *Stewart* does not address what types of mandatory statutes may be waived or who may waive such provisions. Rather, we determined in *Stewart* only that the mandatory nature of a statute or provision does not, by itself, dictate whether the statute or provision is waivable.[34] See id., 78–80; cf. *New Haven* v. *Local 884, Council 4, AFSCME, AFL-CIO*, supra, 237 Conn. 384–90.[35]

Moreover, although it is generally true that privately held statutory and constitutional rights are waivable, not every mandatory statutory provision can be waived, even by the party who benefits or is protected under the statute. See 28 Am. Jur. 2d, supra, § 200, p. 667

[34] We note that whether a right is waivable does not necessarily depend on the *importance* of that right, as even fundamental constitutional rights can be waived by the person possessing those rights. See, e.g., *New Haven* v. *Local 884, Council 4, AFSCME, AFL-CIO*, supra, 237 Conn. 385. But see *Singer* v. *United States*, 380 U.S. 24, 36, 85 S. Ct. 783, 13 L. Ed. 2d 630 (1965) (holding that, because of nature of adversary system, defendant can waive constitutional right to jury trial only with consent of prosecutor and trial judge). Rather, as we explain in this opinion, the determination as to waivability concerns the *nature* of the right, that is, whether it inures to the benefit of the individual or whether it primarily serves the public interest.

[35] In *New Haven* v. *Local 884, Council 4, AFSCME, AFL-CIO*, supra, 237 Conn. 378, the issue was "whether a party may waive misconduct, as defined in [General Statutes] § 52-418 (a) (3), by an arbitration board." Id., 380. Although we concluded that a party may waive such misconduct, our conclusion was grounded in *both* "the general rule that rights may be waived *and* the strong public policy that favors arbitration . . . ." (Citation omitted; emphasis added.) Id., 386–87.

("Waivers of statutory rights are not favored. . . . Parties may not waive statutory rights [when] a question of public policy is involved. Likewise, a law established for a public reason cannot be waived or circumvented by a private act or agreement."); see also *Santiago* v. *State*, supra, 261 Conn. 543–44 ("Although we acknowledge that, typically, noncompliance with a mandatory statutory provision may be waived, either explicitly or implicitly, by the parties . . . those exceptions to the general rule requiring strict compliance with a mandatory statutory provision were created in recognition of the fact that a party may relinquish its right to demand strict adherence to a mandatory statutory provision by virtue of its own failure to enforce that right. . . . In light of this statutory objective, it is apparent that the [statutory requirement] serves important public and institutional policy objectives that are independent of, and perhaps even paramount to, the state's interest as a party to the litigation. Thus . . . any purported waiver by the state of the [statutory requirement] simply is not an adequate substitute for compliance with that requirement in light of the policy objectives of the statutory provision that embraces that requirement." [Citations omitted.]); cf. *Ambroise* v. *William Raveis Real Estate, Inc.*, 226 Conn. 757, 766–67, 628 A.2d 1303 (1993) ("[When] . . . a specific time limitation is contained within a statute that creates a right of action that did not exist at common law, then the remedy exists only during the prescribed period and not thereafter. . . . In such cases, the time limitation is not to be treated as an ordinary statute of limitation, but rather is a limitation on the liability itself, and not of the remedy alone. . . . [U]nder such circumstances, the time limitation is a substantive and jurisdictional prerequisite, which may be raised . . . at any time, even by the court sua sponte, and may not be waived." [Internal quotation marks omitted.]).

We previously have held that "[o]ne cannot waive a public obligation created by statute . . . but he may waive a statutory requirement the purpose of which is to confer a private right or benefit." (Citation omitted.) *Hatch* v. *Merigold*, 119 Conn. 339, 343, 176 A. 266 (1935), citing *L'Heureux* v. *Hurley*, 117 Conn. 347, 356, 168 A. 8 (1933). At the time we stated this, we did not define the scope of what we meant by the term "public obligation," and we do not appear to have done so since then.[36] Despite this lack of a clear definition, we find the following reasoning highly instructive: "[W]aiver is not . . . allowed to operate so as to infringe [on] the rights of others, or to transgress public policy or morals.

"*The public interest may not be waived.* [When] a law seeks to protect the public as well as the individual, such protection to the state cannot, at will, be waived by any individual, an integral part thereof. The public good is entitled to protection and consideration and if, in order to effectuate that object, there must be enforced protection to the individual, such individual must submit to such enforced protection for the public good. . . . Accordingly, a statutory right conferred on a private party, but affecting the public interest, may

[36] In the context of *L'Heureux* v. *Hurley*, supra, 117 Conn. 347, we employed the term with regard to a landlord's statutory obligation to provide adequate lighting in the public areas of an apartment building. See id., 351; see also id., 356 (specifically referring to "obligation owed by another to the public"). Specifically, we addressed the defendant landlord's attempt to avoid liability for injuries that the plaintiff had sustained in a dark hallway on the ground that the plaintiff had knowledge of the lack of lighting and therefore had assumed the risk by using the hallway. See id., 355. We acknowledged that the defendant's assumption of risk argument was equivalent to an argument that the plaintiff had waived the defendant's obligation to provide hallway lighting. See id., 355–56. Nevertheless, we rejected the defendant's claim, concluding that the statutory obligation to provide lighting in public areas existed not for the benefit of any specific individual but for the public generally. See id. Accordingly, the plaintiff could not be deemed to have waived the defendant's obligation because the statute did not exist to benefit the plaintiff himself.

not be waived or released if such waiver or release contravenes the statutory policy." (Citation omitted; emphasis added; internal quotation marks omitted.) *In re Application for Petition for Writ of Habeas Corpus by Dan Ross*, 272 Conn. 676, 719–20, 866 A.2d 554 (2005) (*Lavery* and *Dranginis*, *Js.*, dissenting); see also *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 704, 65 S. Ct. 895, 89 L. Ed. 2d 1296 (1945) ("[when] a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed [when] it would thwart the legislative policy which it was designed to effectuate"). Indeed, further research reveals that we initially based this reasoning on the simple concept that "[o]ne cannot give what one does not possess. One may waive a personal obligation of another to the one waiving. One cannot waive an obligation owed by another to the public." *L'Heureux* v. *Hurley*, supra, 117 Conn. 355–56. Thus, when an obligation is "a public obligation created by statute," it cannot be waived by any individual or group of individuals.[37] Id., 356; see

[37] This concept finds long-standing support in numerous other jurisdictions. See, e.g., Cal. Civ. Code § 3513 (Deering 2005) ("Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."); *Hillside* v. *Sternin*, 25 N.J. 317, 325–26, 136 A.2d 265 (1957) ("The fact that the waiver is attended by good faith on both sides and is not harmful in the particular situation is not sufficient to justify it. If erosion of the policy is to be avoided, even in such a state of affairs, the municipality cannot be permitted to breathe validity into an invalid bid by waiver."); *Isenhower* v. *Isenhower*, 666 P.2d 238, 241 (Okla. App. 1983) ("A statute founded on public interest and prescribing the manner in which the public interests must be performed is mandatory and cannot be waived. While we agree that a right may be waived whether conferred by law or contract, when a statute contains provisions that are founded [on] public policy, such provisions cannot be waived by a private party if such waiver thwarts the legislative policy which the statute was designed to effectuate. Courts must give effect to legislative acts and may not amend, repeal or circumvent them."); cf. *Campbell* v. *Campbell*, 87 Ohio App. 3d 48, 50, 621 N.E.2d 853 (1993) ("It is well established that neither the defense of laches nor principles of estoppel will apply against the state, its agencies or agents when exercising governmental functions. . . . The rationale behind this rule is one of public policy. The

also *Beasley* v. *Texas & Pacific Railway Co.*, 191 U.S. 492, 498, 24 S. Ct. 164, 48 L. Ed. 274 (1903) (Holmes, J.) ("the very meaning of public policy is the interest of others than the parties and that interest is not to be at the mercy of the [parties] alone").

We believe that the training requirement in § 10-223e (h) embodies a public obligation that, through the act of the General Assembly, inures to the benefit of the citizens of Connecticut as a whole. We reach this conclusion in view of the fact that this provision is meant to ensure that, if it is necessary to reconstitute a local board of education, reconstitution will occur in a methodical, deliberate and transparent manner. In this sense, the provision creates a process that benefits no person or group individually. It benefits the citizens of this state by mandating a transparent process, it protects the local electors and the democratic process, and it furthers a policy of maintaining a locally elected board of education to the maximum extent possible, even when that board is subjected to increased state supervision and control. In that sense, the training provision serves, at the very least, the twin purposes of providing notice that the state board is considering authorizing reconstitution of a local board and of affording that local board another chance, following training, to demonstrate that it can operate effectively without the need to resort to the severe measure of reconstitution. At a minimum, the goal that the legislature envisioned through the training requirement consists of protecting the democratic process by providing locally elected boards of education with every possible opportunity to become more effective, without the need to resort to the extreme action of reconstitution. These considerations

public should not suffer due to the inaction of public officials. . . . This reasoning applies with equal force to the defense of implied waiver. Waiver is a concept which applies to an individual who freely waives his own rights and privileges. . . . The public interest may not be waived." [Citations omitted.]).

support our conclusion that the training provision is a public obligation and sufficiently distinguishable from the time limit provision that was at issue in *Stewart*, or, for that matter, the arbitration provision at issue in *Local 884*, *Council 4*, *AFSCME*, *AFL-CIO*.[38]

In sum, because the training provision serves the public interest of Connecticut as a whole, we are not persuaded that the local board, even as a democratically elected representative body of the electors of the city of Bridgeport, could act to waive the provision. Put differently, the legislature, as the representative body of the citizens of Connecticut, has determined that requiring local boards of education to undergo training before the state board can authorize their reconstitution is in the public interest. Because the legislature has determined that it is in the interest of the state as a whole to have a methodical, deliberate and transparent process for reconstitution, it simply cannot follow that the local board could waive, on behalf of the electors of the city of Bridgeport, this statewide public obligation.

In light of the defendants' failure to provide this court with any reasonable justification in support of their

[38] We also disagree with the dissent's reasoning that the jurisprudence governing waiver of individually held constitutional rights informs whether statutory provisions with no clear individual beneficiary are waivable. A criminal defendant's ability to knowingly and intelligently waive his sixth amendment rights at trial is beyond question. We nevertheless fail to see the relevance of this proposition to the issue in this reservation, that is, whether a statutory provision that creates a condition precedent to the state board's power to act can be waived by an inferior local board of education. In attempting to connect the two, the dissent elides a key distinction between the sixth amendment to the United States constitution and § 10-223e (h). The rights afforded under the sixth amendment clearly confer a benefit on an individual criminal defendant and therefore may be waived by that defendant. Section 10-223e (h) does not clearly confer a benefit on any individual. Indeed, the fact that it is so difficult to discern any specific individual or body that § 10-223e (h) is intended to benefit supports the conclusion that the training provision was not meant to confer a right or benefit on anyone. See footnote 39 of this opinion. Rather, as we concluded in part II of this opinion, the legislature intended the training provision to serve as part of a clear, deliberate process when the state board seeks to authorize reconstitution.

waiver argument, we follow our previous decisions and decline to extend the doctrine of waiver to a mandatory statutory provision that exists for the benefit of the public rather than a specific individual. Accordingly, we conclude that the training requirement in § 10-223e (h) is both mandatory and not subject to waiver.[39]

[39] The dissent takes issue with our waiver analysis on the ground that "mandatory statutory provisions are 'typically' subject to waiver." We are somewhat perplexed by this statement, as our opinion clearly upholds the general rule that rights are typically waivable by the individual who possesses them. The dissent apparently fails to discern that the operative word in this principle is "typically." As our analysis demonstrates, the training provision set forth in § 10-223e (h) is best characterized not as a right or protection that inures to the local board's benefit but as a condition precedent to the grant of authority to the state board to reconstitute a local board of education. To the extent that the training provision could be construed as providing an additional protective benefit, that benefit is one that inures to the citizens of the state as a whole and not to any particular local board of education. It therefore cannot be waived by any individual person or group. Furthermore, the dissent appears to misunderstand our reliance on the myriad of cases cited in support of the public obligation doctrine. Like the dissent, we have identified no precedent that supports the proposition that a local board of education may waive an obligation imposed on a state board. We do, however, find it instructive that courts in this state and other jurisdictions have precluded application of the waiver doctrine in cases in which a statute does not exist for any individual's benefit. Thus, we adopt the principles espoused by these courts and determine that the public obligation doctrine militates against a conclusion that the waiver doctrine applies to the training provision in § 10-223e (h).

Additionally, we find the dissent's contrary analysis unpersuasive. The dissent provides no basis for its conclusion that waiver occurred in the present case other than by relying on the inherently ambiguous language of the local board's resolution. Despite the dissent's attempt to portray the language of that resolution as supporting only one conclusion, namely, that the local board intended to waive training, it is equally if not more clear that the language supports a conclusion that the local board believed that the statute had been substantially complied with because the local board already had received some training. Indeed, both the local board hearing held on July 5, 2011, and the state board hearing held on July 6, 2011, are notable for the absence of any discussion of waiver. Remarkably, during the state board hearing, only one state board member tangentially raised the issue of training with Bellinger, the president of the local board. In response, Bellinger stated that the local board had *not* received enough training and could benefit from *additional* training. We initially note that the dissent dismisses these statements and instead selectively focuses only on those statements made by local board members that support the dissent's conclusion. Thus, in contrast to the dissent's conclusion that the local board resolution plainly supports a finding of waiver, the discussion at the state board meeting militates against such a finding. At the very least, it injects

III

The foregoing analysis dispenses with the bulk of the arguments proffered by the defendants in this reservation. We address only one additional argument in more detail, as we believe doing so will further emphasize why the training provision in § 10-223e (h) is not waivable. In essence, the defendants claim that this court should not construe the training requirement to be so important as to override a resolution of a local board seeking reconstitution by the state board. As we understand this claim, the defendants are arguing that, once a local board has reached its own determination that it is operating dysfunctionally, has attempted to undergo its own training, and has concluded that it would not benefit from the training envisioned by § 10-223e (h), imposing the training requirement on the local board would elevate form over substance.[40] We disagree with this claim.

ambiguity into the meaning of the local board resolution, ambiguity that the dissent ignores.

[40] We note that there is substantial overlap between this argument and the defendants' waiver argument. The difference we perceive between the two is that, in this argument, the defendants focus on the fact that, although § 10-223e (h) requires strict compliance, we should not raise statutory form over factual substance when it appears that no added benefit would have been achieved by requiring the local board to undergo the statutorily mandated training.

We also clarify that, in addressing this argument, we do not accept the defendants' claim that the training in which certain of the local board members participated in 2010 should be treated as the functional equivalent of the training required under § 10-223e (h). As appellate counsel for the defendants conceded during oral argument before this court, as of October, 2011, there were no regulations, policies or standards in place for the specific type of training that the state board would require a local board of education to complete under § 10-223e (h). Indeed, the local board appears to be the first local or regional board of education reconstituted under § 10-223e (h). Because the local board did not undergo training specifically ordered by the state board pursuant to § 10-223e (h), there also is no precedent for determining what type of training the state board would require under the statute, or for determining how the state board factors satisfactory completion of training into its ultimate decision to authorize reconstitution.

We begin with the legislative intent and policy rationale behind the training requirement. For largely the same reasons that we discussed in connection with the defendants' waiver argument; see part II of this opinion; the statute's legislative history and significant policy considerations germane to Connecticut's education system compel the conclusion that the training requirement is not a mere procedural speed bump for the state board to overcome prior to authorizing the commissioner to reconstitute a local or regional board of education.

Additionally, the defendants' argument in this regard lacks merit for two other reasons. First, if we accepted the defendants' argument that the training requirement should be dismissed as being unimportant or futile, at least when a local board of education has undergone some sort of arguably relevant training, we would be concluding, essentially, that a public agency such as the state board and the public officials that compose it have no good faith obligation to fulfill statutory requirements that are directed at them. This is contrary to common sense and, more importantly, the oath of office that public officials must take. See General Statutes § 1-25 (delineating forms of oaths, which require individual to swear or affirm that he or she will "faithfully discharge, according to law, the duties of [his or her] office"); see also Bridgeport Municipal Code § 2.04.020 ("[e]very officer of the city shall, before he enters upon the duties of his office, make oath or affirmation before some competent authority for the faithful and impartial discharge of the duties of such office"); Bridgeport Charter c. 2, § 6 (b) ("[a]ll elected and appointed officials of the city shall be sworn to the faithful discharge of their respective duties"). Moreover, with specific regard to the present case, there is no dispute that § 10-223e (h) refers to the mandate that the *state board* require a local board of education to

undergo and complete training but not to the authority of a local board to seek out its own training. As we noted previously, § 10-223e (c) (2) sets forth the state board's obligation to improve all low achieving schools and districts by dictating that the state board work in conjunction with the local schools and boards of education. The defendants' position would allow the state board to sidestep its statutory obligation to work in cooperation with the local board before authorizing reconstitution. In other words, if we were to accept the defendants' argument, we essentially would be allowing the state board to forgo a statutory obligation that the legislature intended the state board to fulfill. In this regard, an application of the waiver doctrine to the present case premised on the notion that training is unimportant or futile is equivalent to wholly disregarding the will of the legislature. As we stated in part II of this opinion, the legislature has signaled in numerous instances that it expects the state board and local boards of education to work together in every manner possible to maintain local control and operations of the educational system.

Even if we were to accept the proposition that, at some point, requiring training would be futile,[41] in the

[41] With regard to one aspect of the futility argument, we note that the state board clearly has the statutory authority to mandate training under § 10-223e (c) (2), as well as the authority to take various other remedial actions. If, for some reason, members of a local board of education or the local board of education as a whole refused to attend or complete training, it would appear that the state board could enforce its mandate through administrative and judicial procedures. See *New Haven* v. *State Board of Education*, supra, 228 Conn. 704–705 ("[i]f the local board of education fails or is unable to implement the educational interests of the state by carrying out these mandates, the state board may conduct an investigation, hold an administrative hearing pursuant to the Uniform Administrative Procedure Act, order appropriate remedial steps, and, if necessary, enforce its order in the Superior Court"). Nevertheless, we do not foreclose the possibility that the state board may be able to rely on a futility argument under certain circumstances. In the present case, however, for the reasons noted in this opinion, the defendants reliance on a theory of futility is not supported by the record.

present case, the state board and local board's determination to that effect was premature. Neither the state board nor the local board could have adequately assessed whether training would be futile because (1) neither board knew what type of specific training the local board would receive, as the state board never had required training of any local board of education prior to authorizing reconstitution in this case, and (2) the local board members, having never been in the position of potentially having their board be reconstituted, were unable to know whether training would be helpful in that circumstance. Simply put, the defendants' futility argument does nothing more than beg this court to accept the premise that a public official need not attempt to carry out his or her responsibilities. Even more troublesome is that, taken to its logical end, the defendants' argument would allow the state board to reconstitute local boards of education without requiring any training at all. As we have stated elsewhere in this opinion, this clearly is not the result intended by the legislature, which sought to provide protections to the public by requiring the state board to fulfill certain statutory obligations prior to authorizing reconstitution.

Additionally, and on a more fundamental level, the claim that the training requirement is effectively not a requirement for the state board ignores the plain language of the statute and well accepted principles of statutory construction. If the legislature did not intend for the state board to require local boards of education to undergo and complete training before the state board authorizes their reconstitution, it would have used different language or omitted that language from the statute altogether. The fact that the legislature inserted the training requirement *and* directed that requirement to the state board strongly suggests that (1) the legislature intended that the *state board* would determine when it

would require the local board to undergo and complete training, and (2) only this specific type of training would give the state board the authority to authorize reconstitution of the local board.[42] Moreover, neither the plain language of the statute nor the legislative history indicates that an exception to the training requirement exists if the state board were to conclude that such training would be unnecessary or futile, and we do not believe it is appropriate to read such an exception into the statute in light of the record presented by this case. Cf. *Forest Walk, LLC* v. *Water Pollution Control Authority*, 291 Conn. 271, 284, 968 A.2d 345 (2009) ("[i]n the absence of any indication of legislative intent, we cannot engraft additional requirements onto an otherwise silent provision").

On the basis of the legislative history, policy considerations and the well-founded principle that we presume that the legislature acts intentionally when it includes certain words or provisions within a statute; see, e.g., *Housatonic Railroad Co.* v. *Commissioner of Revenue Services*, 301 Conn. 268, 303, 21 A.3d 759 (2011) ("We presume that the legislature did not intend to enact meaningless provisions. . . . [S]tatutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant . . . ." [Internal quotation marks omitted.]); we reject the

[42] This conclusion is further bolstered by the legislative history and intent that the state board would reassess the need to reconstitute a local board following completion of training. See, e.g., 53 H.R. Proc., Pt. 14, 2010 Sess., p. 4582, remarks of Representative Fleischmann ("*if* after that training [required under § 10-223e (h)] that board *continues* to be an impediment to execution of reforms, *then and only then* would the commissioner consider reconstituting that board of [education]" [emphasis added]). In other words, the legislature viewed the required training as a specific and identifiable benchmark to be used in the state board's overall assessment of whether a local board of education should be reconstituted. At no point does it appear that the legislature intended that local boards of education would undergo their own, self-motivated, training to supplant the requirement in § 10-223e (h).

defendants' claim that the training requirement is illusory or that it can be satisfied by evidence of participation in training by the local board of education on its own initiative.

In emphasizing the different roles of the state board and local boards of education, we do not suggest that the state's role is limited, especially with regard to low achieving schools or districts, or that the state does not have the ultimate responsibility of providing appropriate educational opportunities. Indeed, as we previously noted, the state board's supervisory role includes many responsibilities that concern the day-to-day administration of low achieving schools and districts, and the state board possesses broad powers to carry out those responsibilities. As the foregoing analysis demonstrates, however, Connecticut has not entirely abandoned a policy of delegating the vast majority of educational administration to local boards of education, even with regard to local oversight of low achieving schools and districts. Section 10-223e (h) must be construed in light of that policy. At a minimum, there is no reasonable basis for concluding that the legislature intended that § 10-223e (h) would upend the balance of operations and control between the state board and local boards of education in any circumstance other than the specific one envisioned by the statute. There is no suggestion that the legislature expects local boards of education to seek out reconstitution themselves. Instead, the legislature empowered the state board, and the state board only, with the power to authorize reconstitution, but that authority is circumscribed to the extent that the state board must first require the local board of education to undergo training. Neither the statute nor legislative history provides that local boards of education may make their own determination as to whether training or reconstitution is appropriate.

Thus, the fundamental distinction between the majority opinion and the dissent is not the concern for the educational needs of Bridgeport students. Rather, it is

our answer to the question of whom the training provision is intended to protect. In light of the language of the statute and the relevant legislative history, we do not view the training provision as protective of any particular individual or group. The dissent, however, without any analysis or authority to support its position, claims that it protects the local board. Because we are unwilling to accept such an assumption when there is authority to the contrary, we reach an outcome different from that of the dissent.

For the foregoing reasons, we conclude that the state board's failure to require the local board to undergo and complete training, as required by § 10-223e (h), rendered void the state board's authorization to the commissioner to reconstitute the local board. Accordingly, we answer the first question presented in this reservation in the affirmative.[43] We decline to answer the remaining four questions because our answer to the first disposes of all other underlying issues.

The case is remanded to the trial court with direction to order a special election for the local board pursuant to General Statutes § 9-164 (b). The trial court shall set all applicable dates under the statute but shall schedule the special election no later than 150 days from the date of its order. All other requirements set forth by the statute, including those covered by the statutes governing party endorsement of candidates and primary elections, shall be satisfied. The special election will include all four seats that would have been filled on the basis of voting in the 2011 Bridgeport municipal elections. Because not all

[43] Because we only address the reserved question of whether the state board violated § 10-223e (h) under the stipulated facts of this case and the waiver argument advanced by the defendants, we agree with the dissent that our holding indicates "that the training provision could not be waived even upon a 9 to 0 vote of the local board and upon unanimous community and political agreement" only, however, insofar as it concerns waiver. Whether the unanimous vote of a local board of education seeking reconstitution could serve to obviate the training requirement—for example, as the equivalent of a board's resignation contingent on reconstitution and, therefore, not in violation of § 10-223e (h)—is a question not presented by this reservation. Accordingly, we do not address it.

former local board members can be reinstated at this time, as some of their terms of office have expired, and because a local board must continue to function until a new local board can be elected, we stay the effect of our decision pending final certification of the special election results by the town clerk. Therefore, the trial court shall direct that the seven current members of the reconstituted board remain in office until the special election has been completed. At that time, the trial court shall reinstate the five members of the local board whose terms of office have not expired, to serve along with the four newly elected members.

The answer to the reserved question of whether the state board of education violated § 10-223e (h) when it authorized the commissioner of education to reconstitute the board of education of the city of Bridgeport is: Yes. The case is remanded to the trial court with direction to proceed in accordance with this court's directive in the preceding paragraph.

No costs shall be taxed in this court to either party.

In this opinion ROGERS, C. J., and NORCOTT, McLACHLAN, EVELEIGH and HARPER, Js., concurred.

McLACHLAN, J., concurring. I agree with and join the well reasoned majority opinion. I write separately, however, to highlight a significant point addressed by Justice Harper. In his concurrence, he points out the necessity of parental and community involvement in order for our public schools to be successful. I heartily agree. No matter how magnificent the facility, and regardless of the credentials and commitment of the teachers, if the school system is not supported by the parents and the community at large, the children, when they come to school, cannot be engaged fully in the educational process. Therefore, I agree with Justice Harper that anything that may alienate parents and the

community from the schools leaves students without the support and encouragement that they need to succeed.

HARPER, J., concurring. A closely divided state board of education (state board) voted to reconstitute the board of education of the city of Bridgeport (Bridgeport board) without requiring that board to complete training that the legislature has mandated as a precondition to reconstitution.[1] See General Statutes § 10-223e (h). In determining implicitly that training need not be provided, the state board acted wholly in reliance on a resolution adopted by six of the nine members of the Bridgeport board purporting to waive the training requirement on the ground of futility. I agree with the conclusions reached by the majority in determining that the state board's decision to reconstitute was unlawful. In so concluding, I emphasize that the Bridgeport board's resolution, in which the board attempted to waive its right to training to induce the state board to reconstitute the Bridgeport board (reconstitution resolution), did not, and *could not* as a matter of law, negate the state board's mandatory statutory obligation to require completion of that training or serve as a basis to displace duly elected members of the Bridgeport board. I believe that the majority's resolution of the issue of whether the Bridgeport board could waive this right is consistent with the apparent legislative intent.

In writing separately, I wish to highlight my disagreement with the dissent's suggestion that permitting a local board of education to waive preconditions to state intervention necessarily honors the principle of local control and best advances the educational interests of

[1] This case involves three separate complaints in which the state board, various city and school officials of the city of Bridgeport, members of the reconstituted Bridgeport board and the state board of education are named as defendants. See the text of the majority opinion for a more detailed identification of the various defendants.

schoolchildren in low performing schools. I also wish to bring to light certain concerns that the plaintiffs[2] have raised, in their complaints and in arguments to this court, regarding allegedly improper motives for the reconstitution resolution and the deprivation of the Bridgeport electorate's voice in their own children's education. These concerns give context to the plaintiffs' claims and explain the deep passions that motivated their opposition to reconstitution. In acknowledging these issues, however, I am mindful that the plaintiffs agreed not to litigate the merits of all of their allegations in favor of a more expeditious resolution of the case by reserving questions of law to this court and stipulating to the limited facts necessary to resolve those legal issues. It is on the basis of this stipulation and attached exhibits[3] that we ultimately must render our decision.

I first note that the resolution adopted by six members of the Bridgeport board to forgo training cannot logically be separated from the intended effect of that decision—to displace duly elected board members through a state created reconstituted board. Nothing in the record suggests that the state or the state board had considered reconstitution prior to the state board's receipt of the Bridgeport board's resolution, despite serious deficits in the Bridgeport schools for *seven* years.[4] The record plainly manifests that, in acting favorably on the resolution, the state board relied on repre-

[2] The plaintiffs in these three cases were comprised of various former Bridgeport board members, electors of the city of Bridgeport, and residents of the city. We, like the majority, refer to these individuals collectively as the plaintiffs.

[3] The record includes the transcript of the Bridgeport board's special meeting at which it voted on the resolution and the DVD of the state board meeting in which it addressed the issue of reconstitution.

[4] The procedures by which the General Assembly may reconstitute a local board of education are set forth in § 10-223e (d). Well before the legislature enacted this provision in 2007; see Public Acts, Spec. Sess., June, 2007, No. 07-3, § 32; it had employed this procedure when the state took over the Hartford school system in 1997.

sentations by certain Bridgeport board members and city officials that, due to fundamental disagreements between three board members and the majority of the board that resulted in "dysfunction," reconstitution was the *only* possible course of action and that such action must be taken *immediately*.[5] These claims were accepted by a bare majority of the state board, despite the fact that elections were imminent for three seats on the Bridgeport board and that the Bridgeport charter provides a mechanism to fill school board vacancies should others choose to step down. See Bridgeport Charter, c. 15, § 1 (d). The three members of the Bridgeport board who opposed the resolution made clear their interest in continuing to serve, their belief in their capacity to fulfill their obligations, and their view that those board members who felt otherwise should act consistently with the democratic process by either declining to seek reelection or relinquishing their seats. The only members of the community who spoke at the meeting opposed reconstitution generally or the lack of transparency in the process, a subject I later address. Therefore, although the Bridgeport board's reconstitution resolution legally could not, in and of itself, displace duly elected board members, it is appropriate to consider the resolution as the cause of that action.

In light of the actual effect of the Bridgeport board's purported waiver, I take issue with the dissent's assumption that the legislature intended to permit the Bridgeport board to waive statutorily mandated training and that such a result necessarily is consistent with the principle of local control and is in the best interests of

[5] The Bridgeport board members supporting reconstitution acknowledged that there consistently was a six person majority that permitted the board to act on matters before it, but asserted that the three member minority had made that process more protracted through the use of various procedural mechanisms. Democracy assumes, however, the utility of dissent, and procedural mechanisms adopted by a collective body necessarily are tools deemed legitimate by that body.

the children of the Bridgeport public schools. There can be no doubt that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society . . . ." *Wright* v. *Council of Emporia*, 407 U.S. 451, 469, 92 S. Ct. 2196, 33 L. Ed. 2d 51 (1972); accord *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 49, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) ("[t]he persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters"); see also *Milliken* v. *Bradley*, 418 U.S. 717, 741–42, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974) ("local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to [the] quality of the educational process"). Undoubtedly, many citizens in this state cherish this exercise of direct control in their children's educational process, and they exercise this control when they have their say at the ballot box regarding who will make decisions involving that educational process. It is universally accepted that children perform better in school when their parents are involved in their education. Significantly, this premise is reflected in the federal act that was the impetus for our legislature's enactment of § 10-223e.[6] The federal No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, codified as amended at 20 U.S.C. § 6301 et seq. (2006 & Supp. III 2009), not only is replete with references to parents, it also contains an entire section devoted to parental involvement.[7] See 20 U.S.C. § 6318.

[6] See General Statutes § 10-223e (a) ("[i]n conformance with the No Child Left Behind Act . . . the Commissioner of Education shall prepare a statewide education accountability plan, consistent with federal law and regulation").

[7] "[P]arents are mentioned over 300 times in various part[s] of the No Child Left Behind [A]ct [of 2001] . . . ." NCLB Action Briefs, "Parental Involvement," (April 23, 2004), p. 1, available at http://www.ncpie.org/nclbaction/parent_involvement.html (last visited February 28, 2012) (copy contained in the file of this case with the Supreme Court clerk's office). Numerous studies document the relationship between parental involvement and

Local control over education fosters and affirms parental involvement, thus comporting not only with deep civic values, but also in important respects with the interests of children as well. In this context, reconstituting a local board of education is an extraordinary act that necessarily diminishes local control into the future and, if imposed against the will of a majority of parents, threatens to undermine sustained parental involvement in the education system.[8] The dissent, in considering a local board of education's act of waiver only as an isolated political act by a duly elected representative body, wrongly concludes that "we honor the principle of local control by permitting a local board [of education] to waive the training afforded by § 10-223e (h) in order to discharge as expeditiously as possible the local board's duty to promote the interests of the schoolchildren." Local control, however, is not merely a matter of exercising political power or of expeditiously discharging legal duties; rather, it is a matter of *enduring* civic investment and responsibility that is formed from the dense fabric of the families and neighborhoods in which our public schools operate. The reconstitution of a local board of education, even if done with the best of intentions, risks tearing at that civic fabric, and it is not clear that a reconstituted "local" board of education will necessarily make up for the damage done.

student performance. See, e.g., Michigan Department of Education, "What Research Says About Parent Involvement In Children's Education In Relation to Academic Achievement," (March 2002), available at http://www.michigan.gov/documents/Final_Parent_Involvement_fact_sheet_14732_7.pdf (last visited February 28, 2012) (copy contained in the file of this case with the Supreme Court clerk's office).

[8] The dissent dismisses this concern by pointing to the lack of evidence that reconstitution was imposed against the will of a majority of parents and by deeming any such evidence to be irrelevant if it existed. As I explain later in this concurring opinion, lack of information bearing on this question is directly attributable to the haste with which reconstitution was raised and decided, and I disagree that such evidence necessarily would have been irrelevant to the state board in deciding whether reconstitution was the best course of action.

It bears emphasizing that the children of this state have a constitutional right to an adequate and equal education. I seriously doubt, however, whether anyone on either the Bridgeport board or the state board considering reconstitution, with or without state mandated training, operated under the illusion that such a measure would be a panacea for the serious and long-standing deficits in the Bridgeport public school system. In mandating training prior to reconstitution, however, § 10-223e (h) reflects a legislative determination that such a precondition ultimately *is* in the best interests of our schoolchildren. In other words, the legislature has determined that the *potential* benefits that might be gained by providing training to local or regional boards of education in long-term, low achieving school districts outweighs the benefits of a more expedited procedure that would displace locally elected or appointed boards in favor of a new board that has no particular attachment, or political accountability, to the community it serves.

I also take note of the fact that, in their complaints and in arguments to this court, the plaintiffs have leveled accusations that certain members of the Bridgeport board colluded with the mayor, superintendent, private parties and certain members of the state board to engineer a takeover of the Bridgeport board for purely political purposes. They suggest that these actions were undertaken for the purpose of ousting a vocal minority who had opposed the mayor's policies. I underscore that these allegations are unproven; they are not part of the stipulated facts. As a general matter, this court assumes that public officials are acting in good faith. *Kinsella* v. *Jaekle*, 192 Conn. 704, 729, 475 A.2d 243 (1984). Accordingly, in the absence of clear evidence to the contrary, I operate under the assumption that Bridgeport board members have exercised their authority in good faith, solely for the purpose of advancing

the educational interests of the children. Indeed, the fact that no member of the Bridgeport board was appointed to the reconstituted board and that the superintendent's ability to retain his position was placed in jeopardy by supporting reconstitution undermines these accusations.[9] If true, however, such allegations might raise a fundamental question as to the fitness of certain board members to serve. The Bridgeport board has a broad grant of authority under the Bridgeport charter, but only insofar as its actions relate to educational considerations. See Bridgeport Charter, c. 15, § 2 ("[t]he board of education shall have all the powers vested in, and shall perform all the duties imposed [upon], boards of education under the laws of this state and the United States").

I observe, however, one adverse inference in support of the plaintiffs' allegations that readily can be drawn from the stipulated facts and exhibits submitted as part of that stipulation, namely, that the reconstitution process was undertaken in a manner that not only limited transparency, but intentionally limited opportunity for community involvement and for board members to marshal opposition. Only certain Bridgeport board members were privy to private discussions about reconstitution that took place many months before the resolution was adopted requesting that action. Thereafter, at 4:55 p.m. on Friday, July 1, 2011, just before a three day holiday weekend was to commence, notice was issued for a special meeting of the Bridgeport board to be held at 6 p.m. on Tuesday, July 5, to consider the reconstitution resolution. At its regularly scheduled meeting on the morning of July 6, the state board voted in favor of adding the reconstitution resolution to its agenda and acted on that issue later that same day.

[9] The reconstituted Bridgeport board appointed by the state has in fact replaced the Bridgeport superintendent.

Thus, essentially two business days lapsed between the initiation and the resolution of the reconstitution issue. Although a handful of Bridgeport citizens spoke at the board meeting in opposition to reconstitution, it seems likely that the speed at which this action was finalized deprived members of the community who hold passionate views for or against the wisdom or propriety of reconstituting their duly elected board the opportunity to participate in this process. Although one member of the state board strongly advocated for a delay in voting on reconstitution in order to give the citizens of Bridgeport sufficient opportunity to voice their views on the matter, that suggestion did not garner support.

In making these observations, I am mindful that the plaintiffs have not advanced a claim that these procedures violated the public hearing requirements of the Freedom of Information Act, General Statutes § 1-200 et seq., or their constitutional right to procedural due process. Indeed, the legislature has not mandated *any* procedural requirements in connection with reconstitution generally or the training precondition specifically.[10] To the extent, however, that the legislature has imposed the training precondition as a protection against the arbitrary and capricious ousting of elected or appointed representatives and the advancement of educational interests, it may want to consider whether those interests might better be served by enacting some procedural guidelines. It would seem evident that parents will be more likely to remain invested in their children's education when they are given a voice in as essential a matter as who governs that educational process.

Undoubtedly, it is for the legislature, not this court, to determine whether it is good policy for the state to

[10] The state board also has not enacted regulations specifying procedures to be followed for reconstitution or for the provision of training.

reconstitute a duly elected or appointed local school board. Nonetheless, we need not be blind to the implications of the lawful exercise of authority. Poor urban districts like Bridgeport are among the state's longest, low achieving school districts. I cannot help but note that parents in such districts often are cited as being less involved in their children's education than their more affluent suburban counterparts. One reason posited for this difference is that "low-income families often perceive themselves as outside the school system . . . ." P. McDermott & J. Rothenberg, "Why Urban Parents Resist Involvement in their Children's Elementary Education," 5 The Qualitative Report (October, 2000) p. 1, available at http://www.nova.edu/ssss/QR/QR5-3/mcdermott.html (last visited February 28, 2012) (copy contained in the file of this case with the Supreme Court clerk's office). Thus, it has been recommended that "[s]chools serving low income, ethnically diverse neighborhoods . . . must make greater efforts to welcome families, because those are the parents who often feel excluded because of differences in their ethnicity, income, and culture." Id., p. 2. Failure to provide procedures that allow for optimum community involvement in a decision of the magnitude of reconstituting a locally elected board of education would seem to reinforce the perception of parents in such districts that they are outsiders. I feel confident that the legislature would not intend such an effect.

In sum, I conclude that the state board violated § 10-223e (h) by authorizing the commissioner of education to reconstitute the Bridgeport board in disregard of its independent obligation to ensure that the Bridgeport board completed training to improve its operational efficiency and effectiveness as leaders of its districts' improvement plans.

I respectfully concur.

PALMER, J., dissenting. Acknowledging their inability to fix a school system that has failed to meet minimum state standards for seven consecutive years, Bridgeport's mayor, superintendent of schools, and school board formally requested that the state board of education authorize the commissioner of education to reconstitute the Bridgeport school board,[1] as authorized by General Statutes § 10-223e (h). In response, the state board, acting in furtherance of its constitutional and statutory duties to ensure that this state's schoolchildren receive an adequate public education,[2] acceded to Bridgeport's request and directed the commissioner to reconstitute the Bridgeport board. For approximately seven months now, the reconstituted board has endeavored to repair Bridgeport's broken school system.

Today, the majority deals the schoolchildren of Bridgeport a major setback, striking down the state board's action without any legitimate basis for doing so. The majority holds that the Bridgeport board was not free to waive the training provision of § 10-223e (h). Yet it is axiomatic that a statutory requirement typically may be waived by the requirement's intended benefi-

[1] I hereinafter refer to the board of education of the city of Bridgeport as the "Bridgeport board," the commissioner of education as the "commissioner," and the state board of education as the "state board."

[2] Under article eighth, § 1, of the constitution of Connecticut, the schoolchildren of this state are entitled to a free public elementary and secondary education. This right requires the state "to provide a substantially equal educational opportunity to its youth in its free elementary and secondary schools." *Horton* v. *Meskill*, 172 Conn. 615, 649, 376 A.2d 359 (1977). The right is a substantive one that "guarantees Connecticut's public school students educational standards and resources suitable to participate in democratic institutions, and to prepare them to attain productive employment and otherwise to contribute to the state's economy, or to progress on to higher education." *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 244–45, 990 A.2d 206 (2010). Moreover, it is the public policy of this state that "each child shall have . . . equal opportunity to receive a suitable program of educational experiences . . . ." General Statutes § 10-4a (1). Under General Statutes § 10-220 (a), each local and regional board of education is required to implement this policy.

ciary or by the beneficiary's duly authorized representative, and this case presents no exception to that general rule: a local board of education is free to waive the training provision of § 10-223e (h) because that provision obviously exists to protect a local school district from an unwanted state takeover, not to force a local board of education to retain control even after the local board has determined that it cannot discharge its constitutional duty to provide an adequate public education. There is not a shred of evidence to support the majority's contrary conclusion—not in the statutory text, not in the legislative history, and not in our case law. The majority achieves its unfounded conclusion only by misapplying the law and ignoring this state's recent sea change in public policy toward failing school districts.

Not only does the majority disregard established principles of law, relying instead on superficially favorable language that it lifts from an assortment of largely irrelevant opinions, but the majority also invokes a nonexistent principle of statutory interpretation to rationalize ignoring the legislative history of § 10-223e and to justify saddling the training provision of § 10-223e (h) with an entirely fictional purpose: to provide "notice" of an impending reconstitution *to the citizens of the entire state* and to promote "transparen[cy]" and "deliberation]" during the ensuing reconstitution process. This purported statutory purpose receives no support from the evidence on which the majority relies, nor does it *provide* any support to the majority's conclusion that the training provision is nonwaivable. The majority does not even attempt to justify its assumption that permitting a local board of education to waive the mandated training would deprive the citizens of this state of adequate notice of an impending reconstitution or render the reconstitution process impermissibly opaque or overhasty. The majority also does not attempt to explain how the citizens of Connecticut's various towns and

cities could have an overriding interest in the transparency and deliberateness of the reconstitution process in *Bridgeport*, an interest so strong as to outweigh that city's own interest in permitting the Bridgeport board, acting on behalf of the local electorate, to waive the training contemplated by § 10-223e (h) in order to discharge as expeditiously as possible the Bridgeport board's duty to protect the schoolchildren's constitutional right to an adequate public education.

In analyzing the training provision of § 10-223e (h), the majority refuses to consider the legislative history of the comprehensive statutory scheme of which the training provision is but a small part, a statutory scheme that grants the state sweeping power to rescue failing schools and school districts. To read the majority opinion, one would scarcely know the extent to which this grant of power represents a dramatic shift away from what was once a blanket preference for local control of education. Where our most profoundly troubled school systems are concerned, this state has abandoned any preference for local control. Oddly enough, however, it is in fact the majority opinion that disregards the value of local control, offering an analysis of § 10-223e (h) that yields an absurdly paternalistic result, namely, that the training provision could not have been waived even upon a 9 to 0 vote of the local board and upon unanimous community and political agreement that the Bridgeport school system required immediate state intervention. This irrational statutory construction defies common sense, not to mention settled principles of law. Compounding the problem is the majority's holding that the training provision serves the purpose of providing for a "transparent and deliberate process." This holding yields the additional irrational result that, even if the members of a local board of education had voluntarily undergone all of the training that the state board possibly could have required of them, the state

board could not reconstitute the local board without requiring the board members to undergo the training all over again.

It seems that what really drives the majority opinion is a general sense of unease with Connecticut's dramatic shift away from a policy of local control of failing school systems and a lack of affection for the state's newfound statutory power to reconstitute a local school board unable to stem the tide of chronic failure. Expressly agreeing with Justice Harper's critical view of the reconstitution authority, the majority proclaims that "local control over education fosters a beneficial and symbiotic relationship between the parents, students and local school administrators, a relationship that should not be lightly disregarded." Footnote 24 of the majority opinion. Yet this case simply is not about whether permitting the state board to reconstitute failing school districts is good public policy.[3] That is a question

[3] Nor is this case about the set of inflammatory and unsubstantiated allegations to which Justice Harper, in his concurrence, accords unwarranted attention, allegations to the effect that "certain members of the Bridgeport board colluded with the mayor, superintendent, private parties and certain members of the state board to engineer a takeover of the Bridgeport board for purely political purposes." These unsubstantiated allegations show up, among other places, in the complaint filed by Maria Pereira and other plaintiffs, which begins: "When, in the course of human events, it becomes necessary for one group of duly elected public officials [presumably, members of the original Bridgeport board who brought the present actions] to bring to light the corrupt bands which have connected them with another, and to expose the shadowy usurpations of the people's rights by a cabal of petty tyrants [presumably, the state board] and corporate private interests with no regard for the rule of law or the votes of the people, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to an action such as this . . . ." I agree with Justice Harper when he notes that "these allegations are unproven; they are not part of the stipulated facts. As a general matter, this court assumes that public officials are acting in good faith. . . . Accordingly, in the absence of clear evidence to the contrary, [it can be assumed] that [the members of the] Bridgeport board . . . have exercised their authority in good faith, solely for the purpose of advancing the educational interests of the children." (Citation omitted.) Because these inflammatory allegations are utterly unsubstantiated, it is inappropriate to accord them any attention at all, let

already answered by the legislature, and answered resoundingly.[4]

In sum, it is clear that a local board of education is competent to waive the protection of § 10-223e (h) both because it is the locality's duly elected representative and because it is an agent of the state charged with fulfilling the state's constitutional obligation to provide schoolchildren with a suitable education. That constitutional obligation adverts to what this case really is about: the dismal state of affairs confronting Connecticut's poorest schoolchildren. Absent from the majority opinion is anything more than a passing reference to this calamity.[5] Yet the plight of Bridgeport schoolchildren is

alone to rely on them as "giv[ing] context to the plaintiffs' claims and explain[ing] the deep passions that motivated their opposition to reconstitution." Dwelling on these inflammatory allegations is profoundly unfair to the defendants and can serve only to undermine this court's image as an arbiter of impartial justice. The public has a right to know with certainty that this court's decisions are not tainted by unproven allegations or other irrelevant considerations.

[4] Although I wholeheartedly agree with Justice Harper that parental involvement is to be encouraged as an extremely important component of a child's educational experience, I do not agree with his suggestion that reconstituting a local board of education against the will of a majority of parents in a chronically failing school district necessarily discourages parental involvement, and there is no evidence in the record even remotely indicating that it does. Much less is there any evidence in the record indicating that a majority of parents *in this case* opposed reconstitution of the Bridgeport board. Even if there were, such evidence would be completely irrelevant to the issue in this case, which is whether the state board's action was *lawful*, not whether it was wise. Moreover, I do not hold the view that Justice Harper ascribes to me, namely, that "evidence [of parental preferences] necessarily would have been irrelevant to the state board in deciding whether reconstitution would have been the best course of action." In any event, my view on the wisdom of reconstituting a local board does not actually matter at all, and neither does the view of any of my colleagues. The only view that matters is that of the *legislature*, as expressed in a governing statutory scheme that provides that the state board, in its sound discretion, may reconstitute chronically failing school districts.

[5] The majority observes that it "cannot ignore the fact that the foundational issue . . . is how to provide students with the best possible education"; text accompanying footnote 24 of the majority opinion; but then proceeds to ignore this issue entirely. Nowhere does the majority explain how a

what prompted the state board to honor the Bridgeport board's request for state intervention and is what the legislature generally sought to remedy when it enacted a statutory scheme making that intervention possible. Because the state board's intervention in Bridgeport was statutorily authorized, and because the plaintiffs' constitutional claims are meritless, I disagree with the majority's conclusion that the state board's reconstitution of the Bridgeport board was unlawful. I therefore dissent.

I

Before explaining my disagreement with the majority's waiver analysis, I find it necessary to discuss in some detail this case's historical and statutory backdrop.[6] The majority pays scant attention to this important context, which amply reflects the state's dominant role with respect to failing school districts. This context makes it crystal clear that § 10-223e serves one overriding purpose: to endow the state with sweeping power to rescue failing schools and school districts. In light of the statute's interventionist purpose, it is obvious that the training contemplated by § 10-223e (h) serves simply to put a modest[7] brake on the process of

failing school district's students possibly would benefit from a local board of education retaining control over the district even after the mayor, the superintendent, and the local board itself all have made impassioned pleas for state intervention.

[6] With respect to my discussion of this case's historical and statutory backdrop, the majority writes, "To the extent the dissent relies on these data to suggest that the issue before this court is the broader policy issue of whether and when the state board should reconstitute local or regional boards of education, the dissent improperly expands the scope of this reservation." Footnote 14 of the majority opinion. I do not know why the majority insists on transmuting my statutory analysis into something it is not and criticizing a "suggest[ion]" I do not make, instead of engaging the argument that I *do* make.

[7] The majority in fact acknowledges that, whatever the training provision's purpose, its *effect* is to erect little more than a speed bump on the road to reconstitution: "We note that the state board's obligation to require training would unlikely be considered an onerous one. Although . . . there are no

reconstituting a local board of education in order to protect the locality's still existing but minimal interest in retaining control over public education. In short, the training provision is a *shield*, a measure meant to protect a locality against what it might perceive as an unwarranted state takeover.[8] The training provision is not a *sword*, a measure meant to force a local board of education to retain control over the education of the district's schoolchildren even after the local board—and, in the present case, the mayor and the superintendent—has determined that it cannot discharge its duty to provide an adequate public education. Because the shield can serve no function when a locality *requests* reconstitution instead of opposing it, and because mandatory statutory provisions typically may be waived,[9] it is clear that a local board of education is free to waive the training provision.

I begin, then, by describing the sad state of affairs confronting Connecticut's poorest schoolchildren. It

procedures or guidelines with respect to § 10-223e (h), whatever training is required under § 10-223e (h) is unlikely to be any significant impediment to reconstitution." Footnote 32 of the majority opinion.

[8] The majority simply mischaracterizes my view when it asserts that, "without any analysis or authority to support [my] position," I claim that the training provision "protects the [Bridgeport] board." On the contrary, I state repeatedly in this dissent that the training provision serves to protect the locality's interest in retaining control over public education. It does not serve to protect the local board of education as such. I do not know why the majority refuses to engage my analysis on its own terms.

[9] See, e.g., *Santiago* v. *State*, 261 Conn. 533, 543, 804 A.2d 801 (2002) (mandatory statutory provisions are "typically" subject to waiver); see also *United States* v. *Mezzanatto*, 513 U.S. 196, 200–201, 115 S. Ct. 797, 130 L. Ed. 2d 697 (1995) ("[I]n the context of a broad array of constitutional and statutory provisions . . . [r]ather than deeming waiver presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption. . . . [A]bsent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." [Citations omitted.]); *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) 151, 159, 21 L. Ed. 123 (1873) ("[a] party may waive any provision, either of a contract or of a statute, intended for his benefit").

was this state of affairs that the legislature sought to rectify when it enacted a statutory scheme enabling the state to intervene in the educational affairs of municipalities like Bridgeport, whose schools chronically have failed to deliver on this state's constitutional obligation to provide an adequate public education. Of all fifty states, Connecticut has the largest " 'achievement gap,' " that is, the gravest disparity between the educational performance of "students who are from low-income families compared with those from more affluent circumstances."[10] Connecticut Commission on Educational Achievement, "Every Child Should Have a Chance to Be Exceptional. Without Exception. A Plan to Help Close Connecticut's Achievement Gap" (2011) p. 7. A commission established by former governor M. Jodi Rell to study Connecticut's achievement gap recently reported that fourth and eighth grade low income students are on average about three grade levels behind fourth and eighth grade non-low income students in reading and mathematics; id.; 42 percent of third through eighth grade low income students score at "goal level" in reading, compared with 80 percent of their non-low income peers; id., p. 8; 18 percent of tenth grade low income students score at "goal level" in reading, compared with 57 percent of their non-low income peers; id.; only 60 percent of Connecticut's low income students graduated from high school in 2009, compared with 86 percent of their non-low income peers; id.; and, even among Connecticut students who manage to graduate from high school and to go on to college, more than one half of these students entering Connecticut's public two year and four year colleges require immediate remediation in mathematics or English. Id.

[10] In the interest of simplicity, I hereinafter refer to students from low income families as low income students and refer to students from more affluent circumstances as non-low income students.

The plight of Connecticut's poorest schoolchildren is unusually dire in Bridgeport. As the members of the reconstituted Bridgeport board note in their brief to this court, a vivid snapshot of Bridgeport's education crisis is its dropout rate. For the statewide high school graduating class of 2008, the cumulative dropout rate was 6.6 percent, meaning that one out of fifteen members of the class of 2008 withdrew along the four year path to graduation. Connecticut Department of Education, Data Bulletin: High School Dropout Rates in Connecticut (November 2009) p. 4. In the Bridgeport school district, by contrast, the cumulative dropout rate for the class of 2008 was a staggering 23.3 percent, that is, nearly one out of every four students. Id., p. 10. This dropout rate is deplorable, even in comparison with Connecticut's other underperforming school districts. For the class of 2008, the dropout rate for students in the Bridgeport school district was more than double that in Hartford (11.9 percent); id., p. 11; and substantially higher than that in New Haven (15.7 percent). Id. Similarly deplorable is the annual high school graduation rate in the Bridgeport school district, that is, the percentage of high school seniors who actually graduate in a given year. On the basis of data collected by the state department of education in 2008, Connecticut Coalition for Achievement Now found that Bridgeport's graduation rate was lower than that of every other school district in the state. Connecticut Coalition for Achievement Now, Connecticut Graduation Rates (September 2011) pp. 17–22.

No less tragic than Bridgeport's high school dropout rate is its abysmal student performance. In the 2010–2011 school year, according to data collected by the state department of education, fewer than one in four third graders in the Bridgeport school district read at "goal" level or above, compared with a clear majority of third graders statewide; approximately 43 percent of

eighth graders in the Bridgeport school district read at "goal" level or above, compared with approximately 75 percent statewide; approximately 31 percent of eighth graders in the Bridgeport school district attained "goal" level in mathematics, compared with approximately 67 percent statewide; and *just one in ten* tenth graders in the Bridgeport school district read at "goal" level or above, compared with nearly one half of tenth graders statewide. Similarly poor performance in previous years has consistently placed the Bridgeport school district in the lowest achieving 5 percent of school districts, on average, in Connecticut. See Strategic School Profile (2008–2009) of the Bridgeport School District (produced by state department of education); Strategic School Profile (2007–2008) of the Bridgeport School District (produced by state department of education).

These heartbreaking statistics provide a context for the key stipulated facts in this case: that the state board designated the Bridgeport school district as a low achieving school district under § 10-223e (c) (1) for at least seven consecutive years; that the Bridgeport school district has failed to make acceptable progress toward benchmarks established by the state board, pursuant to § 10-223e (a) and (c); and that the Bridgeport school district has failed to make adequate yearly progress, as defined by the federal No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, codified as amended at 20 U.S.C. § 6301 et seq. (2006 & Sup. III 2009), for at least two consecutive years while being designated as a low achieving school district. Contrary to the majority's assertion, these troubling statistics are hardly "irrelevant."[11] Footnote 14 of the majority

[11] The majority also implies that, because the parties did not include these statistics in their stipulated facts, my reliance on them is improper. See footnote 14 of the majority opinion. On the contrary, it is perfectly appropriate to take judicial notice of unchallenged statistical data pertaining to the state of public education in Bridgeport and elsewhere; see, e.g., *Sheff* v. *O'Neill*, 238 Conn. 1, 38 n.42, 678 A.2d 1267 (1996) (taking judicial notice of statistics compiled by board of education of city of Hartford); and the

opinion. To the contrary, they demonstrate the urgency of the Bridgeport board's constitutional duty to provide the schoolchildren with an adequate public education and therefore help explain why barring local boards of education from waiving the training provision would frustrate the purpose of § 10-223e.

The relevant statistics also serve to illuminate the legislative intent, painting a vivid picture of the crisis that the legislature sought to remedy when it created the statutory scheme of which § 10-223e (h) is but a small component.[12] The bulk of that statutory scheme came into being in June, 2007, when the legislature passed An Act Implementing the Provisions of the Budget Concerning Education (2007 act), Public Acts, Spec. Sess., June, 2007, No. 07-3 (Spec. Sess. P.A. 07-3). Supported by a virtually unanimous General Assembly; 50 H.R. Proc., Pt. 28, 2007 Spec. Sess., p. 9070 (vote of 138 to 0 in favor of passage in House of Representatives); 50 S. Proc., Pt. 19, 2007 Spec. Sess., p. 6219 (vote of 32 to 1 in favor of passage in Senate); the 2007 act made sweeping changes to Connecticut's education law.

Of greatest significance to the present case, the 2007 act amended § 10-223e to give the state unprecedented

majority would have been free to rely on such data itself if it had chosen to resolve this case on the basis of what really is at stake: the precarious constitutional right of Bridgeport schoolchildren to an adequate public education.

[12] See, e.g., 50 S. Proc., Pt. 19, 2007 Spec. Sess., p. 6203, remarks of Senator Edward Meyer on the proposed legislation that became Public Acts, Spec. Sess., June, 2007, No. 07-3 ("In my three years . . . [in] this body, I don't think I've ever been as distressed by any one statistic as I have by the academic gap that exists in the public schools of Connecticut, a gap which, according to scholars and economists who have studied it, is actually greater than [that of] any other state in the United States. It's a gap between the underachieving students, the underachieving schools and the rest of the schools in the state. And Senator [Thomas P.] Gaffey [co-chairman of the education committee] is presenting to us today a blueprint to overcome that gap. And there's no doubt if this blueprint is enforced by us and by the [s]tate [d]epartment of [e]ducation, that we will make a significant dent in the gap.").

power to intervene in failing schools and school districts. See Spec. Sess. P.A. 07-3, § 32. As amended by the 2007 act, § 10-223e provided that low achieving schools and school districts would be subject to "intensified supervision and direction" by the state board. Spec. Sess. P.A. 07-3, § 32, codified at General Statutes (2008 Sup.) § 10-223e (c) (1). To improve student performance in these schools and school districts, the 2007 act empowered the state board, inter alia, (1) to require a local or regional board of education to use state and federal funds for critical needs, as directed by the state board, (2) to provide incentives to attract highly qualified teachers and principals, (3) to direct the transfer and assignment of teachers and principals, (4) to require that teachers, principals, and office staff receive additional training, (5) to require local boards to implement model curricula, including recommended textbooks, materials and supplies approved by the state department of education, (6) to identify schools for reconstitution as state or local charter schools, (7) to identify schools for management by an entity other than the local or regional board of education for the district in which the school is located, (8) to direct a local or regional board to develop and implement a plan addressing deficits in achievement, (9) to assign a technical assistance team to a school or district to guide local initiatives and to report progress to the commissioner, and (10) to direct schools to establish "learning academies" requiring continuous monitoring of student performance by teacher groups. Spec. Sess. P.A. 07-3, § 32, codified at General Statutes (2008 Sup.) § 10-223e (c) (2). With respect to school districts and elementary schools that, for two successive years, had failed to make "adequate yearly progress," and accordingly had been designated as low achieving, the 2007 act empowered the commissioner, after an evaluation, to order the school or school district to provide full day kindergarten

classes, summer school, an extended school day, weekend classes, tutorial assistance to students, or professional development for administrators, principals, teachers, and others, provided that either 30 percent or more of the students in any subgroup, as defined by the federal No Child Left Behind Act of 2001, had not achieved the level of proficiency on any subpart of the third grade statewide mastery test, or the commissioner determined "that it would be in the best educational interests of the school or the school district to have any of [the aforementioned] programs." Spec. Sess. P.A. 07-3, § 32, codified at General Statutes (2008 Sup.) § 10-223e (e).

The 2007 act further provided that, if a school district had failed to make adequate yearly progress, as defined by the federal No Child Left Behind Act of 2001, for two consecutive years while being designated as a low achieving school district and also failed to make acceptable progress toward benchmarks established by the state board, the state board, after consulting with the governor and the chief elected official of the failing school district, could request that the General Assembly enact legislation authorizing the state board or another entity to take control of the school district, *thereby entirely supplanting the local administration*. Spec. Sess. P.A. 07-3, § 32, codified at General Statutes (2008 Sup.) § 10-223e (d). This remedy is even more comprehensive and thoroughgoing than the remedy of reconstitution.

Speaking on the Senate floor, Senator Thomas P. Gaffey, cochairman of the education committee, described the 2007 act as "a historic investment in education in the school districts throughout Connecticut"; 50 S. Proc., Pt. 19, 2007 Spec. Sess., p. 6185; that "establishes far more accountability measures than ever before"; id., p. 6186; and "will give [the state department of education and the commissioner] broad and sweep-

ing powers" to intervene in failing school districts. Id., p. 6187; see also id., pp. 6197, 6199, remarks of Senator Thomas J. Herlihy (speaking strongly in favor of 2007 act and calling it "[a] huge increase in spending for education" and "accountability with teeth").

In 2008, the legislature passed An Act Concerning Minor Changes to the Education Statutes, Public Acts 2008, No. 08-153 (P.A. 08-153), which augmented the state board's already robust power to intervene in failing school districts.[13] In particular, P.A. 08-153 added a new subparagraph (M) to § 10-223e (c) (2), which gave the state board the authority to "require local and regional boards of education [in designated low achieving school districts] to (i) undergo training to improve their operational efficiency and effectiveness as leaders of their districts' improvement plans, and (ii) submit an annual action plan to the Commissioner of Education outlining how, when and in what manner their effectiveness shall be monitored . . . ." P.A. 08-153, § 4, codified at General Statutes (Rev. to 2009) § 10-223e (c) (2) (M).

The operational training delineated in General Statutes (Rev. to 2009) § 10-223e (c) (2) (M) would two years later become an ingredient in another interven-

[13] See 51 H.R. Proc., Pt. 10, 2008 Sess., p. 3215, remarks of Representative Andrew M. Fleischmann, cochairman of the education committee (P.A. 08-153 "expands actions the [s]tate [b]oard of [e]ducation can take to improve student performance"); id., pp. 3218–19, remarks of Representative Kevin M. DelGobbo ("I appreciate the [d]istinguished [c]hair of the [e]ducation [c]ommittee [Representative Fleischmann] in presenting this amendment to clarify a concern that was expressed by myself and some others [about] the accountability measures that we adopted last year [in the 2007 act], which were so critical . . . . [T]here was concern that the underlying bill might have in some way constrained the [c]ommissioner . . . from being able to implement those accountability measures. So I appreciate very much Representative Fleischmann's [a]mendment here at this moment to make it clear that in fact all of those provisions of authority that we gave to the [c]ommissioner to go into [a] school district and make certain changes if necessary, that in fact . . . this bill would not in any way impinge [on] that . . . .").

tionist tool, namely, the state's authority to reconstitute a local or regional school board pursuant to § 10-223e (h), the focal point of this case. The legislature enacted § 10-223e (h) in the course of implementing a substantial piece of education reform legislation, namely, An Act Concerning Education Reform in Connecticut, Public Acts 2010, No. 10-111 (P.A. 10-111), which aimed in part to improve Connecticut's chances of obtaining funds under the federal Race to the Top program.[14] Race to the Top is a competitive grant program designed to reward states for implementing significant reforms in four areas of education policy: "enhancing standards and assessments, improving the collection and use of data, increasing teacher effectiveness and achieving equity in teacher distribution, and turning around struggling schools." United States Department of Education, Race to the Top Program: Guidance and Frequently Asked Questions (May 27, 2010), p. 3. In rejecting Connecticut's first round Race to the Top application, four out of five federal reviewers had found deficiencies in the state's capacity to turn around struggling schools, noting features of state law that made it difficult for the state to intervene in the lowest achieving "[l]ocal [e]ducation [a]gencies," that is, the lowest achieving local boards of education.[15] See, e.g., Race to the Top,

[14] See 53 S. Proc., Pt. 7, 2010 Sess., p. 2078, remarks of Senator Gaffey ("[w]hat this amendment focuses on is changes to our education statutes to respond to . . . the criteria in the application for federal funding for education, the so-called 'Race to the Top' program"); 53 H.R. Proc., Pt. 14, 2010 Sess., p. 4554, remarks of Representative Andrew M. Fleischmann, cochairman of the education committee ("the amendment that stands before us is essentially Connecticut's Race to the Top of education reform legislation for the year").

[15] Regs., Conn. State Agencies § 10-295-5 (b) (16) (" 'Local Education Agency' or 'LEA' refers to a public board of education or other public authority legally constituted within Connecticut for either administrative control or direction of or to perform a service function for public elementary schools or secondary schools in a town, city, school district or other political subdivision of the state or for such combination of towns, cities or school districts as are recognized in Connecticut as an administrative agency for its public elementary schools or secondary schools").

Technical Review Form—Tier 1, Connecticut Application #1680CT-3, comments from reviewer 3 ("Before the state can intervene in the lowest achieving [local education agencies] it must consult with the [g]overnor, [and the] chief elected officials of the district and may request the General Assembly to authorize that control of the [local education agency] be reassigned to the [state]. This statutory requirement makes intervention very difficult."), available at http://www.ctmirror.org/sites/default/files/documents/connecticut-2.pdf (last visited February 27, 2012).[16] To rectify this shortcoming, the legislature added one more facet to the state board's substantial power to intervene in low achieving school districts: the authority to reconstitute a local board of education.[17]

Viewed in its entirety, the statutory scheme provides a range of increasingly interventionist tools: (1) the state board may oversee and direct the principal activities of an existing local board of education; see General

[16] See also Race to the Top, Technical Review Form—Tier 1, Connecticut Application #1680CT-1, comments from reviewer 1 ("[t]he state has legal authority to intervene in persistently low-achieving schools, but to intervene in the [local education agencies] they need to get the [g]overnor and [l]egislature to approve the intervention, which is very difficult to do"); id., Connecticut Application #1680CT-2, comments from reviewer 2 ("the approval of [the] legislature is needed for district takeover, and this may be difficult to obtain"); id., Connecticut Application #1689CT-10, comments from reviewer 5 ("It is not clear that the state could take over an entire [local education agency] without legislative approval . . . . The state is authorized to 'retrain' local boards but not to remove them for alleged failures.").

[17] The majority asserts that "the legislative history on which the dissent relies suggests that one of the principal reasons why the legislature amended § 10-223e by adding subsection (h) [the reconstitution authority] . . . was to secure federal funding"; footnote 27 of the majority opinion; as if thereby to imply that the legislature did not add the reconstitution authority for the primary purpose of enhancing the state's power to rescue failing schools or school districts. This is a false dichotomy. Obviously, when the legislature enacted § 10-223e (h), the legislature's primary purpose was to secure federal funding *by* enhancing the state's power to rescue failing schools and school districts.

Statutes § 10-223e (c); (2) the state board may reconstitute a local board of education for a limited period while leaving the local administration substantially in place; see General Statutes § 10-223e (h); or (3) the General Assembly may divest control from the local administration entirely and reassign it to the state board or another entity for an unspecified period. See General Statutes § 10-223e (d).

Given the statutory scheme and the legislative history, the clear purpose of § 10-223e is to enhance the state's power to intervene in failing school districts. Viewed in the light of that overarching purpose, the training provision of § 10-223e (h) obviously serves to put a modest brake on the process of reconstituting a local board in recognition of the locality's still existing but dramatically reduced interest in retaining control.[18]

[18] That the training provision of § 10-223e (h) serves simply to protect local control draws ample support from the legislative history. For example, during the education committee hearing on the proposed addition of subsection (h) to § 10-223e, Representative Andrew M. Fleischmann, cochairman of the education committee, noted: "There's a tension between trying to get things done and respecting the will of the people in democracy. And one of the concerns . . . would be taking a body that had been elected by the folks in a given town and dispersing them . . . and, instead, giving the power, essentially, to [the commissioner] and the [s]tate board." Conn. Joint Standing Committee Hearings, Education, Pt. 4, 2010 Sess., p. 1049. Former commissioner of education Mark McQuillan responded that "it is very, very important that . . . the democratic-elected officials remain in the positions if they are prepared and demonstrate the capacity to do the leadership." Id. McQuillan subsequently explained that "in rare instances—and I'm saying 'in rare instances,' not the general pattern—we have found that it would be necessary to have [the] authority" to reconstitute a local board. Id., p. 1051. During debate on the House floor, Representative Marilyn Giuliano noted that reconstituting a local board of education was a "significant usurpation of powers" and asked Representative Fleischmann about the "exact criteria that would give the commissioner such full-blown powers to dissolve a duly-elected, by the people, [b]oard of [e]ducation." 53 H.R. Proc., Pt. 14, 2010 Sess., p. 4581. Seeking to assuage Representative Giuliano's concern about usurping local control, Representative Fleischmann replied that "the commissioner would first have to find that he had a school board that was overseeing a school district that was a low-achieving district consistently for several years, and that the board was actually an impediment to moving

As I discuss more fully in parts II and III of this opinion, a locality is perfectly free to waive this limited protection, acting through its elected representative, the local board of education.

II

Before I address the various arguments that the majority offers in support of its interpretation of § 10-223e (h), I must observe that the majority's interpretation of that statute violates a cardinal rule of statutory construction, namely, that a court must not construe a statute to reach a bizarre or irrational result; if there are two asserted interpretations of a statute, the court must adopt the reasonable one over the unreasonable one.[19] E.g., *State* v. *Courchesne*, 296 Conn. 622, 710, 998 A.2d 1 (2010). Under the majority's interpretation of § 10-223e (h), no local board of education could ever waive the training provision, not even a unanimous board acting with the full support of the populace and the municipality's other elected officials.[20] This result

forward with reforms. . . . [I]f that's happening, and I'm not sure if it's happening in Connecticut . . . [t]he members of the board can be retrained by the [s]tate [d]epartment of [e]ducation. And if after that training that board continues to be an impediment to execution of reforms, then and only then would the commissioner consider reconstituting that board . . . ." Id., pp. 4581–82. These remarks all evince a modest but real concern to protect localities from unwanted state intervention.

[19] This is true even when the plain and unambiguous text of the statute leads to a bizarre or irrational result. See General Statutes § 1-2z ("The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.").

[20] Although the majority agrees that, on the basis of its analysis of § 10-223e (h), the training provision could not be waived even upon a 9 to 0 vote of the local board and upon unanimous community and political agreement, the majority suggests that there might be circumstances in which "the unanimous vote of a local board of education seeking reconstitution could serve to obviate the training requirement—for example, as the equivalent of a board's resignation contingent on reconstitution . . . [which would]

is untenable because there is no rational justification for mandating that such a board undergo training before being reconstituted. A second irrational result follows from the majority's conclusion that the training provision cannot be waived because it provides for a "transparent and deliberate process." This aspect of the majority's holding entails that, even if the members of a local board of education had voluntarily undergone all of the training that the state board possibly could have required of them, the state board nevertheless could not reconstitute the local board without requiring the board members to undergo the training all over again. Any other result would deprive the local board of education and all other interested persons of notice of the state board's intention to reconstitute the local board, thereby defeating the supposed statutory purpose of "delibera[tion]" and "transparen[cy] . . . ."

Having noted that the majority's interpretation of § 10-223e (h) has several irrational consequences, I turn to the majority's reasons for offering that interpretation. Three principal strains of argument emerge from the majority's discussion. First, the majority asserts that the legislative history of § 10-223e (h) indicates that the legislature did not intend that the training provision could be waived; in doing so, the majority all but ignores the legislative history and genealogy of the interventionist statutory scheme of which § 10-223e (h) is only one part, and pays little regard to whether the legislators whom it quotes actually voted in favor of § 10-223e (h). Second, the majority contends that, because the training provision embodies a public obligation that inures to

not [be] in violation of § 10-223e (h) . . . ." Footnote 43 of the majority opinion. Whatever the majority might mean by "resignation contingent on reconstitution," it seems clear that any such attempt to circumvent the training provision would contravene the purpose that the majority ascribes to § 10-223e (h)—to afford notice of a potential reconstitution and to promote transparency and deliberation during the reconstitution process—notwithstanding the majority's contrary suggestion.

the benefit of the citizens of Connecticut as a whole, and because a public obligation created by statute cannot be waived by any individual or group of individuals, the training provision embodies a public obligation that no one, and a fortiori no local board of education, is competent to waive. Third, the majority asserts that, if a local board of education could waive the training provision, a local board could expand the scope of the state board's power, which would be impermissible.

The majority's three main arguments contain severe flaws. Most glaringly, none of the sources on which the majority relies actually supports its view of waiver, and many of these sources in fact support the opposite view. Nowhere is this last flaw more vivid than in the majority's selective reliance on legislative history. The majority refuses to consider the legislative history of the 2007 act; Spec. Sess. P.A. 07-3; the very act that created the comprehensive statutory scheme of which § 10-223e (h) is but one of several substantive provisions. Ignoring this crucial source of evidence, the majority looks only to the legislative history of P.A. 10-111, § 21, which gave rise to § 10-223e (h). The legislative history of P.A. 10-111, § 21, obviously tells us very little about the legislative intent behind the overall statutory scheme, most of which was enacted three years earlier. Had the majority consulted the legislative history of the 2007 act, it would have been forced to confront the fact that a virtually unanimous General Assembly approved the unprecedented interventionist measures that stand alongside the reconstitution process outlined in § 10-223e (h), measures that suggest anything *but* a legislative preference for local control of education in failing school districts.[21] By the time

[21] The majority seems unable to make up its mind about the extent of this state's preference for local control over education. The majority begins by proclaiming "the long-standing policy in Connecticut of local, rather than state, control over schools and school districts" but then performs an abrupt about-face in stating that § 10-223e (h) "remove[d] the last vestige of local control over low achieving schools and school districts," and that it "agree[s]

§ 10-223e (h) became law in 2010, Connecticut's low achieving school districts already had been subject to "intensified supervision and direction" by the state board for three years. Spec. Sess. P.A. 07-3, § 32, codified at General Statutes (2008 Sup.) § 10-223e (c) (1). Such supervision and direction consisted of an assortment of interventionist programs, only some of which are canvassed in part I of this opinion. The majority nevertheless asserts that these unprecedented interventionist measures were intended "to promote local control . . . ." Contrary to the majority's assertion, it is perfectly clear that these statutory provisions do not increase local control; rather, they dramatically enhance state power over failing school districts. It also is perfectly clear that the key historical fact in this case is Connecticut's recent sea change in education policy, not what the majority describes as "the legislature's decision to initially restrict to the General Assembly the power to reconstitute local boards." The historic set of legislative developments that preceded the enactment of § 10-223e (h) demonstrate that the advent of the reconstitution authority was the final step in a steady march toward enhanced state power to rescue failing school districts, a step that the legislature had been intent on taking after Connecticut failed to obtain a grant under the Race to the Top program, in part as a result of the state's then limited capacity to turn around struggling schools.

The majority avoids interpreting § 10-223e (h) in the light of what it acknowledges to be "a sea change in educational policy in this state" only by announcing a heretofore unknown principle of statutory construc-

. . . that § 10-223e . . . represented a sea change in educational policy in this state," only to perform *another* about-face by stating "that the legislature did not intend § 10-223e (h) to supplant Connecticut's long-standing policy of preferring and preserving locally elected boards of education," and that this state has a supposed "policy of maintaining a locally elected board of education *to the maximum extent possible* . . . ." (Emphasis added.)

tion: when construing a statutory amendment, the court must look primarily to the legislative history of the amendment and must pay little or no attention to the purpose and legislative history of the underlying statute. To state this principle is to refute it. This principle also runs counter to the established practice of this and other courts of construing a statutory amendment by reference to the legislative history of previous versions of the statute. See, e.g., *McCoy* v. *Commissioner of Public Safety*, 300 Conn. 144, 172–73 n.23, 12 A.3d 948 (2011) ("the legislative history of [General Statutes] § 14-227a demonstrates that many of the amendments to § 14-227a over the years have been intended to make our driving under the influence law consistent with the law of other states and federally recommended guidelines"); see also *Bell* v. *United States*, 366 U.S. 393, 411, 81 S. Ct. 1230, 6 L. Ed. 2d 365 (1961) ("[n]othing in the legislative history of the original statute or of its many re-enactments offers support for any other construction").

The majority's use of legislative history is flawed in yet another respect as well. In support of its conclusion that "there was a concern that reconstitution . . . would trample on the rights of the people who had duly and democratically elected their representatives to the local board," the majority relies to a significant extent on the statements of legislators who actually voted *against* P.A. 10-111. The statements of legislators who voted against P.A. 10-111 establish little if anything about the legislative intent behind § 10-223e (h). They certainly do not establish that the training provision signifies a deep-seated preference for local control of failing school districts. Even less do they establish that the training provision is nonwaivable. If the remarks of legislators who voted against the law establish anything at all, they likely establish that the legislature knew about and *discounted* the concerns of those legis-

lators.[22] The majority's attempt to divine the legisla-

[22] In its defense, the majority cites two cases, *Cotto* v. *United Technologies Corp.*, 251 Conn. 1, 738 A.2d 623 (1999), and *Washington* v. *Meachum*, 238 Conn. 692, 680 A.2d 262 (1996), for the proposition that "[a]lthough the comments of opponents of a bill are entitled to less weight than those of its proponents, there are instances in which we have found them to be relevant." (Internal quotation marks omitted.) Footnote 18 of the majority opinion, quoting *Cotto* v. *United Technologies Corp.*, supra, 12 n.7. I of course agree with the majority that the comments of a bill's opponents sometimes are relevant to the task of deciphering a statute's meaning. For example, the comments of a bill's opponents may be relevant when a court seeks to identify "the problem that the legislature intended to address"; *Cotto* v. *United Technologies Corp.*, supra, 12; or when a court seeks to discern what type of activity the legislature intended to regulate; see *Washington* v. *Meachum*, supra, 714 (holding that various comments in legislative history of wiretapping statutes, including several comments by legislators who opposed those statutes, "confirm[ed] [the] conclusion that the wiretapping statutes were intended to apply only to monitoring and recording done without the knowledge of either party to the conversation"). Yet the majority fails to show that *this* case is one of those "instances" in which the comments of a bill's opponents are relevant to the task of deciphering a statute's meaning. Although the majority correctly observes that "both the legislators in support of and the legislators in opposition to [P.A. 10-111] spoke about . . . the importance of preserving locally elected boards of education"; footnote 18 of the majority opinion; the majority does not acknowledge that the opponents accorded far *greater* importance to preserving locally elected boards than did the supporters. Only the opponents expressed grave reservations about the reconstitution authority. Ignoring this obvious disparity, the majority asserts inaccurately that the opponents and supporters of P.A. 10-111 "expressed identical concerns . . . ." Id.

In support of its reliance on the remarks of Representative Marilyn Giuliano, who voted against P.A. 10-111, the majority claims that her remarks are relevant "to show that the legislature was aware of the full implications of § 10-223e (h)"; footnote 22 of the majority opinion; in particular, that § 10-223e (h) empowered the state to dissolve a duly elected body. In making this claim, the majority ignores the incontrovertible fact that, if the legislature passed P.A. 10-111 *despite being aware* that it empowered the state to dissolve a duly elected body, the legislature could not have found this grant of power to be troubling or problematic. The majority also contends that the fact that the legislature passed P.A. 10-111 over Representative Giuliano's concerns "does not . . . negate the veracity of these concerns . . . ." Id. No matter how "veraci[ous]" Representative Giuliano's concerns might have been, however, the fact that the legislature passed P.A. 10-111 *notwithstanding* those concerns certainly calls into question whether they reflected the concerns of the legislature as a whole. In addition to quoting Representative Giuliano, the majority quotes Representative Lawrence F. Cafero, Jr., another

ture's intent by relying on the statements of legislators who voted against P.A. 10-111 is a good example of the sort of use of legislative history that arouses "concerns over the manipulation by legislators or interest groups seeking to influence judicial interpretation after having

opponent of P.A. 10-111, who stated: "[W]e take [great] pride . . . here in New England, and Connecticut in particular, about local control. . . . The referendum that people mostly have is at the polling booth. If they believe their [b]oard of [e]ducation is failing . . . [t]hey could vote them out . . . ." 53 H.R. Proc., Pt. 15, 2010 Sess., pp. 4631–32. The majority acknowledges that Representative Cafero voted against P.A. 10-111 but asserts that his remarks are relevant nonetheless because his "view of Connecticut's educational administration coincides with the policy embodied in the statutory scheme." Footnote 25 of the majority opinion. In light of the fact that the statutory scheme unquestionably *undermines* local control of failing schools, I am unable to understand the majority's assertion.

In its search for the legislature's intent, the majority relies not only on irrelevant legislative history but also on an assortment of cases and other statutes that actually support the opposite of the majority's conclusion. The majority cites two cases, namely, *New Haven* v. *State Board of Education*, 228 Conn. 699, 638 A.2d 589 (1994), and *West Hartford Education Assn., Inc.* v. *DeCourcy*, 162 Conn. 566, 295 A.2d 526 (1972), in support of its contention that the legislature did not intend that § 10-223e (h) would supplant Connecticut's long-standing policy of preferring local control of education. Both of these cases were decided many years before the sweeping changes to Connecticut's education law that culminated in the enactment of § 10-223e (h). More to the point, both of these cases, in language that the majority itself quotes, affirm that the predominant interest in public education belongs not to Connecticut's various localities *but to the state*. *New Haven* v. *State Board of Education*, supra, 703 ("[t]he state board is charged with the broad and general power to *supervise and control* the educational interests of the state" [emphasis added; internal quotation marks omitted]); *West Hartford Education Assn., Inc.* v. *DeCourcy*, supra, 573 ("[t]he state has had a vital interest in the public schools from the earliest colonial times"). The majority also cites a handful of statutes in the same or surrounding chapters of the General Statutes—General Statutes §§ 10-220 (a), (b) and (e), 10-4g (a) and (b), and 10-221 (a) and (b)—that, in the majority's view, "demonstrate a clear policy of defining a supervisory role for the state board separate and distinct from local boards . . . ." These statutes are irrelevant to the present case. To the extent that the statutes evince a policy of defining a supervisory role for the state board separate and distinct from local boards, they evince such a policy only with respect to school districts *that are not failing*. With respect to school districts that are failing, § 10-223e establishes a contrary policy, one of robust state direction and control. Connecticut education law may still evince a *general*

failed to have their view adopted in the text of the legislation"; *State* v. *Courchesne*, 262 Conn. 537, 636, 816 A.2d 562 (2003) (*Zarella*, *J.*, dissenting); and gives rise to "the appearance of . . . result-oriented decision-making." (Internal quotation marks omitted.) Id., 632 (*Zarella*, *J.*, dissenting); see also id. (*Zarella*, *J.*, dissenting) (criticizing majority's use of legislative history as result driven and explaining that "[t]he trick [employed by the majority] is to look over the heads of the crowd and pick out your friends" and that "[t]he variety and specificity of result that [the majority's approach] can achieve is unparalleled" [internal quotation marks omitted]).

Even if the selection of legislative sources on which the majority relies truly were representative of the legislature's intent, these sources would not support the majority's conclusion that the training provision is nonwaivable. The majority's conclusion simply is a non sequitur, a non sequitur concealed behind a sequence of purported inferences. From an assemblage of legislative quotations, the majority first infers "three general principles of legislative intent": (1) reconstitution is an "extreme remedy, to be used only sparingly after it becomes apparent that other remedial measures have failed to produce results"; (2) "the testimony and remarks [concerning § 10-223e (h)] track the plain [mandatory] language of the statute"; and (3) reconstitution is a "usurpation of local democratic will." From these three general principles, the majority then infers that the legislature intended the training provision to serve three "purposes": (1) to afford notice to a local board of education and its electors of a potential takeover; (2) to provide the local board with an opportunity to prevent its reconstitution; and (3) to allow the state board to reconstitute the local board only if "it first

policy of preferring and preserving local control, but no such policy pertains to Connecticut's failing school districts.

requires the local board to undergo and complete training"—in other words, the training provision is mandatory. "View[ing]" these three purposes "together," the majority infers that the overarching purpose of the training provision is to afford notice of a potential takeover to the local board, its electors, and the citizens of this state as a whole, and to foster transparency and deliberation during the process of reconstitution. Having saddled the training provision with this overarching purpose, the majority then concludes that the provision is nonwaivable.

As I explain hereinafter, none of the purposes or principles that the majority ascribes to the training provision supports the conclusion that the provision is nonwaivable, and only some of these purposes or principles find any support in the legislative sources that the majority cites. I address these principles and purposes in turn.

First, the majority repeatedly emphasizes that the legislature understood § 10-223e (h) to be mandatory. This is irrelevant. As a conceptual matter, only a mandatory provision can be waived; thus, only in the context of a mandatory provision does the issue of waiver even arise. The fact that "the testimony and remarks track the plain [mandatory] language of the statute" does not lend one iota of support to the majority's conclusion that the provision is nonwaivable. On the contrary, because the issue of waiver arises only in the context of a mandatory provision, if the mandatory language of § 10-223e (h) is evidence of anything, it is evidence that the provision *might be waivable*.[23] I therefore am

[23] Nor is the supposed *strength* of the statute's mandatory language evidence that the training contemplated by § 10-223e (h) is nonwaivable. Examples abound of provisions that are forcefully worded, mandatory, and waivable. For instance, the sixth amendment to the United States constitution provides: "In *all* criminal prosecutions, the accused *shall* enjoy the *right* to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature

baffled by the majority's lengthy discussion of why the training provision of § 10-223e (h) is mandatory.[24] There is little to discuss. Not only does the provision employ presumptively mandatory language; see General Statutes § 10-223e (h) ("[t]he [b]oard *shall not* grant such authority to the commissioner *unless*" [emphasis added]); but the defendants *concede* that the provision is mandatory. The clear effect of this long discussion is to give the false impression that, because the training provision is mandatory, it therefore is likely nonwaivable.

Second, the majority observes that the training provision serves the protective purpose of affording a local

and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." (Emphasis added.) Notwithstanding the sixth amendment's strong, mandatory language, a criminal defendant can waive nearly all of his sixth amendment rights. See, e.g., *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 314 n.3, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (confrontation); *Barker* v. *Wingo*, 407 U.S. 514, 528–29, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (speedy trial); *Levine* v. *United States*, 362 U.S. 610, 618, 80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960) (public trial); *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) (assistance of counsel); *Patton* v. *United States*, 281 U.S. 276, 308–309, 50 S. Ct. 253, 74 L. Ed. 854 (1930) (trial by jury). For similar reasons, it is insignificant that § 10-223e (h) does not explicitly provide for waiver. The Bill of Rights does not explicitly provide for waiver, either. Also insignificant is whether the training provision of § 10-223e (h) is unusually important. No mandatory provision in our law is more important than any provision in the sixth amendment, yet nearly all of the rights guaranteed by the latter can be waived. Indeed, many important rights may be waived by defense counsel without prior consultation with the defendant. See *State* v. *Gore*, 288 Conn. 770, 779 n.9, 955 A.2d 1 (2008).

[24] I also find this discussion highly unpersuasive. To begin with, the fact that § 10-223e (c) (1) "uses strong, presumptively mandatory language in describing the role that the state board occupies with regard to low achieving schools and districts" has no bearing whatsoever on whether § 10-223e (h)—*a separate subsection*—is mandatory. Equally irrelevant is the fact that § 10-223e (d) employs mandatory language. I fail to see how italicizing every occurrence of the word "shall" in § 10-223e (c) (1) and (2), and (d) lends any support to the majority's otherwise sensible, and unchallenged, conclusion that § 10-223e (h) is mandatory.

board of education an opportunity to prevent its reconstitution. I agree, but if the training provision serves to protect a local board from an *unwanted* takeover, then *of course* the local board can waive that protection. Indeed, every single legislative remark that the majority quotes evinces a desire to protect local boards of education from unwanted reconstitution. These remarks therefore support the very conclusion that majority eschews, namely, that the local board of education is free to waive the training provision because that provision serves only to protect the locality's greatly reduced interest in retaining control of its chronically failing public schools. Furthermore, contrary to what the majority implies, the legislature's failure to consider whether a local board of education could seek out reconstitution or waive the training provision lends no support at all to the majority's conclusion that the training provision is not waivable. Rather, the absence of any evidence of legislative intent to *preclude* waiver strongly suggests that the training provision is indeed waivable. As this court previously has recognized, mandatory statutory provisions "typically" are subject to waiver. See, e.g., *Santiago* v. *State*, 261 Conn. 533, 543, 804 A.2d 801 (2002). Our permissive approach to waiver accords with that of the United States Supreme Court, which has noted that "in the context of a broad array of constitutional and statutory provisions . . . [r]ather than deeming waiver presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption. . . . [A]bsent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." (Citations omitted.) *United States* v. *Mezzanatto*, 513 U.S. 196, 200–201, 115 S. Ct. 797, 130 L. Ed. 2d 697 (1995); see *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) 151, 159, 21 L. Ed. 123 (1873) ("[a] party may

waive any provision, either of a contract or of a statute, intended for his benefit").

Third, the majority contends that the legislature regarded reconstitution as an "extreme remedy, to be used only sparingly after it becomes apparent that other remedial measures have failed to produce results."[25] Although I agree that reconstitution is an "extreme remedy," it is beyond dispute that no circumstances could be more extreme than those of the present case, in which student performance in the locality is chronically abysmal; see part I of this opinion; oversight measures have failed to yield appreciable improvement,[26] and the

[25] I disagree with the majority's related contention that, "when § 10-223e (h) is analyzed in the context § 10-223e (c) (1) and (2), the logical inference is that the state board should pursue the remedial actions in § 10-223e (c) (2), with regard to the low achieving school or school district overseen by a local or regional board of education, before it pursues the seemingly severe remedy of reconstituting that local or regional board of education under § 10-223e (h)." The legislature made just *one* of the actions enumerated in § 10-223e (c) (2) a precondition to reconstitution under § 10-223e (h). Our rules of statutory construction require us to assume that, if the legislature had intended to make *all* of the remedial actions enumerated in § 10-223e (c) (2) a precondition to reconstitution, it would have done so explicitly. See, e.g., *Genesky* v. *East Lyme*, 275 Conn. 246, 258, 881 A.2d 114 (2005) ("if the legislature wants to [engage in a certain action], it knows how to do so"); *Carmel Hollow Associates Ltd. Partnership* v. *Bethlehem*, 269 Conn. 120, 135, 848 A.2d 451 (2004) (same). Also unsound is the majority's contention that, in view of the legislative history, "the reference in § 10-223e (h) to § 10-223e (c) (2) (M) can easily be understood as signaling the legislature's preference that the state board pursue the cooperative remedial and supervisory options under § 10-223e (c) (2) prior to eliminating all local control through reconstitution." Even if the majority's characterization of the legislative history were correct—and none of the sources that the majority cites suggests that any legislator understood § 10-223e (h) to oblige the state board to perform all of the actions enumerated in § 10-223e (c) (2) before reconstituting a local board—the majority ignores the bedrock principle that "[t]he intent of the legislature . . . is to be found not in what the legislature meant to say, but in the meaning of what it did say." (Internal quotation marks omitted.) *Cruz* v. *Montanez*, 294 Conn. 357, 370, 984 A.2d 705 (2009).

[26] At the meeting of the state board, state board member Joseph Vrabely, Jr., stated: "We've already intervened in Bridgeport with our programs, and those programs are not working."

mayor, the superintendent, and the Bridgeport board itself all have made impassioned pleas for state intervention. Testifying before the state board, former Bridgeport board member Thomas Mulligan, who had served just six months of his first term when he voted for reconstitution, explained that the Bridgeport board could not possibly fulfill its obligations to Bridgeport schoolchildren because of the "toxic" atmosphere at board meetings and because the board could not agree on anything, even a budget. Mulligan testified that he would not have voted for the reconstitution measure if he had believed there was any other way to promote the educational interests of Bridgeport schoolchildren. He added that, although a few of his colleagues might be disappointed about losing their jobs, "more important than elective office is to do the job that you have been elected to do. . . . [I]t is more important that the students get the education that they are entitled to . . . . The kids in the city of Bridgeport need a functional board more than any other municipality [in the state]. They deserve it." Barbara Bellinger, former president of the Bridgeport board, expressed a similar sentiment. She testified that reconstitution was necessary because the Bridgeport board simply was incapable of "delivering the education that the children deserve and the state says they should have. . . . We might disagree as to the reasons for our current problems, but the status quo is not working or acceptable. We need the state to step in and be our partners." John Ramos, the Bridgeport superintendent of schools, described the reconstitution measure as the "last and best hope for our district and its students."

Fourth, the majority contends that the legislature viewed reconstitution as a "usurpation of local democratic will." Whether true or not, this contention is irrelevant. Reconstitution may represent a usurpation of the local democratic will only when it occurs over

the *objection* of an elected local board of education. Reconstitution represents no such usurpation when it occurs at the *urging* of the local board, as it did in the present case. Indeed, in the present case, reconstitution received strong support not only from the Bridgeport board but also from the superintendent and from the mayor, the city's highest elected official.

Fifth, the majority asserts that the training provision serves the overarching purpose of benefiting the citizens of the *entire state* by ensuring that reconstitution can occur only upon adequate public notice and in a manner that is deliberate and transparent. Although the majority does not say so, this assertion derives no support from the statutory scheme or the legislative history and, in fact, runs counter to our rules of statutory construction. It also runs counter to common sense; the majority does not explain how the residents of Torrington and Greenwich and New London could have any interest at all, much less an overriding one, in the transparency and deliberateness of the reconstitution process in *Bridgeport*. Nor does the majority bother to explain exactly how such an interest could possibly trump Bridgeport's *own* interest in permitting its board of education, acting on behalf of the local electorate, to waive the training contemplated by § 10-223e (h) in order to discharge as expeditiously as possible the Bridgeport board's duty to protect the schoolchildren's constitutional right to an adequate public education.

Perhaps even more fundamentally, the majority seems oblivious to the fact that § 10-223e (h) enables the state board to reconstitute a local board of education *in a manner that affords the locality no notice whatsoever*. It would be perfectly lawful under § 10-223e (h) for the state board to take several of the remedial actions specified in § 10-223e (c) (2), including requiring the local board of education to undergo training, and then,

months later, *without warning*, authorize the commissioner to reconstitute the local board. Because this sequence of events is perfectly lawful under § 10-223e (h), it makes no sense to suppose that the legislature meant for the training contemplated by § 10-223e (h) to serve the purpose of providing a locality notice of an impending takeover.[27] Unsurprisingly, the majority has produced no evidence that the legislature intended any such thing. Not a single remark that the majority has quoted evinces the belief that the purpose of the training provision is to afford notice of an impending takeover or to foster transparency and deliberation during the process of reconstitution. Indeed, given that the legislature made notice an express component of *another* part of § 10-223e; see General Statutes § 10-223e (d) (requiring state board to give "notice" to local

[27] Notwithstanding the plain meaning of § 10-223e (h), the majority denies that the state board properly could reconstitute a local board of education in a manner that affords the locality no notice whatsoever, relying on what it describes as "the clear legislative intent that the state board should authorize reconstitution only if a procedure for doing so is in place." Footnote 27 of the majority opinion. Regardless of whether there is any such "clear legislative intent," the majority again ignores the bedrock principle that "[t]he intent of the legislature . . . is to be found not in what the legislature meant to say, but in the meaning of what it did say." (Internal quotation marks omitted.) *Cruz* v. *Montanez*, 294 Conn. 357, 370, 984 A.2d 705 (2009). The legislature said *nothing* about there being any prereconstitution procedure other than the training provision itself.

A further reason why the majority disputes my assertion that the state board properly could reconstitute a local board in a fashion that affords the locality no notice whatsoever is that, in the majority's view, reconstituting a board in such a fashion would "[frustrate] one of the purposes of the training requirement that [it has] identified, namely, to provide notice." Footnote 27 of the majority opinion. The majority simply begs the question, arguing that, *because* the training provision serves to provide notice of an impending reconstitution, the state board properly could not reconstitute a local board of education in a manner that affords the locality no notice whatsoever. The far more logical inference runs the other way. Because it is obvious from the plain meaning of the statute that the state board properly *could* reconstitute a local board of education in a manner that provides the locality no notice whatsoever, providing notice cannot possibly be the training provision's purpose.

board of education in low achieving school district of that district's "progress toward meeting the benchmarks established by the State Board"); we must presume that, if the legislature had intended for the state board to provide *further* notice before reconstitution, the legislature would have said so explicitly. See, e.g., *Genesky* v. *East Lyme*, 275 Conn. 246, 258, 881 A.2d 114 (2005) ("if the legislature wants to [engage in a certain action], it knows how to do so"); *Carmel Hollow Associates Ltd. Partnership* v. *Bethlehem*, 269 Conn. 120, 135, 848 A.2d 451 (2004) (same).

Even if the purpose of the training provision truly were to afford notice of a potential takeover and to promote transparency and deliberation during the reconstitution process, the majority's reasoning still would not yield the conclusion that the training provision is not waivable, for the majority does not even *attempt* to explain how permitting a local board of education to waive the training provision would deprive the locality of adequate notice or render the reconstitution process impermissibly opaque or overhasty. To the extent that the training provision serves incidentally to afford notice or to promote transparency and deliberation, it does so most obviously in the case of a *recalcitrant* board, that is, one unwilling to give up control, not in the case of a board like the one in Bridgeport, which waived the training provision by passing a lawful resolution at a properly noticed public meeting. See part III of this opinion. Evidently, the majority believes that the resulting reconstitution occurred with less notice and deliberation than might have been desirable as a matter of good public policy. Regardless of whether the majority's belief is correct—and the majority offers no evidence to suggest that it is—this court may not rewrite a statute in order to promote the policy that it happens to prefer. E.g., *AvalonBay Communities, Inc.* v. *Zoning Commission*, 280 Conn. 405, 422, 908 A.2d

1033 (2006) ("[the court] cannot rewrite a statute to accomplish a particular result" [internal quotation marks omitted]).[28]

In seeking to establish that a local board of education cannot waive the training provision of § 10-223e (h), the majority appears to place the greatest weight on its "public obligation" argument. This argument rests on two premises. The first is that the training provision "embodies a public obligation that . . . inures to the benefit of the citizens of Connecticut as a whole." The second is that a public obligation created by statute "cannot be waived by any individual or group of individuals." From these two premises, the majority infers that the training provision of § 10-223e (h) embodies a public obligation that no one, including local boards of education, is competent to waive.

The problem with this argument is that neither premise is plausible. In support of the first premise, that the training provision "embodies a public obligation that . . . inures to the benefit of the citizens of Connecticut as a whole," the majority asserts that the purpose of the training provision is to ensure that reconstitution occur only upon adequate public notice and in a manner that is deliberate and transparent. As I have explained, this purported purpose is something that the majority simply creates out of whole cloth.

In support of its second premise, that a public obligation created by statute cannot be waived by any individual or group of individuals, the majority provides a rather lengthy argument, which I discuss more fully

[28] In this connection, the majority baldly asserts that the training provision "furthers a policy of maintaining a locally elected board of education *to the maximum extent possible* . . . ." (Emphasis added.) The majority offers no evidence to show that this state has any such policy—a policy that would force a local board of education to remain in place even after it has made a desperate plea for state intervention with the backing of the municipality's mayor and superintendent of schools.

hereafter. In brief, no part of this argument withstands scrutiny. Far from analyzing any of our prior holdings, the majority merely plucks superficially favorable language from various judicial opinions, paying little regard to whether the language in question is dictum or holding, and paying even less regard to whether the underlying opinions are on point. Not one of the five opinions that the majority cites in the text of its opinion[29] is on point; only two would be binding even if they *were* on point;[30] and of these two, only one[31] contains favorable language that can fairly be characterized as a holding. It is hardly surprising, then, that the majority says so little about the facts or reasoning underlying these cases.

The majority relies foremost on several sentences from a dissenting opinion in *In re Application for Petition for Writ of Habeas Corpus by Dan Ross*, 272 Conn. 676, 719–20, 866 A.2d 554 (2005) (*Lavery* and *Dranginis*, *Js.*, dissenting), a case in which the court permitted a death row inmate to waive his statutory right to seek habeas review of his sentence. See id., 678–79. The majority omits the fact that the bulk of the following passage, including the sentence that the majority itali-

[29] In a footnote, the majority cites four out-of-state authorities in support of the proposition that a public obligation created by statute cannot be waived by any individual or group of individuals. See footnote 37 of the majority opinion. As I explain more fully hereinafter; see footnote 32 of this opinion; none of these authorities supports the majority's premise.

[30] The two cases that would be binding if they were on point are *Hatch* v. *Merigold*, 119 Conn. 339, 176 A. 266 (1935), and *L'Heureux* v. *Hurley*, 117 Conn. 347, 168 A. 8 (1933). We are not bound by *In re Application for Petition for Writ of Habeas Corpus by Dan Ross*, 272 Conn. 676, 717, 866 A.2d 554 (2005) (*Lavery* and *Dranginis*, *Js.*, dissenting), because it is a dissenting opinion. Nor are we bound by *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 65 S. Ct. 895, 89 L. Ed. 1296 (1945), a case in which the United States Supreme Court interpreted a federal statute. Id., 698. The fifth case that the majority cites in the text of its opinion is *Beasley* v. *Texas & Pacific Railway Co.*, 191 U.S. 492, 24 S. Ct. 164, 48 L. Ed. 274 (1903), a case that has nothing at all to do with waiver.

[31] See *L'Heureux* v. *Hurley*, 117 Conn. 347, 355–56, 168 A. 8 (1933).

cizes, is a verbatim quotation from a long since deleted portion of an almost half century old edition of a legal encyclopedia, American Jurisprudence 2d: "[W]aiver is not . . . allowed to operate so as to infringe [on] the rights of others, or to transgress public policy or morals.

"*The public interest may not be waived.* [When] a law seeks to protect the public as well as the individual, such protection to the state cannot, at will, be waived by any individual, an integral part thereof. The public good is entitled to protection and consideration and if, in order to effectuate that object, there must be enforced protection to the individual, such individual must submit to such enforced protection for the public good. . . . Accordingly, a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." (Citation omitted; emphasis added; internal quotation marks omitted.) *In re Application for Petition for Writ of Habeas Corpus by Dan Ross*, supra, 272 Conn. 719–20, quoting 28 Am. Jur. 2d 847, Estoppel and Waiver § 161 (1966). Even if this language were the law, instead of an excerpt from a defunct portion of an encyclopedia entry, the language still would not support the majority's position that the training provision of § 10-223e (h) is not waivable. First, the Bridgeport board is not an individual; it is a duly elected representative body. Second, the training provision of § 10-223e (h) is not "a statutory right conferred on a private party . . . but affecting the public interest . . . ." *In re Application for Petition for Writ of Habeas Corpus by Dan Ross*, supra, 720. Rather, it is a benefit conferred on the locality as a whole. Third, the Bridgeport board's waiver of the training provision did not "contravene the statutory policy." Id. On the contrary, when that board waived the training provision with the stated intention of "enabl[ing] the Bridgeport public schools to fulfill their statutory and constitutional

responsibilities," the board clearly was acting in furtherance of the statute's policy of "improv[ing] student performance and remov[ing] the . . . district from the list of . . . districts designated . . . as . . . low achieving . . . ." General Statutes § 10-223e (c) (2).

Also irrelevant for present purposes are *Beasley* v. *Texas & Pacific Railway Co.*, 191 U.S. 492, 24 S. Ct. 164, 48 L. Ed. 274 (1903), a case having nothing to do with waiver, in which the court held that specific performance of a contract prohibiting the construction of a railway depot would contravene public policy; id., 497; and *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 65 S. Ct. 895, 89 L. Ed. 1296 (1945), a case in which the court concluded that an employee who had accepted a delayed payment of the basic statutory wages due under the Federal Labor Standards Act of 1938, Pub. L. No. 75-718, c. 676, 52 Stat. 1060, could not validly waive any further right to recover liquidated damages under that act. *Brooklyn Savings Bank* v. *O'Neil*, supra, 704–706. The court in *Brooklyn Savings Bank* concluded that there could be no waiver on the ground that the legislative history of the act "show[ed] an intent on the part of Congress to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce. To accomplish this purpose standards of minimum wages and maximum hours were provided." Id., 706–707. The court observed that "[n]either [party] suggest[ed] that the right to the basic statutory minimum wage could be

waived by any employee subject to the [a]ct. No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the [a]ct." Id., 707. The court then concluded "that the same policy considerations which forb[ade] waiver of basic minimum and overtime wages under the [a]ct also prohibit[ed] waiver of the employee's right to liquidated damages." Id. No aspect of the court's reasoning in *Brooklyn Savings Bank* applies in the present case. A local school board is not a private individual; it is a public entity. Nor does a local board of education suffer from unequal bargaining power. Most important, insofar as § 10-223e serves to protect the interests of a vulnerable "segment of the population"; id., 706; the segment that § 10-223e serves to protect is neither the local board of education nor the local board's electorate; it is instead the locality's schoolchildren, a group on whose behalf the local board of education is both statutorily and constitutionally obligated to act. In sum, none of the considerations that led the United States Supreme Court to conclude that an employee could not validly waive the right to liquidated damages under the Federal Labor Standards Act indicate that a local board of education cannot validly waive the protection afforded by § 10-223e (h).

L'Heureux v. *Hurley*, 117 Conn. 347, 168 A. 8 (1933), which I discuss later, is the only binding case from which the majority culls language that fairly can be characterized as a holding. The other binding case on which the majority relies is *Hatch* v. *Merigold*, 119 Conn. 339, 343, 176 A. 266 (1935). Quoting *Hatch*, the majority observes that this court "previously [has] *held* that '[o]ne cannot waive a public obligation created by statute . . . but he may waive a statutory requirement the purpose of which is to confer a private right or benefit.' " (Emphasis added.) Contrary to what the majority implies, *Hatch* did not hold that "[o]ne cannot waive a

public obligation . . . .'' *Hatch* v. *Merigold*, supra, 343. Rather, *Hatch* held, inter alia, that a particular statutorily created presumption—specifically, a presumption that the decedent in a wrongful death case had exercised reasonable care—was a statutory benefit that a party *could* waive. See id. (''By affirmatively pleading her decedent's lack of contributory negligence, the plaintiff waived her right to claim the benefit of the statute. The plaintiff in this case having done this, the trial court was not in error in failing to instruct the jury that under the statute there was still a presumption that her decedent had been in the exercise of reasonable care.''). In view of what the court in *Hatch* actually held, its assertion that one cannot waive a public obligation was merely dictum, which the court supported by citing *L'Heureux* v. *Hurley*, supra, 356.

The upshot is that the majority cites only one Connecticut case that, on its face, might seem to provide any support for the majority's position. That case is *L'Heureux* v. *Hurley*, supra, 117 Conn. 347, a 1933 personal injury case in which the court held that a tenant could not waive a landlord's statutory duty to illuminate common areas of a building at night. Id., 355–56. *L'Heureux* provides no actual support for the majority's position because a tenant is a private individual who, unlike the Bridgeport board, obviously is not entitled to act on behalf of the segment of the public that the statute in question aims to protect. Ignoring this difference, the majority divines a holding of sweeping breadth in the court's observation in *L'Heureux* that ''[o]ne cannot give what one does not possess. One may waive a personal obligation of another to the one waiving. One cannot waive an obligation owed by another to the public.'' Id. The majority seizes on this language and reads the word ''one'' so broadly as to encompass not just private individuals but also duly elected representative bodies. There is no basis for this broad reading,

either in the reasoning of *L'Heureux* or in that of any other case the majority cites.[32]

In a final attempt to prove that the training provision is not waivable, the majority offers the following argument based in general principles of administrative law: "Because the training provision [in § 10-223e (h)] defines the scope of the grant of [the reconstitution] power from the legislature to the state board, the local board of education, as a separate agent of the state, cannot alter the scope of this grant of power. See *Kinney* v. *State*, [213 Conn. 54, 60 n.10, 566 A.2d 670 (1989)] ('administrative agencies . . . must act strictly within their statutory authority and cannot unilaterally modify, abridge or otherwise change . . . provisions because the act's enabling legislation does not expressly grant

[32] In a footnote, the majority cites four additional authorities for the proposition that a public obligation created by statute cannot be waived by any individual or group of individuals. See footnote 37 of the majority opinion. Again, the majority does little more than pluck superficially favorable language from these authorities; not one of them actually stands for the broad proposition that statutorily created public obligations cannot be waived by anyone. Three of these authorities establish at most that public obligations cannot be waived by individuals. Cal. Civ. Code § 3513 (Deering 2005) ("Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a *private agreement*." [Emphasis added.]); *Campbell* v. *Campbell*, 87 Ohio App. 3d 48, 50, 621 N.E.2d 853 (1993) ("The public interest may not be waived. [28 Am. Jur. 2d, supra, § 161, p. 847]. Just as with laches and estoppel, it would not be sound public policy to allow individuals employed by [the county child support enforcement agency] to waive the public's right to the support arrearages owed by [the appellee]."); *Isenhower* v. *Isenhower*, 666 P.2d 238, 241 (Okla. App. 1983) ("when a statute contains provisions that are founded [on] public policy, such provisions cannot be waived by a *private party* if such waiver thwarts the legislative policy which the statute was designed to effectuate" [emphasis added]). The fourth authority establishes not that statutorily created public obligations cannot be waived by anyone but, rather, that a municipality cannot waive bidding requirements when "the statute evinces a clear intention to provide maximum protection for the taxpayer." *Hillside* v. *Sternin*, 25 N.J. 317, 325, 136 A.2d 265 (1957); see also id., 326 ("[o]nly by this approach can the desirable protection be afforded to the taxpayers; only in this way can perfect equality be maintained among bidders").

that power' . . .). It therefore follows that the local board cannot expand this grant of power by waiving the training obligation." I am perplexed by the majority's assertion that, "[b]ecause the training provision defines the scope of the grant of power from the legislature to the state board, the local board of education, as a separate agent of the state, cannot alter the scope of this grant of power." If I understand what this assertion means, and I am not sure I do, I certainly am aware of no legal authority that supports it, especially not *Kinney*, the only case that the majority cites. *Kinney* states that "administrative agencies . . . cannot unilaterally modify, abridge or otherwise change" their statutory authority. (Citation omitted.) *Kinney* v. *State*, supra, 60 n.10. Because the fundamental question in this case is whether a local board's authority encompasses the authority to waive the training provision, the majority simply begs the question when it asserts that, if the local board could waive the training provision, it thereby could unilaterally modify, abridge or change its authority.

III

Having explained why each of the majority's arguments is meritless, I now explain why I would resolve this fundamentally straightforward case by concluding that a local board of education is competent to waive whatever protection § 10-223e (h) might afford a locality against a state takeover. I begin with a few basic principles. It well established that waiver is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 2d 1461 (1938); accord *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 57, 970 A.2d 656, cert. denied sub nom. *Bridgeport Roman Catholic Diocesan Corp.* v. *New York Times Co.*, 558 U.S. 991, 130 S. Ct. 500, 175 L. Ed. 2d 348 (2009). "As a general rule, both statutory and constitutional

rights and privileges may be waived." *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 57. Indeed, as I noted earlier, this court has recognized that mandatory statutory provisions "typically" are subject to waiver. *Santiago* v. *State*, supra, 261 Conn. 543; see also *United States* v. *Mezzanatto*, supra, 513 U.S. 200–201 ("[r]ather than deeming waiver presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption"); *Shutte* v. *Thompson*, supra, 82 U.S. (15 Wall.) 159 ("[a] party may waive any provision, either of a contract or of a statute, intended for his benefit").

Because of the general presumption in favor of waiver, and because it is fundamental that a representative body possesses the authority to make binding decisions on behalf of its constituents, it is self-evident that a local board of education possesses the authority to waive the locality's interest in retaining control of public education. Besides being self-evident, this result follows from general principles. Because the role of a local board of education is not to make law but to implement it; see General Statutes § 10-220 (a); a local board is functionally an arm of the executive branch. As an arm of the executive branch, a local board serves as an agent of the electorate. Cf. *Loving* v. *United States*, 517 U.S. 748, 777, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996) (Scalia, J., concurring) ("[w]hat Congress does is to assign responsibilities to the [e]xecutive; and when the [e]xecutive undertakes those assigned responsibilities it acts, not as the 'delegate' of Congress, but as the agent of the [p]eople"). It is axiomatic that a duly authorized agent may waive rights on behalf of its principal. The only possible question is whether a local board, as agent of the local electorate, is duly authorized to waive the electorate's interest in retaining control of public education. This question must be answered in the affirmative, not only because a representative

body self-evidently possesses the authority to make binding decisions on behalf of its constituents, but also because a local board serves as an agent of the electorate *and* as an agent of the state, insofar as the local board performs the state's statutory and constitutional duty to furnish an education for the public. *Cheshire* v. *McKenney*, 182 Conn. 253, 257–58, 438 A.2d 88 (1980); see *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 314–15, 990 A.2d 206 (2010) (state has constitutional obligation to ensure that students receive suitable educational opportunities); *Sheff* v. *O'Neill*, 238 Conn. 1, 46, 678 A.2d 1267 (1996) (same); *Horton* v. *Meskill*, 172 Conn. 615, 649, 376 A.2d 359 (1977) (same); see also General Statutes § 10-4a ("the educational interests of the state shall include, but not be limited to, the concern of the state that [1] each child shall have . . . equal opportunity to receive a suitable program of educational experiences"); General Statutes § 10-220 (a) ("[e]ach local or regional board of education shall maintain good public elementary and secondary schools, implement the educational interests of the state as defined in section 10-4a and provide such other educational activities as in its judgment will best serve the interests of the school district"). As an agent of the state responsible for discharging the state's duty to furnish an education for the public that meets state constitutional and statutory requirements, a local board of education clearly has a duty to promote the interests of the schoolchildren. When local control no longer serves the interests of the schoolchildren, a local board's duty to promote these interests evidently entails a duty to waive the locality's interest in retaining control of public education.

If a local board of education can have a *duty* to waive the locality's interest in control, then it obviously must have the *authority* to waive the locality's interest in control. To conclude otherwise, as the majority effec-

tively does, is to countenance the possibility of a conflict between the local board's role as agent of the local electorate and its role as agent of the state. If such a conflict were possible, it would be necessary to resolve the conflict in favor of the local board's role as agent of the state, because, in its role as agent of the state, the local board acts under a duty of constitutional magnitude. See *Connecticut Assn. of Boards of Education, Inc.* v. *Shedd*, 197 Conn. 554, 563, 499 A.2d 797 (1985) ("[a]lthough the local boards [of education] may at times have divided loyalties, [i]t is an established principle that local charter powers must yield to the superior power of the state when the two enter a field of statewide concern" [internal quotation marks omitted]). In reality, however, no such conflict is possible. As I stated at the outset, we honor the principle of local control by permitting a local board of education to waive the training contemplated by § 10-223e (h) in order to discharge as expeditiously as possible the local board's duty to promote the interests of the schoolchildren.[33]

Having established that a local board of education may waive the protection afforded by § 10-223e (h), I find it undeniable that the Bridgeport board waived such protection. "Waiver does not have to be express, but may consist of acts or conduct from which waiver may be implied. . . . In other words, waiver may be inferred from the circumstances if it is reasonable to do so." (Internal quotation marks omitted.) *Rosado* v.

[33] The majority argues against an obvious straw man when it asserts that "the legislature did not intend that the state board's reconstitution authority would supersede the existing, comprehensive statutory scheme that provided for other means of supervising and intervening in local educational issues." Text accompanying footnote 27 of the majority opinion. Nowhere do I claim that § 10-223e (h) was meant to "supersede" the rest of § 10-223e. Indeed, I have no idea what such a claim would even mean. Nor do I have any idea what the majority means when it states, "we construe the reconstitution [power] . . . narrowly, so as not to *supplant* the other remedies already available to the state board." (Emphasis added.)

Bridgeport Roman Catholic Diocesan Corp., supra, 292 Conn. 58. Furthermore, "although the question of whether a privilege has been waived ordinarily presents a question of fact reviewed under a clearly erroneous standard, the standard of review is plenary when the trial court has made its determination on the basis of pleadings and other documents, rather than on live testimony." Id., 57. Here, we must inquire into the issue of waiver de novo. Such a de novo inquiry is entirely proper, not only because there is no trial court determination for us to review, but also because the stipulated facts in this case enable us to resolve the issue of waiver as a matter of law "on the basis of pleadings [or] other documents . . . ." Id.

The present case readily may be resolved on the basis of the Bridgeport board's July 5, 2011 resolution "concerning a request to the state board of education." It is undisputed that, on July 5, 2011, by a vote of six to three, the Bridgeport board passed a resolution stating: "WHEREAS, the Bridgeport [b]oard has received training in the skills needed to function effectively as a [b]oard of [e]ducation, but such training has not enabled the [b]oard to carry out its statutory responsibilities, and the Bridgeport [b]oard does not believe that further training would be productive or would enable the [b]oard to carry out those responsibilities . . . .

"[T]he Bridgeport [b]oard hereby requests that the [s]tate [b]oard, acting pursuant to the . . . General Statutes, including, but not limited to . . . § 10-223e (h), authorize the [c]ommissioner . . . to reconstitute the Bridgeport [b]oard . . . in accordance with statutory authority, and that the [s]tate [b]oard take such other statutorily authorized actions as may enable the Bridgeport public schools to fulfill their statutory and constitutional responsibilities." On its face, this resolution plainly constitutes the "intentional relinquishment . . . of a known right" to the training contemplated by

§ 10-223e (h); *Johnson* v. *Zerbst*, supra, 304 U.S. 464; accord *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 292 Conn. 57; a relinquishment that the Bridgeport board undertook in the avowed belief that further training would not enable it to carry out its responsibility to provide a suitable education to Bridgeport schoolchildren. Because the Bridgeport board waived the training provision, the state board acted lawfully when it reconstituted the Bridgeport board pursuant to § 10-223e (h).[34]

[34] The majority asserts that the record is "ambiguous" with respect to whether the Bridgeport board, in passing the July 5 resolution, intended to waive the training provision or simply "believed that the statute had been substantially complied with because the [Bridgeport] board already had received some training." Footnote 39 of the majority opinion. Contrary to the majority's assertion, there is no ambiguity at all in the Bridgeport board's July 5 resolution, which expressly requests that the state board reconstitute the Bridgeport board and notes that "further training would [not] be productive or [otherwise] enable the [b]oard to carry out [its] responsibilities . . . ." Moreover, even if the resolution did appear ambiguous on its face, no such appearance could survive the assertion of the defendant board members, in their briefs and at oral argument before this court, that relinquishing the benefit of additional training is *precisely what the board intended to do*.

In asserting that the July 5 resolution was ambiguous with respect to whether the Bridgeport board intended to waive the training provision, the majority trades on the law's well-known aversion to countenancing ambiguous waivers. That aversion simply is irrelevant to this case. The obvious rationale behind the law's aversion to countenancing ambiguous waivers is to protect those who might claim that they did *not* waive a right, specifically by requiring the adverse party—the party claiming that waiver occurred—to prove its claim through competent evidence. I am not aware of any case, and the majority cites none, in which the law's reluctance to countenance ambiguous waivers was invoked to *defeat* a party's claim that it *did* waive a right.

Even if such a case existed, the defendants would have no trouble demonstrating that the Bridgeport board waived the training requirement. To do so, the defendants would need to demonstrate only that, when the Bridgeport board voted for reconstitution, it was aware of its statutory right to training. See, e.g., *Wadia Enterprises, Inc.* v. *Hirschfeld*, 224 Conn. 240, 252, 618 A.2d 506 (1992) ("[a]ssuming [the threshold applicability of the doctrine of] implied waiver [to the present case] . . . the plaintiff[s] would . . . have to make a showing that the defendants knew of their right[s] [under the statute] . . . before they could [intentionally] waive [them]"). The record is replete with evidence that the Bridgeport board was aware of that statutory right. Not only did the July 5 resolution expressly reference § 10-223e (h),

but the transcript of the hearing at which the resolution was adopted reveals that the discussion actually *centered* on the issue of whether the mandatory training provision precluded the Bridgeport board from adopting the proposed resolution. One of the named plaintiffs, Maria Pereira, argued vehemently that it did, reading aloud from the statute in an unsuccessful attempt to persuade her fellow board members that the Bridgeport board could not pass the resolution until after it had received training. Barbara Bellinger, president of the Bridgeport board, took the opposite position, stating: "I disagree [that the state board cannot authorize reconstitution unless and until there has been compliance with mandatory training]. [W]e have already discussed this with the state board . . . and they have indicated that we [can] move forward, that efforts for training have been fulfilled and that further training would not ameliorate the situation. . . .

"[H]aving experienced some training with some members of this board, [I] do not believe that further training, given the level of dysfunctionality that we're experiencing, will help us. We need a new idea, we need the state's assistance, we need [the state] to step in and help fix these issues. . . . And training isn't the answer to that. Training is the answer to a lot of things, especially when people are willing to collaborate and work together . . . on issues."

Furthermore, even though no one at the Bridgeport board hearing formally described the board's resolution as a "waiver" of the training provision, it is indisputable that "[w]aiver need not be express, but may consist of acts or conduct from which a waiver may be implied. . . . In other words, waiver may be inferred from the circumstances if it is reasonable to do so." (Internal quotation marks omitted.) *Wadia Enterprises, Inc.* v. *Hirschfeld*, supra, 224 Conn. 252. In the present case, one would have to blink at reality in order to maintain that the Bridgeport board waived the training requirement without full awareness of its right to receive additional training prior to reconstitution. It is clear that the Bridgeport board was aware of that right but had concluded that, given its extreme level of dysfunction and acrimony, no amount of training would have enabled it to fulfill its constitutional duties to the schoolchildren of Bridgeport.

In view of these facts, the majority's assertion that the evidence is inadequate to support a finding of waiver is nothing short of astounding. This court has found an implicit waiver of a *constitutional* right on the basis of far less evidence. See *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011) (holding that defendant will be found to have knowingly and intentionally waived by implication his constitutional right to adequate jury instruction when counsel was provided copy of proposed instructions and, after meaningful opportunity to review and comment on them, counsel affirmatively accepted proposed instructions even though record contained no other indicia of waiver).

The majority accuses me of dismissing a statement that Bellinger made at the state board hearing on July 6, 2011, a statement that, according to the majority, "injects ambiguity" into the meaning of the July 5 resolution and calls into question whether the local board intended to waive its right to training. Footnote 39 of the majority opinion. In the majority's words, Bellinger "stated that the [Bridgeport] board had not received enough train-

Furthermore, contrary to the plaintiffs' arguments, the Bridgeport board plainly had the legal power or authority to adopt a resolution requesting that the state board reconstitute it. As I explained earlier, a local board of education is competent to waive the protection afforded by § 10-223e (h), both in its capacity as a duly elected representative of the locality and in its capacity as an agent of the state charged with carrying out the state's obligation to provide a suitable education. Moreover, when the Bridgeport board passed a resolution requesting that the state board intervene pursuant to § 10-223e (h), the board clearly acted within the scope of its authority under the Bridgeport charter. See Bridgeport Charter, c. 15, § 2 ("[t]he board of education shall have all the powers vested in, and shall perform all the duties imposed [on], boards of education under the laws of this state and the United States").[35]

ing and [perhaps] could benefit from additional training." Id. Viewed in their proper context, however, Bellinger's actual statements inject no ambiguity at all into the meaning of the July 5 resolution. When a member of the state board asked Bellinger to identify the main "divide" on the Bridgeport board, she responded, "the divide is on almost every issue." The same state board member then queried: "I know you are a training professional. You said [the Bridgeport board] had training. What kind of training have you had? Have you had lighthouse training?" Bellinger responded: "We had training that I arranged for with an outside consultant, to help people understand their roles and responsibilities. It was not attended by 100 percent of [our members], nor do I feel that that was adequate training. Don't forget, I am a training person. I really think that training is important." Whatever the significance of these particular remarks, Bellinger's testimony as a whole contains repeated assertions that *no amount of training could enable the Bridgeport board to achieve its objectives, given its profound level of dysfunction.* Marion Martinez, a representative of the state department of education, reinforced Bellinger's view, explaining that the training programs then offered by the state, including the lighthouse program, simply were not designed to address the kind of problem that the Bridgeport board was experiencing. As Martinez succinctly put it, "lighthouse does not repair damaged relationships."

[35] Because there is ample legal support for the Bridgeport board's competency to waive the protection afforded by § 10-223e (h), it is irrelevant, contrary to the assertion of Maria Pereira and other plaintiffs, that § 10-223e (h) does not explicitly provide that a local board of education can request reconstitution.

The plaintiffs offer several meritless arguments in support of their contention that the Bridgeport board lacked the authority to enact a resolution requesting the state board to reconstitute it. The plaintiffs in the *Farrar-James* case contend that the Bridgeport board did not have the authority to remove its own members by resolution. This is true but irrelevant because the Bridgeport board simply did not remove its own members, either by resolution or by any other means. Rather, it was the *state board* that removed the Bridgeport board members. The Bridgeport board merely invited the state board to act. When the state board authorized reconstitution, it acted autonomously, not at the command of the Bridgeport board. The state board obviously could have rejected or ignored the Bridgeport board's request for reconstitution. Thus, the Bridgeport board did not remove its own members any more than a person arrests his neighbor when he alerts the police to the neighbor's criminal activity.[36] Nor did the Bridgeport board dissolve itself, as the plaintiffs in the *Pereira* case contend. The Bridgeport board merely made its own dissolution more likely. Finally, it is entirely irrelevant—contrary to the assertion of the plaintiffs in the *Farrar-James* case—that the Bridgeport board lacked the authority to delegate its vacancy appointing power to the state board. The process of reconstituting a local board of education pursuant to § 10-223e (h) does not result in the sort of vacancy contemplated by statute;

[36] Even though the state board was perfectly free to reject or ignore the Bridgeport board's request for reconstitution, Justice Harper appears to believe that the Bridgeport board did in fact dispossess its three member minority. He states that "the resolution adopted by six members of the Bridgeport board to forgo training cannot logically be separated from the intended effect of that decision—to displace duly elected board members through a state created reconstituted board." I am unable to discern why Justice Harper accords this purported dispossession any significance at all, given that he joins a majority opinion under which a local board of education could not waive the training provision even upon a *unanimous* vote—a vote that dispossesses no one.

see General Statutes § 10-219;[37] because the reconstitution process results in both the appointment of new members and the removal of existing ones. Even if the reconstitution process did result in the sort of vacancy contemplated by § 10-219, thereby giving rise to a conflict between §§ 10-219 and 10-223e (h), the latter would control because it is more specific. See, e.g., *Housatonic Railroad Co.* v. *Commissioner of Revenue Services*, 301 Conn. 268, 301–302, 21 A.3d 759 (2011) (invoking "the well established principle of statutory interpretation that requires courts to apply the more specific statute relating to a particular subject matter in favor of the more general statute that otherwise might apply in the absence of the specific statute").

IV

Finally, the plaintiffs raise several constitutional challenges to § 10-223e (h) that it is necessary for me to address in light of my conclusion, namely, that a local board of education is competent to waive the protections embodied in that statute and that the Bridgeport board validly waived those protections. The plaintiffs contend that § 10-223e (h) is unconstitutional because it violates the home rule provision of article tenth, § 1,[38]

[37] General Statutes § 10-219 provides: "If a vacancy occurs in the office of any member of the local board of education, unless otherwise provided by charter or special act, such vacancy shall be filled by the remaining members of said board until the next regular town election, at which election a successor shall be elected for the unexpired portion of the term, the official ballot specifying the vacancy to be filled."

[38] The constitution of Connecticut, article tenth, § 1, provides: "The general assembly shall by general law delegate such legislative authority as from time to time it deems appropriate to towns, cities and boroughs relative to the powers, organization, and form of government of such political subdivisions. The general assembly shall from time to time by general law determine the maximum terms of office of the various town, city and borough elective offices. After July 1, 1969, the general assembly shall enact no special legislation relative to the powers, organization, terms of elective offices or form of government of any single town, city or borough, except as to (a) borrowing power, (b) validating acts, and (c) formation, consolidation or dissolution of any town, city or borough, unless in the delegation of legislative authority

the free suffrage provision of article sixth, § 4,[39] and article first, §§ 1,[40] 4,[41] and 20,[42] of the Connecticut constitution. In considering these claims, this court must "indulge in every presumption in favor of the statute's constitutionality . . . ." (Internal quotation marks omitted.) *State* v. *McKenzie-Adams*, 281 Conn. 486, 500, 915 A.2d 822, cert. denied, 552 U.S. 888, 128 S. Ct. 248, 169 L. Ed. 2d 148 (2007). The plaintiffs bear the heavy burden of demonstrating that the statute is unconstitutional beyond a reasonable doubt. See, e.g., *Kinney* v. *State*, 285 Conn. 700, 710, 941 A.2d 907 (2008) ("legislative enactments carry with them a strong presumption of constitutionality, and . . . a party challenging the constitutionality of a validly enacted statute bears the heavy burden of proving the statute unconstitutional beyond a reasonable doubt" [internal quotation marks omitted]). For the reasons that follow, the plaintiffs cannot meet their burden. Indeed, the plaintiffs' constitutional claims warrant little discussion because with respect to none of these claims can the plaintiffs even satisfy the relevant threshold requirement.

A

The plaintiffs contend that § 10-223e (h) violates the home rule provision of article tenth, § 1, of the state

by general law the general assembly shall have failed to prescribe the powers necessary to effect the purpose of such special legislation."

[39] The constitution of Connecticut, article sixth, § 4, provides: "Laws shall be made to support the privilege of free suffrage, prescribing the manner of regulating and conducting meetings of the electors, and prohibiting, under adequate penalties, all undue influence therein, from power, bribery, tumult and other improper conduct."

[40] The constitution of Connecticut, article first, § 1, provides: "All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community."

[41] The constitution of Connecticut, article first, § 4, provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

[42] The constitution of Connecticut, article first, § 20, provides: "No person shall be denied the equal protection of the law nor be subjected to segrega-

constitution because § 10-223e (h) interferes with municipal charter provisions governing the organization and election of local boards of education and because it undermines municipal control over local budgetary concerns. This claim is wholly meritless because it is beyond dispute that education is a matter of statewide concern. Our case law establishes unequivocally that a statute of general application, such as § 10-223e (h), runs afoul of article tenth, § 1, only when it purports to regulate a matter of *purely local concern* and, even then, only if it conflicts with a local charter provision governing the same general subject matter. See, e.g., *Board of Education* v. *Naugatuck*, 268 Conn. 295, 307, 843 A.2d 603 (2004) (in determining whether statute violates home rule provision, "we must determine whether [it] pertains to a matter of statewide concern such that it preempts any conflicting provisions of the charter"); *Carofano* v. *Bridgeport*, 196 Conn. 623, 631, 495 A.2d 1011 (1985) (statute of general applicability conflicts with home rule provision of state constitution only when "its purpose or its operation involves subjects of purely local concern"); *Caulfield* v. *Noble*, 178 Conn. 81, 87, 420 A.2d 1160 (1979) ("a general law, in order to prevail over a conflicting charter provision of a city having a home rule charter, must pertain to those things of general concern to the people of the state").

"By its terms, article tenth restricts only the enactment of special and not of general legislation. . . . [W]hen the legislature deals with matters that are primarily of statewide concern, it may deal with them free of any restriction contained in the home-rule amendment. The legislature can thus make effective a law touching on a matter of statewide concern in one city and not in another, provided that the classification is

tion or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin."

proper. The home-rule amendment does not limit the right of the legislature to deal with matters of statewide concern, even if, in so dealing, some cities and not others are affected." (Citation omitted; internal quotation marks omitted.) *Shelton* v. *Commissioner of Environmental Protection*, 193 Conn. 506, 521–22, 479 A.2d 208 (1984), quoting *West Allis* v. *Milwaukee*, 39 Wis. 2d 356, 365–66, 159 N.W.2d 36 (1968), cert. denied, 393 U.S. 1064, 89 S. Ct. 717, 21 L. Ed. 2d 707 (1969).

Even if § 10-223e (h) conflicted with a provision of the Bridgeport charter governing the same general subject matter, the plaintiffs could not prevail on their claim under article tenth, § 1, because "[*t*]*here can be no dispute . . . that the education of our schoolchildren is an issue of statewide concern*." (Emphasis added.) *Board of Education* v. *Naugatuck*, supra, 268 Conn. 309; see also *Cheshire* v. *McKenney*, supra, 182 Conn. 257–58 ("[T]he furnishing of an education for the public is a state function and duty. . . . This duty is placed [on] the state by article eighth, § 1, of the state constitution and is delegated to local school boards by state statute. . . . There is no question but that local boards of education act as agencies of the state when they are fulfilling the statutory duties imposed [on] them pursuant to the constitutional mandate of article eighth, § 1." [Citations omitted.]).

Furthermore, to the extent that any local charter provision conceivably might conflict with the state's constitutional and statutory authority to furnish a suitable education to the schoolchildren of this state—in this case by reconstituting the local board of education in a chronically failing school district—there can be no question but that such a charter provision would have to yield to the state's authority to carry out its mandate. *Connecticut Assn. of Boards of Education, Inc.* v. *Shedd*, supra, 197 Conn. 563 ("[a]lthough the local boards may at times have divided loyalties, [i]t is an

established principle that local charter powers must yield to the superior power of the state when the two enter a field of statewide concern" [internal quotation marks omitted]); see also *City Council* v. *Hall*, 180 Conn. 243, 248, 429 A.2d 481 (1980) ("the only powers a municipal corporation has are those which are expressly granted to it by the state"); *Waterford* v. *State Board of Education*, 148 Conn. 238, 245, 169 A.2d 891 (1961) ("local boards of education are creatures of the state," exercising only such powers that state has conferred on them).

B

The plaintiffs also contend that § 10-223e (h) violates the free suffrage provision of article sixth, § 4, of the Connecticut constitution because it authorizes the removal from office of duly elected school board officials prior to the expiration of their terms, and because it prevents other candidates from running for office during the reconstitution period. In support of this claim, the plaintiffs argue, inter alia, that § 10-223e (h) "restricts the right of suffrage by disenfranchising the citizens who voted for the [removed] official" and "infringes [on] the free suffrage rights of those from . . . Bridgeport . . . who are eager to perform the duties of school board members . . . ."

This claim founders on the plaintiffs' false assumption that the right to free suffrage, as established under article sixth, § 4, encompasses a right to elect and serve on local boards of education. The plaintiffs can cite no authority to support this assumption because it is well settled that there simply is no right to elect and serve on local boards of education. See, e.g., *Moore* v. *Detroit School Reform Board*, 293 F.3d 352, 365 (6th Cir. 2002) ("The comparison that the plaintiffs seek to make between their ability to elect school board members before the [Michigan School Reform Act (act)] was

enacted and their inability to do so under the [act] thus involves circular reasoning. Specifically, they appear to complain about lacking the right to do something [elect school board members] that they never had a fundamental right to do."). As the United States Supreme Court stated in *Sailors* v. *Board of Education*, 387 U.S. 105, 87 S. Ct. 1549, 18 L. Ed. 2d 650 (1967): "Political subdivisions of [s]tates—counties, cities, or whatever [including local boards of education]—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the [s]tate to assist in the carrying out of state governmental functions. . . . [T]hese governmental units are created as convenient agencies for exercising such of the governmental powers of the [s]tate as may be entrusted to them, and the number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the [s]tate. We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, *or by some other appointive means rather than by an election*." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 107–108. The plaintiffs simply ignore this precedent, which establishes unequivocally that there is no right to elect or serve on local boards of education.

The plaintiffs also ignore precedent establishing that the state has virtually unfettered authority to set the terms by which local boards of education may exist and carry out their delegated duties. See id., 109 ("[T]he state legislatures have constitutional authority to experiment with new techniques . . . when it comes to municipal and county arrangements within the framework of a [s]tate. Save and unless the state, county, or municipal government runs afoul of a federally pro-

tected right, it has vast leeway in the management of its internal affairs." [Citations omitted; internal quotation marks omitted.]); *City Council* v. *Hall*, supra, 180 Conn. 250 n.6 ("[t]he number, nature and duration of the powers conferred [on municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the [s]tate" [internal quotation marks omitted]).

The legislature, acting pursuant to the state's authority to set the terms by which local boards of education may exist and carry out their delegated duties, has enacted General Statutes § 9-185,[43] which expressly conditions the election of local boards of education *on the state's right to reconstitute such boards under the circumstances specified in § 10-223e (h)*. The plaintiffs do not even mention § 9-185 in their briefs, let alone explain how their claim could possibly be reconciled with its provisions or with the provisions of § 10-223e (d) (2), which expressly provides that the state board may grant the commissioner the authority to reconstitute a regional or local board of education in accordance with § 10-223e (h) "*notwithstanding the provisions of chapter 146* [*relating to election law*], *any special act, charter or ordinance* . . . ." (Emphasis added.) I can only interpret the plaintiffs' failure to address §§ 9-185 and 10-223e (d) (2) as a tacit acknowledgement that their claim under article sixth, § 4, simply cannot be reconciled with the foregoing provisions.

C

Finally, the plaintiffs contend that § 10-223e (h) violates the equal protection provisions of article first,

[43] General Statutes § 9-185 provides in relevant part: "Unless otherwise provided by special act or charter, (1) members of boards of assessment appeals, (2) selectmen, (3) town clerks, (4) town treasurers, (5) collectors of taxes, (6) constables, (7) registrars of voters, (8) *subject to the provisions of subsection (h) of section 10-223e*, members of boards of education, and (9) library directors shall be elected . . . ." (Emphasis added.)

§§ 1 and 20, of the Connecticut constitution because it impinges on their "fundamental right to seek election" to the Bridgeport board. As I explained earlier, the plaintiffs possess no such right, fundamental or otherwise.[44] Accordingly, the plaintiffs' equal protection claim must submit to the well established principle that "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (Internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 271 Conn. 808, 834, 860 A.2d 715 (2004). This court has stated that "[r]ational basis review is satisfied [as] long as there is a plausible policy reason for the classification . . . . [I]t is irrelevant whether the conceivable basis for the challenged distinction actually motivated the legislature. . . . To succeed, the party challenging the legislation must negative every conceivable basis which might support it . . . ." (Internal quotation marks omitted.) *Contractor's Supply of Waterbury, LLC* v. *Commissioner of Environmental Protection*, 283 Conn. 86, 93, 925 A.2d 1071 (2007).

To their credit, the plaintiffs do not argue that § 10-223e (h) fails rational basis review. Indeed, no such argument legitimately could be maintained, both because of the pressing problem that § 10-223e seeks to address—that of chronically underperforming school districts—and because reconstituting an intractably dysfunctional local board of education is a manifestly rational way of carrying out the statute's purpose. The plaintiffs' equal protection challenge therefore fails.

[44] For the same reason, there is no merit to the plaintiffs' contention that § 10-223e (h) violates article first, § 4, of the state constitution because it burdens their "access to the ballot."

V

It has long been said that hard cases make bad law. This case shows that easy cases can make bad law as well. It is evident that the state board did not violate § 10-223e (h) in authorizing the commissioner to reconstitute the Bridgeport board, the Bridgeport board had the authority to adopt a resolution requesting that the state board reconstitute it, and § 10-223e does not violate the home rule provision of article tenth, § 1, of the state constitution, the free suffrage provision of article sixth, § 4, or the equal protection provisions of article first, §§ 1, 4, and 20. Accordingly, I dissent.

COMMISSIONER OF ENVIRONMENTAL PROTECTION ET AL. *v.* STATE FIVE INDUSTRIAL PARK, INC., ET AL.
(SC 18543)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan and Eveleigh, Js.

Syllabus

The plaintiffs, the commissioner of environmental protection, the town of Hamden and the town's zoning enforcement officer, brought an action against the defendant corporation, S Co., and its president, the defendant F, seeking to hold them liable for a judgment that had been rendered in 2001 against F's husband, J, and five of his corporations. The 2001 judgment required, inter alia, that J and his corporations fund the closure of two illegal landfills, post certain bonds and pay $3.8 million in civil penalties to the plaintiffs. Although S Co. and F were not named or involved in that action, F was the principal owner of R Co., which owned all of the stock of S Co. The plaintiffs claimed that S Co. should be held liable for the 2001 judgment by applying the equitable doctrine of reverse piercing of the corporate veil, under which a claimant may reach the assets of a corporation to satisfy a judgment against a corporate insider. The plaintiffs further claimed that F should be held liable for the resulting judgment against S Co. by applying the traditional doctrine of piercing the corporate veil, under which a claimant may reach the assets of a corporate insider. The trial court found that, over the years, J had negotiated the transfer of ownership of S Co. from R Co. to a friend of J and F, had quitclaimed certain real property to S Co., had caused one of his corporations to transfer certain land to S Co. and had written

personal checks to S Co. without satisfying the 2001 judgment. The trial court further found that S Co. had assumed certain obligations of one of J's corporations without also acquiring that corporation's assets and had paid personal expenses for J and F. Finally, the trial court found that although the two sons of J and F had no real involvement in running either S Co. or R Co., that evidence did not support a finding that the sons were innocent shareholders whose interests required protection. The trial court then applied reverse veil piercing to hold S Co. liable for the 2001 judgment, and applied traditional veil piercing to hold F liable for the resultant judgment against S Co., from which F and S Co. appealed. *Held* that, regardless of whether the equitable remedy of reverse veil piercing is a viable theory in Connecticut, the trial court's application of that remedy here was based in part on unsupported factual findings and that court employed improper reasoning in its analysis of other facts such that this court was left with the definite and firm conviction that a mistake had been made, and, therefore, the trial court's determination that reverse veil piercing was warranted was set aside as clearly erroneous: evidence that the sons of J and F were not involved in running S Co. did not support the trial court's finding that they were complicit in J's activities, which the court relied on to justify the reverse veil piercing, and because the plaintiffs failed to establish that the sons were not innocent shareholders, it was improper for the trial court to apply reverse veil piercing without regard to whether their interests would be impacted; furthermore, the trial court, prior to applying reverse veil piercing, did not adequately ensure that third party creditors of S Co. did not exist or, if they did, that they would not be prejudiced by the judgment; moreover, the trial court improperly determined that reverse veil piercing was warranted here because that court's analysis failed to establish with specificity that J exercised his control over S Co. to divert assets that otherwise would have been available to satisfy the judgment, and that J's actions were the proximate cause of the plaintiffs' inability to collect on the 2001 judgment.

(*One justice concurring separately*)

Argued September 6, 2011—officially released March 20, 2012

Procedural History

Action to pierce the corporate veil to hold the defendants liable for an unsatisfied prior judgment rendered against certain other defendants in an environmental clean up action, and for other relief, brought to the Superior Court in the judicial district of Hartford, and tried to the court, *Bentivegna*, *J.*; judgment for the plaintiffs; thereafter, the trial court denied the defendants' motion for articulation, and the defendants

sought review from the Appellate Court, which ordered the trial court to articulate its decision with regard to three certain points; subsequently, the trial court denied the defendants' motion for further articulation and the Appellate Court granted the defendants' motion for review but denied the relief requested, and the defendants appealed. *Reversed; judgment directed.*

Kerry M. Wisser, with whom was *Nathan A. Schatz*, for the appellants (defendants).

Krista E. Trousdale, assistant attorney general, with whom were *Matthew I. Levine*, assistant attorney general, *Susan Gruen*, corporation counsel, and, on the brief, *Richard Blumenthal*, former attorney general, for the appellees (plaintiffs).

Opinion

ROGERS, C. J. This case raises the question of whether the equitable doctrine of reverse piercing of the corporate veil is a viable remedy in Connecticut. The defendants, State Five Industrial Park, Inc. (State Five), and Jean L. Farricielli (Jean), appeal[1] from the judgment of the trial court holding them liable, after invoking both reverse and traditional veil piercing principles, for a $3.8 million judgment rendered in 2001 (2001 judgment)[2] against Jean's husband, Joseph J. Farricielli (Joseph), and five corporations that he owned and/or controlled, in an environmental enforcement action (1999 action) brought by the plaintiffs, the com-

[1] The defendants 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.

[2] At the time of trial, the amount outstanding on the 2001 judgment had grown to $4,164,317, and the trial court held the defendants liable for that amount. The court also imposed prejudgment interest of 10 percent, calculated from September 21, 2001, and directed that prohibitory injunctions and orders to reimburse the commissioner for certain remediation costs, which were issued in the 1999 action against Joseph and his corporations, also be binding on the defendants in the present action.

missioner of environmental protection (commissioner), the town of Hamden (town) and the town's zoning enforcement officer.[3] See generally *Rocque* v. *Farricielli*, 269 Conn. 187, 848 A.2d 1206 (2004). The defendants claim that the trial court improperly employed reverse veil piercing to hold them liable for the 2001 judgment because that remedy should not be recognized at all in Connecticut or, alternatively, that the trial court should not have applied it given the facts of the present case. We agree that the facts that were proven in this case do not warrant reverse veil piercing and, accordingly, reverse the judgment.[4]

The following facts, which the trial court found, and procedural history are relevant to the appeal. On July 9, 1999, the commissioner initiated an action against Joseph and the five corporations that he controlled and/or owned—Hamden Salvage, Inc., Tire Salvage, Inc., North Haven Tire Disposal, Inc., Quinnipiak Real Estate & Development Corporation and Hamden Sand &

[3] We refer to the town, its zoning enforcement officer and the commissioner collectively as the plaintiffs, and note that they were the plaintiffs in *Rocque* v. *Farricielli*, 269 Conn. 187, 848 A.2d 1206 (2004), as well.

[4] After imputing liability for the 2001 judgment through Joseph to State Five, by employing reverse veil piercing, the trial court applied traditional veil piercing principles to impose the resulting liability of State Five on Jean, who owns a controlling interest in State Five. In addition to arguing that the trial court improperly applied reverse veil piercing, Jean claims that the trial court improperly: (1) applied "successive," or "triangular," veil piercing to then hold her liable for the judgment against State Five; and (2) applied traditional veil piercing to hold her liable for the judgment against State Five, because the element of proximate causation was not proven. Furthermore, both defendants claim that the trial court improperly ordered additional unauthorized relief, namely, prejudgment interest and the extension of the injunctive relief and orders from the 2001 judgment to the defendants in the present matter. See footnote 2 of this opinion. Our conclusion that the trial court improperly applied reverse veil piercing renders moot all of the defendants' remaining claims. Specifically, without first imputing Joseph's liability for the 2001 judgment to State Five, there is no liability thereafter to transfer from State Five to Jean. Additionally, all of the other relief ordered by the trial court was dependent on its conclusion that the defendants were liable for the 2001 judgment.

Stone, Inc.—alleging egregious violations of state statutes regulating solid waste disposal. Id., 191. "Specifically, the commissioner sought: an order from the trial court enforcing the terms of the commissioner's 1998 consent order with [Joseph] and his corporations, which was designed to end ongoing statutory violations; a temporary and permanent injunction requiring [Joseph] and his corporations to cease their illegal activities; and an order requiring [Joseph] and his corporations to pay civil penalties for each day of each alleged violation. . . . [T]he plaintiffs filed a joint amended complaint seeking, in addition to all of the aforementioned remedies, enforcement of an existing cease and desist order and the stipulated judgment in effect between the town and [Joseph] and his corporations, which was designed to end ongoing violations of various zoning ordinances. A bench trial took place in September and October, 2000, and the trial court issued its memorandum of decision on September 21, 2001, ordering all of the forms of relief sought by the plaintiffs." Id., 191–92. Joseph appealed and, on June 1, 2004, this court affirmed the trial court's judgment.[5] Id., 213.

The 2001 judgment required Joseph and his corporations to, inter alia, post bonds, fund the closure of two illegal solid waste landfills and pay approximately $3.8 million in civil penalties to the commissioner and the town. The judgment also required Joseph and his corporations to reimburse the commissioner for amounts expended in addressing environmental conditions at the landfills. Although the bonds have been posted, in part, and substantial remediation work has been done at the subject properties since the 2001 judgment, the civil penalties largely have gone unpaid.

[5] In *Rocque*, the five corporations were defaulted by the trial court for their failure to appear, and they did not appeal from the judgment rendered against them. At the time of the appeal, all of those corporations were "defunct." *Rocque* v. *Farricielli*, supra, 269 Conn. 190 n.1.

In 2005, the plaintiffs initiated the present action, alleging that Jean and State Five should be held liable for all of the obligations imposed upon Joseph and his corporations pursuant to the 2001 judgment. Specifically, they alleged that reverse veil piercing should apply to hold State Five liable for the 2001 judgment against Joseph and that traditional veil piercing thereafter should apply to hold Jean liable for the resulting judgment against State Five. As to each veil piercing claim, the plaintiffs alleged that both the instrumentality and identity rules had been satisfied.

A trial to the court was held in February and March, 2008. The trial court examined the activities of Joseph, Jean and State Five prior and subsequent to the 2001 judgment and found the following facts. State Five, under its present name and various others, has been in existence since 1967.[6] State Five's most substantial asset is a piece of land in Hamden known as parcel C.[7] State Five primarily is engaged in leasing out portions of parcel C to commercial tenants, for which it collects rents. Parcel C also houses a cellular telephone tower, for which State Five has received rental income. On October 14, 1999, during the pendency of the 1999 action, the commissioner attempted to add State Five as a defendant in that action, but its motion was denied.[8]

Over the years, Joseph has quitclaimed real property to State Five, including parcel C in February, 1996. In January, 2000, he caused Tire Salvage, Inc., to transfer a strip of land to State Five so that parcel C would meet

[6] Although the corporation known as State Five was known by another name during earlier time periods, we refer to that entity as State Five throughout this opinion.

[7] Illegal dumping activities on properties other than parcel C were the main focus of the 1999 action.

[8] The basis of the commissioner's motion to add State Five as a party to the 1999 action was that access over parcel C was necessary to reach the properties involved in the 1999 action. There were no allegations that State Five was involved in the activities that were the subject of that action.

the requisite regulatory requirements for construction of the cellular telephone tower. Between 2001 and 2004, Joseph wrote personal checks transferring funds to State Five, and he provided a down payment for a pickup truck for the company.

Joseph presently has no ownership interest in State Five. All of the stock of State Five is owned by another entity, Recycling Enterprises (Recycling). Eighty percent of the stock of Recycling is owned by Jean, and the remaining 20 percent is owned by the two sons of Jean and Joseph, thereby giving the sons an indirect ownership interest in State Five. The sons are not parties to this action. This ownership structure originated in the late 1980s, when Joseph transferred all of the stock of State Five to Recycling, and has been in place since then, except for a period between December, 2001 and August, 2004. During that period, Recycling transferred ownership of all of State Five's stock to a friend of Jean and Joseph, William J. LaVelle.[9] The trial court found that Joseph had negotiated the transfer of stock to LaVelle, that it was not an authentic sale[10] and that Joseph and Jean retained control over State Five during the period of LaVelle's ownership.

Joseph currently is not an officer or director of State Five. Prior to February, 2001, he was president of State Five, but on February 15, 2001, LaVelle assumed that office. Jean is currently president and sole officer and director of State Five. The sons have not been involved in running either State Five or Recycling. According to the trial court, the sons "had no real involvement with [those companies]. They did not make any decisions

[9] LaVelle wanted to develop parcel C further as an industrial park. He wished to create distance between State Five and Joseph due to the latter's legal troubles with the state and the town.

[10] Although LaVelle executed an installment sale agreement and a $2.5 million promissory note in conjunction with the stock transfer, he never made any payments on the note.

necessary to run the business and did not make any suggestions that things be done any differently."

Prior to February, 2001, Joseph ran all aspects of State Five. Thereafter, although he held no formal office or position at State Five, he remained very involved in its operations. During the period that LaVelle owned State Five and was its president, LaVelle's control over State Five was restricted, and Joseph and Jean both continued to participate in State Five's affairs. Although it was agreed that LaVelle would split profits that accrued from the development of parcel C with Joseph and Jean, LaVelle ran into roadblocks when pursuing that development, and no significant progress was made. Jean frequently was present at State Five's offices and dealt with its tenants. Joseph maintained an office at State Five, sometimes received wages from the corporation and continued to deal with its tenants. He directed its bookkeeper and accountant as to how to characterize transactions, and he wrote correspondence on State Five's behalf. Both Joseph and Jean continued to write checks from State Five's checking account.

Subsequent to the 2001 judgment, State Five continued to earn rental income from its existing tenants, and it gained several new tenants during LaVelle's tenure. While State Five previously had operated profitably as a landlord and, between 1998 and 2000, was not liable on any notes to lending institutions, it began, starting in 2001, to take on substantial debt by assuming obligations of Hamden Sand & Stone, Inc., without also acquiring that corporation's assets. The corporate debt that State Five assumed had been personally guaranteed by Jean and Joseph. Between 2001 and 2006, State Five's financial condition worsened, it became thinly capitalized and most of its debt did not relate to its business as a landlord.

To keep State Five viable, Jean contributed her own funds, as well as those borrowed from her mother, to finance State Five. Additionally, she borrowed against her own property, and property she owned jointly with Joseph, and put the proceeds into State Five. State Five also opened a line of credit with Citizens Bank, which was secured with Jean's personal assets.

Despite its poor financial condition, State Five paid "thousands of dollars" worth of personal expenses for Jean and Joseph, consisting mostly of joint obligations, but also including individual expenses such as Joseph's legal expenses. State Five's accounting treatment of these personal expenses was improper and inconsistent, and it lacked appropriate documentation. Although Joseph and Jean have caused State Five to make payments to themselves or loans to family members, they have not caused State Five to make any payments due under the 2001 judgment.

After comprehensively surveying Connecticut's jurisprudence addressing traditional veil piercing claims, as well as *Litchfield Asset Management Corp.* v. *Howell*, 70 Conn. App. 133, 799 A.2d 298, cert. denied, 261 Conn. 911, 806 A.2d 49 (2002), which is the only Connecticut appellate decision explicitly approving a reverse veil piercing claim, the trial court applied the legal standards set forth in those cases, namely, the identity and instrumentality rules,[11] to hold State Five liable for the entire

[11] "The instrumentality rule requires, in any case but an express agency, proof of three elements: (1) [c]ontrol, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of [the] plaintiff's legal rights; and (3) that the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of. . . .

"The identity rule has been stated as follows: If [the] plaintiff can show that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, an adherence

2001 judgment against Joseph. The court thereafter applied the same rules and held Jean liable for the resulting judgment against State Five.

The trial court considered, but rejected, the defendants' argument that reverse veil piercing should not apply because the plaintiffs had adequate remedies at law that they had not pursued, including, inter alia, filing a fraudulent transfer action. The court concluded, however, that reverse veil piercing nevertheless was warranted because the parties, following the 2001 judgment, "were occupied with the appeal and remediation efforts," and because Jean and Joseph made unspecified misrepresentations in postjudgment interrogatories,[12] "attempted to use State Five to hide assets" and used State Five "funds to pay thousands of dollars in personal expenses, complicating any normal collection efforts." This appeal followed.

The defendants claim that the trial court improperly held State Five liable for the 2001 judgment against Joseph because this court has never recognized reverse veil piercing and argue that, for various policy reasons, it should not be adopted as a viable legal theory in Connecticut under any circumstances. Consequently, they request that *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 133, a case in which the Appellate Court applied reverse veil piercing to hold a corporate defendant liable for a stockholder's debt, be overruled. Alternatively, the defendants argue that

to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise." (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 232, 990 A.2d 326 (2010).

[12] In a subsequent articulation, the trial court elaborated: "Contrary to the evidence at trial, the postjudgment interrogatories responses stated that Joseph . . . was not employed by State Five and that State Five was holding no assets of his. Based on these responses, the plaintiffs, rightfully, did not seek any garnishment."

reverse veil piercing is not proper on the facts of the present case. Because we agree that the facts proven here do not support the application of reverse veil piercing as that doctrine has been applied in other jurisdictions, we need not answer the question of whether the doctrine should be disallowed in Connecticut under any and all circumstances.[13]

We begin with the applicable standard of review. "Whether the circumstances of a particular case justify the piercing of the corporate veil presents a question of fact." (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 234, 990 A.2d 326 (2010). Accordingly, we defer to the trial court's decision to pierce the corporate veil, as well as any subsidiary factual findings, unless they are clearly erroneous. Id. "A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Levine* v. *Sterling*, 300 Conn. 521, 535, 16 A.3d 664 (2011).

[13] We express no opinion on the continued viability of *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 133, other than to note that the factual scenario presented by that case differs substantially from the factual scenario in the present appeal. The circumstances relevant to a veil piercing analysis "necessarily vary according to the facts of the particular case. Therefore, each case in which the issue is raised should be regarded as sui generis, to be decided in accordance with its own underlying facts." (Internal quotation marks omitted.) *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, 187 Conn. 544, 556 n.7, 447 A.2d 406 (1982).

As evidenced by our discussion in this opinion and our particular criticisms of the trial court's analysis, we share the concerns expressed by the concurring justice with regard to the potential unfair effects of applying the reverse veil piercing doctrine. We are not convinced, however, that those concerns cannot be addressed adequately, in the appropriate case, by recognition of the doctrine only when it is proven that it achieves its equitable purpose without harming third parties. Because this so clearly is not such a case, and we are reluctant to presume that there is no possible factual scenario in which reverse veil piercing would be appropriate, we decline to hold that this doctrine is not viable under any circumstance at this juncture.

"Generally, a corporation is a distinct legal entity and the stockholders are not personally liable for the acts and obligations of the corporation"; *Saphir* v. *Neustadt*, 177 Conn. 191, 209, 413 A.2d 843 (1979); or vice versa. "Courts will, however, disregard the fiction of a separate legal entity to pierce the shield of immunity afforded by the corporate structure in a situation in which the corporate entity has been so controlled and dominated that justice requires liability to be imposed on the real actor." Id.

In a traditional veil piercing case, a litigant "requests that a court disregard the existence of a corporate entity so that the litigant can reach the assets of a corporate insider, usually a majority shareholder. In a reverse piercing action, however, the claimant seeks to reach the assets of a corporation or some other business entity . . . to satisfy claims or a judgment obtained against a corporate insider." *C.F. Trust, Inc.* v. *First Flight, L.P.*, 266 Va. 3, 10, 580 S.E.2d 806 (2003); see also *In re Blatstein*, 192 F.3d 88, 100 (3d Cir. 1999); *Postal Instant Press, Inc.* v. *Kaswa Corp.*, 162 Cal. App. 4th 1510, 1513, 77 Cal. Rptr. 3d 96 (2008), cert. denied, 2008 Cal. LEXIS 10671 (August 27, 2008); annot., 2 A.L.R.6th 195, § 2 (2005). In either circumstance, veil piercing is not lightly imposed. "[C]orporate veils exist for a reason and should be pierced only reluctantly and cautiously. The law permits the incorporation of businesses for the very purpose of isolating liabilities among separate entities." *Cascade Energy & Metals Corp.* v. *Banks*, 896 F.2d 1557, 1576 (10th Cir.), cert. denied sub nom. *Weston* v. *Banks*, 498 U.S. 849, 111 S. Ct. 138, 112 L. Ed. 2d 105 (1990). Accordingly, "the corporate veil is pierced only under exceptional circumstances, for example, where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice." (Internal quotation marks omitted.) *Angelo Tomasso, Inc.* v. *Armor Con-*

struction & Paving, Inc., 187 Conn. 544, 557, 447 A.2d 406 (1982).

Although some courts have adopted reverse veil piercing with little distinction as a logical corollary of traditional veil piercing, because the two share the same equitable goals, others wisely have recognized important differences between them and have either limited, or disallowed entirely, reverse veil piercing. See G. Crespi, "The Reverse Pierce Doctrine: Applying Appropriate Standards," 16 J. Corp. L. 33, 37 (1990) ("reverse pierce claims implicate different policies and require a different analytical framework from the more routine corporate creditor veil-piercing attempts"). Three specific concerns have been identified. "First, reverse piercing bypasses normal judgment-collection procedures, whereby judgment creditors [of an individual judgment debtor] attach the judgment debtor's shares in the corporation and not the corporation's assets." (Internal quotation marks omitted.) *Postal Instant Press, Inc.* v. *Kaswa Corp.*, supra, 162 Cal. App. 4th 1520. When corporate assets are attached directly for the benefit of the creditors of an individual, it prejudices rightful creditors of the corporation, who relied on the entity's separate corporate existence when extending it credit and "underst[ood] their loans to be secured—expressly or otherwise—by corporate assets." *Floyd* v. *Internal Revenue Service*, 151 F.3d 1295, 1299 (10th Cir. 1998).

Second, if a "corporation has other non-culpable shareholders, they [too] obviously will be prejudiced if the corporation's assets can be attached directly. In contrast, in ordinary piercing cases, only the assets of the particular shareholder [or other insider] who is determined to be the corporation's alter ego are subject to the attachment." (Internal quotation marks omitted.) *Postal Instant Press, Inc.* v. *Kaswa Corp.*, supra, 162 Cal. App. 4th 1520. Thus, "[a] key factor in any outsider

reverse piercing controversy is the presence of corporate shareholders other than the insider against whom the outsider is asserting the primary claim. If other shareholders do exist, allowance of a reverse pierce would prejudice those shareholders by allowing the outsider to attach assets in which they have an interest." G. Crespi, supra, 16 J. Corp. L. 65.[14]

Finally, because corporate veil piercing is an equitable remedy, it should be granted only in the absence of adequate remedies at law. See *Naples* v. *Keystone Building & Development Corp.*, supra, 295 Conn. 233; see also *Floyd* v. *Internal Revenue Service*, supra, 151 F.3d 1300; 1 W. Fletcher, Cyclopedia of the Law of Private Corporations (1999) § 41.25, p. 604; annot., 2 A.L.R.6th, supra, § 3, p. 195. In the case of a traditional veil pierce, "[w]hen a judgment debtor is a corporation, the judgment creditor cannot reach the assets of the individual shareholders due to limitations on liability imposed by corporate law"; *Postal Instant Press, Inc.* v. *Kaswa Corp.*, supra, 162 Cal. App. 4th 1522; thereby justifying the invocation of equity. Conversely, when the judgment debtor is a shareholder or other insider, many legal remedies potentially are available to reach corporate assets that rightfully should be available for collection, including the attachment of the debtor's shares in the corporation, if he or she is a shareholder, garnishment of his or her pay from the corporation, if he or she is an employee, challenging of his or her transfers of assets to the corporation as fraudulent conveyances or illegal conversion, or attribution of individ-

[14] "Judicial recognition of corporations as separate legal entities is well established and plays an important role in encouraging investment by limiting investor risk exposure." G. Crespi, supra, 16 J. Corp. L. 34. If courts permit reverse veil piercing without regard to whether nonculpable shareholders will be impacted, "the general expectations of investors that their corporations will be free from liability for claims against corporate insiders may be impaired. This impairment of investor expectation ultimately could reduce the usefulness of the corporate form as a vehicle for raising and deploying capital . . . ." Id., 64.

ual conduct to the corporation under theories of agency or respondeat superior. See id., 1520; *Floyd* v. *Internal Revenue Service*, supra, 1300. If pursued, these remedies may "[obviate] the need for the more drastic remedy of corporate disregard." *Floyd* v. *Internal Revenue Service*, supra, 1300; see, e.g., *Owens & Sons, Inc.* v. *Guastella East, Inc.*, 354 So. 2d 571, 572 (La. App. 1977) (finding reverse pierce "an unnecessary and therefore unavailable remedy" where judgment creditor could execute on debtors' shares).

When the preceding concerns are implicated, courts have declined to impose reverse veil piercing. To summarize, "a court considering reverse veil piercing must weigh the impact of such action upon innocent investors . . . . A court considering reverse veil piercing must also consider the impact of such an act upon innocent secured and unsecured creditors. The court must also consider the availability of other remedies the creditor may pursue." *C.F. Trust, Inc.* v. *First Flight, L.P.*, supra, 266 Va. 12–13.

We conclude that in the present matter, the trial court should not have applied reverse veil piercing, regardless of whether it is a viable theory in Connecticut. Certain of the trial court's subsidiary factual findings lacked evidentiary support and, therefore, were clearly erroneous. Those findings related to crucial factors that necessarily render reverse veil piercing inequitable. Additionally, after reviewing the trial court's application of the identity and instrumentality rules, although we conclude that the court's findings have some basis in the evidence, we nevertheless are left with the definite and firm conviction that a mistake has been made.

First, the plaintiffs failed to demonstrate[15] that the sons, indirect owners of a 20 percent interest in State

[15] In veil piercing cases, it is the burden of the party seeking to disregard the corporate form that there is a basis for doing so. See 1 W. Fletcher, supra, § 41.28, pp. 610–11.

Five, were participants in any wrongdoing in relation to State Five's affairs. Moreover, there was no evidence indicating that their ownership interests in State Five somehow were illusory. The sons were not made parties to the present action; see *Estate of Daily* v. *Title Guaranty Escrow Service*, 178 B.R. 837, 844 (D. Hawaii 1995) (refusing to allow reverse piercing claim when debtor's children, to whom debtor allegedly had transferred corporate stock for no consideration, could not be made parties to action and therefore could not defend their legal interests), aff'd, 81 F.3d 167 (9th Cir. 1996); nor were they called to testify about their knowledge or activities regarding State Five. No testimony or other evidence was presented that tended to show that the sons were aware of, and acquiesced in, any of the conduct that the trial court found objectionable. Nevertheless, according to the trial court, because the evidence showed that the sons "had no real involvement in" State Five and "did not make any decisions necessary to run the business and did not make any suggestions that things be done any differently," it "did not support a finding that the . . . sons were innocent shareholders" whose interests required protection. We do not agree.

Evidence of the sons' lack of involvement in running State Five, making necessary business decisions or suggesting any changes simply does not support the trial court's finding, implicit in the previous statement, that they were complicit in Joseph's activities, which the court relied on to justify a reverse veil pierce. Accordingly, that important finding is clearly erroneous. Reasonably, the circumstances cited by the court suggest only that the sons were passive minority owners of State Five, and nothing more. Compare *Sweeney, Cohn, Stahl & Vaccaro* v. *Kane*, 6 App. Div. 3d 72, 78–79, 773 N.Y.2d 420 (2004) (permitting reverse veil pierce where judgment debtor's husband, co-owner of corporation, "certainly acted in concert with the judgment debtor,"

"was a driving force behind the scheme to avoid [her] creditors" and, although party to case, never claimed otherwise), appeal dismissed, 3 N.Y.3d 751, 821 N.E.2d 965, 788 N.Y.S.2d 661 (2004). Because the plaintiffs did not establish that the sons were not innocent shareholders, it was improper for the trial court to apply reverse veil piercing without regard to whether their interests would be impacted. Compare *LFC Marketing Group, Inc.* v. *Loomis*, 116 Nev. 896, 905–906, 8 P.3d 841 (2000) (upholding reverse pierce where trial court had made specific finding that innocent shareholder would not be harmed by attachment of commissions wrongfully diverted to corporation); *Standage* v. *Standage*, 147 Ariz. 473, 476, 711 P.2d 612 (App. 1985) (upholding reverse pierce in dissolution action where husband and wife owned entire corporation and no harm to innocent shareholders would result).

Second, the plaintiffs did not demonstrate that nonparty creditors of State Five would not be harmed by making all of the corporation's assets available to satisfy the 2001 judgment by way of a reverse veil pierce. Testimony and printed statements in evidence at trial indicated that State Five had a line of credit of approximately $200,000 with Citizens Bank that it had actively accessed, at times carrying balances that were close to the limit. The trial court in its memorandum of decision did not address this circumstance but subsequently, in response to the defendants' motion for articulation, pointed to its factual finding that the line of credit was secured with Jean's personal assets, not State Five property. The court further noted that a 2007 accounting ledger of State Five indicated that, earlier in the year, the line of credit had been paid off.

To the extent that the court's observations constitute a finding that no third party corporate creditors would be harmed by reverse veil piercing, that finding is clearly erroneous. It is of no consequence that State Five's line

of credit is not secured by corporate assets; a lender in this context extends credit in reasonable reliance on the existence of *both* a viable borrower in possession of assets *and* the additional security provided by a secondary obliger. See *Floyd* v. *Internal Revenue Service*, supra, 151 F.3d 1299 (corporate creditors rely on entity's separate existence when extending it credit and "understand their loans to be secured—*expressly or otherwise*—by corporate assets" [emphasis added]); *In re Phillips*, 139 P.3d 639, 646 (Colo. 2006) ("secured *and unsecured* creditors of the corporation have a cognizable legal interest in corporate assets, upon which they relied in lending money and selling goods and services to the corporation" [emphasis added]). Permitting direct attachment of corporate assets to satisfy an individual insider's debt undermines corporate viability, reasonably relied upon by creditors, with no forewarning. Additionally, even if a brief entry in State Five's records, which the trial court considered to be deficient in many respects, suffices to establish that the line of credit was repaid in early 2007, it is silent as to the outstanding balance, if any, on that line of credit in January, 2009, when the trial court issued its memorandum of decision applying reverse veil piercing. In sum, the court did not, before applying reverse veil piercing, adequately ensure that third party creditors did not exist or, if they did, that they would not be prejudiced by the judgment. See, e.g., *Standage* v. *Standage*, supra, 147 Ariz. 476–77 (before applying reverse veil piercing, trial court made specific provision for corporate liabilities, including not only tax deficiencies, maintenance costs and potential expenses connected with rental property owned by corporation, but also for unknown liabilities that could arise).

Aside from the foregoing problems, our review of the trial court's application of the rules governing veil piercing convinces us that the court improperly con-

cluded that the equitable remedy was warranted in this case.[16] Pursuant to the instrumentality rule, to justify any veil pierce, it is not enough for the plaintiff merely to prove that the insider debtor exercised complete control over the subject corporation. It further must be shown that the debtor used that control "to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of [the plaintiffs'] legal rights; *and* . . . that the aforesaid control and breach of duty . . . proximately cause[d] the injury or unjust loss complained of." (Emphasis in original; internal quotation marks omitted.) *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, supra, 187 Conn. 553.

Applying that standard to the present case, the trial court reasoned that Joseph exercised his control over State Five[17] wrongfully or unjustly and contrary to the plaintiffs' rights by: negotiating the transfer of State Five to LaVelle; transferring financial resources to State Five; comingling personal funds with corporate funds; diverting State Five assets for personal use; and paying personal expenses as well as the property taxes of one of his corporations, while not satisfying the 2001 judgment. According to the court, "Joseph . . . committed an unjust act by using [State Five] to evade satisfying the 2001 judgment."

As to proximate causation, the trial court found that "Joseph . . . and [his corporations] have not complied with the 2001 judgment; specifically, they have not funded the closure of the [properties involved in the 1999 action], nor have they paid the assessed penalties.

[16] We believe that the defendants' argument with respect to the trial court's application of traditional veil piercing from State Five to Jean applies similarly to the court's application of reverse veil piercing from Joseph to State Five.

[17] We do not take issue with the trial court's finding that Joseph exercised control over State Five.

Joseph['s] . . . direct or indirect control or influence over State Five was used to avoid funding the obligations under the 2001 judgment, including the obligation to pay the civil penalties assessed. Joseph . . . was responsible for transferring assets and funds out of the 2001 judgment [corporations], thereby depriving the plaintiffs of means to collect the 2001 judgment. Joseph . . . commingled his personal funds with [State Five] to evade the 2001 judgment.

"The plaintiffs attempted property executions, but they have not been able to satisfy the 2001 judgment. They have been deprived of the means of collecting the 2001 judgment. The actions of Joseph . . . were a substantial factor in the failure to satisfy the 2001 judgment and were the proximate cause of the plaintiffs' loss. As a result, Joseph . . . and [his corporations] have not funded the obligations under the [2001] judgment and have not paid the civil penalties."

The chief problem with this analysis is that it fails to establish with specificity the necessary connection between Joseph's improper actions vis-á-vis State Five and the plaintiffs' inability to collect on the 2001 judgment. In short, to justify imposing the entire obligation of the 2001 judgment on State Five, the plaintiffs needed to show that Joseph exercised his control over State Five to divert or secrete assets *that otherwise would have been available to satisfy that judgment*, namely, assets that belonged to him personally or to his corporations, and, further, that these maneuvers were the *proximate cause* of the plaintiffs' inability to collect $3.8 million that it otherwise would have been able to recover. Although there was evidence that Joseph, in the years following the 2001 judgment, transferred some assets from himself and his corporations to State Five, the trial court did not calculate the value of those transfers, and the evidence presented would not support a finding that their value came anywhere near to the

amount for which the court ultimately held State Five liable.[18] Additionally, although Joseph transferred parcel C to State Five for no consideration, he did so in 1996, more than three years before the institution of the 1999 action and more than five years prior to the 2001 judgment that imposed the fines at issue. Given that circumstance, it cannot be argued that the transfer was contrary to the plaintiffs' legal rights and proximately caused their inability to collect on their judgment.[19]

[18] In a seventy-one page memorandum of decision, the trial court's only specific finding regarding a transfer of assets from Joseph and his corporations to State Five was that, in or around 2000, some topsoil, which later was sold for $20,000, was transferred from Hamden Sand & Stone, Inc., to State Five. More frequently, the court found that the corporations transferred their *liabilities* to State Five. With regard to a $150,000 debt of Hamden Sand & Stone, Inc., the trial court observed that State Five's "records show that equipment associated with [the] debt never came into the business, nor were the proceeds of any sale of assets reflected in the books."

The trial court found that Joseph "wrote personal checks to State Five," but did not indicate the amounts of those checks. Checks in evidence, written from Joseph to State Five following the 2001 judgment, total $59,500. An additional check from Quinnipiak Real Estate & Development Corporation to State Five, endorsed by Joseph and dated May 28, 2002, is for $7500. The trial court also found that Joseph "wrote a check on the Discover Card [of Jean and Joseph] for a down payment on a . . . pickup truck for State Five," but does not specify the amount. A memorandum in evidence indicates that the down payment was $4784.49.

In a July, 2009 articulation responding to the defendants' claim that the plaintiffs had failed to pursue other opportunities for collecting the 2001 judgment, the trial court suggested that $250,000 generated from remediation activities at one of the properties at issue in the 1999 action improperly had been recorded in State Five's books. Assuming that to be the case, the total of all transfers of assets during the relevant period is approximately $342,000, which is less than 10 percent of the judgment for which the trial court ultimately found State Five liable. Because transfers to State Five totaling only $342,000 could not be the proximate cause of the plaintiffs' failure to collect a judgment that had grown to exceed $4 million, application of a reverse veil pierce to make *all* of State Five's assets available for collection was not equitable.

[19] Similarly, Joseph's transfer of the strip of land from Tire Salvage, Inc., to State Five for construction of the cellular telephone tower occurred in 2000, subsequent to the institution of the 1999 action but prior to the 2001 judgment. If the plaintiffs could show that the two real estate transfers,

Finally, to the extent that Joseph caused State Five to use its own assets, or those transferred to State Five by its majority owner, Jean, to pay his personal expenses and the tax bill of one of his corporations, his actions did not offend the plaintiffs' collection rights nor cause them any detriment. Because neither Jean nor State Five were defendants in the 1999 action, and because Joseph has had no ownership interest in State Five since the late 1980s, the assets of Jean and State Five were not subject to the 2001 judgment. Accordingly, use of those assets to pay Joseph's personal expenses, although certainly offensive to State Five's interests, was not contrary to the plaintiffs' rights and was not the proximate cause of their inability to collect the judgment against Joseph.[20] If anything, payment of a judgment debtor's expenses by nonliable third parties *enhances* a creditor's ability to collect from the judgment debtor, in this case Joseph. See, e.g., *In re Blatstein*, supra, 192 F.3d 99–100 (upholding district court's refusal to reverse pierce veil where, inter alia, corporation's payments of insider's expenses "actually benefitted his creditors"); *Lifshutz* v. *Lifshutz*, 61

despite their timing, were improper maneuvers to avoid payment on a preexisting claim, their remedy was to pursue a fraudulent transfer action under the Uniform Fraudulent Transfer Act, General Statutes § 52-552 et seq., which they did not do. Deeds in evidence showed that the transfers were timely recorded in the land records and, therefore, were a matter of public knowledge. Unlike the trial court, we are not convinced that the plaintiffs' preoccupation with other aspects of this litigation excused this lapse. The foregoing is illustrative of a criticism of reverse veil piercing previously discussed, namely, that it permits a bypass of adequate legal remedies. In this instance, application of the statutory provisions governing fraudulent transfer would have established whether the land transfers, given their timing, were wrongful to the plaintiffs and, if so, would have limited the plaintiffs' recovery to the amount of harm caused.

[20] For the same reason, the temporary transfer of State Five's stock to LaVelle did not harm the plaintiffs. Because Joseph did not own that stock, the plaintiffs could not have attached it to satisfy the 2001 judgment. Its transfer to LaVelle was, therefore, of no consequence, even if Joseph negotiated that transfer.

S.W.3d 511, 518 (Tex. App. 2001) (reverse veil pierce was inappropriate in dissolution action where husband controlled corporations and used their funds to pay his personal expenses, because those payments "actually enhanced the [marital] community [property] at the expense of the corporations").[21]

Understandably, the trial court was troubled by the fact that State Five, owned by Joseph's family members, had assets that benefited Joseph while the obligations imposed by the 2001 judgment remained outstanding. It is not enough, however, simply to show that a judgment remains unsatisfied; indeed, most veil piercing claims are initiated due to unpaid debts. *Sea-Land Services, Inc.* v. *Pepper Source*, 941 F.2d 519, 522–23 (7th Cir. 1991); see also 18 Am. Jur. 2d 696, Corporations § 47 (2d Ed. 2004) ("[a] corporate entity may not be disregarded simply because it stands as a bar to a litigant's recovery of property"). There must be some wrong beyond the creditor's inability to collect, which is contrary to the creditor's rights, and that wrong must have proximately caused the inability to collect. See *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, supra, 187 Conn. 558. Simply put, the segregation of assets within

[21] In addition to finding reverse veil piercing justified under the instrumentality rule, the trial court found it applicable pursuant to the identity rule. That rule requires, in addition to a unity of interest between an insider and his corporation(s), that permitting a corporate defendant to "escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise" through adherence to the concept of its separate existence "would serve only to defeat justice and equity . . . ." (Internal quotation marks omitted.) *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, supra, 187 Conn. 554. Similar to the instrumentality rule, the identity rule is not satisfied in the present case insofar as it is neither unjust nor inequitable to permit State Five to avoid liability for the multimillion dollar judgment against Joseph and his other corporations when it has received little in the way of assets from those parties and much in the way of liabilities and, further, has been caused to pay other expenses of Joseph for which it is not legally obligated. Again, State Five was not a defendant in the 1999 action, and parcel C was not the focus of the 2001 judgment.

State Five and the control of Joseph and Jean over the family owned corporation, standing alone, cannot constitute the basis for veil piercing. See *Cascade Energy & Metals Corp.* v. *Banks*, supra, 896 F.2d 1578 ("the 'injustice' or 'inequity' on which a piercing claim is based cannot stem from the mere existence of limited liability, which is a legitimate characteristic of the corporate form").

To summarize, the trial court's application of the equitable remedy of reverse veil piercing was based in part on unsupported factual findings, and additionally, the court employed improper reasoning when analyzing other facts such that we are left with the definite and firm conviction that a mistake has been made. Accordingly, the trial court's determination that reverse veil piercing was warranted must be set aside as clearly erroneous, and judgment on the plaintiffs' veil piercing claims should be rendered in favor of the defendants.

The judgment is reversed and the case is remanded with direction to render judgment for the defendants.

In this opinion NORCOTT, PALMER, McLACHLAN and EVELEIGH, Js., concurred.

ZARELLA, J., concurring. I agree with the result that the majority reaches but write separately to express my view that *Litchfield Asset Management Corp.* v. *Howell*, 70 Conn. App. 133, 799 A.2d 298, cert. denied, 261 Conn. 911, 806 A.2d 49 (2002), which applied the doctrine of reverse veil piercing in this state for the first time, should be disavowed. Because the facts of the present case implicate the applicability of the doctrine, and because the defendants[1] expressly have asked this court to overrule *Howell*, I believe it is appropriate and necessary to address the issue. The majority

[1] The defendants are State Five Industrial Park, Inc., and Jean L. Farricielli.

decides this case by assuming that the doctrine is viable in Connecticut but nevertheless determines that the facts of this case do not fall within that doctrine. Resolution of the larger issue, according to the majority, should be left for another day. Connecticut courts, however, have followed *Howell* in several decisions and, in doing so, have allowed reverse veil piercing in some cases, including in the prior proceedings in the present case.[2]

[2] The doctrine has been cited in at least seven trial court decisions. *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, Superior Court, judicial district of Hartford, Docket No. HHD-CV-05-4105888-S (January 5, 2009) (reverse veil piercing is viable legal theory and is applicable to corporations); *Cadle Co.* v. *Zubretsky*, Superior Court, judicial district of Hartford, Docket No. CV-04-0832477-S (January 30, 2008) (same); *Angle* v. *Angle*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FST-FA-04-4000812-S (March 22, 2007) ("Connecticut law clearly recognizes the doctrine of piercing the corporate veil as well as the concept of reverse piercing"); *LSE Leasing Corp.* v. *Greenblatt*, Superior Court, judicial district of New London, Docket No. KNL-CV-06-5000878 (December 14, 2006) ("[w]hen the elements of piercing the corporate veil have been established, a reverse pierce is a viable remedy that a court may employ [against a corporation] when necessary to achieve an equitable result and when unfair prejudice will not result" [internal quotation marks omitted]); *Cadle Co.* v. *Zubretsky*, Superior Court, judicial district of Hartford, Docket No. CV-04-0832477-S (February 23, 2006) (same); *Ackerman* v. *Sobol Family Partnership, LLP*, Superior Court, judicial district of Hartford, Docket No. CV-03-0826123 (May 12, 2004) (recognizing applicability of reverse veil piercing doctrine to limited liability companies but dismissing case in part because pleadings failed to support claim under that doctrine); see also *In re Flanagan*, 373 B.R. 216, 223 (Bankr. D. Conn. 2007) (" '[r]everse piercing' claims have been recognized as viable causes of action in Connecticut").

The impact of the Appellate Court's decision in *Howell* extends beyond the boundaries of this state. For example, the Virginia Supreme Court relied on the decision when it adopted reverse veil piercing as a viable doctrine in that state. See *C.F. Trust, Inc.* v. *First Flight Ltd. Partnership*, 266 Va. 3, 11, 580 S.E.2d 806 (2003); see also *C.F. Trust, Inc.* v. *First Flight Ltd. Partnership*, 306 F.3d 126, 141 (4th Cir. 2002) (reasoning that "[i]f a Virginia court followed the rationale of [*Howell*], outsider reverse veil-piercing against the limited partnership would be a viable option . . . even if not generally permitted in cases involving limited partnerships"). Scholars and academics also have relied on *Howell* in their discussions regarding the appropriateness and applicability of the doctrine of reverse veil piercing. See, e.g., C. Bishop, "Reverse Piercing: A Single Member LLC Paradox," 54 S.D. L. Rev. 199, 230–31 (2009); L. Heilman, comment, "*C.F. Trust, Inc.* v. *First Flight Limited Partnership*: Will the Virginia Supreme Court Permit Outside Reverse Veil-Piercing Against a Limited Partnership?," 28 Del. J.

Notably, the courts following *Howell* have extended it beyond the scenario presented by that case, in which the Appellate Court allowed a judgment creditor to engage in the reverse veil piercing of a limited liability company in which the debtor held a controlling membership. See id., 135–36, 158. In sum, the rule espoused in *Howell* has been broadly interpreted such that reverse veil piercing is applicable to all corporate entities as well as limited liability companies. It appears, therefore, that the majority's decision to "express no opinion on the continued viability of . . . *Howell*"; footnote 13 of the majority opinion; will effectively sanction the continued application of the reverse veil piercing doctrine in our courts. I believe that this court should avail itself of this opportunity to consider and reject this doctrine. Because I believe that compelling considerations militate against allowing reverse veil piercing, I would overrule *Howell* to the extent it holds that reverse veil piercing is a viable legal theory in this state.

The majority has summarized and explained the general principles governing both traditional veil piercing and reverse veil piercing, and, therefore, I do not repeat that discussion in any length. Suffice it to say that virtually all jurisdictions accept the doctrine of traditional veil piercing, whereas jurisdictions are split on the propriety of adopting the reverse veil piercing doctrine.[3]

Corp. L. 619, 628–29, 636–37 (2003); M. Richardson, comment, "The Helter Skelter Application of the Reverse Piercing Doctrine," 79 U. Cin. L. Rev. 1605, 1623 n.141 (2011). Additionally, commentary to the Revised Limited Liability Company Act cites to *Howell* with approval in its discussion of charging orders against limited liability companies. Revised Uniform Limited Liability Company Act (2006) § 503 (g), comment, 6B U.L.A. 500 (2008).

[3] The traditional veil piercing doctrine has a long history in the law of business corporations in this state and virtually all other jurisdictions, and generally has been expanded to limited partnerships and, more recently, limited liability companies. See, e.g., *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, 187 Conn. 544, 552–53, 447 A.2d 406 (1982) (citing cases in which Connecticut courts have found it appropriate to pierce corporate veil). See generally S. Bainbridge, "Abolishing Veil Piercing," 26 J. Corp. L. 479, 480–513 (2001) (describing history and evolution of veil piercing

Those jurisdictions that reject reverse veil piercing provide several justifications for doing so, but those that adopt the doctrine typically do so with little or no exploration of its potential effects, although they generally cite equitable grounds for doing so. Certainly, at first glance, traditional veil piercing and reverse veil piercing appear to be two sides of the same coin. See *In re Phillips*, 139 P.3d 639, 645 (Colo. 2006); see also *In re Moore*, 608 F.3d 253, 258 (5th Cir. 2010) ("[w]e have previously held that distinction [between traditional and reverse veil piercing] to be one without a difference"). "In traditional veil piercing, the veil shields a shareholder who is abusing the corporate fiction to perpetuate a wrong. In outside reverse piercing, however, the corporate form protects the corporation which, through the acts of a dominant shareholder or other corporate insider, uses the legal fiction to perpetuate a fraud or defeat a rightful claim of an outsider. While traditional [piercing] and outside reverse piercing affect diverse corporate interests, the purposes sought to be achieved are similar.

"Both types of piercing strive to achieve an equitable result. . . . In traditional piercing, equity requires [that] the veil be pierced to impose liability on a shareholder who has abused the corporate form for his or her own advantage. . . . Similarly, in outside reverse

doctrine). Reverse veil piercing, although considerably less developed and only somewhat recently addressed by the Appellate Court in *Howell*, also can be traced back nearly one century in other jurisdictions. See, e.g., *Kingston Dry Dock Co.* v. *Lake Champlain Transportation Co.*, 31 F.2d 265, 267 (2d Cir. 1929) (recognizing in very rare circumstances that parent company may be held liable for subsidiary).

Although the plaintiffs argue that our holding in *Zaist* v. *Olson*, 154 Conn. 563, 576–78, 227 A.2d 552 (1967), suggests that this court also previously has employed reverse veil piercing, it is unclear from the facts and reasoning in that decision whether that is true. To the extent that *Zaist* can be read to support the application of the reverse veil piercing doctrine, I would overrule its application of that doctrine for the same reasons that I would overrule the Appellate Court's adoption of it in *Howell*.

piercing, an equitable result is achieved by ignoring the corporate fiction to attach liability to the corporation." (Citations omitted.) *In re Phillips*, supra, 139 P.3d 645.

Jurisdictions adopting the reverse veil piercing doctrine largely have relied on a perceived fundamental similarity between traditional and reverse piercing. With respect to both types of piercing, courts focus on identifying whether an individual has abused the corporate form by failing to treat the corporation as a distinct legal entity. Accordingly, a court will not allow that individual to rely on the statutory protections limiting the individual's liability. Put differently, if an individual and a corporation are indistinguishable by virtue of the individual's own acts, the corporate veil should be subject to piercing in either direction. Thus, both traditional piercing and reverse piercing attempt to rectify the same inequity, and, therefore, some jurisdictions that permit traditional veil piercing also permit reverse veil piercing.

The flaw with this rationale is that it glosses over critical distinctions between traditional and reverse veil piercing. See *Postal Instant Press, Inc.* v. *Kaswa Corp.*, 162 Cal. App. 4th 1510, 1522, 77 Cal Rptr. 3d 96 (2008) ("[t]raditional alter ego doctrine and reverse piercing, while having similar goals, advance those goals by addressing very different concerns"), review denied, 2008 Cal. LEXIS 10671 (Cal. August 27, 2008). The focus cannot be only on whether an individual has abused the corporate form. Under traditional veil piercing, when an individual is held liable for the actions of the corporation, the corporation itself is not affected by the piercing. In the case of reverse veil piercing, however, the opposite is true. The corporation itself is liable—and thus corporate assets are vulnerable—for the wrongdoing of an individual. In more concrete terms, reverse veil piercing allows courts to alter the legislatively created corporate form by allowing a creditor to reach other-

wise protected corporate assets. Three separate but related issues specifically illustrate the problem with this result.[4]

First, reverse veil piercing "bypasses normal judgment-collection procedures, whereby judgment creditors attach the judgment debtor's shares in the corporation and not the corporation's assets." *Cascade Energy & Metals Corp.* v. *Banks*, 896 F.2d 1557, 1577 (10th Cir.), cert. denied sub nom. *Weston* v. *Banks*, 498 U.S. 849, 111 S. Ct. 138, 112 L. Ed. 2d 105 (1990); see also M. Richardson, comment, "The Helter Skelter Application of the Reverse Piercing Doctrine," 79 U. Cin. L. Rev. 1605, 1624 (2011) ("counts raised against the corporation for aiding and abetting or under general agency principals could succeed under similar circumstances to those present in many reverse piercing cases"). "[T]raditional theories of conversion, fraudulent conveyance of assets, respondeat superior and agency law are adequate to deal with situations [in which] one seeks to recover from a corporation for the wrongful conduct committed by a controlling stockholder without the [need] to invent a new theory of liability." *Cascade Energy & Metals Corp.* v. *Banks*, supra, 1577.

The Tenth Circuit Court of Appeals recently explained why creating an additional means of securing

[4] In addition, there is somewhat of an internal, conceptual inconsistency with the reverse veil piercing doctrine. As I noted previously, the test for traditional veil piercing generally requires courts to find that the corporation causing the harmful act was so dominated by the individual shareholder that they became the same for purposes of establishing liability. Yet, if this analysis is properly inverted for a reverse veil piercing claim, a court should be required to find that a shareholder was so dominated by the corporation that they became the same. Cf. *Estate of Daily* v. *Title Guaranty Escrow Service, Inc.*, 178 B.R. 837, 845 (D. Haw. 1995), aff'd mem. sub nom. *Estate of Daily* v. *Lilipuna Associates*, 81 F.3d 167 (9th Cir. 1996). Herein lies the conceptual inconsistency, and "it stretches the imagination, not to mention the equities, to conceive of how someone wholly outside the corporation may be used to pierce the corporate veil from within." Id.

a judgment against a corporation would be inappropriate by distinguishing a claim grounded in fraudulent transfer from one grounded in reverse veil piercing: "The difference between finding an entity to be a nominee holding fraudulently conveyed assets and finding an entity to be the debtor's alter ego under [the] reverse veil piercing doctrine may be a subtle one. But it is no less significant for its subtlety. Under [the] reverse veil piercing doctrine, the [creditor] would have needed to show that the [corporations] at issue were not just [the debtor's] nominees with respect to the particular assets in question but his alter ego for all purposes. See *Bollore S.A.* v. *Import Warehouse, Inc.*, 448 F.3d 317, 325 (5th Cir. 2006) (recognizing that courts can reverse pierce a corporation's veil based on a finding of alter ego). As reward for making this more onerous showing, the [creditor] might have seized all the assets in the trusts without regard to their original source. See *Oxford Capital Corp.* v. *United States*, 211 F.3d 280, 284 (5th Cir. 2000) (Under the alter ego doctrine . . . all the assets of an alter ego corporation may be levied [on] to satisfy the tax liabilities of a delinquent taxpayer-shareholder if the separate corporate identity is merely a sham.). . . . By contrast, a nominee holding a fraudulently conveyed asset may maintain an independent legal identity and lawfully hold other assets of its own. Finding that an entity is a nominee of the debtor only requires a showing that the nominee holds bare or apparent title to a particular asset that actually belongs to the debtor. And it is only the particular assets held in this fashion (not others the nominee may possess in its own right) that the debtor's creditor may reach." (Internal quotation marks omitted.) *In re Krause*, 637 F.3d 1160, 1165 (10th Cir. 2011); see also *Postal Instant Press, Inc.* v. *Kaswa Corp.*, supra, 162 Cal. App. 4th 1523 ("[c]ounsel for [the creditor] acknowledged . . . that [it] did not pursue those [traditional] legal remedies because

amending the judgment to add [a reverse veil piercing claim against the corporation] as a judgment debtor was simply more expedient"). Simply put, reverse veil piercing greatly expands the scope of assets that a judgment creditor would normally be able to reach under traditional causes of action.

A second issue arises with respect to what assets can, and should be, reached by a creditor. Reverse veil piercing allows a judgment creditor to reach the assets of a corporation to the detriment of other shareholders and existing creditors. That is, "to the extent that the corporation has other non-culpable shareholders, they obviously will be prejudiced if the corporation's assets can be attached directly. In contrast, in ordinary piercing cases, only the assets of the particular shareholder who is determined to be the corporation's alter ego are subject to attachment." *Cascade Energy & Metals Corp.* v. *Banks*, supra, 896 F.2d 1577. Some jurisdictions that have allowed reverse veil piercing have attempted to eliminate, or at least minimize, this concern by prohibiting reverse veil piercing in situations in which doing so would harm other shareholders, or otherwise would be inequitable. See *C.F. Trust, Inc.* v. *First Flight Ltd. Partnership*, 266 Va. 3, 12–13, 580 S.E.2d 806 (2003) ("[A] court considering reverse veil piercing must weigh the impact of such action [on] innocent investors, in this instance, innocent limited partners or innocent general partners. A court considering reverse veil piercing must also consider the impact of such an act [on] innocent secured and unsecured creditors. The court must also consider the availability of other remedies the creditor may pursue."); see also *In re Phillips*, supra, 139 P.3d 646 ("A court may reverse pierce the corporate veil and obtain the assets of a corporation for the obligations of a controlling shareholder or other corporate insider only upon a clear showing that [1] the controlling insider and the corporation are alter egos of each other . . .

[2] justice requires recognizing the substance of the relationship over the form because the corporate fiction is utilized to perpetuate a fraud or defeat a rightful claim . . . and [3] an equitable result is achieved by piercing . . . . Only when a claimant makes a clear showing of each factor may the corporate form be disregarded." [Citations omitted.]).

Another way to minimize this concern may be to restrict veil piercing to single shareholder corporations, for it is difficult to conceive of other circumstances in which reverse piercing would not affect other shareholders. See *Postal Instant Press, Inc.* v. *Kaswa Corp.*, supra, 162 Cal. App. 4th 1524 ("To ameliorate the flaws in outside reverse piercing, courts recognizing the doctrine have imposed qualifications and requirements which, in their totality, essentially eliminate the outside reverse piercing doctrine as a practical matter. Indeed, if all the requirements of outside reverse piercing are met, its application would be unnecessary to protect the judgment creditor."). Moreover, if reverse veil piercing is truly an equitable remedy, and thus only available to a plaintiff if no legal remedy exists, it would appear that the limitations espoused by the Virginia and Colorado Supreme Courts in *C.F. Trust, Inc.*, and *In re Phillips*, respectively, are superfluous.[5] In any event, it

[5] There may be one instance in which reverse veil piercing is the only feasible means to adequately satisfy a judgment. When the wrongdoer is also the alter ego of a single member limited liability company, current judgment collection methods may prevent adequate satisfaction of a judgment. Judgment creditors are initially limited to obtaining a charging order against the limited liability company member. See General Statutes § 34-171. This, however, only transfers to the judgment creditor a right to receive distributions; it does not confer membership or voting rights. See General Statutes §§ 34-170 and 34-171. "[T]he transferee then does not become a member in substitution for the only transferring member simply by default. Rather, the transferee must obtain the consent of the transferor to become the only substituted member." C. Bishop, "Reverse Piercing: A Single Member LLC Paradox," 54 S.D. L. Rev. 199, 219 (2009). Simply put, "the transferring member may well insist on continuing as the only rightful member to prevent the creditor from reaching the [limited liability company's] assets. In these cases, the creditor will be effectively precluded from reaching those

does not address a broader, systemic problem implicated by the doctrine, which I discuss next.

A third concern is that reverse piercing injects uncertainty into the corporate structure in a way that could systemically alter the ability of corporations to obtain loans and investment capital. "[T]he prospect of losing out to an individual shareholder's creditors will unsettle the expectations of corporate creditors who understand their loans to be secured—expressly or otherwise—by corporate assets. Corporate creditors are likely to insist on being compensated for the increased risk of default posed by outside reverse-piercing claims, which will reduce the effectiveness of the corporate form as a means of raising credit." *Floyd* v. *Internal Revenue Service*, 151 F.3d 1295, 1299 (10th Cir. 1998); see also M. Richardson, supra, 79 U. Cin. L. Rev. 1628 ("If reverse piercing is allowed, there would be no rational way to investigate a business to determine the risk it presents. . . . There are multiple implications to [reverse piercing as a] collateral attack on the rights of consensual creditors. . . . If creditors take steps to shield themselves from this increased risk, the result could be a general chilling of the ability of small businesses with few owners to receive financing. At the very least, lenders may begin through altered risk calculations to spread the cost of individual misdeeds across all small businesses.").

In light of the foregoing, I believe that we should overrule *Howell* and reject the doctrine of reverse veil piercing until the legislature signals otherwise. Reverse veil piercing should be a remedy created by the legisla-

assets under statutory approaches inherent in . . . limited liability company law." Id., 220. Nevertheless, even if reverse veil piercing would be the only feasible method available, limited liability companies, like corporations, are creatures of statute. It therefore should be within the prerogative of the legislature, rather than the courts, to amend the statutory scheme to allow reverse veil piercing.

ture, and not the courts, because corporate entities are creatures of statute, and, unlike traditional veil piercing, reverse veil piercing alters the corporate attributes established by those statutes. As one court has succinctly stated in rejecting the doctrine, "[a]llowing . . . reverse piercing claims would constitute a radical change to the concept of piercing the corporate veil . . . and, thus, should be created by the [legislature] and not by [the] [c]ourt." *Acree* v. *McMahan*, 276 Ga. 880, 883, 585 S.E.2d 873 (2003).

STATE OF CONNECTICUT *v.* WILLIE JAMES COLEMAN
(SC 18519)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.

Syllabus

The defendant, who was convicted after a jury trial of murder in connection with the stabbing death of his girlfriend, W, appealed to this court, claiming, inter alia, that the state failed to provide sufficient evidence to prove beyond a reasonable doubt his intent to kill W. After stabbing W with a grill fork and a steak knife, the defendant telephoned 911 requesting an ambulance and reported to the operator what had happened. The defendant also informed the police that he and W had been drinking prior to the incident, that he apparently "snapped" after she allegedly boasted of her infidelity, and that he had not intended to hurt or kill W. Although the medical examiner's autopsy report revealed various superficial cuts, scrapes and puncture wounds on her hands, back and scalp, W ultimately died from a single stab wound in her chest. At trial, the court agreed to the defendant's request for the jury to be instructed on the lesser included offenses of murder and on the affirmative defense of extreme emotional disturbance. The jury returned a verdict of guilty on the murder charge, and the trial court rendered judgment in accordance with the verdict. On the defendant's appeal, *held*:

1. The evidence was sufficient to establish beyond a reasonable doubt that the defendant had the specific intent to kill W, this court having been unable to conclude that the inferences necessarily drawn by the jury lacked reason and logic; the defendant's comments to the 911 operator that he used a grill fork and then a knife inferred an escalation in the choice of weapons and an intention to inflict more serious injury, the

fact that the defendant stabbed W in her chest with a knife and did so deeply enough to penetrate her heart also supported an inference that the defendant intended to kill W, and, although the defendant subsequently sought to obtain aid for W after the stabbing, any acts demonstrating remorse for his earlier conduct that was undertaken with the requisite intent were relevant for sentencing purposes only but not for a determination of his guilt.

2. The defendant could not prevail on his claim, raised for the first time on appeal, that the trial court improperly instructed the jury that it could infer his intent to kill W from the number of wounds inflicted on her because the superficial nature of all but one of W's wounds made such an instruction here misleading and prejudicial: the defendant failed to preserve his objection to the trial court's charge because he failed to plainly put the trial court on notice as to the specific basis for his objection, he abandoned his objection by suggesting a curative instruction that the trial court adopted, he expressed satisfaction with the trial court's proposed instructions, and he took no exception to the charge as given; moreover, the defendant was not entitled to relief under the plain error doctrine, the defendant having acknowledged that the prosecutor properly could have pointed to the number of wounds and that the jury properly could have relied on such evidence in determining the sufficiency of his intent, and the defendant having provided no authority to distinguish between the propriety of the jury's consideration of the evidence for such purpose and the propriety of an instruction permitting it to do so.

3. The defendant's claim of prosecutorial impropriety due to the prosecutor's allegedly improper statement of his personal opinion about what the defendant or defense counsel knew about the defendant's guilt was unavailing, the defendant having failed to meet his burden of proving that, considered in light of the whole trial, the alleged impropriety was so egregious that it amounted to a denial of due process and deprived him of a fair trial; the prosecutor's statement was a response to what the state believed was the defendant's attempt to divert the jury's attention from what crime was proved by the evidence, that statement was an isolated statement in the state's rebuttal, and the trial court provided a curative instruction following the defendant's objection to the statement.

Argued January 4—officially released March 20, 2012

Procedural History

Amended information charging the defendant with murder, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *O'Keefe*, *J.*; after the court denied the defendant's motion for a judgment of acquittal, verdict and judgment of guilty,

from which the defendant appealed to this court. *Affirmed.*

Jon L. Schoenhorn, for the appellant (defendant).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Anthony Bochicchio*, senior assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Willie James Coleman, was convicted, following a jury trial, of murder in violation of General Statutes § 53a-54a in connection with the fatal stabbing of his girlfriend, Twonna White. The trial court imposed a sentence of forty-five years imprisonment, and thereafter the defendant appealed directly to this court pursuant to General Statutes § 51-199 (b) (3). On appeal, the defendant contends that the state offered insufficient evidence to prove beyond a reasonable doubt his intent to kill White, that the trial court improperly instructed the jury that it could infer such intent from the number of wounds he had inflicted on her and that an improper statement by the prosecutor in closing argument deprived him of a fair trial. We affirm the judgment.

The jury reasonably could have found the following facts. On July 8, 2008, at approximately 5:30 p.m., the defendant placed a 911 call from his apartment reporting that he had "just stabbed [his] girlfriend" and requesting an ambulance. At the time the defendant placed the call, White still was conscious. In response to questions from the 911 operator as to White's condition, the defendant stated that he had "[s]tabbed her in the back and in the front a couple of times" and that, with respect to the means by which he had inflicted these wounds, "it was a fork and . . . then I used a knife too." The operator inquired as to what had caused

the incident, and the defendant explained: "Well, she want to keep on talking about all the people that she got coming in my house, and I'm tired of it, had enough of it, all the people that she fucking around with, and I'm tired of it." Following a comment by the operator indicating that police officers were on their way, the defendant stated: "I'm not going nowhere. You know, I did it, you know. I ain't scared of nothing. . . . I'm just tired, that's all it is. I got tired . . . . I just got home from the court . . . pay the fine and all that.[1] I'm sick of it. Enough is enough. Enough is enough."

When Officers Aaron Boisvert and Robert Quaglini of the Hartford police department arrived on the scene, the defendant again acknowledged to Boisvert that he had stabbed White. Boisvert handcuffed the defendant, placed him on a bed and then went into the kitchen to aid White. A two-pronged grill fork and a black handled steak knife were lying near White's body in plain view. While Boisvert attempted to ascertain the location of White's wounds, he heard the defendant say that he was tired of White bringing other men to the apartment and then telling the defendant about those sexual encounters.

The defendant reiterated the impetus for the attack in voluntary statements to Quaglini while being escorted to the police cruiser and to Detective Seth Condon at the police station. The defendant told Quaglini that he and White had been drinking and that "[s]he got to my head. She started telling me about all the guys she was fucking and I stabbed her with a fork and a knife . . . ." The defendant later told Condon that, after the drinking and White's boasts of infidelity, he had "snapped" and stabbed her, but had not meant to hurt or kill her.

[1] It appears from the record that the defendant had paid a fine in connection with an offense committed by White for which she had been arrested.

While these events transpired, White received medical aid, including chest and abdominal surgery, but she did not survive. The medical examiner's autopsy revealed that White had sustained the following external injuries: cuts on the back of two fingers on her left hand that appeared to be "defense wounds . . . where somebody might be trying to fend off a weapon"; superficial cuts on the back of her left hand and on the middle of her back; a pair of puncture wounds, consistent with a barbeque type fork, in the superficial layer of the skin in her back; a pair of scrapes on her left back; a deeper scrape to her left upper back; and a cut on her scalp. None of these wounds contributed to her death. The cause of death was a single stab wound in White's chest, from the front left of her breastbone into her heart. The examiner was unable to determine the sequence of the wounds.

At trial, the court agreed to the defendant's request for the jury to be instructed on lesser included offenses to murder, acknowledging that there was evidence supporting the defendant's contention that he did not intend to kill White, and his request for an instruction on the affirmative defense to murder of extreme emotional disturbance. Thereafter, the court instructed the jury on murder, manslaughter in the first degree, manslaughter in the second degree and criminally negligent homicide. The jury returned a verdict of guilty on the murder charge and the trial court rendered judgment in accordance with the verdict. This direct appeal followed.

I

The defendant's first claim challenges the sufficiency of the evidence to establish beyond a reasonable doubt that he had the specific intent to kill White. The defendant claims that the totality of the evidence proves only that he committed manslaughter in the first degree. Specifically, the defendant points to his 911 call seeking

help for White, White's still conscious condition when police arrived, the mostly empty bottles of rum and malt liquor in the kitchen that supported his assertion that he and White had been drinking, his statements to the police officers indicating that he had not meant to hurt White and that he had "snapped" after hearing White boast about her sexual relations with other men and, most importantly, the fact that all but one of the wounds he had inflicted on White were superficial. We conclude that the evidence is sufficient to support the jury's verdict.

In light of the evidence cited by the defendant, undoubtedly a jury properly *could have* concluded that the state had failed to prove beyond a reasonable doubt that the defendant had intended to kill White. To reach such a conclusion, the jury would have had to credit evidence and draw inferences that favored the defendant's version of events. Under our well established standard for review of the sufficiency of the evidence, however, we take the opposite view of the evidence, applying a two part test. "First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"[P]roof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [jury], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [jury's] verdict of guilty."

(Internal quotation marks omitted.) *State* v. *Papandrea*, 302 Conn. 340, 348–49, 26 A.3d 75 (2011).

"In order to be convicted under our murder statute, the defendant must possess the specific intent to cause the death of the victim. . . . To act intentionally, the defendant must have had the conscious objective to cause the death of the victim." (Internal quotation marks omitted.) *State* v. *Booth*, 250 Conn. 611, 655, 737 A.2d 404 (1999), cert. denied sub nom. *Brown* v. *Connecticut*, 529 U.S. 1060, 120 S. Ct. 1568, 146 L. Ed. 2d 471 (2000). "Intent is a mental process which ordinarily can be proven only by circumstantial evidence. An intent to cause death may be inferred from circumstantial evidence such as the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading to and immediately following the death. *State* v. *Zdanis*, 182 Conn. 388, 396, 438 A.2d 696 (1980), cert. denied, 450 U.S. 1003, 101 S. Ct. 1715, 68 L. Ed. 2d 207 (1981); see *State* v. *Stankowski*, 184 Conn. 121, 127, 439 A.2d 918, cert. denied, 454 U.S. 1052, 102 S. Ct. 596, 70 L. Ed. 2d 588 (1981); *State* v. *Holley*, 174 Conn. 22, 26, 381 A.2d 539 (1977); *State* v. *Bzdyra*, 165 Conn. 400, 404–405, 334 A.2d 917 (1973); *State* v. *Litman*, 106 Conn. 345, 352–53, 138 A. 132 (1927). The use of inferences based on circumstantial evidence is necessary because direct evidence of the accused's state of mind is rarely available." (Internal quotation marks omitted.) *State* v. *Chace*, 199 Conn. 102, 105, 505 A.2d 712 (1986).

In the present case, the evidence was sufficient to demonstrate that intent. The jury could have taken literally the defendant's comment to the 911 operator that he had used the grill fork and "then" had used the knife, and in turn inferred an escalation in the choice of weapons for the attack and an intention to inflict more serious injury. The fact that the defendant stabbed White in her chest with a knife and did so deeply enough

to penetrate her heart also would support an inference that he intended to kill her. Cf. *State* v. *Edwards*, 247 Conn. 318, 322–23, 721 A.2d 519 (1998) ("[w]e have stated that [o]ne who uses a deadly weapon upon a vital part of another will be deemed to have intended the probable result of that act, and from such a circumstance a proper inference may be drawn in some cases that there was an intent to kill" [internal quotation marks omitted]). Although a steak knife is not a deadly weapon per se; see *State* v. *Ray*, 228 Conn. 147, 157 n.8, 635 A.2d 777 (1993); see also General Statutes § 53a-3 (6) and (7) (respectively defining " '[d]eadly weapon' " and " '[d]angerous instrument' "); it is self-evident that such an instrument readily can cause death if used to inflict a wound in a vital organ. The jury also could have construed the defendant's statements as demonstrating a motive to kill White—he wanted to put an end to her infidelity and boasts thereof.

The jury also properly could have discredited or deemed irrelevant certain evidence on which the defendant relies. With regard to the defendant's subsequent efforts to obtain aid for White, the question before the jury was whether the defendant had the specific intent to kill at the time he inflicted the fatal wound. *State* v. *Hines*, 187 Conn. 199, 204, 445 A.2d 314 (1982); *State* v. *Burgos*, 37 Conn. App. 404, 410–14, 656 A.2d 238, cert. denied, 233 Conn. 915, 659 A.2d 186 (1995). Acts demonstrating remorse for an earlier act undertaken with the requisite intent may be relevant for sentencing purposes but not for determinations of guilt. Similarly, the jury was free to disregard the defendant's self-serving statement that he had not intended to kill her. *State* v. *Delgado*, 247 Conn. 616, 623–24, 725 A.2d 306 (1999) ("the [jury is] not bound to accept as true the defendant's claim of lack of intent or his explanation of why he lacked intent" [internal quotation marks omitted]). Finally, even if the jury had credited the defendant's

statement that he had been drinking, the defendant proffered no evidence regarding intoxication that would have supported a finding by the jury that the defendant lacked the capacity to form specific intent to kill; indeed, no such instruction was provided. See *State* v. *Chace*, supra, 199 Conn. 106 ("because there was very little evidence concerning the defendant's degree of intoxication, we cannot say that it was unreasonable for the jury to have concluded that the defendant was capable of forming the specific intent to kill").

We underscore that "[w]e do not sit as a thirteenth juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record. . . . Rather, we must defer to the jury's assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . . Moreover, [i]n viewing evidence which could yield contrary inferences, the jury is not barred from drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with innocence. The rule is that the jury's function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Citation omitted; internal quotation marks omitted.) *State* v. *Booth*, supra, 250 Conn. 655. In light of the evidence presented, we cannot conclude that the inferences necessarily drawn by the jury lacked reason and logic. Accordingly, the defendant's sufficiency of the evidence claim fails.

II

The defendant also contends that the trial court improperly instructed the jury that it could infer his intent to kill White from the number of wounds inflicted.

Specifically, he contends that, although that fact can provide circumstantial evidence of intent to kill in some cases, the superficial nature of all but one of the wounds in the present case made such an instruction misleading and prejudicial. The defendant contends that he preserved this claim by challenging the instruction but alternatively seeks to prevail under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989),[2] or the plain error doctrine. The defendant disputes the state's assertion that, by his conduct, he had induced the claimed error or waived his right to assert this claim. We conclude that the defendant cannot prevail on this claim.

The record reveals the following additional facts. The evening before the jury was to receive instructions, the trial court clerk faxed a "rough draft" to the defendant's trial attorney and the assistant state's attorney. The following morning, the court met with both counsel to discuss the charge, at which time the court gave them a completed draft to share for final review.[3] Later that day, the trial court met with counsel and solicited com-

[2] Pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original.)

[3] The record before this court does not contain either the rough draft or the original completed draft. Nonetheless, because defense counsel quoted the particular language at issue, we assume that this language was included in both drafts and that the defendant had a meaningful opportunity to review the charge. We note that there is no claim to the contrary, but underscore that the state, as the party asserting waiver, has the burden of demonstrating that the defendant was provided a meaningful opportunity to review the jury instruction.

ments, requests or objections to the instructions. The following exchange ensued:

"[Defense Counsel]: Your Honor, I have only one point. On page fifteen when you're discussing the first element of murder, intent to cause death . . . you correctly point out that intent to cause death may be inferred from circumstantial evidence. And then you state, quote, 'the type and number of wounds inflicted, as well as the instrument used, may be considered as evidence of the perpetrator's intent.'

"And with all due respect Your Honor, I feel that that is editorializing. I think that that's more than fair for the prosecutor to argue. It's certainly appropriate that the jury can consider that, but I think that for Your Honor to single that out without, on the other hand, mentioning the very sound of his voice when he—the defendant's voice when he speaks on the 911 [tape], his behavior when he's staying by the body, assisting the police, tried to bring assistance to [White], all of which is circumstantial evidence of a lack of intent, and you don't say that.

"So I think it's unbalanced, and I think it does constitute improper editorializing, and I would ask Your Honor either to omit that clause or to balance it by talking about all of the things that show a lack of such intent.

"The Court: That's easy enough to do. I'll just go off the script and mention that all of the circumstances, including the tape and whatever other evidence they heard."

In response to comments from the assistant state's attorney that the charge as written was proper, the trial court indicated that it thought that the instruction was not only proper because it is "boilerplate . . . used in hundreds of murder cases," but also balanced, because

the relatively small number of wounds could be argued as evidence for or against the intent to kill. The following exchange then ensued:

"The Court: I guess it depends on your perspective. And I'm sure you'll both argue your contentions with regard to what the wounds—the number of wounds, the type of wounds, the instrument used, and there's plenty to argue on both sides there.

"So . . . I'll say that they should also consider all of the other circumstances including the tape, and the observations of the police officers with regard to the behavior of the . . . defendant, and there's other language in the body of the . . . charge that talks about circumstantial evidence and what it is. It's everything that they know and have heard.

"That's a good point and I'm listening to it and I'll do the best I can to make my remarks balanced. Anything else?

"[Defense Counsel]: No, Your Honor."

Thereafter, the trial court provided the following instruction to the jury on specific intent: "The intent to cause death may be inferred from circumstantial evidence. . . . The type and number of wounds inflicted, as well as the instrument used, and any other circumstances occurring at the time of the event, or—before or after the event, these are all circumstances that may be considered as evidence of the perpetrator's intent and . . . included in that are the statements of the defendant recorded on the 911 tape. So, I'm not just trying to focus you on one aspect of the case when I say wounds, all the circumstances around that time may be considered by you as evidence of the perpetrator's intent. And from such evidence, an inference may be drawn that there was or wasn't an intent to cause death.

"Any inference that may be drawn from the nature of the instrumentality used and the manner of its use is an inference of fact to be drawn by you upon consideration of these and other circumstances in the case in accordance with my previous instructions. Declarations and conduct of the accused after the infliction of the wounds may be considered if you find that they tend to show the defendant's intent, and . . . both attorneys argued that point. They explained their contentions and they were obviously different based on the same evidence, the declarations of the defendant. This inference is not a necessary one; that is, you are not required to infer intent from the defendant's alleged conduct, but it is an inference you may draw if you find it is reasonable and logical and in accordance with my instructions on circumstantial evidence."

Thereafter, the trial court completed instructions on the murder charge, provided instructions on the affirmative defense of extreme emotional disturbance and provided instructions on the various lesser included offenses. The court then excused the jury, at which time the court immediately inquired whether either counsel had "[a]ny exceptions, or suggested corrections, or anything [else] you'd like me to say to the jury." Defense counsel replied, "None whatsoever, Your Honor."

Several observations readily can be drawn from this record. First, the objection that the defendant raised before the trial court is different than the objection that he raises on appeal. At trial, the defendant contended that instructing the jury that they could infer intent to kill from the number of wounds, as well as the instrument used, was improper because it was "editorializing" and "unbalanced . . . ." In essence, the defendant contended that the instruction both suggested that an inference adverse to him could be drawn from that evidence and failed to direct the jury to consider other evidence

from which inferences favorable to him could be drawn. Although the trial court viewed the instruction as one that would permit an inference either of intent or lack thereof, it agreed with the defendant that it would be appropriate to direct the jury to consider the surrounding circumstances that the defendant had claimed demonstrated his lack of intent to kill. On appeal, however, the defendant contends that the instruction regarding the number of wounds was legally improper because all but one wound was superficial and therefore the evidence could not support such an instruction. Because the defendant must plainly put the trial court on notice as to the specific basis for his objection; see Practice Book § 60-5; *State* v. *Jose G.*, 290 Conn. 331, 342–43, 963 A.2d 42 (2009); he did not preserve the objection that he now raises on appeal.

Even if the defendant's objection at trial could be viewed as consistent with his claim on appeal, he abandoned that objection by suggesting a cure that the trial court adopted.[4] As we recently observed, in addition to express waiver, implicit waiver of a claim of instructional error may properly be found where "the defense expressly acknowledged and agreed by words or conduct to the instruction challenged on appeal." *State* v. *Kitchens*, 299 Conn. 447, 475, 10 A.3d 942 (2011). The defendant not only expressed satisfaction when the court indicated what it proposed to do to address the defendant's objection, he also stated, after the jury had received its instructions, that he took no exception to those instructions. Accordingly, the defendant has failed to satisfy the third prong necessary to prevail under *Golding*. See *State* v. *Holness*, 289 Conn. 535,

[4] We do not agree with the state that the defendant induced the error by making such a suggestion. He did not request the language that he challenges on appeal regarding the number of wounds as evidence of intent; rather, he requested additional instructions to balance the instruction crafted by the court.

543, 958 A.2d 754 (2008) (concluding that claim failed third prong of *Golding* where "defense counsel clearly and unequivocally agreed to the limiting instruction that the trial court gave to the jury").

The defendant suggests, with respect to the issues of both preservation and waiver, that he is entitled to relief because he asked the trial court to omit the language that he challenges on appeal and should not be required to take an exception after the court declined to provide the relief requested. Related to this suggestion, the defendant contends that his request that the trial court omit the language "or" add further instructions highlighting additional circumstances should not be construed as proposing equally satisfactory alternative forms of relief such that he should be deemed to have obtained the relief sought. We disagree. Nothing in the defendant's objection itself indicated that adding further instructions was a secondary alternative to be considered only if the trial court denied his preferred relief of excising the phrase at issue. Moreover, given the nature of the defendant's objection, there is nothing inherent in the request for these two forms of relief that plainly manifests a preferential hierarchy of the sort that can plainly be seen, for example, in alternative requests for a mistrial or for a curative instruction. Indeed, when the defendant asked for a mistrial in response to his claim of improper argument by the assistant state's attorney; see part III of this opinion; he stated: "I think that the appropriate remedy is mistrial, in the alternative, perhaps, a curative instruction could be formulated."

Finally, we reject the defendant's request for relief under the plain error doctrine. Even if we were to assume, without deciding, that the defendant's waiver would not preclude him from seeking such relief; see *State* v. *Darryl W.*, 303 Conn. 353, 371–72 n.17, 33 A.3d 239 (2012) (recognizing that "there appears to be some

tension in our appellate case law as to whether reversal on the basis of plain error could be available in cases where the alleged error is causally connected to the defendant's own behavior"); we conclude that "[i]t is manifest from the defendant's own exposition of his claim that he cannot demonstrate . . . [his entitlement to] the extraordinary remedy of reversal." (Internal quotation marks omitted.) Id., 373. To be entitled to reversal under the plain error doctrine, "we must determine whether the trial court in fact committed an error and, if it did, whether that error was indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . [I]t is not enough for the defendant simply to demonstrate that his position is correct. Rather . . . the claimed impropriety [must be] so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal." (Internal quotation marks omitted.) Id. The defendant acknowledges that the instruction at issue is provided on the judicial branch's website[5] and that there is case law deeming such evidence relevant in determining the sufficiency of evidence of intent to kill. The defendant further acknowledges that, in the present case, the prosecutor properly could have pointed to the number of wounds and that the jury properly could have relied on such evidence to determine his intent. The defendant has provided the court with no authority to distinguish between the propriety of the jury's consideration of such evidence for that purpose and the propriety of an instruction permitting the jury to do so. Therefore, the defendant's exposition of his claim demonstrates on its face that he is not entitled to relief under the plain error doctrine.

[5] Contrary to the defendant's suggestion, the fact that the judicial branch website contains a disclaimer that the instructions are not necessarily legally sufficient in every case does not suggest that the instructions are legally improper in and of themselves in any given case.

III

Finally, we briefly consider the defendant's claim of prosecutorial impropriety. The defendant points to a comment the assistant state's attorney made in response to defense counsel's closing argument, in which defense counsel had urged the jury to consider the lesser included offenses, that each of those offenses carry a "substantial penalty," and that, of those offenses, the evidence proved only the defendant's guilt of criminally negligent homicide, which is a "serious crime . . . ." Specifically, the defendant points to the following statement in the assistant state's attorney's rebuttal argument: "[A]s far as the different crimes, don't let anybody tell you what's serious and what's not; that's not for you to consider. You're to consider what crime fits the facts; penalties are not a consideration. While we make that attempt to go that way, I would argue, because *they don't want you to pay attention to the facts and to the evidence because they know that points to murder*." (Emphasis added.) The defendant contends that the emphasized statement constitutes an improper statement of the prosecutor's personal opinion on what the defendant, or his counsel, believes or knows about the defendant's guilt.

The state argues that the statement was not improper because it was responding, albeit inartfully, to the defendant's improper attempts to divert the jury's attention from what crime was proved by the evidence and to assuage any potential concern that the defendant would not be subject to serious penalties if convicted of the least serious of the lesser offenses because they would not be, as defense counsel stated, "letting someone off the hook or . . . [get] away with something . . . ." The state further contends that the prosecutor should be given some leeway because rebuttal argument is largely unscripted and responsive to argument given moments before. We conclude that, even if the

comment by the assistant state's attorney exceeded the bounds of proper argument, the defendant has not met his burden of proving that "considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process." *State* v. *Payne*, 303 Conn. 538, 562–63, 34 A.3d 370 (2012).

In considering such claims, we examine the factors articulated in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987), "with due consideration of whether that misconduct was objected to at trial." (Internal quotation marks omitted.) *State* v. *Warholic*, 278 Conn. 354, 362, 897 A.2d 569 (2006). These factors include: "the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Internal quotation marks omitted.) *State* v. *Payne*, supra, 303 Conn. 562.

In the present case, defense counsel did, to some extent, invite this comment by improperly suggesting to the jury that the penalty attached to the offenses was relevant to their considerations, not simply the evidence. The trial court did state to defense counsel, however, in the jury's presence in response to the state's objection, that "[p]enalties and the relative penalties amongst murder are not really relevant." The assistant state's attorney did not state that the defendant or his counsel knew that the defendant *was* guilty of murder but, rather, that they knew that the *evidence points to* murder. The comment was an isolated statement in the state's rebuttal. The trial court provided a curative instruction following the defendant's objection, explaining that counsel sometimes forget the rule requiring them to focus on the evidence and not to express a personal opinion, pointing specifically to the

comment to which the defendant objected and directing the jury to ignore that comment. Although the state's case was far from overwhelming as to the requisite intent to kill, we are not persuaded that the defendant has demonstrated that, under the totality of the factors, an isolated comment of this nature deprived him of a fair trial.

The judgment is affirmed.

In this opinion the other justices concurred.

ARROWOOD INDEMNITY COMPANY *v.* PENDLETON KING ET AL.
(SC 18658)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.

Syllabus

The predecessor insurance companies to the plaintiff, A Co., brought an action to the federal District Court for the District of Connecticut seeking a judgment declaring that they had no duty to defend or to indemnify the defendant insured policyholders and their minor child for any liability arising out of injuries sustained by a third party while the minor child was operating his parents' all-terrain vehicle. The defendants lived in a private residential community that was managed by an incorporated homeowners association, and pursuant to their warranty deed, the defendants had the right to travel along the private roads leading from their premises to and from the public road. The accident occurred on a dead-end portion of one of the private roads, approximately seventy-five feet from the defendants' residence. The defendants' son was driving the all-terrain vehicle and pulling a friend, M, on a skateboard with a tow rope when M fell and suffered severe head injuries. More than one year after the accident, the defendants received notice of an action brought against them by M and his parents, and the defendants then notified their insurer of a potential claim. In the District Court, the insurers claimed that the accident had not occurred on an "insured location" and that the defendants' notice of the claim was untimely. During the pendency of the action in the District Court, A Co. was substituted as the plaintiff, and the District Court rendered summary judgment in its favor without reaching the issue of notice. The defendants then appealed to the United States Court of Appeals for the Second Circuit, which,

sua sponte, certified to this court certain questions of unresolved state law with respect to the homeowners liability policy that covered the defendants' residence. Specifically, the questions involved the interpretation of the phrase "insured location" in a claim for negligent entrustment under the defendants' homeowners policy, a determination of whether the private road on which the accident occurred was considered "premises used . . . in connection with [the residence] premises," and whether certain social interactions between the defendants and the claimants, M's parents, which did not make any reference to the accident claim, justified a delay in the defendants giving notice of the claim to A Co. *Held*:

1. This court concluded that, in order to fall within the scope of the exception to the general exclusion of liability coverage for accidents involving motor vehicles under the defendants' homeowners insurance policy, the vehicle must have been owned by the defendants and the vehicle must have been on an insured location, and in the context of the claim that the defendants' act of negligent entrustment ultimately led to the all-terrain vehicle accident, the natural and ordinary meaning of the phrase "on an [i]nsured location" unambiguously referred to the location of the vehicle at the time of the accident giving rise to the insurance claim, not to the place where the vehicle was regularly kept or garaged.

2. This court concluded that, although the precise meaning of the phrase "[a]ny premises used . . . in connection with [the residence] premises" was uncertain under the insurance policy, the broader meaning of the essential term "insured location" was sufficiently clear to exclude the private road where the accident occurred in this case; the limited easement expressed in the defendants' warranty deed did not give them a sufficient interest in the accident site, a dead-end stretch of road beyond the scope of that easement, to render it an insured location, and, therefore, the accident site here was not covered under the policy.

3. This court concluded that the social interactions between the defendants and the victim's parents after the accident had occurred did not justify a delay in giving notice of a potential liability claim to A Co., the notice provision of the policy that the insured, in the case of an accident or occurrence, give written notice to the insurer as soon as practical not having turned on the defendants' subjective assessment of how likely a claim is to be brought, but, rather, on whether a reasonable person would recognize that liability may have occurred, which, in this case, was unmistakably apparent; furthermore, this court concluded that in determining whether A Co. was prejudiced by the defendants' late notice of the claim, A Co. had the burden of proving, by a preponderance of the evidence, that it was prejudiced by the defendants' failure to comply with the notice provision in the policy.

Aetna Casualty & Surety Co. v. *Murphy* (206 Conn. 409), to the extent that it allocated the burden of proof on an insured to disprove prejudice to

the insurer by the insured's failure to comply with a notice provision, overruled.

Argued December 5, 2011—officially released March 27, 2012

Procedural History

Action seeking a judgment declaring that the Royal Indemnity Company and the Royal Insurance Company of America did not owe a duty to defend or indemnify the defendants under certain homeowners or umbrella insurance policies in connection with an all-terrain vehicle accident, brought to the United States District Court for the District of Connecticut, where Arrowood Indemnity Company was substituted as the plaintiff; thereafter, the defendants filed certain counterclaims against the plaintiff and a third party complaint against the National Surety Corporation et al., and the New England Brokerage Corporation filed cross claims against the plaintiff; subsequently, the court, *Underhill*, *J.*, rendered summary judgment for the plaintiff on the complaint and counterclaims, for the third party defendant National Surety Corporation et al. on the third party complaint, and dismissed the cross claims; thereafter, the defendants appealed to the United States Court of Appeals for the Second Circuit, *Kearse*, *Livingston* and *Vitaliano*, *Js.*, which certified to this court certain questions of law concerning the interpretation of Connecticut insurance law.

Daniel P. Scapellati, with whom were *Coleman C. Duncan*, and, on the brief, *Ralph W. Johnson III*, for the appellant (substitute plaintiff Arrowood Indemnity Company).

James T. Hargrove, with whom was *Frederic P. Rickles*, for the appellees (defendants).

Robert G. Oliver, with whom were *James D. Hine II* and *Michael J. Pinto*, and, on the brief, *Francis*

J. Drumm III, for the appellee (third party defendant National Surety Corporation).

Opinion

HARPER, J. This case, on certification from the United States Court of Appeals for the Second Circuit, presents questions regarding the proper construction of terms in a homeowners insurance contract under Connecticut law. The predecessor insurance companies to the plaintiff, Arrowood Indemnity Company, brought a declaratory judgment action in the United States District Court for the District of Connecticut claiming that they did not have a duty to defend or to indemnify the defendants, Pendleton King, Daphne King and their minor child, Pendleton King, Jr. (Pendleton, Jr.) (collectively, the Kings), for any liability arising out of injuries sustained by a third party while Pendleton, Jr., was driving his parents' all-terrain vehicle (ATV) on a private road in a private residential community where the Kings resided because, inter alia, the accident had not occurred "on an insured location" and the Kings' notice of a claim was untimely.[1] The District Court rendered

[1] At the time of the accident at issue, the Kings were covered by three insurance contracts, each of which was obtained through the New England Brokerage Corporation: a homeowners insurance policy issued by Royal Indemnity Company; an umbrella insurance policy issued by Royal Insurance Company of America; and an excess liability insurance policy that followed form to the homeowners and umbrella policies issued by National Surety Corporation. Royal Indemnity Company and Royal Insurance Company of America originally brought the declaratory action in the federal District Court against the Kings, and, thereafter, the Kings asserted counterclaims against both of those insurers and filed a third party complaint against National Surety Corporation and New England Brokerage Corporation. Each of the parties filed motions for summary judgment, and the District Court ruled in favor of the insurance companies on all five motions. During the course of litigation, Arrowood Indemnity Company was substituted as the plaintiff for Royal Indemnity Company and Royal Insurance Company of America, and the Second Circuit thereafter granted a motion by Royal Indemnity Company and Royal Insurance Company of America to amend the caption of the complaint to reflect that substitution. Because the certified questions refer only to the terms of the homeowners insurance policy, except where noted, we direct our attention exclusively to that contract and refer to Arrowood Indemnity Company as the plaintiff.

summary judgment in favor of the plaintiff; see footnote 1 of this opinion; without reaching the issue of notice. *Royal Indemnity Co.* v. *King*, 512 F. Sup. 2d 117 (D. Conn. 2007). The Kings then appealed to the Circuit Court of Appeals, which, sua sponte, certified the following three questions of unresolved state law to this court: "(1) With respect to a claim for negligent entrustment under a liability policy that excludes coverage for '[a]rising out of . . . [t]he entrustment by an insured' 'to any person,' 'of a motor vehicle' other than '[a] motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration and . . . [o]wned by an insured and *on an insured location*,' is the insured location

"(a) the place where the entrustment of the vehicle took place, or

"(b) the place where the vehicle is garaged, or

"(c) the place where the accident occurred?

"(2) In the absence of a policy definition of 'premises,' should a private road located within a residential development owned by the insured's homeowners association be considered 'premises used . . . in connection with a [residence] premises' under the terms of a homeowner's insurance policy if the portion of the road where the liability arose is not regularly used by the insured, although other portions of the road are so used?

"(3) Under Connecticut law, where a liability insurance policy requires an insured to give notice of a covered claim 'as soon as practical,' do social interactions between the insured and the claimant making no reference to an accident claim justify a delay in giving notice of a potential claim to the insurer?" (Emphasis in original.) *Arrowood Indemnity Co.* v. *King*, 605 F.3d 62, 80 (2d Cir. 2010). The Second Circuit noted that Connecti-

cut trial courts had adopted conflicting approaches to the first certified question[2] and that it could find no Connecticut case law resolving the second and third certified questions.

Pursuant to General Statutes § 51-199b, we accepted the certification and conclude that: (1) the relevant location is the site of the accident; (2) such a private road does not fall under the coverage provision; and (3) social interaction making no reference to an accident does not justify delayed notice, but an insurer must prove prejudice to disclaim its obligation to provide coverage based upon untimely notice.

The record certified by the Second Circuit contains the following undisputed facts relevant to resolving these questions. The plaintiff provides homeowner's insurance that covers the Kings' residence. This residence is located in Deer Park, a private residential development in Greenwich that is managed by an incorporated homeowners association. Pursuant to a warranty deed, the Kings have a right to travel along the private roads leading from their premises to and from the public road. The residence is situated on Deer Park Court, which terminates at one end at Midwood Road. The northern portion of Midwood Road is a dead end; the southern portion of Midwood Road leads to the development's exit and a public roadway.

The present litigation arose out of an incident that occurred in 2002. Pendleton, Jr., then fourteen years

[2] See *Pister* v. *Nationwide Mutual Ins. Co.*, Superior Court, judicial district of Danbury, Docket No. DBD-CV-06-4005239 (April 13, 2007) (determining that exclusion for bodily injury arising out of use of ATV "while *off* an insured location"; [emphasis added; internal quotation marks omitted]; applied to accident alleged to have occurred on land owned by third party, with no reference to location where ATV was garaged); *Chen* v. *Celon*, Superior Court, judicial district of Fairfield, Docket No. CV-02-0391304-S (October 10, 2006) (42 Conn. L. Rptr. 147, 149) (holding that "the phrase 'on an insured location,' while ambiguous, refers to the physical location where the motorized vehicle designed for use off public road is garaged or housed").

old, was driving an ATV owned by his parents and using a nine foot rope attached to the ATV to tow his friend, Conor McEntee, on a skateboard. While the two boys were on the dead-end portion of Midwood Road north of the Kings' residence, McEntee let go of the tow rope and subsequently fell, suffering a severe head injury that resulted in hospitalization and a temporary coma. The accident occurred approximately fifty to seventy-five feet from the Kings' property. Following the accident, the King and McEntee families socialized, and the McEntees did not indicate that they intended to bring an action related to the accident. More than one year after the accident, however, a letter from an attorney representing the McEntees alerted the Kings that an action might be filed, at which point the Kings, through New England Brokerage Corporation; see footnote 1 of this opinion; notified the plaintiff of the potential claim. The present declaratory judgment action followed. Additional facts will be set forth as necessary.

I

We begin by considering the first two certified questions, which require us to determine whether, in an action alleging liability on the basis of negligent entrustment, the ATV accident in this case is covered under the terms of the Kings' homeowner's insurance policy. Specifically, we must determine whether the accident falls within the scope of an exception to the policy's general exclusion of liability coverage for accidents involving motor vehicles.

The relevant provisions of the exclusions section of the policy provide that "1. Coverage . . . do[es] not apply to bodily injury or property damage . . .

"f. Arising out of:

"(1) The ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land

conveyances, including trailers, owned or operated by or rented or loaned to an Insured;

"(2) *The entrustment by an Insured of a motor vehicle or any other motorized land conveyance to any person* . . . .

"*This exclusion does not apply to* . . .

"(2) *A motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration and*:

"(a) Not owned by an Insured; or

"(b) *Owned by an Insured and on an Insured location* . . . ." (Emphasis added.) There is no dispute in this case that the ATV at issue qualifies as "[a] motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration" and that the Kings owned the ATV. To fall within the scope of coverage, therefore, the ATV also must have been "on an [i]nsured location . . . ." The proper interpretation of this phrase is at the heart of the first two certified questions.

We note that, although the questions certified by the Second Circuit conceivably could be answered without reference to the specific contract out of which they arise, it is the practice of this court to analyze such questions with respect to the specific contract at issue, where such analysis can yield an appropriate answer. See *Enviro Express, Inc.* v. *AIU Ins. Co.*, 279 Conn. 194, 199, 901 A.2d 666 (2006) (employing principles of contract interpretation to answer certified question posed in more general terms). In interpreting an insurance contract, "[t]he determinative question is the intent of the parties, that is, what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . If the terms of the policy are clear and

unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . Under those circumstances, the policy is to be given effect according to its terms. . . . When interpreting [an insurance policy], we must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result. . . .

"In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy." (Internal quotation marks omitted.) *Johnson* v. *Connecticut Ins. Guaranty Assn.*, 302 Conn. 639, 643, 30 A.2d 1004 (2011). Under this holistic approach, if the policy sufficiently specifies the general contours of coverage, such that it is readily apparent that a particular claim falls within the scope of coverage, we are bound to give effect to that clearly expressed intent even when a particular term is not susceptible to a definite meaning. With these principles in mind, we turn to the first two certified questions.

A

The first question concerns the point in time to which the phrase "on an [i]nsured location" refers. Specifically, in the context of a claim that an act of negligent entrustment ultimately led to an ATV accident, we must

determine whether coverage depends on where the ATV was at the time of the accident or where it was at the time of entrustment. Or, alternately, we must decide, as the Superior Court determined in *Chen* v. *Celon*, Superior Court, judicial district of Fairfield, Docket No. CV-02-0391304-S (October 10, 2006) (42 Conn. L. Rptr. 147); see footnote 2 of this opinion; that the phrase refers to the place the ATV is regularly kept or garaged, such that an ATV garaged on an insured location is covered regardless of where the actual accident occurs. We conclude that the natural and ordinary meaning of the phrase "on an [i]nsured location" unambiguously refers to the location of the ATV at the time of the accident giving rise to the insurance claim.

Most basically, it is clear from the insurance contract that liability coverage may be invoked only at the point of an accident. The policy's personal liability provision covers claims and actions "brought against an Insured for damages because of bodily injury, personal injury or property damage caused by an occurrence to which this coverage applies . . . ." The policy defines "[o]ccurrence," in turn, as "an accident . . . which results, during the policy period, in: a. Bodily injury; b. Personal injury; or c. Property Damage." The personal liability provision thus plainly provides insurance against the consequences of certain accidents, and it is the ATV's location at the time of such an accident that therefore determines whether coverage applies.[3]

[3] The Kings rely heavily on a Superior Court opinion interpreting the same "on an insured location" language, which reasoned: "This debate would have been easily resolved had [the insurer] specified in its policy that the phrase refers to a vehicle 'garaged' on an insured location, or 'entrusted' to someone while on an insured location, or 'used' on an insured location. Unfortunately, an examination of the policy does not supply the needed clarification. Therefore, in the absence of specific policy language, the court will not infer that the exclusion is applicable . . . . It is found that the phrase 'on an insured location,' while ambiguous, refers to the physical location where the motorized vehicle designed for use off public road is garaged or housed." *Chen* v. *Celon*, supra, Superior Court, Docket No. CV-02-0391304-S. Because we disagree that this phrase is ambiguous when

This plain reading of the phrase "on an [i]nsured location," moreover, is necessary to give coherent meaning to the policy's ATV exception. The applicable exception to the motor vehicle exclusion from coverage for "[a] motorized land conveyance . . . [o]wned by an Insured and on an Insured location" may be invoked only if two conditions are met: (1) the vehicle must be owned by an insured; and (2) the vehicle must be on an insured location. Because it cannot reasonably be disputed that the vehicle must be owned by the insured *at the time of the accident giving rise to the claim* for this exception to apply, in the absence of some textual basis to distinguish temporally between these essential facts, it seems self-evident that the vehicle also must be on an insured location at this same point in time.

Our determination that coverage depends on the location of the ATV at the time of the accident is also in keeping with this court's focus on the location of the accident in determining whether a claim is governed by other location based coverage provisions involving motor vehicles. As the court held in *LaBonte* v. *Federal Mutual Ins. Co.*, 159 Conn. 252, 257, 268 A.2d 663 (1970), "an obvious purpose of the exclusion clause [applying to automobiles off the premises or the ways immediately adjoining] was to limit the territorial scope of the . . . liability coverage in cases involving automobiles. . . . That clause provides, in effect, that any liability, under any theory of recovery, whether personal negligence, master-servant, agency, or other theory of vicarious liability, which arises from an automobile accident off the premises, is outside the scope of the contract." (Citation omitted; internal quotation marks omitted.)

viewing the contract as a whole, we decline to adopt the reasoning of *Chen*. "We recognize that this policy language could have been, and perhaps should have been, more artfully and, thus, more clearly drafted. But [the insurer's] failure to state the exclusion in the clearest language possible does not render the language used 'ambiguous.' " *Allstate Ins. Co.* v. *Shofner*, 573 So. 2d 47, 49 (Fla. App. 1990).

As was the case in *LaBonte*, the homeowner's policy in the present case provides coverage against accidents—not theories of liabilities.[4] Cf. *Iorio* v. *Simone*, 340 N.J. Super. 19, 23, 773 A.2d 722 (2001) ("[t]he occurrence which triggers the liability coverage is an accident which results in a bodily injury claim, not a particular type of careless conduct by the insured"); *Bankert* v. *Threshermen's Mutual Ins. Co.*, 110 Wis. 2d 469, 480, 329 N.W.2d 150 (1983) ("An occurrence is defined as an accident. This is what is insured against—not theories of liability."). Coverage must therefore be assessed at the time of the accident.

B

Having determined that the ATV must be "on an [i]nsured location" at the time of the accident for coverage to apply, we now turn to the second certified question, which concerns whether the site of the accident in

[4] The alternate construction of the provision as applying to ATVs so long as they are on an insured location at the time of the negligent entrustment cannot be reconciled with this long-standing recognition that the underlying purpose of liability insurance is to provide coverage based on accidents. Specifically, this construction fails to account for the inherently derivative nature of negligent entrustment liability. Although the act of entrustment may be negligent (and hence a potential basis of liability), the act of entrusting an ATV is not a *direct* source of potential accidents and injury; rather, it is the subsequent use of the entrusted ATV that may result in an injurious accident for which the entrusting party can be held responsible. *Greeley* v. *Cunningham*, 116 Conn. 515, 520, 165 A. 678 (1933) ("[w]hen the evidence proves that the owner of an automobile knows or ought reasonably to know that one to whom he [e]ntrusts it is so incompetent to operate it upon the highways that the former ought reasonably to anticipate the likelihood of injury to others by reason of that incompetence, and such incompetence does result in such injury, a basis of recovery by the person injured is established"). Although the policy does not categorically exclude from coverage claims based on negligent entrustment, the existence of such vicarious liability cannot alone dictate whether a given accident falls within the sphere of coverage. As the court recognized in *Greeley*, there is an inherent gap between the act of negligent entrustment and the ultimate accident such that the conditions that existed at the time of entrustment (for example, the vehicle being on an insured location) have little bearing on the conditions that pertain to the actual accident in relation to which coverage is claimed. Id.

this case—a dead-end private road within a residential development owned by the homeowners association of which the Kings are members—is such an "[i]nsured location." In certifying this question to us, the Second Circuit observed that only one policy definition of the term insured location arguably applies to this site—"[a]ny premises used by you in connection with [the residence premises]"[5]—and that the policy does not further define "premises." *Arrowood Indemnity Co.* v. *King*, supra, 605 F.3d 76. In addition to raising the question of whether a private road may ever qualify as "premises," the Second Circuit noted that no Connecticut court has interpreted the phrase "[a]ny premises used by you in connection with [the residence] premises" and that courts in other jurisdictions have adopted divergent criteria—including "repeated use,"[6] "integral

[5] The definition, or glossary, section of the policy provides: " 'Insured Location' means:

"a. The residence premises.

"b. The part of other premises, other structures and grounds used by you as a residence and:

"(1) Which is shown on your Declarations; or

"(2) Which is acquired by you during the policy period for your use as a residence.

"c. Any premises used by you in connection with a premises in 8.a. or 8.b. above.

"d. Any part of a premises:

"(1) Not owned by an Insured; and

"(2) Where an Insured is temporarily residing;

"e. Vacant land, other than farm land, owned by or rented to an Insured.

"f. Land owned by or rented to an Insured on which a one or two family dwelling is being built as a residence for an Insured.

"g. Individual or family cemetery plots or burial vaults of an Insured; or

"h. Any part of a premises occasionally rented to an Insured for other than business use."

[6] *Arrowood Indemnity Co.* v. *King*, supra, 605 F.3d 72, quoting *Allstate Ins. Co.* v. *Drumheller*, 185 Fed. Appx. 152, 158 (3d Cir. 2006) ("[W]e do not believe that the precise physical relationship of [the residence premises to the accident site] is the crucial inquiry. . . . We think that the Pennsylvania Supreme Court would follow [the] holding that in connection with means the repeated use of the ATV emanating from and returning to the insured's residence." [Internal quotation marks omitted.]).

use,"[7] "property ownership and legal right to use,"[8] "foreseeable use"[9] and "actual use"[10]—to determine whether a location is used in connection with the residence premises. Id., 72–75. We conclude that, although the precise meaning of the phrase "[a]ny premises used by you in connection with [the residence] premises" is uncertain, the broader meaning of the essential term that this phrase helps to define—"[i]nsured location"—is sufficiently clear to exclude the private road at issue in the present case.

As a threshold matter, we note that the mere fact that the accident site was a private road would not per se exclude it from qualifying as a "premises." The Kings' warranty deed indicates that the premises they own extends "to the center line of a private road known as Deer Park Court . . . ." It is thus clear from this deed that segments of private roads within Deer Park are

[7] *Arrowood Indemnity Co.* v. *King*, supra, 605 F.3d 73, quoting *Massachusetts Property Ins. Underwriting Assn.* v. *Wynn*, 60 Mass. App. 824, 830, 806 N.E.2d 447 (2004) ("the term insured location is intended and appropriately understood to be limited to the residence and premises integral to its use as a residence" [internal quotation marks omitted]).

[8] *Arrowood Indemnity Co.* v. *King*, supra, 605 F.3d 74, quoting *Uguccioni* v. *United States Fidelity & Guaranty Co.*, 408 Pa. Super. 511, 513, 597 A.2d 149 (1991) ("[T]hese streets, it would seem, are private property used by the insureds in connection with their insured residence. As such, the street on which [the ATV accident occurred] was an insured location." [Internal quotation marks omitted.]).

[9] *Arrowood Indemnity Co.* v. *King*, supra, 605 F.3d 74, quoting *Utica Mutual Ins. Co.* v. *Fontneau*, 70 Mass. App. 553, 559, 875 N.E.2d 508 (2007) ("[t]o determine whether a site is covered by reason of its use in connection with the specifically insured residential premises, courts will examine [1] the character of the use as a residentially related activity; [2] the distance between the residence and the site; and [3] the resulting reasonable foreseeability of the risk of the connected activity on the site to the insurer" [internal quotation marks omitted]).

[10] *Arrowood Indemnity Co.* v. *King*, supra, 605 F.3d 75, citing *Royal Indemnity Co.* v. *King*, supra, 512 F. Sup. 2d 127 (actual use is prerequisite to satisfying homeowner's policy clause that requires use of piece of property in connection with residence premises).

not excluded from the definition of "premises" simply because they are also "roads."[11]

We turn next to the question of whether the dead-end road where the accident occurred was "used . . . in connection with [the residence] premises" as provided in the policy. The varied judicial glosses identified by the Second Circuit highlight the fact that this phrase, taken in isolation, is susceptible to a variety of tenable constructions. We have noted, however, that "[w]hen interpreting [an insurance policy], we must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result." (Internal quotation marks omitted.) *Johnson* v. *Connecticut Ins. Guaranty Assn.*, supra, 302 Conn. 643. Thus we need not decide whether to follow other courts in applying a judicial gloss to the phrase "used . . . in connection with [the residence] premises" if we can discern whether "[i]nsured location," the operative term defined by this phrase, encompasses the private road at issue.[12]

[11] According to Black's Law Dictionary (9th Ed. 2009), "premises" may be defined as "[a] house or building, along with its grounds . . . ." The dictionary further notes, quoting from B. Gardner, A Dictionary of Modern Legal Usage (2d Ed. 1995), that this definition "has a curious history in legal usage. Originally, in the sense of things mentioned previously, it denoted the part of a deed that sets forth the names of the grantor and grantee, as well as the things granted and the consideration. Then, through hypallage in the early [eighteenth] century, it was extended to refer to the subject of a conveyance or bequest as specified in the premises of the deed. Finally, it was extended to refer to a house or building along with its grounds." (Internal quotation marks omitted.) Black's Law Dictionary, supra. As the Kings' warranty deed demonstrates, a private road in Deer Park may be the subject of a conveyance conferred by deed and thus may qualify as premises.

[12] As reflected in the policy provision cited in footnote 5 of this opinion, "used . . . in connection with [the residence premises]" represents one of several definitions of the term "insured location." By virtue of this relationship, if a location qualifies as a "premises used by you in connection with [the residence premises]" then that location is by definition an "insured location." This relationship also necessarily indicates that if a location *is not* an "insured location" it *is not* a "premises used by you in connection

The term insured location appears in several related provisions of the insurance contract that, along with the ATV exception at issue, address the scope of liability coverage under the policy. Most notably, as part of its liability coverage, the insurer pledges to pay certain medical expenses for injuries sustained by nonresidents of the insured household. The coverage applies: "1. To a person on the Insured location with the permission of an Insured; or

"2. To a person off the Insured location, if the bodily injury:

"a. Arises out of a condition on the Insured location or the ways immediately adjoining;

"b. Is caused by the activities of an Insured;

"c. Is caused by a residence employee in the course of the residence employee's employment by an Insured; or

"d. Is caused by an animal owned by or in the care of an Insured."

Although we cannot glean a precise meaning of insured location from this provision, it does narrow the scope of the term in two important respects. First, coverage is afforded to "a person on the Insured location *with the permission of an Insured* . . . ." (Emphasis added.) This language implies that the insured must have a sufficient legal interest in the insured location such that the insured has the right to grant permission to a noninsured to enter that location. From this we infer that "[i]nsured location" plainly may

with [the residence premises] . . . ." Our inquiry therefore turns to the scope of the term "insured location" as used in the policy, with the understanding that if the location of the accident necessarily falls outside the scope of this term then coverage is precluded, both because that location cannot be a "premises used by you in connection with [the residence premises]" and, more directly, because coverage applies to ATVs owned by an insured only when they are also "on an insured location . . . ."

not be construed so broadly as to include public spaces, access to which cannot be contingent on the permission of any individual property owner. Similarly, the insured location may not be premises over which some party other than the insured exercises exclusive control and that the insured cannot rightfully access or permit another to access. Another person's private property, that is to say, cannot reasonably be construed as an insured location simply because an insured sanctions a trespass by giving a third party "permission" to access those premises.

Second, the policy provides medical coverage for all invitees injured "on the Insured location," regardless of whether the injury relates to the insured's own activities or property maintenance. By contrast, the policy only provides for medical care of third parties injured "off of the Insured location" if there are specified reasons to charge the insured with responsibility for the injury. From this distinction we draw the ready inference that the insured necessarily carries a heightened level of responsibility for the insured location relative to other locations, such that a third party invitee injured on the insured location might reasonably look to the insured for payment of medical expenses *simply* because of where the injury occurred. This further demonstrates that the term insured location is not intended to include public spaces or property over which the insured exercises no control or for which the insured bears no particularized responsibility.

Turning to the location of the accident in the present case, the record does not show that the Kings had a cognizable interest in the dead-end portion of Midwood Road that would place the accident site within the scope of "an [i]nsured location." According to the Second Circuit's decision, the homeowners association, which is incorporated, owns this road. Nothing in the record demonstrates that the Kings' ownership of the residence

premises conferred to them authority over this stretch of road; nor do we see any indication that the Kings bore a heightened level of personal responsibility for the location. Their warranty deed specifically confers "the right to use in common with others to whom the right has been or may hereafter be granted, for all purposes of travel, the private roads leading from the premises to and from the public highway *insofar as the same may be necessary or convenient in passing to and from the premises* . . . ." (Emphasis added.) It is clear, however, that the location of the accident—a stretch of dead-end road—does *not* lead from the residence to any public road, and the right to use this road is therefore not explicitly conveyed in the deed. The text of the warranty deed, moreover, is not amenable to a more expansive reading of the Kings' easement beyond this express conveyance. The deed affords them the right to use the private roads of Deer Park only "insofar as the same may be necessary or convenient in passing to and from the premises . . . [to the public road]." Accordingly, it is clear that the easement has purposefully limited both the nature and the scope of the rights it creates. The resulting circumscribed right of passage leaves the lion's share of rights and concomitant duties, even along the roads reasonably leading to the public way, to that road's actual owner—whether it be another homeowner (who like the Kings was deeded a portion of the road) or the homeowners association generally.[13]

[13] We note that there seems to be some uncertainty in the record regarding the homeowners association's proprietary interest in the roads of Deer Park and the nature of the rights created by the Kings' membership in that association. The District Court noted with respect to this issue: "The parties dispute whether the Kings actually had the legal right to use North Midwood Road under their association contract because the Kings do not use that portion of the road for ingress or egress. I need not resolve that issue." *Royal Indemnity Co.* v. *King*, supra, 512 F. Sup. 2d 125 n.8. The Second Circuit subsequently characterized the location as "a private road in which the [Kings] had a property interest derivative of their ownership of the insured residence premises"; *Arrowood Indemnity Co.* v. *King*, supra, 605 F.3d 71; but it left open the question of "whether merely showing the exis-

We therefore conclude that the limited easement expressed in the Kings' warranty deed does not give them a sufficient interest in the accident site, a dead-end stretch of road beyond the scope of that easement, to render it an insured location. Under the terms of the insurance contract at issue in this case, the accident site therefore is not covered.

II

Although we have determined that the accident in this case was not covered by the Kings' homeowners insurance policy, the Second Circuit has indicated that our answers to the first two certified questions may

tence of a property right in the accident situs is sufficient to secure policy coverage as an 'insured location,' or whether the 'legal right' must be further conditioned on it being a right for purposes only of assuring access to the residence premises . . . ." Id., 74. We conclude that, under this insurance contract, a property interest that cannot reasonably be construed to confer the level of rights and responsibilities discussed in the "medical payments" provision of the policy would not be sufficient to qualify a given site as an insured location. Whatever derivative property interest the Kings may have in the private roads of Deer Park as a result of their membership in the homeowners association, that interest, precisely because it is mediated through the association and does not arise directly from the residence premises itself (unlike the rights outlined in the warranty deed), cannot reasonably be read to trigger this heightened level of personal rights and responsibilities. We therefore disagree with *Uguccioni* v. *United States Fidelity & Guaranty Co.*, 408 Pa. Super. 511, 514, 597 A.2d 149 (1991), insofar as the court in that case concluded that a private road in an insured's residence community is necessarily an "insured location."

In further support of this conclusion, we note that, where the insurance contract at issue in the present case extends coverage to locations in a private residence community that are beyond the "insured location," it has done so explicitly. The policy contains a provision similar to the ATV provision that extends coverage to "[a] motorized golf cart while: (a) [b]eing used to play golf on a golf course; (b) [o]n an Insured location; or (c) [o]ff an Insured location; but within the confines of a residential park, planned community or similar limited access living community that contains the Insured location." This provision makes clear both that the parties contemplated that the site of an accident may be "[o]ff an Insured location" while also being "within the confines of a . . . planned community" and that, being aware of this scenario, the parties explicitly extended coverage to the entire community where they intended coverage so to extend.

not be dispositive of the entire appeal. See footnote 1 of this opinion. We therefore turn to the third certified question, which concerns the affirmative defense of untimely notice, that the District Court did not reach. As the Second Circuit noted, "Connecticut requires two conditions to be satisfied before an insurer's duties can be discharged pursuant to the 'notice' provision of a policy: (1) an unexcused, unreasonable delay in notification by the insured; and (2) resulting material prejudice to the insurer. The burden of establishing timely notice or lack of prejudice to the insurer rests with the insured." *Arrowood Indemnity Co.* v. *King*, supra, 605 F.3d 77. The certified question specifically addresses the first of these conditions; however, because both conditions may be relevant to the Circuit Court's disposition, we will address each in turn.

A

The third certified question asks whether "social interactions between the insured and the claimant making no reference to an accident claim justify a delay in giving notice of a potential claim to the insurer . . . ." Id., 80. In certifying this question to us, the Second Circuit observed: "We find that it is unclear under Connecticut law whether the Kings' reliance on social interaction is enough to create a material issue of fact as to whether, prior to their receipt of the letter from the McEntees' counsel, the situation would have 'suggest[ed] to a person of ordinary and reasonable prudence that liability may have been incurred.' " Id., 78. We hold that the severity and circumstances of the injury in this case were such that a reasonable person would have known that "liability may have been incurred" and that social interactions following the injury, in which the victim in no way disclaimed the possibility of bringing an action, did not bear on the Kings' obligation to give notice within a reasonable time following the accident.

The notice provision at issue provides that "[i]n the case of an accident or occurrence," the insured has a duty to "[g]ive written notice to us or our agent as soon as practical . . . ." As this court has long recognized, in the context of notice provisions, "as soon as practicable" means "as soon as can reasonably be expected under the circumstances. . . . The duty to give notice does not arise unless and until facts develop which would suggest to a person of ordinary and reasonable prudence that liability may have been incurred, and is complied with if notice is given within a reasonable time after the situation so assumes an aspect suggestive of a possible claim for damages."[14] (Internal quotation marks omitted.) *Plasticrete Corp.* v. *American Policyholders Ins. Co.*, 184 Conn. 231, 241, 439 A.2d 968 (1981).

Turning to the facts of the present case, it is clear that the Kings had an obligation to give notice following the ATV accident. As a result of this accident, the injured child suffered a severe head injury leading to hospitalization and a temporary coma; the accident, moreover, was to all appearances causally connected to Pendleton, Jr.'s use of an ATV entrusted to him by his parents. These facts would have led a reasonable person to believe that "liability may have been incurred" and thus gave rise to a duty to give notice. Although "the duty to give notice does not attach in the case of a trivial accident where there is no reasonable ground for believing at the time that it involves any injury insured against"; *Baker* v. *Metropolitan Casualty Ins. Co.*, 118 Conn. 147, 150, 171 A. 7 (1934); this court has long recognized that "[i]njury, however slight, received from an accident within the coverage of a liability policy

[14] Although the notice provision contained in the excess liability insurance policy issued by National Surety Corporation; see footnote 1 of this opinion; requires the insurer to be notified "promptly," like the phrase "as soon as practical," the term promptly is construed to require reasonably timely notice. *Baker* v. *Metropolitan Casualty Ins. Co.*, 118 Conn. 147, 149, 171 A. 7 (1934).

may, and experience indicates, probably will, result in a claim for damages . . . .'' Id., 152; see id., 153–54 (reasonableness of delayed disclosure is question of fact when child struck by car displayed no injuries and child's mother informed driver that child was not injured). In the present case, the injury was far from slight and was unmistakably apparent.

Notwithstanding the severe nature of this accident, the Kings suggest that no notice was required prior to their having been contacted by an attorney representing the McEntee family approximately one year after the accident because, subsequent to the accident, they had socialized with the child and his family and these interactions did not create the impression that an action would be brought.[15] The Kings' argument fails to recognize that the notice requirement turns not on an insured's subjective assessment of how likely a claim is to be brought, but rather on whether a reasonable person would recognize that ''liability may have been incurred''; *Plasticrete Corp.* v. *American Policyholders Ins. Co.*, supra, 184 Conn. 241; and ''the situation so assumes an aspect suggestive of a possible claim for damages.'' Id. There is no indication that through these social interactions the victim assumed total liability or otherwise disclaimed ability to bring a claim. Although the social interaction may have made a claim seem less likely, it did not defeat the reasonable conclusion that liability may have been incurred or that a claim for damages could possibly arise from the accident. Therefore, the social interaction between the Kings and the

[15] The Kings also assert that because the homeowner's insurance policy includes an instruction to give notice of ''[n]ames and addresses of any claimants and witnesses,'' the Kings had no obligation to give notice in the absence of a ''claimant.'' This argument plainly lacks merit. Connecticut law makes clear that the duty to give notice arises when ''liability may have been incurred''; in this context the term claimant reasonably refers to those to whom the insured may be liable, regardless of whether a claim has yet been brought.

McEntees would not justify a delay in giving notice of a potential claim.

B

If notice was untimely, a further determination of whether the insurers were prejudiced by the late notice will be necessary. Although a determination of whether prejudice occurred in the present case is beyond the scope of the certified question, we take this opportunity to revisit the allocation of the burden of proof under Connecticut law. In so doing, we overrule *Aetna Casualty & Surety Co.* v. *Murphy*, 206 Conn. 409, 538 A.2d 219 (1988), to the extent that it allocated the burden to the insured to disprove prejudice, and we hold that the insurer bears the burden of proving, by a preponderance of evidence, that it has been prejudiced by the insured's failure to comply with a notice provision.

In reaching this decision, we begin by reviewing the development of the role of prejudice in notice provisions under Connecticut law. Historically, "absent waiver, an unexcused, unreasonable delay in notification constitute[d] a failure of condition that entirely discharge[d] an insurance carrier from any further liability on its insurance contract. . . . That rule was based on the basic principle that contracts should be enforced as written, and that contracting parties are bound by the contractual provisions to which they have given their assent. . . .

"In *Murphy*, we recognized that rigid application of the general rule discharging an insurer's liability when an insured has failed to comply with the notice provisions of the policy, without any initial inquiry into whether the insurer was prejudiced by the timing of the notice, would likely yield a disproportionate forfeiture. . . . Although we noted that most jurisdictions placed the burden upon an insurer to show prejudice before being discharged from liability due to an

insured's late notice, we opted instead to place the burden on the insured to show that the insurer had not been prejudiced by the timing of the notice. . . . In arriving at this rule, we balanced the competing principles of protecting an insured from disproportionate forfeiture and safeguarding an insurer's legitimate interest in protection from stale claims." (Citations omitted; internal quotation marks omitted.) *National Publishing Co.* v. *Hartford Fire Ins. Co.*, 287 Conn. 664, 674–75, 949 A.2d 1203 (2008).

The burden allocation adopted in *Murphy* proceeded from the court's fundamental recognition that "a proper balance between the interests of the insurer and the insured requires a factual inquiry into whether, in the circumstances of a particular case, an insurer has been prejudiced by its insured's delay in giving notice of an event triggering insurance coverage. . . . Literal enforcement of notice provisions when there is no prejudice is no more appropriate than literal enforcement of liquidated damages clauses when there are no damages." *Aetna Casualty & Surety Co.* v. *Murphy*, supra, 206 Conn. 417–18.

Although *Murphy* noted that a majority of other jurisdictions balance the interests of insurers and insureds by requiring the insurer to demonstrate prejudice, this court chose instead to require the insured to demonstrate lack of prejudice. Id., 418–19. The court reasoned that this burden allocation was appropriate because "[i]t is the insured who is seeking to be excused from the consequences of a contract provision with which he has concededly failed to comply. . . . The determination of what is fair, as a factual matter, must . . . depend upon a proper showing by the [party] who seeks this extraordinary relief." Id., 419–20.

We now conclude that this reasoning, while legally tenable, is not as consistent with the principles we

articulated previously herein as the contrary rule. As we recognized in *Murphy*, the task of proving a negative is an inherently difficult one, and it may be further complicated by the opposing party's interest in concealment. Id., 420. Imposing this difficult task on the insured—the party least well equipped to know, let alone demonstrate, the effect of delayed disclosure on the investigatory and legal defense capabilities of the insurer—reduces the likelihood that the fact finder will possess sufficient information to determine whether prejudice has resulted from delayed disclosure. This uncertainty, which may prevent the court from meaningfully weighing the parties' real interests, compromises the principled balance that this court intended to strike in *Murphy*. To better achieve that balance, we now join the overwhelming majority of our sister states in adopting a rule that facilitates informed determinations of prejudice by incentivizing insurers to bring evidence of prejudice, should it exist, to the court's attention.[16]

[16] At the time *Murphy* was decided, the court identified eighteen jurisdictions that placed the burden of showing prejudice on the insurer, five jurisdictions that placed the burden on the insured and seven jurisdictions that strictly construed the notice requirement irrespective of prejudice. *Aetna Casualty & Surety Co.* v. *Murphy*, supra, 206 Conn. 418–19. Since this court decided *Murphy*, at least one of the five jurisdictions placing the burden on the insured has shifted the burden to the insurer, employing much the same reasoning we adopt today. *Dover Mills Partnership* v. *Commercial Union Ins. Cos.*, 144 N.H. 336, 339, 740 A.2d 1064 (1999) ("It is appropriate to impose the burden on the insurance carrier to prove prejudice because the insurer is in the best position to establish facts demonstrating that prejudice exists. Moreover, to hold otherwise would require an insured to prove a negative, a nearly impossible task."). Of the seven jurisdictions that strictly construed the notice requirement according to *Murphy*, five now require the insurer to demonstrate prejudice. *Progressive Specialty Ins. Co.* v. *Steele*, 985 So. 2d 932, 940 (Ala. App. 2007) ("[i]f the insurer fails to present evidence as to prejudice, then the insured's failure to give notice will not be a bar to his recovery"); *Friedland* v. *Travelers Indemnity Co.*, 105 P.3d 639, 648 (Colo. 2005) ("in cases where an insurer has received unreasonably delayed notice of the suit but such notice came prior to the suit's disposition, there should be no presumption of prejudice and the insurer is required to prove prejudice"); *Government Employees Ins. Co.* v. *Harvey*, 278 Md. 548,

The answer to the first certified question is that the relevant location is the site of the accident; the answer to the second certified question is no, the private road in this case does not fall under the coverage provision; and the answer to the third certified question is no, social interactions unrelated to litigation do not justify delayed notice, but the insurer bears the burden of proving prejudice from late notice.

No costs shall be taxed in this court to either party.

In this opinion the other justices concurred.

SCHOLASTIC BOOK CLUBS, INC. *v.* COMMISSIONER OF REVENUE SERVICES
(SC 18425)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.

Syllabus

The plaintiff, S Co., a mail order business with its principal place of business in Missouri, appealed to the trial court from the decisions of the defendant, the commissioner of revenue services, upholding certain sales and use tax assessments that the commissioner imposed after determining that, for purposes of the Connecticut Sales and Use Taxes Act (§ 12-406 et seq.), S Co. had engaged in business in Connecticut, pursuant to statute (§ 12-407 [a] [15] [A] [iv]), by "having any representative . . .

551–52, 366 A.2d 13 (1976) (statute permits disclaimer of coverage based on inadequate notice only if insurer "establishes, by a preponderance of affirmative evidence that such lack of cooperation or notice has resulted in actual prejudice"); *Ponok Realty Corp.* v. *United National Specialty Ins. Co.*, 69 App. Div. 3d 596, 893 N.Y.S.2d 125 (2010) (noting that 2008 legislation "provides that where an insurer alleges that it was prejudiced as a result of a failure to provide timely notice, the burden shall be on . . . the insurer to prove that it has been prejudiced if the notice was provided within two years of the time required under the policy" [internal quotation marks omitted]); *State Farm Mutual Automobile Ins. Co.* v. *Porter*, 221 Va. 592, 599, 272 S.E.2d 196 (1980) (noting that insurer bears "burden of showing that the insured's violation, failure to give prompt notice of suit, was of such substantial and material nature as to justify the voiding of the insurance contract" [internal quotation marks omitted]).

operating in this state for the purpose of selling, delivering or taking orders . . . .'' S Co. conducts its business by mailing catalogs to classrooms at nursery, primary and secondary schools in Connecticut, among other states. Teachers at those schools receive the catalogs, which contain flyers that they can distribute to students. The students and parents, as well as the teachers themselves, order books and related products by returning orders and payments to the teacher, who submits them to S Co. S Co. processes the orders in Missouri and ships them via common carrier to the teachers, who, in turn, distribute the ordered products. Approximately 14,000 Connecticut teachers receive and distribute S Co.'s materials to schoolchildren throughout Connecticut. S Co. does not own or lease property or have offices, employees or agents in Connecticut. The trial court sustained S Co.'s appeals, concluding that the sales and use taxes could not be imposed because the teachers did not function as S Co.'s representatives within the meaning of § 12-407 (a) (15) (A) (iv) but, rather, were customers who purchased materials for themselves and acted in loco parentis by standing in the place of the parents for the purpose of helping students select and order books. The trial court also concluded that the imposition of sales and use taxes on S Co. violated the constitution because there was no definite link or minimum connection between the state and S Co. On the commissioner's appeal from the trial court's judgments, *held*:

1. The trial court incorrectly concluded that the teachers did not serve as S Co.'s in-state representatives for the purpose of selling, delivering or taking orders pursuant to § 12-407 (a) (15) (A) (iv) and that the sales and use tax assessments were not statutorily authorized: this court concluded, on the basis of the ordinary meaning of the term ''representative'' and the fact that the statute distinguished between a person who acts as a representative, and a person who acts as an agent, salesperson, canvasser, or solicitor, that the term ''representative'' included persons who, like the teachers in the present case, are not employees or agents, and who do not necessarily act through delegated authority for remuneration but who otherwise stand in the place of, or act on behalf of, the out-of-state retailer for the purpose of selling, delivering or taking orders for the retailer's products; furthermore, the teachers did not need to have a legal or formal relationship with S Co. in order to be their representatives for purposes of the statute, and, even though the teachers sometimes were customers of S Co.'s products, their principal function was to serve as the exclusive vehicle through which S Co. marketed, sold and delivered its products to Connecticut schoolchildren.
2. The trial court incorrectly concluded that the imposition of sales and uses taxes on S Co. was unconstitutional under the commerce clause of the United States constitution because there was no substantial nexus between the state and S Co.; a substantial nexus existed between the state and S Co. because the teachers were S Co.'s representatives and

because the teachers served as the only means through which S Co. communicated with the in-state purchasers of its products.

Argued October 24, 2011—officially released March 27, 2012

Procedural History

Appeals from the defendant's assessment of certain sales and use tax deficiencies against the plaintiff, brought to the Superior Court in the judicial district of New Britain, Tax Session, and tried to the court, *Cohn, J.*; judgments sustaining the appeals, from which the defendant appealed. *Reversed*; *judgments directed.*

Gregory T. D'Auria, senior appellate counsel, with whom were *Louis P. Buccari*, first assistant commissioner and general counsel, and, on the brief, *George Jepsen*, attorney general, and *Richard Blumenthal*, former attorney general, for the appellant (defendant).

George S. Isaacson, pro hac vice, with whom were *Dominic Fulco III* and, on the brief, *David W. Bertoni*, pro hac vice, for the appellee (plaintiff).

Opinion

ZARELLA, J. The principal issue in this tax appeal is whether the plaintiff, Scholastic Book Clubs, Inc.,[1] is liable under the Sales and Use Taxes Act (act), General Statutes § 12-406 et seq., for more than $3 million in sales and use tax deficiency assessments imposed by the defendant, the commissioner of revenue services (commissioner). The commissioner claims that the trial court incorrectly determined that the taxes could not be imposed because the schoolteachers are not the plaintiff's "representative[s]" within the meaning of

[1] We hereinafter refer to Scholastic Book Clubs, Inc., as the plaintiff throughout this opinion except to the extent that we discuss other cases in which Scholastic Book Clubs, Inc., is also a party, in which we refer to it as "Scholastic."

General Statutes § 12-407 (a) (15) (A) (iv)[2] and the schoolteachers' administrative tasks do not supply the substantial nexus required between the plaintiff and the state to justify imposition of the taxes under the commerce clause of the United States constitution.[3] The plaintiff responds that the trial court correctly determined that the taxes could not be imposed under either of the foregoing theories. We agree with the commissioner and, accordingly, reverse the judgments of the trial court.

The following relevant findings of fact are set forth in the trial court's memorandum of decision. The plaintiff is a Missouri corporation with its principal place of business in Jefferson City, Missouri. The plaintiff also is a wholly owned subsidiary of Scholastic, Inc. Both the plaintiff and Scholastic, Inc., are for profit companies. Scholastic, Inc., employees are allocated to the plaintiff for staffing purposes. Although Scholastic, Inc., products are available through direct purchase or in retail stores, the plaintiff distributes its books and related items only through schools.

The plaintiff has been in operation for sixty years and has "a known reputation" in the elementary and secondary school community. In Connecticut, approximately 14,000 teachers participate in the plaintiff's programs.

[2] General Statutes § 12-407 (a) (15) (A) provides in relevant part: " 'Engaged in business in the state' means and includes but shall not be limited to . . . (iv) . . . having any representative, agent, salesman, canvasser or solicitor operating in this state for the purpose of selling, delivering or taking orders . . . ."

[3] Article one, § 8, of the United States constitution provides in relevant part: "The Congress shall have Power . . . [t]o regulate Commerce . . . among the Several States . . . ."

"The commerce clause prohibits state taxation that discriminates against interstate commerce." *Altray Co.* v. *Groppo*, 224 Conn. 426, 434 n.6, 619 A.2d 443 (1993).

The plaintiff has identified four categories of students, and a catalog is designed for each. Early childhood students are in the "firefly" group. Kindergarten and first grade students are in the "seesaw" group. Students in grades two and three are in the "lucky" group, and students in grades four, five and six are in the "arrow" group.

The plaintiff does not own or lease any real estate or personal property in Connecticut. The plaintiff also has no principal place of business, temporary facility, office, telephone number, mailing address or bank accounts in Connecticut. In addition, the plaintiff has no employees, representatives,[4] independent contractors, salesmen, agents, canvassers, solicitors or other personnel in the state. It does not advertise in the local media or engage in direct advertising to Connecticut customers, and has not communicated with residents of Connecticut by means other than mail or Internet from locations outside the state. Moreover, it has never used state or local government services, such as the police or fire departments, and does not, and did not, use Connecticut vendors to design, prepare, print, store or mail catalogs describing its products. The plaintiff has not retained any security interests in any product sold to Connecticut customers and has no franchisees or licensees operating in Connecticut. The plaintiff does not conduct credit investigations or collection activities in Connecticut and does not solicit orders by telephone, computer, cable or other communication systems in Connecticut.

The plaintiff conducts its mail order business by mailing catalogs monthly during the school year to classrooms at nursery, primary and secondary schools

[4] The trial court distinguished between other persons who might be considered the plaintiff's representatives in Connecticut and the schoolteachers who are the subject of this litigation.

throughout the United States, including Connecticut. Solely as a result of their academic interest in choosing books and other items for their students and themselves, Connecticut teachers play the following role in the plaintiff's sales and distribution process.

Initially, the classroom teacher receives a grade appropriate catalog from the plaintiff. The catalog contains flyers to be distributed to students. It also contains an order form and a memorandum, or "teacher memo," describing the bonus point system that a completed order brings to the classroom. The "teacher memo" states that no agency relationship is created between the teacher and the plaintiff.

Whether a teacher decides to participate in the program or any other book club is entirely the teacher's decision. If a teacher decides to participate, the teacher distributes the flyers to the students, who are expected to bring the flyers home to their parents. If there are not enough flyers, the teacher contacts the plaintiff for more. Sometimes, the teacher sends a "student memo" to the parents, a draft of which is supplied to the teacher by the plaintiff. The teacher also may purchase books from the catalog for the classroom or for gifts to students.

The individual selections are returned to the teacher with cash or checks from the parent or parents. A student with allowance money also may pay for the order with cash. The teacher collects all of the orders and submits them to the plaintiff, and may add his or her own order to the total. Although a teacher may delegate the collection of an order to a "parent helper," the order is submitted under the teacher's name and account number. The teacher may order online from the plaintiff with a credit card and may have the option of using a discount coupon. All orders are processed and filled

in Jefferson City, Missouri. If the order is calculated incorrectly, the plaintiff contacts the teacher.

The books are delivered to the teacher by common carrier with a packing slip addressed to the teacher. A list addressed to the teacher is enclosed with the order and shows the boxes contained in the delivery. The teacher distributes the order to the students. If a book is unavailable, the plaintiff includes a coupon for the affected student, or sometimes a different book. The plaintiff attempts to fill the order eventually. If the order cannot be filled, the teacher receives a refund check for the student or parent. Students with torn or defective books also receive a refund check from the plaintiff, which is sent to the teacher.

A classroom may receive bonus points, which do not expire, based on the number of books ordered each month. Teachers, not parents or students, decide how the bonus points will be spent, and parents are not informed regarding the teachers' redemption choices. The bonus points may be redeemed for book catalog items or from a separate catalog for goods that require a greater number of bonus points. These items include, inter alia, telephones, fax machines, televisions, small refrigerators, and microwave and toaster ovens. The "items catalog" provides that the teacher may redeem bonus points for "classroom use" only. Because the plaintiff does not police this requirement, a teacher could obtain a television, for example, and use it at home. The plaintiff trusts the teachers, however, and does not know of any patent abuse of the bonus point system.

New teachers or teachers new to a grade receive an additional letter from the plaintiff in September of each school year explaining the program. They also receive a catalog known as a "slug," which contains the same information as that sent to established teachers but

omits the teacher's name. The plaintiff suggests that the new teacher call its offices in Missouri to "walk through" the process. The new teacher then learns about grade specific catalogs and special catalogs, such as those oriented to history or African-American studies. There is no restriction that would prohibit a teacher from giving a flyer to a teacher trainee, neighbor or friend.

There is no limit on the size or dollar amount of an order, but the plaintiff audits certain orders. For example, when an order contains a request for a large quantity of books or the same book, the plaintiff may conduct an audit to determine whether the teacher may be conducting a side business.

The plaintiff has been selling its products in this manner to Connecticut schoolchildren for many years. It is the plaintiff's view that teachers are acting to assist students in their purchase of books "in loco parentis," or in their role as surrogate parents.

On March 1, 2003, the commissioner imposed a sales and use tax deficiency assessment on the plaintiff in the amount of $2,048,339.69, plus interest and penalties, for the period of June 1, 1995 through May 31, 2002. On September 11, 2006, the commissioner imposed an additional sales and use tax deficiency assessment on the plaintiff in the amount of $1,250,403.11, plus interest and penalties, for the period of June 1, 2002 through May 31, 2005, for a total tax assessment of $3,298,742.80. The plaintiff protested the assessments pursuant to General Statutes § 12-418.[5] On January 10, 2007, the commissioner issued a written decision in each case

[5] General Statutes § 12-418 (1) provides: "(A) Any person against whom an assessment is made under section 12-414a, 12-415, 12-416 or 12-424 or any person directly interested may petition for a reassessment not later than sixty days after service upon such person of notice thereof. If a petition for reassessment is not filed within the sixty-day period, the assessment becomes final at the expiration of the period.

"(B) Any person against whom an assessment is made under section 12-417 or any person directly interested may petition for a reassessment not later than ten days after service of notice upon such person. If a petition

upholding the assessments because the plaintiff had sold its products by using "in-state representatives . . . pursuant to . . . § 12-407 (a) (15) (A)."

Following the plaintiff's appeals from the commissioner's decisions, the case was tried to the court on October 14 and 15, 2008. On April 9, 2009, the court rendered judgments sustaining the plaintiff's appeals. The court determined that the term "representative," as used in § 12-407 (a) (15) (A) (iv), means "a person who participates in an in-state 'sales force' to sell, deliver or take orders to generate revenue" and that Connecticut schoolteachers do not function as the plaintiff's "representatives" under the statute because they are "not in-state 'order takers' seeking to produce 'revenue' for themselves or [the plaintiff] . . . ." The court instead described the teachers as customers who purchase materials for themselves and act " 'in loco parentis' " by standing in the place of parents for the purpose of helping students select and order books. The court further determined that imposing tax liability on the plaintiff would violate constitutional principles because there existed no "definite link" or "minimum connection" between the state and the plaintiff. (Internal quotation marks omitted.) The court subsequently rejected the commissioner's challenge to the statutory and constitutional grounds for its decision, and denied the commissioner's motion for reargument and reconsideration. This consolidated appeal by the commissioner followed.[6]

I

STATUTORY CLAIM

The commissioner first contests the trial court's conclusion that the commissioner had no authority to

for reassessment is not filed within such ten-day period, the assessment becomes final at the expiration of the period."

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

impose the deficiency tax assessments because Connecticut schoolteachers do not serve as the plaintiff's in-state "representative[s]" for "the purpose of selling, delivering or taking orders" for children's books, among other items, pursuant to § 12-407 (a) (15) (A) (iv). The commissioner claims that a proper interpretation of the term "representative," as used in the statutory provision, focuses objectively on the nature of the teachers' activities, not on the teachers' motives, and that the teachers are the plaintiff's "representative[s]" because their activities are directly related to the plaintiff's business purpose of "selling, delivering or taking orders" for the plaintiff's products. General Statutes § 12-407 (a) (15) (A) (iv). The plaintiff responds that the commissioner construes the term "representatitive" too broadly and that the trial court correctly concluded that Connecticut schoolteachers are merely customers who also act "in loco parentis" for the benefit of their classrooms and students. The plaintiff further argues that it has no contractual or other legal relationship with the teachers that could support the commissioner's claim that the teachers are its representatives, and there is no evidence that the legislature sought to imbue the term with that meaning. We agree with the commissioner.

We begin our analysis with the applicable standard of review. Whether the term "representative," as used in § 12-407 (a) (15) (A) (iv), can be construed to include the teachers in this case presents an issue of statutory interpretation, which is a question of law over which we exercise plenary review. See, e.g., *Rainforest Cafe, Inc.* v. *Dept. of Revenue Services*, 293 Conn. 363, 371–72, 977 A.2d 650 (2009).

"The principles that govern statutory construction are well established. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner,

the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When 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.) *Bysiewicz* v. *DiNardo*, 298 Conn. 748, 765, 6 A.3d 726 (2010). "We recognize that terms in a statute are to be assigned their ordinary meaning, unless context dictates otherwise . . . ." (Internal quotation marks omitted.) *Brown & Brown, Inc.* v. *Blumenthal*, 297 Conn. 710, 722, 1 A.3d 21 (2010).

"[A]long with these principles, we are also guided by the applicable rules of statutory construction specifically associated with the interpretation of tax statutes. . . . [W]hen the issue is the imposition of a tax, rather than a claimed right to an exemption or a deduction, the governing authorities must be strictly construed against the commissioner . . . and in favor of the taxpayer." (Internal quotation marks omitted.) *Rainforest Cafe, Inc.* v. *Dept. of Revenue Services*, supra, 293 Conn. 378. Nevertheless, "[i]t is also true . . . that such strict construction neither requires nor permits the contravention of the true intent and purpose of the statute as expressed in the language used." (Internal quotation marks omitted.) *Ruskewich* v. *Commissioner of Reve-*

nue Services, 213 Conn. 19, 24, 566 A.2d 658 (1989); see also *Key Air, Inc.* v. *Commissioner of Revenue Services*, 294 Conn. 225, 242, 983 A.2d 1 (2009) ("[i]n tax law . . . substance rather than form determines tax consequences" [internal quotation marks omitted]).

Turning to the statute in question, General Statutes § 12-407 (a) (15) (A) provides in relevant part: " 'Engaged in business in the state' means and includes but shall not be limited to the following acts or methods of transacting business . . . ." The statute then sets forth numerous examples of activities that subject an out-of-state retailer to sales and use taxation, one of which is "having any representative, agent, salesman, canvasser or solicitor operating in this state for the purpose of selling, delivering or taking orders . . . ." General Statutes § 12-407 (a) (15) (A) (iv). The commissioner acknowledges that neither the statute itself nor any other provision in the statutory scheme defines the term "representative" in this context. Accordingly, we begin our analysis by examining the statute's language more closely.

As previously noted, General Statutes § 12-407 (a) (15) (A) initially provides that the term " '[e]ngaged in business in the state' . . . includes but shall not be limited to" the examples that follow. The word "includes" is a term of expansion. *Pacific Indemnity Ins. Co.* v. *Aetna Casualty & Surety Co.*, 240 Conn. 26, 31–32, 688 A.2d 319 (1997). Similarly, the phrase "but shall not be limited to," when "coupled with the enumeration of specific or illustrative acts of . . . conduct," is "indicative of a legislative intent . . . to delegate to the [commissioner] the duty of ascertaining what other or additional acts" fall within the articulated standard. *Leib* v. *Board of Examiners for Nursing*, 177 Conn. 78, 90, 411 A.2d 42 (1979). An objective reading of the statute thus suggests that it was intended to encompass a wide range of conduct and that the commissioner has

discretion in determining what type of conduct falls within its purview. Cf. *Ex parte Newbern*, 286 Ala. 348, 352, 239 So. 2d 792 (1970) (rejecting legal formalism in construing term "salesman" under Alabama's sales and use tax statutes because court did not believe that "the legislature intended a seller conducting such solicitation to avoid collecting the use tax merely by showing that its salesmen failed to come within some technical definition of 'salesman' or lacked some legal relationship with the out-of-state seller not articulated in the statute"); *Commissioner of Revenue* v. *Jafra Cosmetics, Inc.*, 433 Mass. 255, 261, 742 N.E.2d 54 (2001) (eschewing technical construction of term "representative" under Massachusetts sales and use tax statutes "that would permit vendors to escape . . . tax liability by artful drafting").

We next consider whether Connecticut schoolteachers are "representative[s]" within the meaning of § 12-407 (a) (15) (A) (iv). In the absence of a definition of "representative" in the statute itself, "[w]e may presume . . . that the legislature intended [the word] to have its ordinary meaning in the English language, as gleaned from the context of its use." (Internal quotation marks omitted.) *Paul Dinto Electrical Contractors, Inc.* v. *Waterbury*, 266 Conn. 706, 725, 835 A.2d 33 (2003). Webster's Third New International Dictionary defines "representative" as one who "stand[s] for or in the place of another: act[s] for another or others: [or] constitute[s] the agent for another esp[ecially] through delegated authority . . . ." Moreover, because the statute distinguishes between persons who may be acting as representatives, agents, salesmen, canvassers and solicitors, we may infer that the legislature was describing the different roles a person may assume for the purpose of "selling, delivering or taking orders" for the products of the out-of-state retailer. General Statutes § 12-407 (a) (15) (A) (iv); see *C. R. Klewin Northeast, LLC* v. *State*,

299 Conn. 167, 177, 9 A.3d 326 (2010) ("[t]he use of the different terms . . . within the same statute suggests that the legislature acted with complete awareness of their different meanings . . . and that it intended the terms to have different meanings" [internal quotation marks omitted]); *Hinchliffe* v. *American Motors Corp.*, 184 Conn. 607, 613, 440 A.2d 810 (1981) ("[t]he use of different terms within the same sentence of a statute *plainly* implies that different meanings were intended" [emphasis added]); see also *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010) ("It is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." [Internal quotation marks omitted.]). Accordingly, the most reasonable construction of "representative" that does not render the term superfluous and is consistent with the statute's purpose of applying to a wide range of conduct is that it means a person who is not an employee or an agent and who does not necessarily act through delegated authority for remuneration, as does a salesman, canvasser or solicitor, but who otherwise stands in the place of, or acts on behalf of, the out-of-state retailer "for the purpose of selling, delivering or taking orders" for the retailer's products.[7] General Statutes § 12-407 (a) (15) (A) (iv).

Applying this construction of the term in the present context, we conclude that the Connecticut schoolteach-

[7] We therefore disagree with the trial court that "representative[s]" in the statutory definition are "in the same class as 'salesmen, canvassers or solicitors.' "

ers who participate in the plaintiff's program may be considered its representatives. The trial court found that the plaintiff is a "for profit" mail order business that distributes its books and related products "only through schools," that approximately 14,000 teachers "participate in [the plaintiff's] programs" and that the plaintiff has no other personnel or means of selling its products in Connecticut. Accordingly, the teachers serve as the sole conduit through which the plaintiff advertises, markets, sells and delivers its products to Connecticut schoolchildren. Although individual teachers may decide not to participate in the program, those who participate distribute the plaintiff's catalogs, flyers, order forms and other materials to the children in their classrooms. The children then bring the information home to their parents and purchase the plaintiff's products by returning the completed order forms, with payments, to the teachers for submission to the plaintiff. All products ordered and sold through this process are delivered to the teachers, who, in turn, distribute them to their students and resolve any issues that may arise thereafter, such as damaged or defective products, backordered products and refunds. In other words, the plaintiff is able to sell its products in Connecticut only through the teachers who participate in its program.

We reject the trial court's and the plaintiff's assertions that the teachers are not the plaintiff's representatives because they are not in-state "order takers" seeking to produce "revenue" for themselves or the plaintiff, do not have a formal legal relationship with the plaintiff like that of an agent or are merely customers who act "in loco parentis" by standing in the place of a parent to help students select and order books. With respect to the first point, it is the effect of the in-state providers' participation in fostering the out-of-state retailer's goal of selling its products, not the providers' motivation, with which the statute is concerned. The statute con-

tains no reference to the motivation that may inform a providers' conduct but simply requires that the retailer have a "representative" who is "operating" in the state for the specified purposes. General Statutes § 12-407 (a) (15) (A) (iv). If the legislature had intended motivation or any other mental attribute of the provider to be considered in construing the statute, it would have used such language therein or in the corresponding regulation,[8] as it is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly; e.g., *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 729, 6 A.3d 763 (2010); or to use broader or limiting terms when it chooses to do so. See, e.g., *Stitzer* v. *Rinaldi's Restaurant*, 211 Conn. 116, 119, 557 A.2d 1256 (1989).

We also reject the plaintiff's argument that, in order to be considered a representative, the in-state provider must have a legal or agency relationship with the retailer. Not only does the statute not require such a relationship, but, as previously discussed, it expressly distinguishes between a "representative," an "agent" and other more formal roles that a provider may assume in assisting an out-of-state retailer market and sell its products in this state, thus clearly indicating that the terms have different meanings. See *Hinchliffe* v. *American Motors Corp.*, supra, 184 Conn. 613 ("[t]he use of different terms within the same sentence of a statute *plainly* implies that different meanings were intended" [emphasis added]). Furthermore, when the legislature has intended the term "representative" to suggest a more formal legal relationship, it has used language

[8] Section 12-426-22 (a) of the Regulations of Connecticut State Agencies provides in relevant part: "The term 'engaged in business in this state' shall include but not be limited to the following acts or methods of transacting business . . . having any representative, agent, salesman, canvasser or solicitor operating in this state for the purpose of selling or leasing, delivering or taking orders for tangible personal property or services." The regulation, for the most part, mirrors the language of the statute.

indicating that intent, as it has done when defining the term "representative" in other contexts. See General Statutes § 21a-70b (2)[9] (defining " '[m]anufacturer's or distributor's representative' "); General Statutes § 42-481 (4)[10] (defining " '[s]ales representative' "); General Statutes § 52-146d (1)[11] (defining " '[a]uthorized representative' "). Thus, in the absence of more specific language, we conclude that the legislature did not intend the term "representative," as used in § 12-407 (a) (15) (A) (iv), to be understood as requiring a formal legal or agency relationship between the in-state provider and the retailer.[12]

[9] General Statutes § 21a-70b (2) defines " '[m]anufacturer's or distributor's representative' " as "any person authorized by a manufacturer or distributor of any drug, as defined in section 21a-92, to offer or sell any such product to the public at retail."

[10] General Statutes § 42-481 (4) defines " '[s]ales representative' " as "a person who: (A) Establishes a business relationship with a principal to solicit orders for products or services, and (B) is compensated in whole, or in part, by commission. 'Sales representative' does not include an employee or a person who places orders or purchases on the person's own account or for resale or a seller . . . ."

[11] General Statutes § 52-146d (1) defines " '[a]uthorized representative' " as "(A) a person empowered by a patient to assert the confidentiality of communications or records which are privileged under sections 52-146c to 52-146i, inclusive, or (B) if a patient is deceased, his personal representative or next of kin, or (C) if a patient is incompetent to assert or waive his privileges hereunder, (i) a guardian or conservator who has been or is appointed to act for the patient, or (ii) for the purpose of maintaining confidentiality until a guardian or conservator is appointed, the patient's nearest relative . . . ."

[12] In light of our conclusion that a "representative" is distinguishable from an "agent" under § 12-407 (a) (15) (A) (iv), we need not address the plaintiff's argument that the courts in *Pledger* v. *Troll Book Clubs, Inc.*, 316 Ark. 195, 201, 871 S.W.2d 389 (1994), and *Troll Book Clubs, Inc.* v. *Tracy*, Docket No. 92-Z-590, 1994 Ohio Tax LEXIS 1374, *17 (Ohio Bd. Tax App. August 1, 1994), found no agency relationship between teachers and out-of-state retailers in similar circumstances, or the commissioner's argument that the courts in *Scholastic Book Clubs, Inc.* v. *Board of Equalization*, 207 Cal. App. 3d 734, 738, 255 Cal. Rptr. 77 (1989), and *In re Scholastic Book Clubs, Inc.*, 260 Kan. 528, 541, 920 P.2d 947 (1996), concluded that the teachers were "agents" or "representatives" for Scholastic. We also do not address the plaintiff's argument as to the relevance of *Scholastic Book Clubs, Inc.* v. *Dept. of Treasury*, 223 Mich. App. 576, 581–84, 567 N.W.2d 692 (1997), appeal denied,

We also disagree with the trial court and the plaintiff that the teachers are merely customers who act entirely on their own without compensation for the benefit of their classrooms and students. Despite the plaintiff's suggestion to the contrary, the terms "customer" and "representative" are not mutually exclusive. Although the teachers may be customers when they purchase books from the plaintiff and participate in the bonus point system to obtain additional materials, this should not obscure the fact that their *principal* function is to serve as the exclusive vehicle for selling the plaintiff's products to their students. Accordingly, the teachers' status as customers does not mean that they cannot also serve as the plaintiff's representatives.

We finally disagree with the trial court's characterization of the teachers as acting "in loco parentis" by helping students select and order books, in part because the court's own factual findings are ambiguous with respect to this point. On the one hand, the court found that the teachers, "[s]olely as a result of their academic interest in choosing books and other items for their students and themselves . . . play a role in [the plaintiff's] sales and distribution process . . . ." The role that the court described in its subsequent findings, however, does not include helping students select and order books. The court specifically found that (1) the plaintiff sends catalogs, flyers and order forms to the teachers, (2) the teachers distribute the flyers to their students, who are expected to bring them home to their parents, (3) the teachers sometimes send a " 'student memo' " to the parents that has been prepared by the plaintiff, (4) the students return their order forms with their

457 Mich. 880, 586 N.W.2d 923 (1998), and *Dell Catalog Sales, L.P.* v. *Commissioner of Revenue Services*, 48 Conn. Sup. 170, 179–88, 834 A.2d 812 (2003), in our analysis of the commissioner's statutory claim because the courts' discussion of the in-state service providers' status in those cases was in the context of their determination as to whether the tax assessments were constitutional under the commerce clause.

individual selections to the teachers with cash or checks from their parents, and (5) the teachers submit the orders to the plaintiff and distribute the books upon delivery. To the extent these latter findings indicate who helps students select and order books, they point to the parents rather than the teachers. Whether the trial court's findings support its conclusion that the teachers act "in loco parentis" is thus problematic.

There is also no support in Connecticut law for the trial court's conclusion that teachers act in loco parentis. The trial court itself acknowledged that, insofar as the doctrine has arisen in situations involving Connecticut teachers, it usually has been in the context of teacher discipline. See *Andreozzi* v. *Rubano*, 145 Conn. 280, 282, 141 A.2d 639 (1958); *Calway* v. *Williamson*, 130 Conn. 575, 579, 36 A.2d 377 (1944); *O'Rourke* v. *Walker*, 102 Conn. 130, 133–34, 128 A. 25 (1925); *Sheehan* v. *Sturges*, 53 Conn. 481, 483, 2 A. 841 (1885); see also *Loomis Institute* v. *Windsor*, 234 Conn. 169, 172–73, 661 A.2d 1001 (1995) (noting in dictum that faculty members at boarding school, unlike off campus faculty members, acted "in loco parentis" with respect to boarding students and in that capacity were required to be available on twenty-four hour basis to take care of *problems* that might occur at school).

In the absence of Connecticut law, the plaintiff relies on three cases from other jurisdictions. None of those cases, however, involved the construction of a statutory provision, much less a provision like the one at issue in this case, and, in any event, most of the language quoted by the plaintiff constitutes dictum relating to teacher discipline and control. See *Vernonia School District 47J* v. *Acton*, 515 U.S. 646, 654–55, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995) (discussing constitutionality of local school board's drug testing policy and privacy rights of schoolchildren, stating with respect to teacher "supervision and control" of students that,

"[w]hen parents place minor children in private schools for their education, the teachers and administrators of those schools stand in loco parentis over the children entrusted to them," and quoting 1 W. Blackstone, Commentaries on the Laws of England (1769) p. 441, for proposition that "a parent may . . . delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of *restraint and correction*, as may be necessary to answer the purposes for which he is employed" [emphasis altered; internal quotation marks omitted]); *Rogliano* v. *Board of Education*, 176 W. Va. 700, 705–706, 347 S.E.2d 220 (1986) (Neely, J., dissenting) (stating in dissent from per curiam opinion involving dismissal of teacher by local board of education due to drug possession arrest outside school that parents should not "have their children involuntarily subjected to the influence of an authority figure and role model who advocates, at least by example, the use of illegal drugs" and that "teachers stand in loco parentis" because they "are not merely instructors . . . [but] are authority figures, role models, behavioral examples, surrogate parents"). The only possibly relevant case is *Scholastic Book Clubs, Inc.* v. *Dept. of Treasury*, 223 Mich. App. 576, 567 N.W.2d 692 (1997), appeal denied, 457 Mich. 880, 586 N.W.2d 923 (1998), in which the court stated with respect to the substantial nexus prong of its commerce clause analysis that "teachers are not a sales force that works for [the retailer but] . . . are analogous to parents who order an item from a mail-order catalog for their children . . . ." Id., 584. We strongly disagree, however, with the Michigan court's characterization and note that no other jurisdiction appears to have expanded the concept of "in loco parentis" in this manner.

Nevertheless, even if the teachers were acting "in loco parentis," the fact remains that they also serve

as the exclusive channel through which the plaintiff markets, sells and delivers its products to Connecticut schoolchildren. Accordingly, we conclude that the trial court incorrectly determined that the teachers are not the plaintiff's "representative[s]" within the meaning of § 12-407 (A) (15) (a) (iv).

II

COMMERCE CLAUSE CLAIM

The commissioner next claims that the trial court incorrectly concluded that there is no "substantial nexus" between the plaintiff and the state under the commerce clause of the United States constitution that would justify imposition of sales or use taxes. The commissioner claims that the trial court improperly focused on the technical label ascribed to the teachers but that the United States Supreme Court has stated that the facts under a substantial nexus analysis must be examined functionally from the perspective of the out-of-state retailer, focusing on the nature and extent of the activities of the in-state provider and whether those activities are significantly associated with the retailer's ability to establish and maintain a market in the state for the sale of its products. The commissioner also claims that, under the foregoing analysis, the teachers' activities in the present case satisfy that standard. The plaintiff responds that the tax assessments are barred under the commerce clause because the plaintiff does not occupy the bright-line physical presence in Connecticut required under the substantial nexus test affirmed by the United States Supreme Court in *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, 504 U.S. 298, 315, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992) (*Quill*). The plaintiff contends that the imposition of tax liability on the basis of the activities of the schoolteachers would blur the United States Supreme Court's rule, with dramatic implications for direct marketers, who would be

deprived of any intelligible definitions or principles to determine where *Quill*'s bright line lies. We agree with the commissioner.

We first set forth the standard of review. Whether a substantial nexus exists between the plaintiff and the state that would justify the imposition of Connecticut sales and use taxes under the commerce clause presents a mixed question of law and fact over which this court exercises plenary review. See, e.g., *Lindholm* v. *Brant*, 283 Conn. 65, 77, 925 A.2d 1048 (2007) (mixed questions of law and fact involving application of legal standard to historical fact determinations require plenary review); *State* v. *Webb*, 252 Conn. 128, 137, 750 A.2d 448 (whether trial court properly concluded that defendant's constitutional rights were violated is mixed question of law and fact subject to plenary review), cert. denied, 531 U.S. 835, 121 S. Ct. 93, 148 L. Ed. 2d 53 (2000). In the present case, the parties do not contest the historical facts but, rather, the legal conclusions that may be drawn from those facts. Accordingly, we turn to United States Supreme Court precedent for an understanding of the applicable legal standard.

We begin with *Scripto*, *Inc.* v. *Carson*, 362 U.S. 207, 207–10, 80 S. Ct. 619, 4 L. Ed. 2d 660 (1960) (*Scripto*), in which the court considered whether Florida could constitutionally impose a state use tax on a Georgia retailer for the sale of goods shipped to purchasers in Florida. Noting that there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax"; (internal quotation marks omitted) id., 210–11; the court concluded that, because the seller had "[ten] wholesalers, jobbers, or 'salesmen' conducting continuous local solicitation in Florida and forwarding the resulting orders from that [s]tate to [Georgia] for shipment of the ordered goods," the required nexus was present. Id., 211. The court reasoned that, although the "sales-

men" had written contracts describing them as "independent contractor[s]," were paid on commission and did not work exclusively for the seller; (internal quotation marks omitted) id., 209; the fact that they were "not regular employees of [the seller] devoting full time to its service . . . [was] a fine distinction . . . without constitutional significance. The formal shift in the contractual tagging of the salesman as 'independent' neither results in changing his local function of solicitation nor bears [on] its effectiveness in securing a substantial flow of goods into Florida. . . . To permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance. . . . The test is simply the nature and extent of the activities of the [seller] in Florida." (Citations omitted.) Id., 211–12.

A few years later, the court determined in *National Bellas Hess, Inc.* v. *Dept. of Revenue*, 386 U.S. 753, 754–55, 758, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967) (*Bellas Hess*), that an Illinois statute taxing goods purchased within the state from a mail order house in Missouri created an unconstitutional burden on interstate commerce where the seller had no outlets or sales representatives in the state and its only connection with its Illinois customers was by common carrier or the United States mail. In reaching that conclusion, the court explained that it had no intention of obliterating the "sharp distinction" generally recognized by state taxing authorities "between mail order sellers with retail outlets, solicitors, or property within a [s]tate, and those who do no more than communicate with customers in the [s]tate by mail or common carrier as part of a general interstate business." Id., 758.

The court subsequently articulated a four part test in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977) (*Complete Auto Transit*), to be used in considering commerce clause

challenges to state taxation authority, stating that a tax will be upheld if "the tax is applied to an activity with a substantial nexus with the taxing [s]tate, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the [s]tate." Id., 279. The court described the test as a "practical analysis"; id.; and added in *Tyler Pipe Industries, Inc.* v. *Dept. of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987), that "the crucial factor governing nexus is whether the activities performed in [the] state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in [the] state for the sales." (Internal quotation marks omitted.) Id., 250.

Thereafter, in *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, supra, 504 U.S. 301–302, the court revisited the question of whether a mail order house that had no outlets or sales representatives in the state could be required to pay a use tax on goods purchased by in-state users after the North Dakota Supreme Court decided not to follow *Bellas Hess* because of subsequent changes in the economic, commercial and retail environment. Surveying its precedent, the court noted that *Bellas Hess* was not inconsistent with *Complete Auto Transit* because *Bellas Hess* concerned only the first prong of the test and stood for the proposition that "a vendor whose only contacts with the taxing [s]tate are by mail or common carrier lacks the 'substantial nexus' required by the [c]ommerce [c]lause." Id., 311. The court emphasized the continuing validity of the " 'sharp distinction [articulated in *Bellas Hess*] between mail-order sellers with [a physical presence in the taxing] [s]tate and those . . . who do no more than communicate with customers in the [s]tate by mail or common carrier as part of a general interstate business' "; id.; explaining that "[w]hether or not a [s]tate may compel a vendor to collect a sales or use tax may

turn on the presence in the taxing [s]tate of a small sales force, plant, or office." Id., 315. The court concluded that the "bright line" rule articulated in *Bellas Hess* "firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes." Id.

On the basis of these principles, at least two jurisdictions concluded in circumstances like those in the present case that a substantial nexus existed between Scholastic and the state under a commerce clause analysis. In *Scholastic Book Clubs, Inc.* v. *Board of Equalization*, 207 Cal. App. 3d 734, 255 Cal. Rptr. 77 (1989),[13] a California appeals court described the case as "more analogous to *Scripto* than to . . . *Bellas* [*Hess*]"; id., 739; observing that, although the teachers did not have "written agency agreements with [Scholastic], they serve[d] the same function as did the Florida jobbers in *Scripto*—obtaining sales within California from local customers for a foreign corporation. In fact, they do more. Unlike the Florida jobbers, the California teachers collect payment from the purchasers, and receive and distribute the merchandise. [Scholastic] not only relies . . . but in fact depends on the teachers to act as its conduit to the students. Moreover, there is an implied contract between [Scholastic] and the teachers [because Scholastic] rewards them with the bonus points for merchandise if they obtain and process the orders. The bonus points are similar to the Florida jobbers' commissions in *Scripto*; the more sales the teachers make, the more bonus points they earn." Id., 739–40.

"[N]either the form of the remuneration, the amount thereof, nor the fact that the teachers . . . were not formally employed by, or dependent [on Scholastic]

[13] We note that the case was decided approximately three years before *Quill* but that *Quill* did not change the principles previously established in *Bellas Hess*.

for their primary income has any legal significance in determining whether they acted as . . . representatives in soliciting orders for [Scholastic's] products in California. Further, unlike the Illinois customers in . . . *Bellas* [*Hess*], the students . . . are not solicited directly through the mail. The only way a student can order books is through a local intermediary—his or her teacher. [Scholastic] is thus exploiting or enjoying the benefit of California's schools and employees to obtain sales." Id., 740. Accordingly, the court concluded that Scholastic and the teachers had an implied agency relationship under California law that justified imposition of the California sales and use tax. Id.

Seven years later, the Kansas Supreme Court examined United States Supreme Court precedent and cases from other jurisdictions and found the reasoning in the California case persuasive. See *In re Scholastic Book Clubs, Inc.*, 260 Kan. 528, 920 P.2d 947 (1996). The Kansas court explained: "The facts are similar to the case at bar. . . . Scholastic clearly has more of a connection with Kansas than catalog sales through the mail or by common carrier. Applying the test stated in . . . *Bellas Hess* and *Quill*, Scholastic's use of the Kansas teachers to sell its product to Kansas students provides a substantial nexus with the state of Kansas. Scholastic is a retailer doing business in Kansas. Application of the [Kansas Compensating Tax Act] does not violate the [c]ommerce [c]lause." Id., 546. Like the California court, the Kansas court concluded that, because Scholastic had an implied agency relationship with the teachers, there was no violation of the commerce clause. Id., 541.

The California and Kansas courts concluded that a substantial nexus existed between the retailer and the state because the retailer had an "implied" agency relationship with the teachers. *Scholastic Book Clubs, Inc.* v. *Board of Equalization*, supra, 207 Cal. App. 3d

737–38; *In re Scholastic Book Clubs, Inc.*, supra, 260 Kan. 541. In the present case, we conclude that a substantial nexus exists between the plaintiff and the state because the teachers are the plaintiff's representatives. The difference in terminology does not affect our analysis. See *Scripto, Inc.* v. *Carson*, supra, 362 U.S. 211 (contractual tagging of salesmen as " 'independent' " had no bearing on their local function of soliciting sales for retailer, test being nature and extent of retailer's activities). The out-of-state retailer in this case, as well as the California and Kansas cases, is Scholastic, and the facts in all three cases are essentially the same. The trial court in the present case found that approximately 14,000 Connecticut schoolteachers receive and distribute the plaintiff's marketing materials to schoolchildren throughout the state and provide essential administrative services by (1) receiving, compiling and sending all orders and payments to the plaintiff, (2) receiving the plaintiff's products and distributing them to the students, and (3) resolving all complaints and problems arising following delivery of the plaintiff's products. Thus, because the teachers who participate in the program serve as the only means through which the plaintiff communicates with Connecticut schoolchildren, they provide the substantial nexus required to permit imposition of sales and use taxes under the bright-line physical presence rule established in *Bellas Hess* and *Quill*. See *Tyler Pipe Industries, Inc.* v. *Dept. of Revenue*, supra, 483 U.S. 250 ("activities performed in [the] state on behalf of the taxpayer [must be] significantly associated with the taxpayer's ability to establish and maintain a market in [the] state for the sales" [internal quotation marks omitted]).

We reject the reasoning of the Michigan Court of Appeals in *Scholastic Book Clubs, Inc.* v. *Dept. of Treasury*, supra, 223 Mich. App. 576, and the Arkansas Supreme Court in *Pledger* v. *Troll Book Clubs, Inc.*, 316

Ark. 195, 871 S.W.2d 389 (1994), which involved similar programs. In *Pledger*, the Arkansas Supreme Court concluded that there was no substantial nexus between the retailer and the state because the teachers lacked a sufficient "physical presence," as defined under the bright-line test for mail order sales in *Quill*, and because the state had failed to prove that the teachers were the retailer's agents subject to its control under Arkansas agency law. See id., 200–201. Similarly, the Michigan appeals court determined that Scholastic did not have the requisite "physical presence" because the teachers were neither employees nor agents of Scholastic, there was no indication that the teachers were vested with authority to bind Scholastic or act on its behalf and there was no evidence that Scholastic exercised control over the teachers. *Scholastic Book Clubs, Inc.* v. *Dept. of Treasury*, supra, 583–84. The Michigan court further noted that the teachers were under no obligation to participate in the plaintiff's program but were merely invited to be consumers of its materials. Id., 584. Accordingly, the court concluded that the plaintiff's mail contacts with Michigan teachers did not give rise to the agency relationship required to establish a substantial nexus under the commerce clause. See id.

We disagree with the foregoing reasoning, and, insofar as the Arkansas and Michigan courts rely on their own state's agency law, we conclude that the holdings in those cases are inapplicable to the present case. The bright-line rule initially established in *Bellas Hess* and reaffirmed in *Quill* was that a "vendor whose only contacts with the taxing [s]tate are by mail or common carrier lacks the 'substantial nexus' required by the [c]ommerce [c]lause." *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, supra, 504 U.S. 311. Thus, it is highly unlikely that the language in *Quill* that a state's ability to "compel a vendor to collect a sales and use tax *may turn on the presence in the taxing* [*s*]*tate of a small*

sales force, *plant*, *or office*"; (emphasis added) id., 315; was intended as a *definitive* description of other contacts that might demonstrate the existence of a substantial nexus, because the issue in *Quill* involved vendors whose contacts with the taxing state were limited to mail or common carrier. Furthermore, insofar as the Arkansas and Michigan courts relied on agency law, we do not apply their reasoning because our legislature has determined that persons acting as "representative[s]" of out-of-state retailers may provide the presence necessary to justify imposition of sales and use taxes. General Statutes § 12-407 (a) (15) (A) (iv). We therefore need not consider whether the teachers and the plaintiff in this case had an express or implied agency relationship.

The plaintiff contends that the facts in three cases in which the United States Supreme Court found a substantial nexus underscore the lack of a substantial nexus in the present case. The plaintiff notes that, in *Standard Pressed Steel Co.* v. *Dept. of Revenue*, 419 U.S. 560, 561, 95 S. Ct. 706, 42 L. Ed. 2d 719 (1975), the vendor had an employee residing in the state of Washington and using a home office as a base of operations to visit in-state customers, and that the employee was assisted by a group of the taxpayer's engineers who visited Washington three days every six weeks, that, in *Scripto*, *Inc.* v. *Carson*, supra, 362 U.S. 209, the vendor's commissioned sales agents were operating within the state under the vendor's authority, and that, in *Tyler Pipe Industries*, *Inc.* v. *Dept. of Revenue*, supra, 483 U.S. 249, the vendor's in-state sales representatives called on its customers and solicited orders on a daily basis. The plaintiff further notes that *Scripto* was viewed by the court in *Bellas Hess* and *Quill* as representing "[t]he furthest extension of [the state's taxing] power" under the federal constitution; *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, supra, 504 U.S. 306;

see also *National Bellas Hess, Inc.* v. *Dept. of Revenue*, supra, 386 U.S. 757 ("the case . . . which represents the furthest constitutional reach . . . of a [s]tate's power to deputize an out-of-state retailer as its collection agent for a use tax is *Scripto*"); and argues that it is not logical to extend the reasoning of *Scripto* to schoolteachers who have no oral or written agreement with the plaintiff to act as sellers of the plaintiff's products and who receive no compensation from the plaintiff for their efforts. We are not persuaded.

We first observe that the language in *Bellas Hess* and *Quill* describing *Scripto* as representing the "furthest" extension of the state's taxing power was no more than an observation concerning the state of the law at that time, and was not necessarily intended to mean that a substantial nexus between the out-of-state retailer and the state could not be found in other, as of yet undefined, circumstances. We also emphasize that the test involves a "practical analysis"; *Complete Auto Transit, Inc.* v. *Brady*, supra, 430 U.S. 279; and that the court viewed the evolution of its case law as "a retreat from the formalistic constrictions of a stringent physical presence test in favor of a more flexible substantive approach . . . ." (Internal quotation marks omitted.) *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, supra, 504 U.S. 314. Under this approach, in which we consider the "nature and extent of the activities" of the seller; *Scripto, Inc.* v. *Carson*, supra, 362 U.S. 211; and whether "the activities performed in [the] state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in [the] state"; *Tyler Pipe Industries, Inc.* v. *Dept. of Revenue*, supra, 483 U.S. 250; it is clear that Connecticut schoolteachers provide the substantial nexus required under the commerce clause to permit imposition of the taxes at issue in the present case. The fact that there is no oral or written agreement compelling the teachers to serve as

agents or sellers of the plaintiff's products and that they receive no direct compensation from the plaintiff is not dispositive. The nature of the program necessarily places the teachers in a position in which they are functioning in much the same way as salesmen, in that they are bringing the plaintiff's products to the attention of the students and are providing them with the means to order, pay for and receive delivery of those products. Moreover, the teachers derive benefits from the program because they earn bonus points that enable them to purchase other items of value from the plaintiff's catalog. Accordingly, under the bright-line rule established in *Bellas Hess* and *Quill* and the "practical analysis" required by United States Supreme Court precedent, we conclude that the activities of the Connecticut schoolteachers who participate in the plaintiff's program provide the requisite nexus under the commerce clause to justify imposition of the taxes at issue in this case.

The judgments are reversed and the case is remanded with direction to deny the plaintiff's appeals and to render judgments for the commissioner of revenue services.

In this opinion the other justices concurred.

DANIEL GROSS ET AL. *v.* M. JODI RELL ET AL.
(SC 18548)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.

Syllabus

Pursuant to statute ([Rev. to 2005] § 45a-649), a respondent must be given notice of any application for an involuntary conservatorship and an opportunity to attend any hearing on the application, and the Probate Court may be required to appoint an attorney for a respondent if the respondent is unable to obtain one.

Pursuant further to statute ([Rev. to 2005] § 45a-648 [a]), a conservatorship is permitted only for persons residing or domiciled in Connecticut.

The plaintiff resident of New York brought an action for damages in the United States District Court for the District of Connecticut, alleging, inter alia, negligent and intentional infliction of emotional distress and violation of his federal civil rights. The plaintiff had been visiting his daughter in Connecticut when he was admitted to a hospital for medical treatment. Thereafter, a hospital employee filed an application for the appointment of a conservator for the plaintiff. The defendant judge of the Connecticut Probate Court, B, granted the application and appointed the defendant attorney, N, to represent the plaintiff in the involuntary conservatorship action. N did not object to the conservatorship or inform the Probate Court that it lacked jurisdiction over the application pursuant to § 45a-648 (a) because the plaintiff was not a Connecticut resident. B then appointed the defendant, D, as conservator, who placed the plaintiff in the defendant nursing home, G Co. The plaintiff's complaint alleged, inter alia, that he was placed in a locked ward for no reason, that he was given limited contact with his family and attorney, that he was threatened and assaulted by his roommate, and that G Co. refused to move him from the room even after learning of the assault. The District Court dismissed the complaint and rendered judgment for the defendants, from which the plaintiff appealed to the United States Court of Appeals for the Second Circuit. That court then certified to this court certain questions of law concerning whether absolute quasi-judicial immunity extends to conservators appointed by the Probate Court, to attorneys appointed to represent conservatees or respondents in conservatorship proceedings, and to nursing homes caring for conservatees. *Held*:

1. This court concluded that absolute quasi-judicial immunity extends to a conservator appointed by the Probate Court only when the conservator is executing an order of the Probate Court or the conservator's actions are ratified by the Probate Court; furthermore, when a conservator's acts are not authorized by the Probate Court, and the conservator is not acting as an agent of the Probate Court but as a fiduciary of the conservatee, both conservators of the estate and of the person may be held personally liable.

2. This court concluded that absolute quasi-judicial immunity does not extend to an attorney appointed pursuant to § 45a-649 (b) to represent a respondent in conservatorship proceedings or a conservatee; the primary function of an attorney appointed pursuant to § 45a-649 (b) is to advocate for the client's expressed wishes and not to determine their best interests, and the primary purpose of the requirement in § 45a-649 (b) that the Probate Court appoint an attorney if a respondent is unable to obtain one is to ensure that the respondent or the conservatee is fully informed of the nature of the proceedings and that their articulated preferences are zealously advocated by a trained attorney both during

the proceedings and during the conservatorship, rather than to authorize the Probate Court to obtain the assistance of an attorney in ascertaining the respondent's or the conservatee's best interests.

3. This court concluded that absolute quasi-judicial immunity does not extend under any circumstances to a nursing home with respect to its care for a conservatee; accordingly, because G Co. was neither executing the orders of the Probate Court nor performing a function comparable to that of the Probate Court when it admitted and cared for the plaintiff, but was merely following the instructions of the conservator and performing its ordinary function as a nursing home, G Co. was not entitled to quasi-judicial immunity.

Lesnewski v. *Redvers* (276 Conn. 526), to the extent that it held that a conservatee may file an appeal in his or her name only when the conservatee's attorney persuades the trial court that an appeal is in the conservatee's best interests, overruled.

(*Three justices concurring and dissenting in one opinion*)

Argued October 24, 2011—officially released April 3, 2012

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligent and intentional infliction of emotional distress, brought to the United States District Court in the District of Connecticut, where Carolyn Dee King, executrix of the named plaintiff's estate, was substituted as a plaintiff; subsequently, the court, *Bryant*, *J.*, dismissed the complaint and rendered judgment for the defendants, from which the plaintiffs appealed to the United States Court of Appeals for the Second Circuit; thereafter, the court, *Jacobs*, *C. J.*, and *Straub* and *Hall*, *Js.*, affirmed in part the judgment of the District Court, and, in determining whether to uphold the District Court's dismissal of certain claims against the defendants Grove Manor Nursing Home, Inc., et al., certified to this court certain questions of law concerning the defense of quasi-judicial immunity.

Sally R. Zanger, with whom was *Thomas Behrendt*, for the appellants (plaintiffs).

Louis B. Blumenfeld, with whom was *Lorinda S. Coon*, for the appellee (defendant Jonathan Newman).

Richard A. Roberts, with whom were *James P. Sexton*, and, on the brief, *Nadine M. Pare* and *James R. Fiore*, for the appellee (defendant Kathleen Donovan).

Jeffrey R. Babbin, for the appellee (defendant Grove Manor Nursing Home, Inc.).

Daniel J. Klau filed a brief for the Connecticut Probate Assembly as amicus curiae.

Stacy Canan and *Daniel S. Blinn* filed a brief for the National Senior Citizens Law Center et al. as amici curiae.

Stephen Wizner and *Amanda Machin*, law student intern, filed a brief for the Jerome N. Frank Legal Services Organization et al. as amici curiae.

James G. Felakos, *Jane Monteith Hudson*, *Terri A. Mazur*, *Jeffrey G. Tougas* and *Christine A. Walsh* filed a brief for the National Disability Rights Network et al. as amici curiae.

Opinion

ROGERS, C. J. This case comes before us upon our acceptance of certified questions of law from the United States Court of Appeals for the Second Circuit pursuant to General Statutes § 51-199b (d).[1] The certified questions are: (1) Under Connecticut law, does absolute quasi-judicial immunity extend to conservators appointed by the Connecticut Probate Court?; (2) Under Connecticut law, does absolute quasi-judicial immunity extend to attorneys appointed to represent respondents in conservatorship proceedings or to attorneys appointed to represent conservatees?; and (3) What is

[1] General Statutes § 51-199b (d) provides: "The Supreme Court may answer a question of law certified to it by a court of the United States or by the highest court of another state or of a tribe, if the answer may be determinative of an issue in pending litigation in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state."

the role of conservators, court-appointed attorneys for conservatees, and nursing homes in the Connecticut probate court system, in light of the six factors for determining quasi-judicial immunity outlined in *Cleavinger* v. *Saxner*, 474 U.S. 193, 201–202, 106 S. Ct. 496, 88 L. Ed. 2d 507 (1985). We conclude that: (1) absolute quasi-judicial immunity extends to a conservator appointed by the Probate Court only when the conservator is executing an order of the Probate Court or the conservator's actions are ratified by the Probate Court; (2) absolute quasi-judicial immunity does not extend to attorneys appointed to represent respondents in conservatorship proceedings or conservatees; and (3) our analysis of the first and second certified questions is responsive to the third certified question as it relates to the roles of conservators and court-appointed attorneys; with respect to nursing homes caring for conservatees, we conclude that their function does not entitle them to quasi-judicial immunity under any circumstances.

The opinion of the United States Court of Appeals for the Second Circuit sets forth the following facts and procedural history. "In 2005, [the named plaintiff] Daniel Gross,[2] a life-long New York resident, was discharged from a hospital in New York after treatment for a leg infection. Shortly thereafter, he went to Waterbury . . . where his daughter [the plaintiff] lived, to convalesce. On August 8, 2005, he was admitted to Waterbury Hospital because of complications from his previous treatment. Nine days later, on August 17, 2005, Barbara F. Limauro, a hospital employee, filed an application for appointment of conservator in Waterbury

[2] Gross originally brought the complaint in the United States District Court for the District of Connecticut. After his death in 2007, the District Court granted the motion of his daughter, Carolyn Dee King, who was also the administratrix of his estate, to be substituted as the plaintiff. Hereinafter, we refer to Gross by name and to King as the plaintiff.

Probate Court. The record does not indicate what prompted Limauro to file this application.

"The pertinent statute requires the [P]robate [C]ourt, as a threshold matter, to give the respondent seven days' notice in any application for an involuntary conservatorship. [General Statutes (Rev. to 2005)] § 45a-649 (a).[3] In addition, the notice must be served on the respondent or, if doing so 'would be detrimental to the health or welfare of the respondent,' his attorney. [General Statutes (Rev. to 2005)] § 45a-649 (a) (1) (A). The statute makes no provision for giving notice to the respondent other than by personal service or service upon his attorney.

"On August 25, 2005, [Probate Court] Judge Thomas P. Brunnock issued an order of notice of a hearing to be held on September 1, 2005, in connection with Limauro's application. On August 30, 2005, the notice was served on Limauro. However, as the Connecticut Superior Court pointed out in the subsequent habeas proceeding, there was no indication that Gross himself ever received notice of the September 1 proceeding. The parties do not dispute that (1) Gross was entitled to notice of the hearing, (2) he should have been given at least seven days' notice, pursuant to [§] 45a-649 (a), and (3) the order dated August 25, 2005, specified that Gross should be served by *August 24*.

[3] As the opinion of the United States Court of Appeals noted, Connecticut's statutory conservatorship scheme; see General Statutes §§ 45a-644 through 45a-663; was amended in 2007, after the incidents in the present case took place. *Gross* v. *Rell*, 585 F.3d 72, 76 n.2 (2d Cir. 2009). The United States Court of Appeals was "of the opinion that the 2007 revisions do not affect the underlying issues in this case regarding quasi-judicial immunity." Id. The court also stated that it had "no reason to conclude that [the amendments] should apply retroactively, and the parties do not suggest otherwise." Id. Accordingly, in this opinion, we focus our analysis on the 2005 revision of the conservatorship scheme, which was in place at the time that the relevant events occurred. Unless otherwise indicated, all references to the conservatorship scheme, §§ 45a-644 through 45a-663, in this opinion are to the 2005 revision.

"Also on August 25, 2005, Brunnock appointed [Attorney] Jonathan Newman to represent Gross in the involuntary conservatorship action. Newman interviewed Gross, who told Newman that he opposed the conservatorship. Newman described Gross as alert and intelligent and stated in a report that Gross wanted to live at home and manage his own affairs. Nevertheless, Newman concluded that he could not 'find any legal basis [on] which to object to the appointment of a conservator of . . . Gross' person and estate.' Newman also signed the form 'attorney for ward.' The relevant statute defines a 'ward' as 'a person for whom involuntary representation is *granted*' pursuant to statute. [General Statutes (Rev. to 2005)] § 45a-644 (h) . . . . At the time Newman signed the form, no such representation had been granted; Gross was not a 'ward' but rather a 'respondent.' [General Statutes (Rev. to 2005)] § 45a-644 (f).

"A Superior Court judge would later say that Newman's conclusion that there was no legal basis for objecting to the involuntary conservatorship 'completely blows my mind,' that there was '[n]o support for it,' and that 'it just defies imagination. . . . This was counsel for . . . Gross and it is obvious to me that he grossly under and misrepresented . . . Gross at the time.' . . .

"The respondent also has a right to attend any hearing on the application. [General Statutes (Rev. to 2005)] § 45a-649 (b) (2). If he wishes to attend 'but is unable to do so because of physical incapacity, the court *shall* schedule the hearing . . . at a place which would facilitate attendance . . . but if not practical, then *the judge shall visit the respondent*' before the hearing, if he is in the state. Id. . . . The next section reiterates that a judge could 'hold the hearing on the application at a place within the state other than its usual courtroom if it would facilitate attendance by the respondent.'

[General Statutes (Rev. to 2005)] § 45a-650 (c). The parties do not dispute that (1) Judge Brunnock never visited Gross, (2) the hearing was not held at a location that would facilitate Gross's attendance, and (3) Gross was not personally present at the hearing.

"Furthermore, Connecticut law at the time only permitted a conservatorship for those who were residing or domiciled in Connecticut, [General Statutes (Rev. to 2005)] § 45a-648 (a); Gross was neither a resident nor a domiciliary. It is undisputed that Newman failed to bring this jurisdictional defect to the court's attention. (As will be explained . . . it was on the basis of this defect that the Connecticut Superior Court eventually granted Gross's petition for a writ of habeas corpus and held the conservatorship void ab initio.)

"On September 1, 2005, Brunnock appointed Kathleen Donovan as conservator to manage Gross's person and estate. Connecticut state law provides that the [P]robate [C]ourt must require a probate bond [when it appoints a conservator of the estate] and, 'if it deems it necessary for the protection of the respondent, [it may] require a bond of any conservator [of the person]' as well. [General Statutes (Rev. to 2005)] § 45a-650 (g). Donovan never posted a bond.

"A week or two later, Donovan placed Gross in the 'locked ward' of [Grove Manor Nursing Home, Inc. (Grove Manor)]. Gross alleges in his complaint that his roommate was a confessed robber who threatened and assaulted him. Gross also claims that Grove Manor, with the knowledge and consent of Donovan, kept him in a room with the violent roommate after it learned of the assault, which was not reported to the police.

"In April of 2006, Gross was on an authorized day visit to Long Island. While there, he experienced chest pains and was admitted to a hospital. According to the complaint, Donovan came to Long Island with an

ambulance and insisted that Gross be returned to Connecticut. When the doctor indicated that this was medically unwise, Donovan nonetheless removed Gross from the hospital against his wishes and returned him to the locked ward at Grove Manor.

"Gross alleges in his complaint that there was no reason to put him in the locked ward. He further alleges that [Maggie] Ewald, [the former acting long-term care ombudsman of the Connecticut department of social services] and Donovan, the conservator, were aware of these problems but failed to take steps to alleviate them. The parties do not dispute that Donovan obtained from Brunnock ex parte orders limiting Gross's contact with family and with counsel; Gross claims that there was no evidence suggesting that such contact was harmful to him. . . . According to Gross's complaint, [one such] order restricted [the plaintiff's] ability to visit him: the visits were required to be on-premises, only once per day, for no longer than one hour. . . . [I]t also [prohibited] her from bringing 'any recording devices (visual and/or audio) into Grove Manor.' . . .

"On June 9, 2006, Gross filed a petition for a writ of habeas corpus in Connecticut Superior Court. A hearing was held on July 12. Brunnock moved to dismiss, making the . . . argument that habeas relief was unnecessary because, if the Probate Court acted without jurisdiction, the conservatorship was void ab initio and Gross could leave Grove Manor at any time. The Superior Court granted the writ: '[O]ut of an absolute caution that somebody else may come in and file [an] appearance in this case, I'm going to grant the writ of habeas corpus . . . . I'm going to find in accordance with the statute that he has—is and has been, since September 1, been deprived of his liberty. And at the time of his—of his appointment of the conservator of both his person and his estate, [the] Probate Court lacked the jurisdiction on the basis that he was not a domiciliary and/or

a resident of the [s]tate of Connecticut. The conservatorship is terminated as a result of the decision on the habeas corpus and . . . Gross is free to leave here today.' The court also halted all pending transactions involving Gross's property, saying 'that nothing [is to] be done with the sale of [Gross'] house in New York,' and that 'any previous orders of the Probate Court with reference to that real property in New York are also terminated, so there is nothing in New York.' The Superior Court said there had been 'a terrible miscarriage of justice.'

"Upon returning to New York, Gross found that his house had been, in his words, 'ransacked.' The complaint alleges that a chandelier and some furniture were missing. Gross lived independently in his home from the time of his release at least until the time of the complaint, and apparently until the time of his death in 2007.

"In 2007, [Gross] brought [a] complaint [in the United States District Court for the District of Connecticut] and the District Court dismissed it as to all defendants.[4] The District Court found that Brunnock was entitled to judicial immunity. The court went on to reason that [Donovan], [Newman], and [Grove Manor] were entitled

[4] The complaint named as defendants: M. Jodi Rell, then governor of Connecticut; Ewald; Judge Brunnock; Donovan; Newman; and Grove Manor. "The claims against Donovan include violation of 42 U.S.C. § 1985, violation of Gross's due process rights pursuant to 42 U.S.C. § 1983, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of fiduciary duty, false arrest, assault and false imprisonment. Gross alleges that Grove Manor violated 42 U.S.C. § 1985, 42 U.S.C. § 1396r, part of the Omnibus Budget Reconciliation Act of 1989 . . . and the Connecticut Patient[s'] Bill of Rights . . . General Statutes § 19a-550, as well as claims for negligent and intentional infliction of emotional distress. Against Newman, Gross asserts claims for violation of 42 U.S.C. § 1985, violation of Gross's due process rights pursuant to 42 U.S.C. § 1983, intentional infliction of emotional distress, negligent infliction of emotional distress, and legal malpractice." *King* v. *Rell*, United States District Court, Docket No. 3:06-cv-1703 (VLB) (D. Conn. March 24, 2008).

to immunity because they were serving the judicial process. However, the District Court reasoned that [Grove Manor] was *not* entitled to derivative, quasi-judicial immunity for discretionary acts that were not performed specifically for the purpose of complying with a Probate Court order. Thus, [Grove Manor's] decision to leave Gross in a room with his roommate for several days, after his roommate attacked him, was held to be discretionary and not protected by quasi-judicial immunity. This left statutory and tort claims against [Grove Manor]. The District Court dismissed the statutory claims on the basis of waiver, leaving only the tort claims, which consisted of claims for intentional and negligent infliction of emotional distress.

"The District Court also dismissed all claims against [M. Jodi Rell, then governor of the state of Connecticut] and most claims against [Ewald], essentially on failure to prosecute or waiver grounds. However, it initially let stand the claims against [Ewald] for failure to investigate complaints about Gross's detention in [Grove Manor]. Thus, there were two sets of claims remaining: intentional and negligent infliction of emotional distress against [Grove Manor] regarding the violent roommate and intentional infliction of emotional distress against [Ewald] for failure to investigate.

"Then, at the end of a telephone conference about discovery and the course of the lawsuit, the District Court announced that it did not think those remaining claims would exceed $75,000 and said it would dismiss the case. Counsel did not object to this dismissal, and those claims were dismissed without prejudice. Once these were dismissed, there were no remaining claims. Gross's timely appeal followed." (Emphasis in original.) *Gross* v. *Rell*, 585 F.3d 72, 75–79 (2d Cir. 2009).

On appeal, the United States Court of Appeals for the Second Circuit concluded that, with respect to the

state law claims against Donovan and Newman, because the question of whether they were entitled to quasi-judicial immunity must be decided on the basis of state law; id., 80; and "because there is no controlling appellate decision, constitutional provision, or statute in Connecticut that explains whether conservators and court-appointed attorneys for conservatees enjoy quasi-judicial immunity"; id., 96; the Court of Appeals would submit the first two questions regarding the quasi-judicial immunity of conservators and attorneys for respondents and conservatees under state law to this court for certification pursuant to § 51-199b (d). Id. With respect to the federal civil rights claims against Donovan, Newman and Grove Manor, the Court of Appeals concluded that, although the issue of quasi-judicial immunity from the claims was a question of federal law; id., 80; because the resolution of the question implicated unsettled questions of state law regarding the roles of court-appointed conservators, court-appointed attorneys and nursing homes under our statutory scheme governing conservatorship, it would submit a third certified question on that issue to this court.[5] Id., 96. This court granted certification on all three questions, as previously set forth.[6]

[5] The Court of Appeals affirmed the District Court's dismissal of the state and federal statutory claims against Grove Manor on waiver grounds; *Gross* v. *Rell*, supra, 585 F.3d 94; and affirmed the dismissal of the tort claims against Grove Manor for failure to meet the minimum jurisdictional damage amount, without prejudice to the plaintiff's right to reassert those claims if any of the remaining civil rights claims against Grove Manor or the claims against Donovan and Newman ultimately survived. Id., 95. The court also affirmed the District Court's judgment dismissing the claims against Judge Brunnock; id., 86; and Governor Rell. Id., 96. Finally, the court affirmed the judgment dismissing the claims against Ewald on the ground that the claim failed to meet the minimum jurisdictional damage amount, again without prejudice to the plaintiff's right to reassert the claim. Id.

[6] After this court granted certification on the three questions, it granted the applications of the Connecticut Probate Assembly, American Association of Retired Persons, National Consumer Voice for Quality Long-Term Care, National Senior Citizens Law Center, Jerome N. Frank Legal Services Organization, Center for Public Representation, Connecticut State Independent

I

With this background in mind, we address the first certified question: Under Connecticut law, does absolute quasi-judicial immunity extend to conservators appointed by the Connecticut Probate Court? The plaintiff contends that conservators are not entitled to quasi-judicial immunity under any circumstances. Donovan contends that: (1) conservators are generally entitled to quasi-judicial immunity from claims against conservatees; or (2) if conservators are not generally entitled to quasi-judicial immunity, they are entitled to immunity when their conduct is authorized or approved by the Probate Court. We agree with Donovan's second claim.

Because any immunity accorded to conservators appointed pursuant to § 45a-650 would be derived from judicial immunity, "we first examine the policy reasons underlying judicial immunity. It is well established that a judge may not be civilly sued for judicial acts he undertakes in his capacity as a judge. . . . This role of judicial immunity serves to promote principled and fearless decision-making by removing a judge's fear that unsatisfied litigants may hound him with litigation charging malice or corruption . . . . Although we have extended judicial immunity to protect other officers in addition to judges, that extension generally has been very limited. This fact reflects an [awareness] of the salutary effects that the threat of liability can have . . . as well as the undeniable tension between official

Living Council, Disability Resource Center of Fairfield County, South Central Behavioral Health Network, Western Connecticut Association for Human Rights, National Disability Rights Network, Advocacy Unlimited, Inc., American Civil Liberties Union, Connecticut Association of Centers for Independent Living, Disability Advocacy Collaborative, National Alliance on Mental Illness-CT, National Association for Rights Protection and Advocacy, People First of Connecticut, Mental Health Association of Connecticut, Inc., and the office of protection and advocacy for persons with disabilities of the state of Connecticut for permission to file briefs on the certified questions as amici curiae.

immunities and the ideal of the rule of law . . . . The protection extends only to those who are intimately involved in the judicial process, including judges, prosecutors and judges' law clerks. Absolute judicial immunity, however, does not extend to every officer of the judicial system. . . . Furthermore, even judges are not entitled to immunity for their administrative actions, but only for their judicial actions. . . .

"We repeatedly have recognized that [a]bsolute immunity . . . is strong medicine . . . . Therefore, not every category of persons protected by immunity [is] entitled to absolute immunity. In fact, just the opposite presumption prevails—categories of persons protected by immunity are entitled only to the scope of immunity that is necessary to protect those persons in the performance of their duties. [T]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. . . . In limited circumstances, however, courts have extended absolute judicial immunity to officials insofar as they perform actions that are integral to the judicial process. . . . For example, because prosecutors are such an integral part of the judicial system . . . this court has repeatedly recognized that they are entitled to absolute immunity for their conduct as participants in the judicial proceeding. . . . By contrast, we declined to extend immunity to public defenders, reasoning that, unlike a prosecutor, who is a representative of the state, and has a duty to see that impartial justice is done to the accused as well as to the state, a public defender's role is that of an adversary and his function does not differ from that of a privately retained attorney. . . . In legislatively overruling [this determination], the legislature granted public defenders only qualified immunity, impliedly deeming that level of protection to be sufficient to protect them in the exercise

of their duties."[7] (Citations omitted; internal quotation marks omitted.) *Carrubba* v. *Moskowitz*, 274 Conn. 533, 539–42, 877 A.2d 773 (2005).

"Although the presumption is that qualified immunity is sufficient to protect most government officials in the justified performance of their duties, courts have extended absolute immunity to a variety of judicial and quasi-judicial officers. See, e.g., *Babcock* v. *Tyler*, 884 F.2d 497 (9th Cir. 1989) (court-appointed social worker), cert. denied, 493 U.S. 1072, 110 S. Ct. 1118, 107 L. Ed. 2d 1025 (1990) [overruled in part by *Miller* v. *Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (social workers are entitled to quasi-judicial immunity from suit only for certain activities)]; *Moses* v. *Parwatikar*, 813 F.2d 891 (8th Cir.) (court-appointed psychologist), cert. denied, 484 U.S. 832, 108 S. Ct. 108, 98 L. Ed. 2d 67 (1987); *Demoran* v. *Witt*, 781 F.2d 155 (9th Cir. 1986) (probation officer); *Boullion* v. *McClanahan*, 639 F.2d 213 (5th Cir. 1981) (bankruptcy trustee); *T & W Investment Co.* v. *Kurtz*, 588 F.2d 801 (10th Cir. 1978) (court-appointed receiver); *Burkes* v. *Callion*, 433 F.2d 318 (9th Cir. 1970) (court-appointed medical examiner), cert. denied, 403 U.S. 908, 91 S. Ct. 2217, 29 L. Ed. 2d 685 (1971). The determining factor in all these decisions is whether the official was performing a function that was integral to the judicial process.

"In considering whether [persons] . . . should be accorded absolute judicial immunity, the United States Supreme Court has applied a three factor test, which we now adopt . . . under our state common law. In its immunity analysis, the court has inquired: [1]

[7] This court determined in *Spring* v. *Constantino*, 168 Conn. 563, 576, 362 A.2d 871 (1975), that public defenders are not entitled to absolute quasi-judicial immunity. In 1976, the legislature, through the enactment of Public Acts 1976, No. 76-371, §§ 1 and 2, added public defenders to the definition of "state officers and employees" entitled to qualified statutory sovereign immunity pursuant to General Statutes § 4-165.

whether the official in question perform[s] functions sufficiently comparable to those of officials who have traditionally been afforded absolute immunity at common law . . . [2] whether the likelihood of harassment or intimidation by personal liability [is] sufficiently great to interfere with the official's performance of his or her duties . . . [and 3] whether procedural safeguards [exist] in the system that would adequately protect against [improper] conduct by the official. C. English, 'Mediator Immunity: Stretching the Doctrine of Absolute Quasi-judicial Immunity: *Wagshal* v. *Foster*,' 63 Geo. Wash. L. Rev. 759, 766 (1995), citing to *Butz* v. *Economou*, 438 U.S. 478, 513–17, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978)." (Internal quotation marks omitted.) *Carrubba* v. *Moskowitz*, supra, 274 Conn. 542–43.

Similarly, the United States Supreme Court stated in *Cleavinger* v. *Saxner*, supra, 474 U.S. 201–202, that, "in general our cases have followed a functional approach to immunity law. . . . [O]ur cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant. . . . Absolute immunity flows not from rank or title or location within the [g]overnment . . . but from the nature of the responsibilities of the individual official. And in *Butz* the [c]ourt mentioned the following factors, among others, as characteristic of the judicial process and to be considered in determining absolute as contrasted with qualified immunity: (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal." (Citations omitted; internal quotation marks omitted.)

Thus, to determine whether court-appointed conservators are entitled to absolute quasi-judicial immunity, we must initially determine whether they perform "functions sufficiently comparable to those of officials who have traditionally been afforded absolute immunity at common law . . . ."[8] (Internal quotation marks omitted.) *Carrubba* v. *Moskowitz*, supra, 274 Conn. 542. The primary duties of court-appointed conservators at the time of the underlying events in the present case are set forth in General Statutes (Rev. to 2005) §§ 45a-655[9] and 45a-656.[10] In general terms, a conservator of the

[8] As we have indicated, the United States Court of Appeals held in the present case that a judge of the Connecticut Probate Court is entitled to judicial immunity. *Gross* v. *Rell*, supra, 585 F.3d 84. The plaintiff does not appear to dispute this conclusion, but disputes only that the judge was acting within its jurisdiction. Id. Although this court previously has not addressed this question, it is clear to us that the Court of Appeals properly concluded that a judge of the Probate Court is entitled to judicial immunity and "will be subject to liability *only when he has acted in the clear absence of all jurisdiction*." (Emphasis in original; internal quotation marks omitted.) Id.

[9] General Statutes (Rev. to 2005) § 45a-655 (a) provides: "A conservator of the estate appointed under section 45a-646, 45a-650 or 45a-654 shall, within two months after the date of his or her appointment, make and file in the Court of Probate, an inventory under penalty of false statement of the estate of his or her ward, with the properties thereof appraised or caused to be appraised, by such conservator, at fair market value as of the date of his or her appointment. Such inventory shall include the value of the ward's interest in all property in which the ward has a legal or equitable present interest, including, but not limited to, the ward's interest in any joint bank accounts or other jointly held property. The conservator shall manage all the estate and apply so much of the net income thereof, and, if necessary, any part of the principal of the property, which is required to support the ward and those members of the ward's family whom he or she has the legal duty to support and to pay the ward's debts, and may sue for and collect all debts due the ward."

[10] General Statutes (Rev. to 2005) § 45a-656 (a) provides: "The conservator of the person shall have: (1) The duty and responsibility for the general custody of the respondent; (2) the power to establish his or her place of abode within the state; (3) the power to give consent for his or her medical or other professional care, counsel, treatment or service; (4) the duty to provide for the care, comfort and maintenance of the ward; (5) the duty to take reasonable care of the respondent's personal effects; and (6) the duty to report at least annually to the probate court which appointed the conservator

estate is required to manage the conservatee's estate for the benefit of the conservatee; General Statutes (Rev. to 2005) § 45a-655 (a); and a conservator of the person is required to provide for the care, comfort and maintenance of the conservatee. General Statutes (Rev. to 2005) § 45a-656 (a).

We have repeatedly recognized, however, that when the Probate Court has expressly authorized or approved specific conduct by the conservator, the conservator is not acting on behalf of the conservatee, but as an agent of the Probate Court. See *Elmendorf* v. *Poprocki*, 155 Conn. 115, 120, 230 A.2d 1 (1967) ("the conservatrix is an agent of the Probate Court and not of the ward"); id., 118 (The Probate Court "is primarily entrusted with the care and management of the ward's estate, and, in many respects, the conservator is but the agent of the court. . . . A conservator has only such powers as are expressly or impliedly given to him by statute. . . . In exercising those powers, he is under the supervision and control of the Probate Court." [Citations omitted.]); id. ("authorization or approval by the Probate Court . . . is essential, and without it the ward's estate is not liable"); *Johnson's Appeal from Probate*, 71 Conn. 590, 598, 42 A. 662 (1899) ("under our law the custody of the ward . . . is primarily intrusted to the Court of Probate, and the conservator is, in many respects, but the arm or agent of the court in the performance of the trust and duty imposed upon it"); *Johnson's Appeal from Probate*, supra, 598 (if conservator "exercises his statutory power . . . he does this subject to [the Probate Court's] power to approve or disapprove of his action").[11] Accordingly, when the conservator has

regarding the condition of the respondent. The preceding duties, responsibilities and powers shall be carried out within the limitations of the resources available to the ward, either through his own estate or through private or public assistance."

[11] See also *Murphy* v. *Wakelee*, 247 Conn. 396, 406, 721 A.2d 1181 (1998) ("[t]he [Probate Court] and *not the conservator*, is primarily entrusted with the care and management of the ward's estate, and, in many respects, the

obtained the authorization or approval of the Probate Court for his or her actions on behalf of the conservatee's estate, the conservator cannot be held personally liable. See *Zanoni* v. *Hudon*, 48 Conn. App. 32, 37–38, 708 A.2d 222 (when Probate Court has approved conservator's action, conservator is agent for Probate Court and "[a]n authorized agent for a disclosed principal, in the absence of circumstances showing that personal responsibility was incurred, is not personally liable to the other contracting party" [internal quotation marks omitted]), cert. denied, 244 Conn. 928, 711 A.2d 730 (1998); see also General Statutes § 45a-202.[12]

Although *Zanoni* was based purely on principles of agency, we conclude that principles of quasi-judicial immunity require the same result. Because conservators are acting as the agents of the Probate Court when their acts are authorized or approved, their function is not merely "*comparable* to those of officials who have traditionally been afforded absolute immunity at common law"; (emphasis added; internal quotation marks omitted) *Carrubba* v. *Moskowitz*, supra, 274 Conn. 542; rather, they function *as* the Probate Court. Accordingly, imposing liability on a conservator for acts authorized or approved by the Probate Court would chill that court's ability to make and carry out fearless and principled decisions regarding the conservatee's care and the management of his or her estate.[13] See id.; cf. *Kermit*

conservator is but the agent of the court" [emphasis in original; internal quotation marks omitted]); *Marcus' Appeal from Probate*, 199 Conn. 524, 529, 509 A.2d 1 (1986) (same).

[12] General Statutes § 45a-202 (a) provides: "Any person, acting as a fiduciary as defined by section 45a-199 or in any other fiduciary capacity, who in good faith makes payments or delivers property or estate pursuant to the order of the court of probate having jurisdiction before an appeal has been taken from such order, shall not be liable for the money so paid, or the property so delivered, even if the order under which such payment or delivery has been made is later reversed, vacated or set aside."

[13] We do not believe that there is a *high* " 'likelihood of harassment or intimidation' " of conservators by conservatees or third parties when they are functioning as the agent of the Probate Court. *Carrubba* v. *Moskowitz*,

Construction Corp. v. *Banco Credito y Ahorro Ponceno*, 547 F.2d 1, 3 (1st Cir. 1976) ("At the least, a receiver who faithfully and carefully carries out the orders of his appointing judge must share the judge's absolute immunity. To deny him this immunity would seriously encroach on the judicial immunity already recognized by the Supreme Court. . . . It would make the receiver a lightning rod for harassing litigation aimed at judicial orders. In addition to the unfairness of sparing the judge who gives an order while punishing the receiver who obeys it, a fear of bringing down litigation on the receiver might color a court's judgment in some cases; and if the court ignores the danger of harassing suits, tensions between receiver and judge seem inevitable." [Citation omitted.]). Quasi-judicial immunity for acts by a conservator that are authorized or approved by the Probate Court is also appropriate because "[a]ny person aggrieved by any order, denial or decree of a court of probate in any matter . . . may appeal therefrom to the Superior Court . . . ." General Statutes (Rev. to 2005) § 45a-186 (a); see *Butz* v. *Economou*, supra, 438 U.S. 512 (judicial immunity is appropriate when official's decision can be corrected on appeal). Accordingly, we conclude that conservators are entitled to quasi-judicial immunity from liability for acts that are authorized or approved by the Probate Court. See *Collins* v. *West Hartford Police Dept.*, 380 F. Sup. 2d 83, 91 (D. Conn. 2005) (conservator is entitled to quasi-judicial immunity for "actions as an agent of the Probate Court, taken under the orders or direction of [that court]").

When the conservator's acts are not authorized or approved by the Probate Court, however, we see no

supra, 274 Conn. 543. Nevertheless, because conservators act as agents for the Probate Court when their acts are authorized or approved, any risk of harassment or intimidation is sufficient to justify quasi-judicial immunity, just as it is for the Probate Court itself.

reason to depart from the common-law rule that the conservator of the estate is not acting as the agent of that court, but as the fiduciary of the conservatee, and, as such, may be held personally liable. *Elmendorf* v. *Poprocki*, supra, 155 Conn. 120 (conservator is personally liable for services provided to conservatee until they are approved by Probate Court); *Zanoni* v. *Hudon*, supra, 48 Conn. App. 37 ("[a] conservator is a fiduciary and acts at his peril and on his own responsibility unless and until his actions in the management of the ward's estate are approved by the Probate Court" [internal quotation marks omitted]); see also *Murphy* v. *Wakelee*, 247 Conn. 396, 398–99, 721 A.2d 1181 (1998) (plaintiff had burden of proving that conservator's negligence had injured conservatee's estate). Indeed, we have held that, even if expenditures on behalf of the estate are *proper and necessary*, liability for them "rest[s] on [the conservator] . . . until they [are] subsequently approved by the Probate Court"; *Elmendorf* v. *Poprocki*, supra, 120; although the conservator may be entitled to reimbursement for proper expenditures from the estate after they are approved. Id. Because holding conservators of the estate personally liable under these circumstances does not undermine the independence and integrity of the Probate Court's decisions regarding the conservatee, and because fiduciaries generally may be held liable for their conduct, we conclude that conservators are not entitled to judicial immunity when their acts on behalf of the conservatee are not authorized or approved by the Probate Court.[14]

[14] See *Trapp* v. *State*, 53 P.3d 1128, 1132 (Alaska 2002) (because conservators may be sued pursuant to statute and act as fiduciaries for conservatees, they are not entitled to quasi-judicial immunity); *Frey* v. *Blanket Corp.*, 255 Neb. 100, 107, 582 N.W.2d 336 (1998) (because guardian must post bond and may be held liable pursuant to statute, and because "the role of a guardian in selecting a residence for an incapacitated ward is not closely related to or ancillary to a court's adjudication of a particular matter," guardian is not entitled to quasi-judicial immunity). Donovan cites a number of cases for the proposition that conservators and guardians are generally entitled to absolute quasi-judicial immunity. See *Cok* v. *Consentino*, 876

The District Court in the present case concluded that *Zanoni* applies only to conservators of the estate, not to conservators of the person, because, pursuant to General Statutes § 45a-164, "the Probate Court must approve the sale of the ward's real property" and "[c]ompleting such a transaction without the Probate Court's approval would clearly be ultra vires and is patently distinguishable from the allegations against Donovan." *King* v. *Rell*, United States District Court, Docket No. 3:06-cv-1703 (VLB) (D. Conn. March 24, 2008); see also General Statutes § 45a-177 (conservator of estate must submit periodic accounts of trust to Probate Court). In contrast, conservators of the person have the statutory authority to take steps to care for the conservatee without the authorization or approval of the Probate Court; see General Statutes (Rev. to 2005) § 45a-656; although the conservator must report at least annually to the Probate Court regarding the

F.2d 1, 3 (1st Cir. 1989) (court-appointed conservator is immune from action for damages resulting from quasi-judicial activities); *Mosher* v. *Saalfeld*, 589 F.2d 438, 442 (9th Cir. 1978) (conservator of estate is entitled to absolute quasi-judicial immunity because "[h]e was acting pursuant to his court appointed authority in the performance of his statutory duties"), cert. denied, 442 U.S. 941, 99 S. Ct. 2883, 61 L. Ed. 2d 311 (1979); *Zimmerman* v. *Nolker*, United States District Court, Docket No. 08-4216-CV-C-NKL (W.D. Mo. December 31, 2008) ("[g]uardians ad litem and conservators making recommendations to a court and managing assets are entitled to absolute immunity in their roles as court delegees"); *Sasscer* v. *Barrios-Paoli*, United States District Court, Docket No. 05 Civ. 2196 (RMB) (DCF) (S.D.N.Y. December 8, 2008) (guardians are "entitled to immunity to the extent they acted as non-judicial persons fulfilling quasi-judicial functions" [internal quotation marks omitted]); *Faraldo* v. *Kessler*, United States District Court, Docket No. 08-CV-0261 (SJF) (ETB) (E.D.N.Y. January 23, 2008) (court-appointed evaluator in guardianship proceeding is entitled to quasi-judicial immunity); *Holmes* v. *Silver Cross Hospital of Joliet*, 340 F. Sup. 125, 131 (N.D. Ill. 1972) (conservator is entitled to judicial immunity when "[h]is order of appointment . . . was made with specific directions as to his course of conduct as a conservator, giving him no discretion"). Because it is not clear in all of these cases that immunity was extended to conservators even when they were acting without the authorization or approval of the court, and because the cases that may be interpreted as extending that far engage in little analysis, we find the cases unpersuasive on that issue.

conservatee's condition. See General Statutes (Rev. to 2005) § 45a-656 (a) (6). Thus, the District Court appears to have concluded that a conservator can be held personally liable for his or her conduct on behalf of the conservatee only when the conservator fails to obtain from the Probate Court an approval that is *statutorily required*.[15] We see no reason, however, why the holding of *Zanoni*, that a conservator is acting as the agent for the Probate Court only when it obtains court authorization or approval for his or her action, should not apply to all actions taken by a conservator on the conservatee's behalf, regardless of whether approval by the Probate Court is statutorily required. Accordingly, we can perceive no reason why conservators of the person should not be liable for actions taken without the authorization or approval of the Probate Court.

Our conclusion that both conservators of the estate and of the person may be held personally liable for actions that are not authorized or approved by the Probate Court is bolstered by General Statutes (Rev. to 2005) § 45a-650 (g), which provides: "If the court appoints a conservator of the estate of the respondent, it shall require a probate bond. The court may, if it deems it necessary for the protection of the respondent, require a bond of any conservator of the person appointed under this section." See also General Statutes § 45a-152 (governing procedure for bringing action against conservator). There would be little point to requiring a probate bond or providing procedures for bringing an action against conservators if they were entitled to absolute quasi-judicial immunity for *all* of their conduct on behalf of conservatees. Thus, § 45a-

[15] Although a conservator of the person is not statutorily *required* to obtain the authorization or approval of the Probate Court when exercising the powers enumerated in § 45a-656, nothing prevents the conservator from doing so. See *Johnson's Appeal from Probate*, supra, 71 Conn. 598 ("under our law the custody of the ward . . . is primarily intrusted to the Court of Probate").

650 (g) evinces a legislative policy that conservators should not be entitled to quasi-judicial immunity when they are not acting as agents for the Probate Court.

To the extent that Donovan argues that conservators are entitled to quasi-judicial immunity even when their acts were not authorized or approved by the Probate Court, because there are ample statutory safeguards to ensure proper behavior by the conservator, we disagree. In support of this argument, Donovan relies on *Carrubba* v. *Moskowitz*, supra, 274 Conn. 543 (quasi-judicial immunity may be appropriate when "procedural safeguards [exist] in the system that would adequately protect against [improper] conduct by the official" [internal quotation marks omitted]), and *Murphy* v. *Wakelee*, supra, 247 Conn. 406 (because conservator's duties and conduct are prescribed by statute and carried out under supervision of Probate Court "there is less reason for concern" about improper conduct than for fiduciaries generally). In *Murphy*, however, we merely noted that a fiduciary generally need not prove fair dealing by clear and convincing evidence in the absence of a threshold showing of "suspicious circumstances"; (internal quotation marks omitted) id., 405–406; and there was even less reason to impose such a burden on conservators. Id., 406. We did not suggest that conservators should always be *immune* from suit because of the statutory safeguards. We further note that, although there are statutory safeguards in place, many of the safeguards enumerated by the court in *Butz* v. *Economou*, supra, 438 U.S. 512, such as the official's insulation from outside influence, an adversarial decision-making process and the correctability of improper decisions through an appeal process do not apply when the conservator's acts are not authorized or approved by the Probate Court. Finally, we find it significant that the statutory safeguards governing conservators of the person were not adequate in the present case to prevent what the

trial court in the habeas proceeding characterized as " 'a terrible miscarriage of justice,' " even though many of the conservator's acts *were* authorized by the Probate Court.

Donovan also argues that conservators are entitled to quasi-judicial immunity for their discretionary acts because they serve a similar function to guardians ad litem, who are entitled to "absolute immunity for their actions that are integral to the judicial process." *Carrubba* v. *Moskowitz*, supra, 274 Conn. 547. The role of a guardian ad litem for children in the inherently hostile setting of a marital dissolution proceeding, which was the setting in *Carrubba*, is distinguishable, however, from the role of a court-appointed conservator. It is all but inevitable that, in a dissolution proceeding, at least one of the parties will be disgruntled by the guardian ad litem's conduct toward the children and his or her recommendations concerning their best interests. Accordingly, without immunity, the guardians would "act like litigation lightning rods." (Internal quotation marks omitted.) Id., 547–48. In contrast, it is not all but inevitable that conservators will act as "litigation lightning rods" for third party claims because there is no such inherent conflict between the conservatee's interests and the interests of others. Moreover, there is no inherent conflict between the conservatee and the conservator. Although an involuntary conservatee might be hostile toward the Probate Court, it does not necessarily follow that he or she would be hostile toward the court-appointed conservator, who could well be a family member or friend.[16] See General Statutes (Rev. to 2005) § 45a-650 (e) ("[t]he respondent may

[16] Contrary to the dissenting justice's statement that the majority has "inexplicably fail[ed] to explain why the similarities between [the duties of conservators] and the duties of both guardians ad litem and attorneys for minor children do not justify extending the same level of immunity to conservators," the foregoing analysis explains this distinction.

. . . nominate a conservator who shall be appointed unless the court finds the appointment of the nominee is not in the best interests of the respondent"). Accordingly, we reject this claim.

II

We next address the second certified question: Under Connecticut law, does absolute quasi-judicial immunity extend to attorneys appointed to represent respondents in conservatorship proceedings or to attorneys appointed to represent conservatees? The plaintiff contends that, because the primary function of attorneys appointed pursuant to § 45a-649 (b)[17] is to advocate for their clients' expressed wishes and not to determine their best interests, they are not acting in a judicial capacity and are not entitled to quasi-judicial immunity. Newman contends that, to the contrary, attorneys for respondents and conservators are entitled to quasi-judicial immunity because their primary function is to assist the Probate Court to ascertain and to serve the best interests of their clients. We agree with the plaintiff.

Again, this question turns on whether such attorneys perform "functions sufficiently comparable to those of officials who have traditionally been afforded absolute immunity at common law . . . ." (Internal quotation marks omitted.) *Carrubba* v. *Moskowitz*, supra, 274 Conn. 542. At the time of the underlying events in the present case, rule 1.14 of the Rules of Professional

[17] General Statutes (Rev. to 2005) § 45a-649 (b) provides in relevant part: "(1) The notice required by subdivision (1) of subsection (a) of this section shall specify (A) the nature of involuntary representation sought and the legal consequences thereof, (B) the facts alleged in the application, and (C) the time and place of the hearing. (2) The notice shall further state that the respondent has a right to be present at the hearing and has a right to be represented by an attorney at his or her own expense. If the respondent is unable to request or obtain counsel for any reason, the court shall appoint an attorney to represent the respondent in any proceeding under this title involving the respondent. . . ."

Conduct (2005) governed the duties of attorneys to clients with impaired capacity. That rule provides that "[w]hen a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Rules of Professional Conduct (2005) 1.14 (a). In a normal client-lawyer relationship, "a lawyer [must] zealously [assert] the client's position under the rules of the adversary system." Rules of Professional Conduct (2005), preamble. In addition, "[t]he normal client-lawyer relationship is based on the assumption that the client [with impaired capacity], when properly advised and assisted, is capable of making decisions about important matters." Rules of Professional Conduct (2005) 1.14, commentary; see also *In re M.R.*, 135 N.J. 155, 176, 638 A.2d 1274 (1994) (under Rules of Professional Conduct, "[t]he attorney's role is not to determine whether the client is competent to make a decision, but to advocate the decision that the client makes"); P. Tremblay, "On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client," 1987 Utah L. Rev. 515, 548–49 (1987) ("Even though this choice [between advocating for the client's wishes and protecting the client's best interests] may be difficult to make personally, its resolution among courts and writers has been rather uniform. Most favor advocacy. The most significant reason is the belief that a lawyer using a more selective approach usurps the function of the judge or jury by deciding her client's fate."); Office of the Probate Court Administrator, "Performance Standards Governing Representation of Clients in Conservatorship Proceedings," (1998) p. 1 ("The attorney is to represent the client zealously within the bounds of the law. . . . The attorney must advocate the client's wishes at all hearings even if the attorney personally disagrees with those wishes.").

Under rule 1.14 (b), "[a] lawyer may seek the appointment of a guardian or take other protective action with respect to a client," but "only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest." Rules of Professional Conduct (2005) 1.14 (b); see also Office of the Probate Court Administrator, supra, p. 2 (attorney should seek appointment of guardian for impaired client "[only] in extraordinary situations . . . because the effect will be that no one in the courtroom will be expressing the respondent's strongly held view"). "Ordinarily, if a client is opposed to the [conservatorship] application, the attorney must be also." Office of the Probate Court Administrator, supra, p. 2; see also *In re J.C.T.*, 176 P.3d 726, 735 (Colo. 2007) (American Bar Association has taken position that "a lawyer . . . should not . . . seek to have himself appointed guardian except in the most exigent of circumstances" [internal quotation marks omitted]); P. Tremblay, supra, 1987 Utah L. Rev. 552 ("[T]he [legal] profession seeks to adhere to the underlying ideology of informed consent while permitting exceptions to that doctrine. This is especially true in commitment-type cases that stress the client's right to decide."); V. Gottlich, "The Role of the Attorney for the Defendant in Adult Guardianship Cases: An Advocate's Perspective," 7 Md. J. Contemp. Legal Issues 191, 201–202 (1996) (under rule 1.14, "even if an attorney thinks the guardianship would be in the client's best interest, the attorney whose client opposes guardianship is obligated . . . to defend against the guardianship petition").

We recognize that the commentary to rule 1.14 of the Rules of Professional Conduct (2005) provides: "If the person has no guardian or legal representative, the lawyer often must act as de facto guardian." This commentary has been criticized, however, on the ground that, "[t]o the extent it permits ad hoc decisionmaking by

the lawyer without either consent or court approval, the [r]ule reincorporates the tension [between the ethical requirement that a lawyer must obtain the client's informed consent for any decision and the reality that an incapacitated client may not be able to grant consent] that has received so much attention in the medical field, but it offers no meaningful assistance regarding how to resolve the tension in practice. In a technical but perhaps significant way, it also violates the law by authorizing action in the absence of direct or proxy consent." P. Tremblay, supra, 1987 Utah L. Rev. 546. In addition, the commentary is problematic because "[t]he [common-law] presumption of competence . . . can easily be construed to mean that all persons are legally competent to make decisions until the presumption has been overcome in a judicial proceeding. . . . Any third party usurpation of authority without judicial approval or prior consent violates this principle." (Citations omitted.) Id., 546 n.130. In light of these concerns, it is reasonable to conclude that, like the commentary recognizing that an attorney may be required to seek the appointment of a guardian, the commentary recognizing that an attorney may have to act as the client's de facto guardian applies only in exceptional cases where it is inescapably clear that the client is unable to make reasonable and informed decisions and immediate action is required to protect an important interest of the client. See *In re J.C.T.*, supra, 176 P.3d 735 (although commentary to rule 1.14 stated in 2005 that "the lawyer must often act as de facto guardian," American Bar Association has taken position that "a lawyer . . . should not act as . . . guardian except in the most exigent of circumstances, that is, where immediate and irreparable harm will result from the slightest delay" [internal quotation marks omitted]).[18]

[18] In apparent recognition of these concerns, the commentary to rule 1.14 of the Rules of Professional Conduct no longer provides that attorneys for clients with impaired capacity must often act as de facto guardians.

On the basis of the foregoing, we conclude that, with respect to attorneys for respondents in conservatorship proceedings, the primary function of such attorneys under rule 1.14 of the Rules of Professional Conduct is to advocate for the client's express wishes. Although an attorney might be required in an exceptional case to act as the client's de facto guardian, that is not the attorney's primary role.

With respect to attorneys for conservatees, "[i]f a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client." Rules of Professional Conduct (2005) 1.14, commentary. Thus, if a conservatee has expressed a preference for a course of action, the conservator has determined that the conservatee's expressed preference is unreasonable, and the attorney agrees with that determination, the attorney should be guided by the conservator's decisions and is not required to advocate for the expressed wishes of the conservatee regarding matters within the conservator's authority. If the attorney believes that the conservatee's expressed wishes are not unreasonable, however, the attorney may advocate for those wishes and is not bound by the conservator's decision. Rules of Professional Conduct (2005) 1.14, commentary ("[e]ven if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication"); *Schult* v. *Schult*, 241 Conn. 767, 783, 699 A.2d 134 (1997) ("[T]he rules . . . recognize that there will be situations in which the positions of the child's attorney and the guardian may differ. . . . Although we agree that *ordinarily* the attorney should look to the guardian, we do not agree that the rules require such action in every case." [Citation omitted; emphasis in original.]). In addition, if an attorney knows that the conservator is acting adversely to the client's

interest, the attorney may have an obligation to rectify the misconduct. See Rules of Professional Conduct (2005) 1.14, commentary.[19]

We conclude, therefore, that attorneys for conservatees ordinarily are required to act on the basis of the conservator's decisions. If the conservator's decision is contrary to the conservatee's express wishes, however, and the attorney believes that the conservatee's expressed wishes are not unreasonable, the attorney may advocate for them.

Thus, as a general rule, attorneys for respondents and attorneys for conservatees are not ethically permitted, much less required, to make decisions on the basis of their personal judgment regarding a respondent's or a conservatee's best interests, although they may be required to do so in an exceptional case. These ethical principles clearly would apply to an attorney personally retained by a respondent or conservatee to represent him or her in conservatorship proceedings at his or her own expense; see General Statutes (Rev. to 2005) § 45a-649 (b) (2) ("the respondent has a right to be present at the hearing and has a right to be represented by an attorney at his or her own expense"); and nothing in the language of § 45a-649 (b) suggests that an attorney appointed by the Probate Court pursuant to the statute would have a different role. Accordingly, we conclude that the primary purpose of the statutory provision of § 45a-649 requiring the Probate Court to appoint an attorney if the respondent is unable to obtain one is to ensure that respondents and conservatees are fully informed of the nature of the proceedings and that their

[19] The commentary provides: "If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct." Rules of Professional Conduct (2005) 1.14, commentary. A fortiori, if the attorney represents the ward, and not the guardian, he or she has such an obligation.

articulated preferences are zealously advocated by a trained attorney both during the proceedings and during the conservatorship. The purpose is not to authorize the Probate Court to obtain the assistance of an attorney in ascertaining the respondent's or conservatee's best interests. Because the function of such court-appointed attorneys generally does not differ from that of privately retained attorneys in other contexts, this consideration weighs heavily against extending quasi-judicial immunity to them. See *Carrubba* v. *Moskowitz*, supra, 274 Conn. 541 (because function of public defender does not differ from privately retained attorney, public defender is not entitled to quasi-judicial immunity).

Moreover, in part I of this opinion we concluded that conservators are not entitled to quasi-judicial immunity when their acts are not authorized or approved by the Probate Court because: (1) they are not acting as agents of the Probate Court, but as fiduciaries, which generally are not entitled to quasi-judicial immunity; (2) their role is distinguishable from the role of guardians ad litem in marital dissolution proceedings because it is less likely that they will be litigation lightning rods; and (3) safeguards such as insulation from outside influence, an adversarial decision-making process and the correctability of improper decisions through an appeal are lacking. Similarly, attorneys for respondents and conservatees act as their fiduciaries; see *Matza* v. *Matza*, 226 Conn. 166, 178–79, 627 A.2d 414 (1993); attorneys for respondents and conservatees are no more likely to act as litigation lightning rods than other privately retained attorneys in contested adversarial proceedings involving conflicting rights and interests; and the decisions of such attorneys lack the procedural safeguards of judicial decision-making.[20] Accordingly, we conclude

[20] Newman contends that the decisions of attorneys for respondents and conservatees are correctable on appeal because § 45a-186 provides for appeals from Probate Court decisions. The fact that, in a particular case, the Probate Court's ruling may have derived from an attorney's decision does not mean, however, that the attorney's decision itself is correctable

that a court-appointed attorney for a respondent in a conservatorship proceeding or a conservatee is not entitled to quasi-judicial immunity from claims arising from his or her representation.[21]

Newman argues that this conclusion is inconsistent with this court's conclusion in *Carrubba* v. *Moskowitz*, supra, 274 Conn. 547–48, that attorneys appointed to represent minors in dissolution proceedings pursuant to General Statutes § 46b-54 are entitled to quasi-judicial immunity. We disagree. In *Carrubba*, we acknowledged "the dual responsibilities of the court-appointed attorney for a minor child both to safeguard the child's best interests and to act as an advocate for the child"; id., 539; but concluded that, "[b]ecause . . . [§ 46b-54] provides that the appointment is for the purpose of promoting the best interests of the child, the representation of the child must always be guided by that overarching goal, despite the dual role required of the attorney for the minor child. Thus, the appointed attorney's duty to secure the best interests of the child dictates that she must be more objective than a privately retained attorney. Furthermore, because the overall goal of serving the best interests of the child always guides the repre-

on appeal. Indeed, the attorney's improper or unauthorized decision may prevent an appeal or take place during an appeal.

[21] We emphasize that, although attorneys for respondents and conservatees are not entitled to quasi-judicial immunity, they are not barred from raising the defense that they disregarded an impaired client's expressed wishes in a reasonable and good faith belief that the client was not capable of making reasonable and informed decisions. See Rules of Professional Conduct (2005) 1.14, commentary ("[i]f the person has no guardian or legal representative, the lawyer often must act as de facto guardian"); id. ("[i]f a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client"). An assessment by the attorney with which the trial court, in retrospect, disagrees does not necessarily rise to the level of an ethical violation or malpractice. Otherwise, every time an attorney requested that a conservator be appointed for an impaired client against the client's wishes, and the Probate Court concluded that a conservator was not required, the attorney would be subject to discipline.

sentation of the child, the dual obligations imposed on the attorney for a minor child, namely, to assist the court in serving the best interests of the child and to function as the child's advocate, are not easily disentangled. In other words, the duty to secure the best interests of the child does not cease to guide the actions of the attorney for the minor child, even while she is functioning as an advocate." Id., 544–45. Because the *primary* role of the attorney in this context is to "assist the court in determining and serving the best interests of the child"; id., 546; the attorney is entitled to quasi-judicial immunity. Id.

Unlike children, however, who are not presumed to be competent,[22] impaired adults are presumed to be competent under rule 1.14 until incompetence is established. See Rules of Professional Conduct (2005) 1.14, commentary ("[t]he normal client-lawyer relationship is based on the assumption that the [impaired] client, when properly advised and assisted, is capable of making decisions about important matters").[23] Indeed, even after an adult client's inability to care for himself or his affairs is established, the attorney can make decisions on the basis of the client's reasonable and informed

[22] See *Carrubba* v. *Moskowitz*, supra, 274 Conn. 539 (although, "[a]s an advocate, the attorney should honor the strongly articulated preference regarding taking an appeal of a child who is old enough to express a reasonable preference; as a guardian, the attorney might decide that, despite such a child's present wishes, the contrary course of action would be in the child's long term best interests" [internal quotation marks omitted]); cf. *State* v. *Sanchez*, 25 Conn. App. 21, 26, 592 A.2d 413 (1991) ("children, unlike adults, are not presumed to be competent [witnesses]").

[23] We recognize that, by its express terms, rule 1.14 applies to minors. See Rules of Professional Conduct (2005) 1.14 (a) ("[w]hen a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of *minority*, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client" [emphasis added]). As we recognized in *Carrubba*, however, the extent to which an attorney can maintain a normal client-lawyer relationship with a child is inherently curtailed, even when the child is unimpaired. That is not true for adults.

decisions. Id. ("[e]ven if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client").

The different presumptions that apply to children and adults with impaired capacity are reflected by the relevant statutes. Section 46b-54 expressly provides that the trial court may appoint an attorney for the child if doing so is in the child's best interests. In addition, children do not have a right under § 46b-54 to representation in dissolution proceedings; rather, attorneys appointed pursuant to § 46b-54 serve at the discretion of the trial court. General Statutes § 46b-54 (a) ("[t]he court *may* appoint counsel for any minor child or children" [emphasis added]); *Carrubba* v. *Moskowitz*, supra, 274 Conn. 544 (attorney appointed under § 46b-54 serves at discretion of court). This supports a conclusion that the controlling factor in deciding whether to appoint an attorney pursuant to § 46b-54 is the court's need for objective assistance in determining the children's best interests, not the children's interest in having an independent advocate. In contrast, § 45a-649 (b) does not refer to the best interests of the respondent or conservatee, and an attorney appointed pursuant to the statute does not serve at the discretion of the Probate Court. Rather, respondents in conservatorship proceedings have the *right* to be *represented* by an attorney, which supports the conclusion that the purpose of appointing an attorney is to provide the client with an independent, zealous advocate, rather than to provide the Probate Court with objective guidance. See General Statutes (Rev. to 2005) § 45a-649 (b) (2) ("[T]he respondent . . . has a *right* to be *represented* by an attorney . . . . If the respondent is unable to request or obtain counsel for any reason, the court *shall* appoint an attorney to *represent* the respondent . . . ." [Emphasis added.]). Accordingly, our conclusion in the present case that attorneys for respondents and conser-

vatees are not entitled to quasi-judicial immunity is not inconsistent with *Carrubba*.

Newman also relies on *Lesnewski* v. *Redvers*, 276 Conn. 526, 886 A.2d 1207 (2005), to support his argument that attorneys for respondents and conservatees are entitled to quasi-judicial immunity because they are expected to act in the client's best interests. See id., 540 ("for both a minor and an adult incapable person, the court's purpose in providing them with representation is to ensure that their legal disability will not undermine the adequate protection of their interests"). In *Lesnewski*, this court concluded that the plaintiff, a conservatee, could bring an appeal from an order of the Probate Court in her own name only if her attorney could convince the court that the appeal was in the plaintiff's best interests. Id., 541. This court also concluded that, if a conservatee's articulated preference conflicted with his or her best interests, the attorney could not bring an appeal, but the appeal must be brought through a guardian ad litem or next friend. Id. In support of this conclusion we relied on our decision in *Newman* v. *Newman*, 235 Conn. 82, 100, 663 A.2d 980 (1995), in which we concluded that the minor children in a marital dissolution proceeding can appeal in their own name only if they can persuade the trial court that an appeal is in their best interests. This is because, as we have explained, "the governing standard [with respect to the representation of minor children in dissolution proceedings] is the best interests of the minor children." Id. As we also have explained, however, the governing standard for the representation of impaired adult clients is not the protection of their best interests, but, to the extent possible, the zealous advocacy of their expressed preferences. This is true even if the Probate Court has appointed a conservator for the client. See Rules of Professional Conduct (2005) 1.14, commentary ("[e]ven if the person does have a legal

representative, the lawyer should as far as possible accord the represented person the status of client"); *Schult* v. *Schult*, supra, 241 Conn. 783 ("[T]he rules . . . recognize that there will be situations in which the positions of the child's attorney and the guardian may differ. . . . Although we agree that *ordinarily* the attorney should look to the guardian, we do not agree that the rules require such action in every case." [Citation omitted; emphasis in original.]). Accordingly, we now clarify that, if a conservatee expresses a preference to appeal from an order of the Probate Court, and the attorney believes and can persuade the trial court that the conservatee's preference is reasonable and informed, the trial court should allow the appeal even if the attorney does not prove that an appeal would be in the client's best interests.[24] Only upon determining that the conservatee's preference to appeal is unreasonable would the court be required to determine whether an appeal would be in the conservatee's best interest.[25] To the extent that *Lesnewski* held that a conservatee

[24] Again, we emphasize that, if the conservator determines that the conservatee's articulated preference to appeal is unreasonable, the attorney ordinarily should be guided by that determination, and the attorney's failure to act on the conservatee's articulated preference under these circumstances would not ordinarily constitute an ethical violation. See footnote 21 of this opinion. We conclude only that the attorney is not *bound* by the conservator's decisions based on the conservatee's best interests if the attorney believes that the conservatee's articulated preference is reasonable and informed.

[25] Of course, if a conservatee is gravely impaired and is incapable of articulating any preferences, the attorney and the trial court can be guided only by the conservatee's best interests. If a conservatee is so gravely impaired, however, there would seem to be little reason to appoint an attorney to represent the conservatee, as distinct from the conservator, inasmuch as the primary role of an attorney for a conservatee is to advocate for his or her articulated preferences, and an attorney for a conservator has an obligation to protect the conservatee from any acts by the conservator that could be adverse to the conservatee's interests. See Rules of Professional Conduct (2005) 1.14, commentary ("[i]f the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct").

may file an appeal in his or her own name *only* when the conservatee's attorney persuades the court that an appeal is in the conservatee's best interests, it is hereby overruled. Accordingly, the case no longer supports Newman's claim that attorneys for respondents and conservatees generally must act to protect their clients' best interests, and not to advocate their articulated preferences.

Newman also argues that, even if attorneys for conservatees are not entitled to quasi-judicial immunity, attorneys for respondents in conservatorship proceedings are entitled to such immunity because, "unless and until the court finds that the statutory prerequisites are met and appoints a conservator, the attorney is the only one who can act for the respondent." As we have indicated, it is true that, if an important right or interest of the client is at stake and immediate action is required, the attorney for a respondent may be required to act as a de facto guardian to protect that specific interest. It does not follow, however, that an attorney for a respondent should act as the client's *general* de facto guardian during that period or that the attorney generally should rely solely on his or her own judgment regarding the client's best interests in deciding whether to oppose an involuntary conservatorship. As we have indicated, an attorney may act as the de facto guardian of an impaired client only in exceptional circumstances, and whether a conservatorship is in the client's best interests is for the Probate Court to decide, not the attorney. It would be anomalous to conclude that, when an individual is facing one of the most serious infringements on personal liberty and autonomy authorized by law; see *Edward W.* v. *Lamkins*, 99 Cal. App. 4th 516, 530–31, 122 Cal. Rptr. 2d 1 (2002) ("commitment is a deprivation of [constitutional due process right to] liberty [and] is incarceration against one's will, whether it is called criminal or civil"; [internal quotation marks

omitted]; and committed person faces possible loss of right to be free of physical restraint, right to practice profession, right to hold public office, right to marry, right to refuse certain types of medical treatment, right to vote, right to contract, and loss of reputation); V. Gottlich, supra, 7 Md. J. Contemp. Legal Issues 197 (guardianship "is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen");[26] the attorney is least obligated to advocate for the individual's express wishes.[27]

Finally, Newman argues that, because the 2007 amendments to the statutory scheme governing conservatorship proceedings; see Public Acts 2007, No. 07-116; clarified that a court-appointed attorney is "closer to (but still not entirely) an independent advocate, more responsive to the wishes of the proposed conservatee and with a less objective role in the process," the

[26] Although an involuntary conservatorship is not an involuntary commitment or a guardianship, as the facts of the present case show, an involuntary conservatee potentially faces many of the same infringements on personal liberty and autonomy.

[27] We recognize the difficult ethical dilemma faced by attorneys representing clients with severely impaired decision-making capacities, and we emphasize that we do not suggest that an attorney for a respondent cannot, under any circumstances, argue in favor of an involuntary conservatorship against the client's express wishes. See *In re J.C.T.*, supra, 176 P.3d 735 (attorney may seek guardianship for impaired client "where immediate and irreparable harm will result from the slightest delay" [internal quotation marks omitted]); *In re M.R.*, supra, 135 N.J. 176 (attorney's duty to advocate for expressed wishes of client with impaired capacity "does not extend to advocating decisions that are patently absurd or that pose an undue risk of harm to the client"). We conclude only that, under the Rules of Professional Conduct, an attorney may act as the client's de facto guardian or advocate for an involuntary conservatorship against the client's express wishes only if it is unmistakably clear that the client is incapable of making reasonable and informed decisions and the attorney is of the firm belief that a conservatorship is the only way to protect important interests of the client. Affording quasi-judicial immunity to all attorneys for all respondents merely because the decision whether to act as an advocate or as a de facto guardian may be very difficult in an exceptional case would be allowing the tail to wag the dog.

amendments support a conclusion that, under the 2005 statutory scheme, attorneys were expected to act as advocates for their client's best interests. See *Chatterjee* v. *Commissioner of Revenue Services*, 277 Conn. 681, 693, 894 A.2d 919 (2006) ("[w]hen the legislature amends the language of a statute, it is presumed that it intended to change the meaning of the statute and to accomplish some purpose" [internal quotation marks omitted]). It does not follow from the fact that the legislature has provided new additional rights to respondents and conservatees,[28] however, that the legislature previously intended that a court-appointed attorney would not act primarily as a zealous advocate for their clients' expressed wishes, but would assist the Probate Court in determining the clients' best interests. Accordingly, we reject this claim.[29]

III

Finally, we address the third certified question: What is the role of conservators, court-appointed attorneys for conservatees, and nursing homes in the Connecticut probate court system, in light of the six factors for determining quasi-judicial immunity outlined in *Cleavinger* v. *Saxner*, supra, 474 U.S. 202. Because parts I and II of this opinion are responsive to the portions of this question relating to conservators and court-appointed attorneys, we focus our analysis in part III of our opinion exclusively on the role of nursing homes with respect to conservatees.[30] The District Court found

[28] See, e.g., Public Acts 2007, No. 07-116, § 15 (c), codified at General Statutes § 45a-649a (c) ("the attorney for the conserved person shall assist in the filing and commencing of an appeal to the Superior Court").

[29] For all of the foregoing reasons, we also reject Newman's claim that, even if attorneys for respondents and conservatees are not entitled to absolute quasi-judicial immunity, they are entitled to qualified immunity.

[30] The amicus Connecticut Probate Assembly argues that this court should suggest to the Second Circuit Court of Appeals that it defer resolving the question of whether conservators are entitled to quasi-judicial immunity under federal law. The amicus contends that resolution of the issue is unnecessary inasmuch as the plaintiff cannot prevail on her claims against

that "Judge Brunnock ordered Gross be placed in a nursing home, issued an order approving the disbursement of Gross's assets to cover his costs of living and ordered the restrictions placed on [the plaintiff's] visitation rights."[31] *King* v. *Rell*, supra, United States District Court, Docket No. 3:06-cv-1703 (VLB). The District Court concluded that Grove Manor was entitled to quasi-judicial immunity to the extent that it was executing these orders.[32] Id. We conclude that Grove Manor was neither executing the orders of the Probate Court nor performing a function comparable to that of the Probate Court when it admitted and cared for Gross, but was merely following the instructions of the conservator and performing its ordinary function as a nursing home. Accordingly, we conclude that it was not entitled to quasi-judicial immunity.

General Statutes § 45a-98 provides in relevant part: "(a) Courts of probate in their respective districts shall have the power to . . . (7) make any lawful orders or

the conservator pursuant to 42 U.S.C. § 1983 in any event, for the reason that conservators are not state actors. Because this argument goes to the merits of the plaintiff's federal claims against conservators, and because the Court of Appeals has not sought the guidance of this court on this issue, we decline to address it.

[31] The plaintiff's complaint alleges that, "[o]n November 3, 2005, at the request of . . . Donovan . . . Brunnock issued an ex parte decree stating 'All visitation by [the plaintiff] for . . . Gross is temporarily suspended. This order applies only to off premises visitation. [The plaintiff] may visit at the health center.' " The complaint further alleges that, "[o]n May 1, 2006, at the request of . . . Donovan . . . Brunnock issued an ex parte decree stating 'Wherefore it is ordered and decreed that . . . [the plaintiff] not be allowed to take . . . Gross off premises from Grove Manor . . . . [The plaintiff's] visitation is limited to one . . . visit per day not to exceed one . . . hour. [The plaintiff] is not to bring any recording devices (visual and/or audio) into Grove Manor . . . .' "

[32] Grove Manor does not challenge the United States District Court's conclusion that nursing homes are not entitled to quasi-judicial immunity for discretionary acts that give rise to state tort claims and claims arising from alleged violations of the Connecticut Patients' Bill of Rights, General Statutes § 19a-550, and the Court of Appeals did not ask us to address this issue.

decrees to carry into effect the power and jurisdiction conferred upon them by the laws of this state." This court previously has recognized, however, that "[t]he [P]robate [C]ourt is a court of limited jurisdiction and has only such powers as are given it by statute or are reasonably to be implied in order to carry out its statutory powers." *Prince* v. *Sheffield*, 158 Conn. 286, 293–94, 259 A.2d 621 (1969). We also have held that "[t]he situation . . . in which the Probate Court may exercise equitable jurisdiction must be one which arises within the framework of a matter already before it, and wherein the application of equity is but a necessary step in the direction of the final determination of the entire matter." *Palmer* v. *Hartford National Bank & Trust Co.*, 160 Conn. 415, 429, 279 A.2d 726 (1971). The Probate Court "does not have plenary powers in equity and cannot adjudicate questions affecting persons who are strangers to the issues involved . . . ." *Delaney* v. *Kennaugh*, 105 Conn. 557, 562–63, 136 A.108 (1927); cf. *Union & New Haven Trust Co.* v. *Sherwood*, 110 Conn. 150, 161, 147 A. 562 (1929) (Probate Courts "possess certain incidental powers beyond the scope of those expressly confided to them, where such powers become necessary in the discharge of duties imposed upon them or are necessary for the adjustment of the equitable rights before the court" [internal quotation marks omitted]). This is because, "in an equitable action, facts must often be found. . . . Yet no jury trial is permitted in cases of this type, in either the Probate Court or in the Superior Court on an appeal from probate. . . . The Probate Court may not adjudicate complex legal questions which are subject to the broad jurisdiction of a general court of equity. . . . Thus, the Probate Court lacks essential powers necessary to handle independent equitable actions . . . ." (Citations omitted.) *Palmer* v. *Hartford National Bank & Trust Co.*, supra, 430.

In the present case, Grove Manor has provided no support for the proposition that the Probate Court has the statutory authority in conservatorship proceedings to issue an order to an entity that was not a party to the conservatorship proceeding, such as a nursing home, that has the force of an injunction.[33] Rather, the

[33] The District Court found that "[a]n order of the Probate Court is required before a ward may be placed in a long-term care facility. See [General Statutes] § 45a-656 (c)." *King* v. *Rell*, supra, United States District Court, Docket No. 3:06-cv-1703 (VLB). Because General Statutes (Rev. to 2005) § 45a-656 does not have a subsection (c), and the current revision of § 45a-656 (c) does not govern the placement of conservatees in a long-term care facility, we assume that the District Court intended to refer to the current revision of § 45a-656b (b), which requires a conservator to obtain the permission of the Probate Court before making such a placement. Section 45a-656b (b) was enacted in 2007 and was not in place at the time of the events in the present case. See Public Acts 2007, No. 07-116, § 21 (b). As we have indicated, a conservator of the person is not required pursuant to General Statutes (Rev. to 2005) § 45a-656 to obtain permission from the Probate Court before placing a conservatee in a nursing home. See footnote 15 of this opinion. Even if § 45a-656b applied in the present case, however, the purpose of the statutory requirement that the conservator obtain the permission of the Probate Court is to protect the conservatee's liberty and autonomy interests, not to impose any duty on a third party. Although, in light of this new statutory provision, a nursing home may decide to refuse to admit a conservatee in the absence of proof that the conservator has obtained the permission of the Probate Court, nothing in the statute suggests that the Probate Court may direct orders at a long-term care facility.

We recognize that General Statutes (Rev. to 2005) § 45a-649 (a) (2) provides that, upon an application for an involuntary conservatorship, "[t]he [Probate] [C]ourt shall order such notice as it directs to the following . . . (G) the person in charge of the hospital, nursing home or some other institution, if the respondent is in a hospital, nursing home or some other institution." In addition, the statute refers to the persons who receive such notice as "parties." General Statutes (Rev. to 2005) § 45a-649 (a) ("the court shall issue a citation to the following enumerated parties"). For the reasons stated in this opinion, however, we conclude that the role of the "person in charge of the hospital, nursing home or . . . other institution"; General Statutes (Rev. to 2005) § 45a-649 (a) (2) (G); who receives such notice is to help the Probate Court to decide whether an involuntary conservatorship is in the respondent's best interests, and the person is not a "party" to the proceeding in the ordinary sense of that term, i.e., the person is not subject to the jurisdiction of the Probate Court. In any event, in the present case, the parties have pointed to no evidence that Grove Manor was given notice of the conservatorship proceeding pursuant to § 45a-649 (a) (2). Indeed,

authority of the Probate Court with respect to conservators of the person is to appoint the conservator; see General Statutes (Rev. to 2005) § 45a-650 (d); and to receive the reports of the conservator regarding the conservatee's condition. See General Statutes (Rev. to 2005) § 45a-656 (a) (6). In addition, the Probate Court has general supervisory authority over the conservator; see *Elmendorf* v. *Poprocki*, supra, 155 Conn. 118; and, if requested by the conservator, may authorize or approve the conservator's decisions regarding the care of the conservatee; see footnote 15 of this opinion; in which case the conservator is deemed to be acting as the court's agent. See *Murphy* v. *Wakelee*, supra, 247 Conn. 406–407. The apparent purpose of these provisions is to authorize the Probate Court, with the assistance of the conservator, to make decisions regarding the care and maintenance of a person who is incapable of making such decisions on his or her own behalf, not to authorize the court to impose duties on third parties, such as a nursing home. Moreover, the power to issue injunctive orders to third parties regarding the conservatee's care is not necessary or incidental to the Probate Court's authority to make such decisions, any more than the power to issue injunctions is necessary or incidental to the right of a competent person to make decisions regarding his or her own care. Accordingly, we conclude that the Probate Court does not have the statutory authority to issue injunctive orders to third parties to carry out its decisions on behalf of a conservatee.

It follows that, although a conservator is acting as an agent of the Probate Court when it gives court-approved instructions to the nursing home regarding the conservatee's admission and care, the nursing home is not acting as the Probate Court's agent when it com-

the record suggests that Grove Manor did not become involved with the conservatee's case until after the conservatorship was imposed.

plies with the conservator's instructions. Rather, it would appear that nursing homes have essentially the same relationship with conservators that they have with competent persons who are seeking admission or are admitted to the nursing home, and are bound by the court-approved instructions of conservators only to the same extent that they are bound by the instructions of competent clients.[34] Although a nursing home may have a legal obligation to honor the instructions of a competent client, and although the fact that it was following the client's instructions may be raised as a defense in an action arising from its conduct, the nursing home is not entitled to quasi-judicial immunity from such an action. Similarly, a nursing home confronted with a claim that it admitted and held a conservatee against his or her will in violation of federal civil rights law

[34] Although a nursing home generally would be entitled to *rely* on the decisions of the conservator regarding the admission and treatment of the conservatee, especially if a decision has been authorized or approved by the Probate Court, it would not be *legally bound* to comply with the conservator's requests and instructions to any greater extent than it is bound to comply with the decisions of competent nursing home residents. For example, if a nursing home believed that a conservatee's resistance to an involuntary conservatorship would make the conservatee an unduly difficult or risky resident of that facility, Grove Manor has pointed to no authority, and we are aware of none, for the proposition that the nursing home would be *required* to comply with the conservator's request that it admit the conservatee. Rather, the conservator's court-approved request *permits* the nursing home to admit the conservatee without the conservatee's personal consent. Although a nursing home's failure to comply with a conservator's instructions regarding the care of the conservatee might, in certain circumstances, subject the nursing home to some type of legal action in the Superior Court, as might its failure to comply with the instructions of a competent client, the nursing home is not subject to the jurisdiction of the Probate Court and, therefore, cannot be violating any order of the Probate Court if it fails to follow the conservator's instructions.

Thus, the Probate Court's orders in the present case merely authorized Donovan to inform Grove Manor of her decisions regarding Gross' care and treatment and *permitted* Grove Manor to carry out those decisions without Gross' personal consent, and were not binding on Grove Manor to any greater degree than instructions from Gross would have been if he had been deemed competent.

generally should be entitled to raise the defense that it was acting in reasonable reliance on the conservator's instructions, and reasonable reliance generally may be established by showing that the conservator's instructions were expressly authorized by the Probate Court.[35] Because a nursing home is simply functioning in its ordinary role as a nursing home when it complies with a conservator's court-approved instructions regarding the admission and care of a conservatee, however, and is not performing the judicial function of the Probate Court, it is not entitled to absolute quasi-judicial immunity from suit under federal law.[36] See *Miller* v. *Gammie*, supra, 335 F.3d 897 ("[A]bsolute immunity shields only those who perform a function that enjoyed absolute immunity at common law. Even actions taken with court approval or under a court's direction are not in and of themselves entitled to quasi-judicial, absolute immunity.").

In support of its claim that nursing homes are performing a judicial function when they admit residents pursuant to the order of the Probate Court, Grove Manor relies primarily on *Miller* v. *Director, Middletown State Hospital*, 146 F. Sup. 674, 676 (S.D.N.Y. 1956), in which the plaintiff was committed to a state mental hospital pursuant to the New York rules of crimi-

[35] There may be exceptions, however, to this general rule. For example, if a plaintiff could prove that a nursing home conspired in bad faith with the Probate Court and the conservator to confine a conservatee in the nursing home or to restrict his activities there when such confinement or restriction clearly was not necessary or in the conservatee's interests, the nursing home could not prevail on the defense that it was reasonably relying on the Probate Court's orders.

[36] We recognize that, when a nursing home is caring for a conservatee, it may face more difficult challenges than when caring for a competent client because of the conflicts that may arise when the conservator's instructions are different than the conservatee's expressed wishes. Nevertheless, because the nursing home simply is not performing a judicial function when it complies with the conservator's instructions, the potential for such conflicts does not entitle it to quasi-judicial immunity.

nal procedure. Although it is not entirely clear from the opinion, it is reasonable to conclude that the institution was designated by the state as the place at which committed criminal defendants would be confined, and that the institution had no discretion to refuse to accept the plaintiff.[37] The plaintiff "escaped" from the hospital and sought damages from the director of the hospital for his illegal confinement and an injunction against further confinement. Id. With respect to the claim for damages, the court held that, "[t]o the extent that the director was called upon to exercise discretion in determining when the plaintiff should be discharged, he was exercising a quasi-judicial role and is therefore immune. To the extent that he was merely executing the order of the [s]tate Supreme Court justice his immunity is equally clear." Id., 678.

As we have indicated, in the present case, Grove Manor has pointed to no authority for the proposition that a conservatee can be "committed" by the Probate Court to a nursing home or the proposition that a nursing home could be bound by an order of the Probate Court to confine a conservatee. Thus, private nursing homes are not in the same position as a state-run institution designated by the state as the place where committed criminal defendants are to be confined. Indeed, Grove Manor has not cited, and our research has not revealed, a single case in which a private nursing home

[37] The court stated that, "[e]ven if the order was erroneously or improvidently made by the special surrogate . . . the [s]tate would not be liable for receiving and detaining the claimant under the order of commitment. The officers of the [s]tate [h]ospital were not required before receiving [the] claimant under the order to institute an inquiry in order to satisfy themselves that the special surrogate had not erroneously or improvidently made it. No such burden is cast upon them. They were confronted by an order valid on its face and it was their duty to yield obedience to it. In complying with that order the officers of the institution and the [s]tate did not subject themselves to an action for false imprisonment." (Internal quotation marks omitted.) *Miller* v. *Director, Middletown State Hospital*, supra, 146 F. Sup. 677 n.3.

claimed that it was entitled to quasi-judicial immunity from an action arising from its care of a conservatee. Accordingly, we find *Miller* to be of limited persuasive value.

The certified questions are answered as follows: (1) absolute quasi-judicial immunity extends to a conservator appointed by the Probate Court only when the conservator is executing an order of the Probate Court or the conservator's actions are ratified by the Probate Court; (2) absolute quasi-judicial immunity does not extend to attorneys appointed to represent respondents in conservatorship proceedings or conservatees; and (3) our analysis of the first and second certified questions is responsive to the third certified question as it relates to the roles of conservators and court-appointed attorneys; with respect to nursing homes caring for conservatees, we conclude that their function does not entitle them to quasi-judicial immunity under any circumstances.

No costs shall be taxed in this court to the parties.

In this opinion PALMER, EVELEIGH and HARPER, Js., concurred.

McLACHLAN, J., with whom NORCOTT and ZARELLA, Js., join, concurring and dissenting. I concur with and join parts II and III of the majority opinion. I also agree with the majority that the question of whether a conservator is entitled to absolute, quasi-judicial immunity in performing his statutory duties is resolved under both principles of agency and our decision in *Carrubba* v. *Moskowitz*, 274 Conn. 533, 537, 877 A.2d 773 (2005), in which we extended absolute, quasi-judicial immunity to attorneys appointed by the trial court to represent minor children pursuant to General Statutes § 46b-54. Because I disagree with the majority's conclusion that a conservator is entitled to absolute, quasi-judicial

immunity only when the conservator's actions are authorized or ratified by the Probate Court, I dissent from part I of the majority opinion. I would conclude that conservators are entitled to absolute, quasi-judicial immunity with respect to all actions brought by third parties for actions undertaken within a conservator's statutory authority, but with respect to actions brought by or on behalf of the conserved person, I would extend absolute immunity to conservators for all actions undertaken within their statutory authority, unless those actions constitute financial malfeasance or misfeasance. I believe that this conclusion is compelled by *Carrubba*, the statutes governing conservatorships, common-law rules governing fiduciaries and principles of agency.

I begin, as I believe we must, with our decision in *Carrubba*. In extending absolute immunity to attorneys appointed pursuant to § 46b-54, we first recognized the most problematic aspect of according absolute immunity to such attorneys—namely, that they serve dual roles that are not always readily reconcilable. An attorney appointed to represent a minor child pursuant to § 46b-54 must both "safeguard the child's best interests and . . . act as an advocate for the child." Id., 539. Put another way, an attorney for a minor child resembles both a guardian ad litem and independent counsel. Although we recognized that the two roles are "not easily disentangled"; id., 545; we concluded that the attorney's duty to safeguard the child's best interests is superior and the duty to serve as the child's advocate "must always be subordinated to the attorney's duty to serve the best interests of the child." Id., 546. Our decision to grant absolute, quasi-judicial immunity to attorneys appointed pursuant to § 46b-54 was grounded primarily on the duty to safeguard the child's best interests. We arrived at that conclusion by applying a three-pronged test, which we adopted as the governing stan-

dard under our state common law: "[1] whether the official in question perform[s] functions sufficiently comparable to those of officials who have traditionally been afforded absolute immunity at common law . . . [2] whether the likelihood of harassment or intimidation by personal liability [is] sufficiently great to interfere with the official's performance of his or her duties . . . [and 3] whether procedural safeguards [exist] in the system that would adequately protect against [improper] conduct by the official." (Internal quotation marks omitted.) Id., 542–43. We concluded that all three prongs of the test were satisfied, and centered the majority of our analysis on the first, functional prong of the test. An attorney for a minor child serves at the discretion of the court, and has an overarching duty to "assist the court in determining and serving the best interests of the child." Id., 546; see General Statutes § 46b-54 (c) (providing that attorney for minor child shall be heard on matters concerning child "so long as the court deems such representation to be in the best interests of the child"). We viewed these two facts as pivotal in defining the function of an attorney for the minor child as most closely resembling that of a guardian ad litem. *Carrubba* v. *Moskowitz*, supra, 274 Conn. 546. We reasoned that the function of an attorney appointed pursuant to § 46b-54 requires such an attorney to employ a degree of thoroughness and objectivity, coupled with a lack of independence from the court, that justifies extending absolute quasi-judicial immunity to that attorney, at least in the performance of those functions that are integral to the judicial process. Id., 544–47.

Any inquiry into whether conservators are entitled to immunity, as well as the appropriate scope of that immunity, must begin with the question of whether a conservator "perform[s] functions sufficiently comparable to those of officials who have traditionally been

afforded absolute immunity at common law . . . .'' (Internal quotation marks omitted.) Id., 542. The majority recites this principle, then briefly discusses the duties of a conservator, but inexplicably fails to explain why the similarities between those duties and the duties of both guardians ad litem and attorneys for minor children do not justify extending the same level of immunity to conservators. Not only are those similarities striking, but to the extent that the role of a conservator differs from that of an attorney appointed pursuant to § 46b-54, the differences make the case for absolute immunity even stronger.

The overall function of the conservator, as understood in relation to the Probate Court and that court's duty to the conserved person, bears the same hallmark that so persuaded us to extend absolute immunity to attorneys appointed pursuant to § 46b-54 to represent minor children. That is, a conservator, like an attorney appointed pursuant to § 46b-54, serves at the discretion of the court and may be removed by the court. General Statutes (Rev. to 2005) § 45a-199; General Statutes § 45a-242. Even more importantly, the overarching principle defining the contours of the relationship between the court, the conservator and the conserved person is the duty to safeguard the best interests of the conserved person. We have recognized that ''there is no difference in the court's duty to safeguard the interests of a minor and the interests of a conserved person,'' and that ''[t]he purpose of statutes relating to guardianship is to safeguard the rights and interests of minors and [adult incapable] persons, and it is the responsibility of the courts to be vigilant in seeing that the rights of such persons are properly protected . . . . This is reflected in the statutory scheme governing conservatorships, which requires the Probate Court to be guided by the conserved person's best interests in establishing the conservatorship and selecting the conservator . . . .''

(Citations omitted; internal quotation marks omitted.) *Lesnewski* v. *Redvers*, 276 Conn. 526, 540, 886 A.2d 1207 (2005).

As I have already mentioned, the differences between a conservator and an attorney appointed pursuant to § 46b-54 support according absolute immunity to conservators. That is, I believe it is significant that a conservator is more closely analogous to a guardian ad litem than an attorney for a minor child. Unlike an attorney for a minor child, a conservator does not serve a dual, sometimes conflicting role. Just as a guardian ad litem must always safeguard the best interests of the minor child, a conservator must always safeguard the best interests of the conserved person. The question of whether a conservator should be extended immunity, therefore, is an easier question than the one presented in *Carrubba*. A conservator has one role—to be the agent of the court and to act for the court in safeguarding the best interests of the conserved person. Accordingly, as I explain later in this concurring and dissenting opinion, so long as he is acting within his statutory authority, the conservator does not act as an independent agent or advocate, but rather, always acts as the arm and agent of the court and is entitled to absolute, quasi-judicial immunity.

As for the remaining two prongs of the *Carrubba* inquiry, I agree with the majority that, for most cases, there is not a significant likelihood that subjecting conservators to personal liability will subject them to a level of harassment or intimidation that would be sufficiently great to interfere with the performance of their duties. See *Carrubba* v. *Moskowitz*, supra, 274 Conn. 542–43. I would not ignore the fact, however, that a conserved person is, by definition, incapable of managing his or her affairs and may resent being, in some respects, under the control of another. I disagree with the majority's suggestion that the procedural safeguards in the

system are inadequate to protect against improper conduct by conservators for two reasons. First, I believe that the majority did not conduct an adequate review of the procedural safeguards that were in place when the events in the present case unfolded. Without reviewing what those procedural safeguards were, the majority simply points to the facts of the present case as demonstrating that whatever those safeguards may have been, they were inadequate.[1] Second, the majority fails to acknowledge the extensive revisions enacted in 2007, which significantly strengthened the available procedural safeguards.

I begin with the safeguards that were in place at the time of the events giving rise to the present case. Most importantly, a conservator is appointed by the Probate Court and serves at the discretion of the court. See General Statutes § 45a-646 (appointment for voluntary representation by conservator); General Statutes (Rev. to 2005) § 45a-650 (d) (appointment for involuntary representation by conservator); General Statutes (Rev. to 2005) § 45a-199 (term "fiduciary" as used in § 45a-242 includes conservator); General Statutes § 45a-242 (removal of fiduciary, including conservator). From the outset, the Probate Court has enormous control over the scope of the conservator's powers over the conserved person, with the best interests of the conserved person guiding the court's decision-making process. General Statutes (Rev. to 2005) § 45a-650 (h) (Probate Court may limit powers of conservator based on findings that such limits are in best interests of conserved person). Moreover, throughout the duration of the conservatorship, the Probate Court's supervisory role safeguards the best interests of the conserved person. General Statutes (Rev. to 2005) § 45a-655, which sets

[1] The fact that the regrettable wrong which the named plaintiff, Daniel Gross, allegedly suffered is so rare as to be almost unique is, of itself, evidence that the system was not reasonably broken.

forth the duties of a conservator of the estate, requires a conservator to file an inventory with the Probate Court within two months of the appointment; allows a conservator to apply a portion of the estate for the support and maintenance of the spouse of the conserved person only after notice and a hearing before the Probate Court, which "proper" amount of support is to be determined by the court; allows the court to require annual accountings of the conservator; and requires a conservator to apply to the Probate Court for authorization to make gifts from the conserved person's estate. Additionally, a person has the right to designate a person of his choice to serve as conservator, should he ever need one; General Statutes (Rev. to 2005) § 45a-645 (a); a respondent has the right to be represented by an attorney in any conservatorship proceeding; General Statutes (Rev. to 2005) § 45a-649 (b) (2); generally, the court's decision to conserve a person must be based on medical evidence; General Statutes (Rev. to 2005) § 45a-650 (a); and the court must apply the clear and convincing evidence standard in conserving a person. General Statutes (Rev. to 2005) § 45a-650 (d). Finally, a conserved person has the right to appeal any decision of the Probate Court. General Statutes (Rev. to 2005) § 45a-186.

In 2007, the legislature amended the statutory scheme to strengthen the procedural safeguards governing involuntary conservatorships. Public Acts 2007, No. 07-116 (P.A. 07-116); see also R. Folsom & G. Wilhelm, Connecticut Estates Practice Series: Incapacity, Powers of Attorney and Adoption in Connecticut (3d Ed. 2011) § 2:2A, pp. 2-10 through 2-17. For example, General Statutes § 45a-132a now allows a respondent or a conserved person to refuse a court-ordered examination by a physician, psychiatrist or psychologist. P.A. 07-116, § 1. The Probate Court must make recordings of all conservatorship proceedings, and the recording shall

be part of the court record. P.A. 07-116, § 11, now codified at General Statutes § 45a-645a. Section 13 of P.A. 07-116 implements significant changes in the procedures involving respondents who are nondomiciliaries. Specifically, the court may not grant an application for involuntary representation by a conservator for a nondomiciliary unless the court finds that: (1) the respondent is presently located in the district; (2) notice has been given to all parties required by statute to receive notice; (3) the respondent was provided an opportunity to return to his domicile, but refused, or the reasonable efforts were unsuccessful; and (4) all other requirements for an involuntary conservatorship have been met. General Statutes § 45a-648 (b). In addition, every sixty days, the Probate Court shall review the involuntary representation (conservatorship) of any nondomiciliary. General Statutes § 45a-648 (d). Section 16 of P.A. 07-116 adds the requirement that, during the hearing on the application for involuntary representation, the Probate Court must first require clear and convincing evidence that the court has jurisdiction, that the respondent has been given notice, and the respondent has been advised of his right to representation, and has either exercised or waived that right. General Statutes § 45a-650 (a). As is historically the case, the court may appoint a conservator only upon finding that the respondent is incapable of managing his affairs or caring for himself without the assistance of a conservator. Pursuant to P.A. 07-116, § 16, the court now must also find that doing so constitutes the least restrictive means necessary to assist the respondent. General Statutes § 45a-650 (f) (1) and (2). In addition, P.A. 07-116, § 16, now requires that conservators, in carrying out their duties, expressly are required to employ the least restrictive means necessary to meet the needs of the conserved person, who shall retain all rights and authority not expressly assigned to the conservator. General Statutes § 45a-650 (k) and (*l*).

One procedural safeguard merits closer scrutiny. I agree with the majority that in determining the limits of a conservator's immunity, we must look to the statutory provisions governing probate bonds. Specifically, General Statutes (Rev. to 2005) § 45a-650 (g) provides: "If the court appoints a conservator of the estate of the respondent, it shall require a probate bond. The court may, if it deems it necessary for the protection of the respondent, require a bond of any conservator of the person appointed under this section." This provision simultaneously protects the conserved person and suggests that a conservator's immunity cannot be unlimited. The statute defining the term " 'probate bond' " itself defines when the conservator may be liable. A probate bond is defined by General Statutes § 45a-139 as follows: "(a) As used in this title, except as otherwise provided, 'bond' or 'probate bond' means a bond with security given to secure the faithful performance by an appointed fiduciary of the duties of the fiduciary's trust and the administration of and accounting for all moneys and other property coming into the fiduciary's hands, as fiduciary, according to law. (b) Except as otherwise provided, every bond or probate bond shall be payable to the state, shall be conditioned for the faithful performance by the principal in the bond of the duties of the principal's trust and the administration of and accounting for all moneys and other property coming into the principal's hands, as fiduciary, according to law, and shall be in such amount and with such security as shall be required by the judge of probate having jurisdiction pursuant to rules prescribed by the Supreme Court. . . ." The plain import of this statute is to provide security for "faithful performance" of the fiduciary duties of trust and administration of all moneys and property of the conserved person coming into the conservator's hands. It logically follows that conservators are not immune from claims by or on behalf of the conserved

person for financial misfeasance or malfeasance. Limiting liability thusly is also consistent with the duties and responsibilities imposed on other fiduciaries appointed by the Probate Court similarly required to provide probate bonds, such as trustees, executors and administrators. See, e.g., General Statutes § 45a-289 (executors); General Statutes § 45a-164 (b) (in connection with sale or mortgage of real property of conserved person or minor, "[t]he court may empower the conservator, guardian, temporary administrator, administrator, executor or trustee to execute a conveyance of such property or to execute a note and a mortgage to secure such property upon giving a probate bond faithfully to administer and account for the proceeds of the sale or mortgage according to law"); General Statutes § 45a-326 (g) (The provision concerning the partition or sale of undivided interest in the decedent's estate provides in relevant part: "If the name or residence of any party entitled to share in the proceeds of property so sold is unknown to the court and cannot be ascertained, it shall appoint a trustee for the share of such party. Such trustee shall give a probate bond and shall hold such share until demanded by the person or persons entitled thereto."). While the majority concludes that the statutory scheme supports the proposition that conservators do not enjoy general immunity, I would assert that, if anything, it supports the opposite conclusion.

In summary, the extensive procedural safeguards in place, taken together with the striking similarities of the functions served by conservators and both attorneys for minor children appointed pursuant to § 46b-54, and, particularly, guardians ad litem, both of whom already enjoy quasi-judicial absolute immunity, persuade me that a conservator is entitled to absolute immunity for actions within his statutory authority, with the exception of actions for financial misfeasance or malfeasance

brought by or on behalf of the conserved person. This rule strikes the proper balance by recognizing the broad immunity that is required in light of the conservator's role as the arm of the Probate Court, yet establishing a limit on that immunity that is consistent with both our statutory scheme and the conservator's function as a fiduciary.

That conclusion is further supported by basic agency principles. It is black letter law that "[a] principal is generally liable for the authorized acts of his agent; 1 Restatement (Second), Agency § 140, p. 349 (1958) . . . ." *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 240, 654 A.2d 342 (1995). Accordingly, "[a]n authorized agent for a disclosed principal, in the absence of circumstances showing that personal responsibility was incurred, is not personally liable to the other contracting party." (Internal quotation marks omitted.) *Whitlock's, Inc.* v. *Manley*, 123 Conn. 434, 437, 196 A. 149 (1937).

In safeguarding the best interests of the conserved person, the conservator functions as the agent of the Probate Court. That is, we consistently have held that a conservator acting within his statutory authority acts as the agent of the Probate Court. We have stated that "[t]he power to appoint a conservator of a person incapable of managing his own affairs is vested in the Probate Court. . . . That court is primarily entrusted with the care and management of the ward's estate, and, in many respects, the conservator is but the agent of the court. . . . A conservator has only such powers as are expressly or impliedly given to him by statute. . . . In exercising those powers, he is under the supervision and control of the Probate Court." (Citations omitted.) *Elmendorf* v. *Poprocki*, 155 Conn. 115, 118, 230 A.2d 1 (1967); see also *Marcus' Appeal from Probate*, 199 Conn. 524, 528, 509 A.2d 1 (1986).

We discussed a conservator's role as the agent of the Probate Court in *Johnson's Appeal from Probate*, 71

Conn. 590, 595, 42 A. 662 (1889), which presented, inter alia, the question of whether the Superior Court, as an appellate court of probate, had the power to authorize a conservator, on behalf of the conserved person, to enter into a settlement of disputed claims regarding the disposition of a decedent's estate. We concluded that it did, reasoning that the conservator's power to manage the conserved person's estate necessarily includes the power to settle and compromise claims on behalf of the estate. We added, however, that "the exercise of this power, as well as all the other dealings of the conservator with the estate of his ward, is under the supervision and control of the Court of Probate. Indeed, under our law the custody of the ward and the care and management of his estate is primarily [e]ntrusted to the Court of Probate, and the conservator is, in many respects, but the arm or agent of the court in the performance of the trust and duty imposed upon it. He is accountable to it for his care and management of the estate, and it may remove him upon its own motion and appoint another in his stead; his accounts are returnable to it, and are subject to its allowance and adjustment." Id., 597–98. We did not in any way condition or limit the scope of a conservator's agency to expressly authorized or approved actions. See also *Marshall* v. *Kleinman*, 186 Conn. 67, 69, 438 A.2d 1199 (1982) ("[t]he performance of *all* of the conservator's official duties comes under the supervision and control of the Probate Court" [emphasis added]); *Shippee* v. *Commercial Trust Co.*, 115 Conn. 326, 330, 161 A. 775 (1932) (citing to *Johnson's Appeal from Probate* for proposition that conservator is agent of Probate Court). It is illogical and inconsistent with our immunity law to fail to extend to conservators, who "are intimately involved in the judicial process," the immunity enjoyed by the judge of Probate. *Lombard* v. *Edward J. Peters, Jr., P.C.*, 252 Conn. 623, 631, 749 A.2d 630 (2000).

In limiting the scope of a conservator's agency to expressly authorized or ratified actions, the majority relies on our decision in *Elmendorf* v. *Poprocki*, supra, 155 Conn. 117–18, which addressed the issue of "whether a conservatrix, without the express approval of the Probate Court, can bind the estate of her ward to an implied contract to pay a substantial commission to a real estate broker." The plaintiff in *Elmendorf* was a real estate broker who brought an action against the conservatrix of the estate of John Poprocki, seeking payment for his alleged services provided in connection with the sale of real property owned by the conserved person. Id., 116. In concluding that any implied agreement between the conservatrix and the plaintiff did not bind the estate of the conserved person, this court looked to General Statutes (1958 Rev.) § 45-238, which requires the express authorization of the Probate Court before a conservator has the power to sell the real estate of a conserved person.[2] Id., 119. The court interpreted § 45-238 to require that a conservator must also receive express authorization for the retention of a real estate broker in connection with such a sale and the payment of any fees in connection with services provided. Id., 117–18. It was undisputed in *Elmendorf* that, although the sale of the real estate had been authorized by the Probate Court, the court had neither authorized nor subsequently approved any agreement between the conservatrix and the plaintiff for payment of a commission. Accordingly, under the court's interpretation of § 45-238, the conservatrix lacked statutory authority to enter into such an agreement. Based on

[2] General Statutes (1958 Rev.) § 45-238 provides in relevant part: "The court of probate may, upon the written application of the conservator of the estate of any incapable person . . . after public notice and such other notice as the court may order and after hearing, if it finds that to grant such application would be for the best interest of the parties in interest, authorize the sale or mortgage of the whole or any part of, or any easement or other interest in, any real estate in this state of any incapable person . . . ."

the facts set forth in the opinion, the court's conclusion that the estate could not be bound by the alleged agreement would seem to be perfectly consistent with our existing precedent that the scope of a conservator's agency is limited to actions taken within the conservator's statutory authority.

In the course of its analysis, however, the court in *Elmendorf* made several statements that, taken out of context, appear to support the majority's position that a conservator may be held personally liable for actions within the conservator's statutory authority, but without the express authorization or approval of the Probate Court. Specifically, the court stated: "While a conservator, as any other fiduciary, *may act at his peril and on his own personal responsibility*, before his ward's estate can be directly obligated to pay for services rendered to that estate at the request or with the knowledge of the conservator, the Probate Court must expressly approve the necessity and propriety of the utilization of those services and the reasonableness of the charge demanded for them." (Emphasis added.) Id., 119. The court also stated: "Even if it was proper and necessary for the conservatrix to utilize the plaintiff's services in the management of her ward's estate, *the liability for the value of services rested on her personally*, until they were subsequently approved by the Probate Court." (Emphasis added.) Id., 120.

For several reasons, I believe that *Elmendorf* should not be read to limit a conservator's agency role and, hence, immunity, solely to those actions undertaken with the authorization or subsequent approval of the Probate Court. First, because the court held that the authorization of the Probate Court was required in order for a conservator to enter into a valid agreement with a broker to pay fees; id., 119; the remarks of the court were unnecessary to the resolution of the case, and, therefore, constituted dicta and had no precedential

value. See, e.g., *State* v. *DeJesus*, 288 Conn. 418, 454 n.23, 953 A.2d 45 (2008) (explaining that statement in prior decision was not binding precedent because it constituted dicta). Second, my review of the record and briefs in *Elmendorf* reveals that the case turned on the question of whether the term "manage" as used in General Statutes (1958 Rev.) § 45-75, which confers upon conservators the power to manage a conserved person's estate, includes the power to engage and pay for the services of a real estate broker in connection with the sale of real property. The question presented in the appeal was whether the conservator, by virtue of its power to "manage" the affairs of the conserved person pursuant to § 45-75, had statutory authority to enter into such an agreement absent the express authorization of the Probate Court. *Elmendorf* v. *Poprocki*, supra, 155 Conn. 117–18. In other words, the question of the personal liability of the conservatrix was bound up in the question of her statutory power to enter into the agreement. Because the statements in *Elmendorf* now relied upon by the majority constitute dicta and went beyond the issues presented to the court, I would accord them no precedential value.

There is another, more serious reason why we should not rely upon the broad language set forth in *Elmendorf*. Examined more closely, *Elmendorf* illustrates precisely why the scope of immunity that the majority extends to conservators does not accord with the role that they serve in the Probate Court or the fiduciary duty that they owe to the conserved person. *Elmendorf* states that the basis for its conclusion that the conservatrix could not bind the estate by contracting for the services of a broker is that she needed the express authorization of the Probate Court in order to sell the conserved person's real property. Id., 119. The natural inference any reader of the opinion would draw is that the conservatrix in *Elmendorf* did not have express authorization

from the court for the sale of the property. That inference is incorrect, an error that is revealed only upon examining the record and briefs, which make it very clear that the Probate Court had indeed authorized the sale of the real estate in question. The *only* aspect of the real estate transaction for which the conservatrix did not have express authorization was the engagement of the services of a professional in selling the property—an action that most would say was required in the exercise of her fiduciary duty.[3]

Elmendorf's conclusion that the conservatrix required express authorization to engage the services of the broker—which I still contend should be treated as dicta—is inconsistent with the court's recognition of the established rule that "[a] conservator has an implied power to enter into contracts on behalf of his ward's estate where such contracts involve the exercise of the express or implied powers which are granted to the conservator by statute." Id., 118. If the conservator is *expressly* authorized to sell a specific piece of real estate, it cannot reasonably be argued that the conservator lacks the implicit authority to enter into a contract with a real estate broker for that purpose. That, however, is precisely the import of the dicta in *Elmendorf*, and the rule announced by the majority opinion in the present case.[4]

[3] I recognize that we ordinarily do not overrule a decision when, as in this instance, we have not been asked to reconsider its validity. Nonetheless, I feel compelled to state that, because of the significant flaws in the analysis in *Elmendorf*, as I have outlined, and the unworkable results its literal application would yield, if we had been asked to revisit *Elmendorf*, I would overrule it.

[4] The logical extension of this requirement is suggested in a later statement in the opinion: "By statute, she is required to manage the estate and to account annually to the court, which account must show items of income and expenditure. General Statutes § 45-268. If, in discharging this statutory duty, she makes a proper expenditure, she has a right to be reimbursed from the estate. On the other hand, if she makes an improper disbursement, the loss must fall on her alone." *Elmendorf* v. *Poprocki*, supra, 155 Conn. 120. This statement, read in conjunction with the court's requirement of

To illustrate the potential significance of the problem, I observe that, according to statistics of the Courts of Probate during calendar year 2010, there were approximately 1900 appointments of conservators for the person and estate both voluntary and involuntary, 467 appointments of conservators only of the estate both voluntary and involuntary, and 460 appointments of conservators only of the person both voluntary and involuntary. See Statistics of the Courts of Probate: January 1, 2010—December 31, 2010, available at http://jud.ct.gov/probate/2010_Stats.pdf (last visited March 15, 2012) (copy contained in the file of this case in the Supreme Court clerk's office). In that year there were 2787 allowance of accounts filed. Based on the Probate Court statistics from 2010, there are approximately 2400 estates under the supervision of the Probate Court and there were approximately 2800 conservatorship accounts filed. Id. Given those statistics, the majority's rule would impose an unreasonable burden on the Probate Court itself rather than the conservators, its agents. Indeed, to do so would defeat the efficiency purposes served by establishing conservators as the agents of the Probate Court.

Moreover, the majority can point to no authority from other jurisdictions to support the line that it has drawn between expressly authorized or approved actions and other actions undertaken within a conservator's statu-

express authorization, suggests that the conservator is not permitted to make disbursements from the ward's estate unless *expressly* authorized to do so by the court, because the opinion grants the conservatrix the right to be reimbursed from the estate only when the expenditure is approved. This overly restrictive approach is unworkable and would render it extremely difficult for the courts to find persons willing to fulfill the role of conservator. Moreover, the majority's requirement that a conservator receive express authorization for every action, or be subject to liability, will unnecessarily impose additional costs on conserved persons—or, in the case of indigent persons, the state—each time the conservator must seek authorization from the Probate Court for actions that heretofore would have been understood to fall within the conservator's implicit authority.

tory authority. The only conclusion that may be drawn from a survey of the case law from other jurisdictions, in fact, is that some jurisdictions confer quasi-judicial absolute immunity upon conservators and others do not. See, e.g., *Cok* v. *Cosentino*, 876 F.2d 1, 3 (1st Cir. 1989) (conservators and guardians ad litem have "absolute quasi-judicial immunity for those activities integrally related to the judicial process"); *Trapp* v. *State*, 53 P.3d 1128, 1132 (Alaska 2002) (state *statutory* provisions preclude extending immunity to conservators). No other court has found that conservators are entitled to quasi-judicial, absolute immunity, then limited the application of that rule based on whether the conservator has obtained the express authorization or approval of the Probate Court. See, e.g., *Cok* v. *Cosentino*, supra, 3; *Mosher* v. *Saalfeld*, 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442 U.S. 941, 99 S. Ct. 2883, 61 L. Ed. 2d 311 (1979) (court-appointed conservator immune from suit).

Accordingly, I respectfully dissent from part I of the majority opinion.

PAUL R. HIMMELSTEIN *v.* TOWN OF WINDSOR ET AL.
(SC 18455)

Rogers, C. J., and Norcott, Zarella, McLachlan, Eveleigh and Vertefeuille, Js.

Syllabus

The plaintiff brought an action against numerous defendants, including the town of Windsor, alleging a breach of the municipal highway defect statute (§ 13a-149) and a claim of nuisance in connection with personal injuries he sustained when he struck a town police department radar trailer while riding his bicycle in the breakdown lane of a state highway located in the town. Thereafter, the claims against the other defendants were withdrawn or dismissed. The trial court then granted the town's motion to strike the plaintiff's nuisance claim against it, concluding that the facts alleged in the complaint constituted a highway defect because the radar trailer was an object in the traveled path that necessarily

obstructed or hindered the use of the road for the purpose of traveling, and because the allegations of that count fell within the province of § 13a-149, the plaintiff's exclusive remedy pursuant to statute (§ 52n-557 [a] [1] [C]) was an action pursuant to § 13a-149. Subsequently, the plaintiff filed an amended complaint, removing all the claims against the town except for the claim brought under § 13a-149, but preserved for appellate review, inter alia, the count of the complaint alleging nuisance. Thereafter, the trial court granted the motion for summary judgment filed by the town, concluding that, because the road on which the accident occurred was indisputably a state highway maintained solely by the department of transportation, the town had no obligation to maintain the highway at the location of the accident, and the plaintiff, therefore, had failed to establish the element of his claim under § 13a-149 that the town was the party bound to keep that roadway in repair. The trial court rendered judgment for the town, and the plaintiff appealed to the Appellate Court, which affirmed the trial court's judgment. The Appellate Court concluded, inter alia, that the trial court properly had determined that the nuisance count was legally insufficient because that count invoked § 13a-149 as a matter of law, and that the plaintiff had failed to present evidence that would raise a triable issue with respect to the fact that the state, and not the town, was bound to keep the road in repair. On the granting of certification, the plaintiff appealed to this court. *Held*:

1. The Appellate Court properly determined that the trial court appropriately struck as legally insufficient the count of the plaintiff's complaint alleging nuisance against the town; because the allegations in the nuisance count implicated § 13a-149 as a matter of law, and because § 52-557n (a) (1) (C) provides that no cause of action in nuisance shall be maintained against a municipality for damages to any person except pursuant to § 13a-149, the trial court properly determined that the plaintiff's count in nuisance against the town was precluded by the exclusivity provision of § 52-557n (a) (1) (C).
2. The trial court properly concluded that § 13a-149 provided the exclusive remedy for the plaintiff's injuries when it granted the town's motion to strike the nuisance count of the plaintiff's complaint; that court was required to take as true the facts as alleged in the complaint in ruling on the motion to strike, including the allegation that the town was the party bound to keep the road in repair, which triggered the application of § 13a-149 as the plaintiff's exclusive remedy.
3. There was no merit to the plaintiff's claim that the preclusion of his nuisance claim against the town created an absurd result because he was unable to recover from either the state or the town, this court having determined that nothing would have prohibited the plaintiff from proceeding with a claim against the state pursuant to the state highway defect statute (§ 13a-144).

Argued November 30, 2011—officially released April 3, 2012

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, where the court, *Elgo*, *J.*, granted the motion by the defendant Stephen E. Korta et al. to dismiss certain counts of the complaint; thereafter, the court, *Keller*, *J.*, granted in part the motion by the named defendant et al. to strike certain counts of the complaint; subsequently, the action was withdrawn as against the defendant Stephen E. Korta et al., and the court, *Dubay*, *J.*, granted the named defendant's motion for summary judgment on the remaining count of the complaint and rendered judgment thereon in its favor, from which the plaintiff appealed to the Appellate Court, *DiPentima*, *Harper* and *Hennessy*, *Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

Juri E. Taalman, with whom, on the brief, was *Timothy Brignole*, for the appellant (plaintiff).

Thomas R. Gerarde, with whom, on the brief, was *Beatrice S. Jordan*, for the appellee (named defendant).

Opinion

NORCOTT, J. The sole issue in this certified appeal is whether General Statutes § 52-557n,[1] in providing that General Statutes § 13a-149[2] affords the exclusive rem-

[1] General Statutes § 52-557n (a) (1) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by . . . (C) acts of the political subdivision which constitute the creation or participation in the creation of a nuisance; *provided, no cause of action shall be maintained for damages resulting from injury to any person or property by means of a defective road or bridge except pursuant to section 13a-149. . . .*" (Emphasis added.)

[2] General Statutes § 13a-149 provides in relevant part: "Any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair. . . ."

edy against a municipality for injuries caused by a defect in a road or bridge, precludes a concurrent nuisance claim against a town when the trial court ultimately determines, on summary judgment, that the plaintiff has failed to establish a highway defect claim under § 13a-149. The plaintiff, Paul R. Himmelstein, appeals, following our grant of his petition for certification,[3] from the judgment of the Appellate Court affirming the trial court's judgment for the named defendant, the town of Windsor (town),[4] rendered after the trial court granted the town's motion to strike count four of the plaintiff's complaint, sounding in nuisance. *Himmelstein* v. *Windsor*, 116 Conn. App. 28, 974 A.2d 820 (2009). Because the trial court must embark on a fundamentally different inquiry when ruling on a motion to strike than when ruling on a motion for summary judgment, and because we agree with the town that the plaintiff has simply pursued his claims against the wrong party, we affirm the judgment of the Appellate Court.

The record reveals the following relevant facts alleged by the plaintiff and procedural history. On Tuesday, July 20, 2004, at approximately 6:45 p.m., the plaintiff was operating his bicycle in the northbound travel

[3] We granted the plaintiff's petition for certification to appeal limited to the following issue: "Did the Appellate Court properly affirm the judgment as to the nuisance claim based on its determination that General Statutes § 13a-149 was the plaintiff's exclusive remedy when it also determined that the plaintiff's claim did not fall within § 13a-149?" *Himmelstein* v. *Windsor*, 293 Conn. 927, 980 A.2d 910 (2009).

[4] Kevin Searles, chief of police of the town, John Doe, an unnamed agent, servant or employee of the town police department, the town police department itself, Stephen E. Korta, the commissioner of transportation or his predecessor, and John Doe II, an unnamed agent, servant or employee of the department of transportation, were also named as defendants in the plaintiff's complaint. The trial court rendered judgment for the town only, and the claims against the remaining defendants have been withdrawn or disposed of. Accordingly, the town is the only remaining defendant in the present case.

portion of Route 159, also known as Palisado Avenue, in the town. Due to vehicular traffic also traveling on Route 159, the plaintiff was forced to cross over the white fog line and into the area of the breakdown lane between the white fog line and the curb, or the edge of the road. There, he collided with a radar trailer that the town's police department had placed in that area. As a result of the collision, the plaintiff suffered various personal injuries and economic damages. Thereafter, on June 24, 2005, in a seven count complaint, the plaintiff alleged, inter alia, a breach of statutory duty pursuant to § 13a-149 against the town, a claim of nuisance against the town for placing the radar trailer in the travel portion of the road, and claims for negligence, nuisance and breach of statutory duty pursuant to General Statutes § 13a-144[5] against the commissioner of transportation and certain employees or agents of the department of transportation.[6]

On September 23, 2005, the trial court, *Keller*, *J.*, granted the town's motion to strike, inter alia, the plaintiff's nuisance claim against it, stating: "In this case, the plaintiff does not allege that anything other than the failure of the town and/or its employees to remedy or warn him of the position of the radar trailer was the

[5] General Statutes § 13a-144 provides in relevant part: "Any person injured in person or property through the neglect or default of the state or any of its employees by means of any defective highway, bridge or sidewalk which it is the duty of the Commissioner of Transportation to keep in repair . . . may bring a civil action to recover damages sustained thereby against the commissioner in the Superior Court. . . ."

[6] All of the claims against the state and its agents or employees have been withdrawn by the plaintiff or dismissed by the trial court. See footnote 4 of this opinion. Although the sole question we address in the present case centers on the trial court's disposition of the plaintiff's claims against the town, a portion of the plaintiff's argument is founded on his belief that the fact that he is unable to pursue claims against the state should affect our analysis of whether the trial court properly struck his nuisance claim against the town. Therefore, the potential claims against the state will be discussed herein when relevant.

proximate cause of his injuries. He clearly alleges that a physical impediment at street level, in the traveled portion of the roadway, rendered the roadway not reasonably safe for travel. . . .

"Therefore, the court concludes, as a matter of law, that the allegations as to the radar trailer in the plaintiff's complaint bring it within the class of objects 'in, upon, or near the traveled path, which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon, or which from [their] nature and position, would be likely to produce that result,' that constitute defects in the highway. [*Hewison* v. *New Haven*, 34 Conn. 136, 142 (1867)] . . . . [I]f the obstruction is maintained in a condition that renders the highway unsafe, it is deemed a defect . . . [and] the town is liable under the highway defect law. . . .

"Accordingly, since the radar trailer [as alleged] constitutes a highway defect, the plaintiff's exclusive remedy is an action pursuant to § 13a-149." (Citations omitted.)

The plaintiff thereafter filed an amended complaint essentially removing all of his claims against the town except for the claim pursuant to § 13a-149, but preserved for appellate review the counts that the trial court had struck. The town subsequently filed a motion for summary judgment as to the plaintiff's remaining count, arguing, inter alia, that the town was not the party bound to keep the roadway in the location of the plaintiff's accident in repair because it was a state highway, and thus was not liable to the plaintiff under § 13a-149. After reviewing the pleadings, affidavits and other proof submitted in connection with the motion for summary judgment, and the plaintiff's opposition thereto, the trial court, *Dubay, J.*, determined that the plaintiff's accident occurred on Route 159, which is indisputably a state highway maintained solely by the

state department of transportation. Accordingly, the trial court granted the town's motion for summary judgment, concluding that the town had no obligation to maintain the highway at the location of the accident and, therefore, the plaintiff had failed to establish an essential element of his claim under § 13a-149, which allows recovery only from "the party bound to keep [the defective road] in repair."

The plaintiff appealed from the judgment of the trial court to the Appellate Court, arguing, inter alia, that the trial court improperly struck his nuisance count and improperly granted the town's motion for summary judgment. *Himmelstein* v. *Windsor*, supra, 116 Conn. App. 30. In affirming the judgment of the trial court, the Appellate Court concluded that the trial court "properly determined, as a matter of law, that the specific allegations set forth in count four of the complaint [sounding in nuisance] fall within the province of § 13a-149 . . . [and] because count four of the complaint set forth an allegation of a municipal highway defect, § 13a-149 was the exclusive remedy available to the plaintiff. . . . After [the trial court] determined that the allegations contained in count four invoked § 13a-149 as a matter of law, the nuisance count was legally insufficient and no longer viable." (Citations omitted.) Id., 39–40.

The Appellate Court further concluded, with respect to the grant of the motion for summary judgment on the plaintiff's sole remaining count, that the town had established that there was no genuine issue of material fact that the state, rather than the town, was bound to keep Route 159 in repair, and that the plaintiff had failed to present evidence that would raise such a triable issue of fact in that regard. Id., 46–47. Finally, the Appellate Court rejected the plaintiff's argument that a statutory paradox exists between §§ 13a-149 and 13a-144 on the basis of the sole proximate cause requirement in those statutes, which, according to the plaintiff, would

leave him with no remedy for his injuries and lead to an unworkable result. Id., 49. This certified appeal followed.

After reviewing the record and the parties' briefs, and after considering the claims advanced by the parties during oral argument before this court, we conclude that the certified issue in the present case; see footnote 3 of this opinion; should be rephrased to more precisely reflect the issue before us. See, e.g., *Stamford Hospital* v. *Vega*, 236 Conn. 646, 648–49 n.1, 674 A.2d 821 (1996). Accordingly, we consider the following revised question: Did the Appellate Court properly affirm the trial court's judgment striking the nuisance claim against the town on the basis of its determination that § 13a-149 was the plaintiff's exclusive remedy against the town, when it also affirmed the grant of summary judgment for the town on the basis of its determination that the plaintiff had failed to establish an essential element of a highway defect claim under § 13a-149?

On appeal, the plaintiff argues that the Appellate Court improperly determined that the trial court appropriately struck the count of his complaint alleging nuisance against the town. Specifically, he argues that the trial court improperly concluded that, because the plaintiff had alleged a breach of statutory duty pursuant to § 13a-149 in the first count of the complaint, he could not plead a separate claim of nuisance against the town in the alternative. Furthermore, the plaintiff argues that he was prejudiced by the trial court's decision striking his alternative pleading in nuisance based on the exclusionary provision of § 52-557n before determining that § 13a-149 did, in fact, apply to his case. Because he claims that the exclusionary provision prohibits alternative pleadings only if § 13a-149 applies, and § 13a-149 only applies to the party bound to keep the road in repair, the plaintiff argues that the trial court was required to make a factual determination regarding

which party—the town or the state—was duty bound to maintain the road where the plaintiff's collision occurred, which the trial court could not do when ruling on a motion to strike. Finally, the plaintiff contends that, because the highway defect on what was later determined to be a state road was created by the positive acts of the town, he is unable to advance a claim against the state based on the sole proximate cause requirement of § 13a-144. See *White* v. *Burns*, 213 Conn. 307, 336, 567 A.2d 1195 (1990) ("[s]ole proximate cause remains the standard of causation under § 13a-144"). He argues, therefore, that precluding nuisance claims against municipalities in these circumstances creates an absurd result wherein a plaintiff, who is injured as a result of positive acts by a municipality that create a hazard on a state road, is left unable to recover from either the state or the municipality.

The town argues in response that the plaintiff unequivocally alleged, in the fourth count of his complaint, that his injuries were caused by a highway defect, which triggered the application of § 13a-149 as a matter of law. The town then contends that, after making the determination that the plaintiff's allegations necessarily implicated § 13a-149, the trial court properly determined that the plaintiff's nuisance claim was legally insufficient and no longer viable because § 52-557n specifically precludes nuisance actions against municipalities for injuries caused by defective roads. Finally, the town argues that our recent decision in *Machado* v. *Hartford*, 292 Conn. 364, 972 A.2d 724 (2009), makes clear that the highway defect statutes require only that the sole proximate cause of the plaintiff's injuries is the existence of the defect itself, rather than the existence of intervening factors unrelated to the defect itself that combine with the defect to cause the injury. The town argues, therefore, that if the highway defect itself is the sole proximate cause of the plaintiff's injuries,

whether a third party participated in the creation of the defect will not affect the liability of the party statutorily bound to keep the roadway in repair. We agree with the town.

We begin with the well established standard of review regarding motions to strike. "A motion to strike attacks the legal sufficiency of the allegations in a pleading. . . . In reviewing the sufficiency of the allegations in a complaint, courts are to assume the truth of the facts pleaded therein, and to determine whether those facts establish a valid cause of action." (Citation omitted.) *Keane* v. *Fischetti*, 300 Conn. 395, 402, 13 A.3d 1089 (2011). "[I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . Thus, we assume the truth of both the specific factual allegations and any facts fairly provable thereunder." *Salemme* v. *Seymour*, 262 Conn. 787, 792, 817 A.2d 636 (2003). Moreover, "[w]hether a highway is defective may involve issues of fact, but whether the facts alleged would, if true, amount to a highway defect according to the statute is a question of law . . . ." (Internal quotation marks omitted.) *Kozlowski* v. *Commissioner of Transportation*, 274 Conn. 497, 501–502, 876 A.2d 1148 (2005). "Because a motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court, our review of the court's ruling [on a motion to strike] is plenary." *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 252, 990 A.2d 206 (2010).

In order to evaluate the plaintiff's claims, we must also consider general, intersecting principles of state and municipal immunity and liability as they relate to injuries caused on or near a roadway. "It is well established law that the state is immune from suit unless it consents to be sued by appropriate legislation waiving sovereign immunity in certain prescribed cases . . . .

The state legislature . . . possesses the authority to abrogate any governmental immunity by statute that the common law gives to the state and municipalities. . . . Indeed, this is what the legislature did in the area of highway defects when it enacted the state and municipal highway liability statutes. The state, which ordinarily would not be liable, permitted itself, as a matter of grace, to be sued under the express conditions of [§ 13a-144]. Therefore, because the state has permitted itself to be sued in certain circumstances, this court has recognized the well established principle that statutes in derogation of sovereign immunity should be strictly construed." (Citations omitted; internal quotation marks omitted.) *White* v. *Burns*, supra, 213 Conn. 312. Accordingly, the only avenue through which a plaintiff, injured by means of a highway defect on a state road, may seek recovery from the state is through an action brought pursuant to § 13a-144.

Furthermore, our legislature has established general principles of municipal liability and immunity, providing that political subdivisions of the state may be sued for creating or participating in the creation of a nuisance. General Statutes § 52-557n (a) (1) (C). The municipal liability statute also specifically provides, however, that "no cause of action [in nuisance] shall be maintained [against a municipality] for damages resulting from injury to any person or property by means of a defective road or bridge *except pursuant to section 13a-149*." (Emphasis added.) General Statutes § 52-557n (a) (1) (C). Therefore, although "[l]iability in nuisance can be imposed on a municipality . . . if the condition constituting the nuisance was created by the positive act of the municipality"; *Wright* v. *Brown*, 167 Conn. 464, 470, 356 A.2d 176 (1975); if the injury complained of was caused by a highway defect on a town road, the plaintiff's only recourse against the town is to pursue a claim under § 13a-149.

Finally, "[w]e have held that a highway defect is [a]ny object in, upon, or near the traveled path, which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon, or which, from its nature and position would be likely to produce that result." (Internal quotation marks omitted.) *Kozlowski* v. *Commissioner of Transportation*, supra, 274 Conn. 502–503. This principle applies to "[t]he shoulders of a highway, [which] while not designed for ordinary . . . traffic, are intended for use when need arises." *Griffith* v. *Berlin*, 130 Conn. 84, 87, 32 A.2d 56 (1943).

With these principles in mind, we turn to the present case. The following allegations, set forth in the fourth count of the plaintiff's complaint, are relevant to our disposition of his claims. Paragraphs one through eight of the fourth count were incorporated from the corresponding paragraphs fully set forth in the first count of the complaint, and included: "[The town] . . . is a municipal corporation charged with the statutory duty of maintaining, repairing and otherwise rendering safe town streets and roads within its municipal limits pursuant to . . . [§] 13a-149. . . . Palisado Avenue is a [t]own [r]oad within the town road system of the [town]. . . . [T]he [p]laintiff, while operating his bicycle in the northbound travel portion of Palisado Avenue in the [town], collided with a . . . [radar trailer] which had been parked, stored or placed in the travel portion of said roadway . . . without the placement of warning lights, hazard flashers, orange cones or barrels, signs or any other warning devices to indicate the location of said [r]adar [t]railer."

The fourth count continued: "The [town] . . . created and maintained a nuisance in that, by placing, parking, erecting or storing said [r]adar [t]railer in the travel portion of said roadway, [it] created and maintained a condition which had a natural tendency to

create danger and inflict injury upon the person or property of persons lawfully using said roadway. . . . The creation and maintenance of the aforesaid dangerous condition by the [t]own . . . constituted a nuisance and interfered with the right of the public, including the [p]laintiff, to the use of a safe roadway. . . . As a consequence of the creation and maintenance of the aforesaid nuisance by the [town] . . . the [p]laintiff . . . was caused to sustain serious personal injuries . . . economic damages . . . [and] physical and emotional pain and suffering . . . ."

Stated more concisely, the plaintiff's fourth count alleged that the town is the party bound to keep the roadway where the plaintiff's accident occurred in repair, that the town had placed the radar trailer in the travel portion of the roadway causing an obstruction, which rendered that area unsafe for ordinary use, and that the plaintiff had collided with the unsafe obstruction while lawfully using the travel portion of the roadway, which resulted in the injuries for which he sought recovery from the town. Taking the facts alleged in count four as true, for the purposes of evaluating the motion to strike, it is clear that such allegations implicate § 13a-149 as a matter of law. Given that § 52-557n (a) (1) (C) provides that the exclusive remedy for damages resulting from injury by means of a defective town road is a claim under § 13a-149, and that count four alleges that the plaintiff's injuries were caused by his encounter with a portion of a town road that was defective—as alleged, the radar trailer was an "object in . . . the traveled path, which would necessarily obstruct or hinder one in the use of the road"; (internal quotation marks omitted) *Kozlowski* v. *Commissioner of Transportation*, supra, 274 Conn. 502–503—we conclude that the trial court properly determined that the plaintiff's count sounding in nuisance against the town was pre-

cluded by the exclusivity provision of § 52-557n (a) (1) (C) and, therefore, struck it as legally insufficient.

Nevertheless, the plaintiff argues that the trial court improperly precluded him from pleading nuisance in the alternative to his breach of statutory duty claim against the town. He first contends that the trial court improperly determined that, because he had pleaded a claim of breach of statutory duty pursuant to § 13a-149 in the first count of his complaint, he was precluded from presenting an alternative theory of nuisance in the fourth count of the complaint. This argument is a mischaracterization of the inquiry performed by the trial court, however, and therefore, is without merit.

In the motion to strike, the town argued that the nuisance claim was legally insufficient because it was barred by the exclusivity provision of § 13a-149. After reviewing count four, taking as true the facts alleged therein—namely, that the plaintiff's injuries were caused by an impediment at street level that rendered the road unsafe for ordinary use—the trial court determined that a nuisance claim was not viable because the plaintiff had alleged, *in count four*, that his injuries were caused by a highway defect. This decision was not based on the fact that the plaintiff had alleged a claim of breach of statutory duty in the first count of his complaint. Rather, it was based on a determination that the facts alleged *in count four* invoked the highway defect statute as a matter of law, which precluded an alternative claim in nuisance.

Second, the plaintiff contends that the trial court could not properly determine that § 13a-149 provides the exclusive remedy for the plaintiff's injuries without first determining whether the town was, in fact, the party bound to keep the road in repair. This inquiry, the plaintiff argues, required a factual determination, such that the trial court should have denied the motion

to strike until such time as it could determine which party owed a duty to the plaintiff. This argument misses the mark, however, because it ignores the fact that the plaintiff specifically alleged, in count four, that the town was the party bound to keep the road in repair, and the trial court was required to take as true the facts alleged in the complaint when ruling on the motion to strike. See, e.g., *Keane* v. *Fischetti*, supra, 300 Conn. 401–402.

Furthermore, the plaintiff's inability to establish that the town was, in fact, the party bound to keep Route 159 in repair, which led to summary judgment for the town and prevented the plaintiff from prevailing on his claim under § 13a-149, does not affect the propriety of the trial court's determination that he could not go forward with his nuisance claim in the alternative. When examining the town's motion to strike, the trial court was asked to evaluate the legal sufficiency of the claims against the town, taking the facts alleged in each count as true. See id. Assuming, as was clearly alleged, that the town was the party bound to keep Route 159 in repair and that the plaintiff's injuries were caused by an obstruction in the travel portion of the road—indeed, no contrary facts regarding the cause of the plaintiff's injuries were pleaded in the alternative elsewhere in the complaint—the only claim that the plaintiff legally could advance against the town was a highway defect claim pursuant to § 13a-149. The determination that the plaintiff's exclusive remedy against the town, *if* the plaintiff could prove the facts alleged, was a highway defect claim under § 13a-149, however, did not establish that the town was, in fact, the party bound to maintain the road. A determination that a claim survives a motion to strike does not relieve the plaintiff from actually establishing a factual basis for that claim in either summary judgment proceedings or at trial, and a determination that the plaintiff has failed to establish a portion

of his claim at the summary judgment stage does not render the trial court's determination regarding the legal sufficiency of any other claims the plaintiff may have attempted to advance improper.

Finally, the plaintiff claims that preventing him from pleading nuisance in the alternative to statutory liability leads to an absurd result should his claim based on statutory liability fail. See *White* v. *Burns*, supra, 213 Conn. 336. This argument is based on the plaintiff's interpretation of the sole proximate cause requirement to establish liability under both the municipal and state highway defect statutes. In this case, because the radar trailer was placed on the road by the town, the plaintiff argues that the state can avoid liability by claiming that the defect was created by the town's positive actions in creating a nuisance on a state road. Thus, he claims, if the town cannot be held liable for the placement of the radar trailer in the travel portion of the road because it is not the party bound to keep the road in repair and, further, cannot be sued in nuisance, and the state can avoid liability because it can claim that its failure to keep that area of the road in adequate repair was not the sole proximate cause of the plaintiff's injuries, §§ 13-149 and 13a-144 combine to produce an absurd result precluding the plaintiff from obtaining recovery for his injuries from any party. This argument misunderstands the implication of the sole proximate cause requirement, as recently clarified in *Machado* v. *Hartford*, supra, 292 Conn. 379.

Both the state and the municipal highway defect statutes require that the highway defect is the sole proximate cause of the plaintiff's injuries, which precludes recovery against the state or a municipality in the event that the injury was caused by a combination of the defect and negligence on the part of the injured party or a third party. See *White* v. *Burns*, supra, 213 Conn. 310–11 (no liability under § 13a-144 when injuries were

caused by combination of neglect and default of state and negligence of third party driver); *Lukas* v. *New Haven*, 184 Conn. 205, 207, 439 A.2d 949 (1981) ("[t]o recover under [§ 13a-149] the plaintiff must prove . . . that the defect [was] the sole proximate cause of the injuries and damages claimed, which means that the plaintiff must prove freedom from contributory negligence").

In *Machado* v. *Hartford*, supra, 292 Conn. 379, we clarified, however, that if two sources of negligence combine to *create* a defect, which defect is then the sole proximate cause of a plaintiff's injuries, the party bound to maintain the area wherein the defect is located can still be held liable under the relevant highway defect statute. See id. ("it is not the mere existence of third party negligence that defeats municipal liability under § 13a-149 but, rather, the existence of any intervening factors *unrelated to the defect itself*, whether negligent or not, that *combine* with the defect to cause the plaintiff's injuries" [emphasis in original]). Furthermore, we stated that "it follows that the manner in which a defect is created in and of itself has no bearing on . . . liability under the statute. Rather, it is the *existence* of the defect and the . . . actual or constructive knowledge of and failure to remedy that defect that are of primary importance in making out a prima facie case of . . . liability . . . ." (Citation omitted; emphasis in original.) Id., 378. "Indeed, this court previously has concluded on several occasions that a municipality may be liable under the applicable highway defect statute despite the fact that the defect was *created* by the negligence of a third party." (Emphasis added.) Id., 379 n.15. Because there exists a statutory duty to maintain highways such that they are safe for ordinary use, liability under the highway defect statutes is premised on the existence of and the failure to remedy a defect, rather than on negligence in creating or allowing a nuisance or other

obstruction to present a danger to travelers. See id., 380. Accordingly, it is clear that the sole proximate cause doctrine would not have prevented the plaintiff from proceeding with his statutory claim against the state pursuant to § 13a-144.[7] Therefore, the plaintiff's claim that he is left without any remedy because he cannot hold the town liable in nuisance or under § 13a-149, and because he cannot hold the state liable due to the sole proximate cause doctrine, is meritless.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

RICHARD LEWIS *v.* COMMISSIONER OF CORRECTION
(SC 18664)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.

Argued March 22—officially released April 10, 2012

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, and tried to the court, *A. Santos*, *J.*; thereafter,

[7] Furthermore, whether the state may seek recovery from the town for any amounts for which it is held liable in an action pursuant to § 13a-144 similarly is irrelevant to the question of the state's liability under that statute in the first place. Section 13a-144 preserves the state's right to subrogation from entities responsible for creating highway defects. Specifically, § 13a-144 provides in relevant part that "[t]his section shall not be construed so as to relieve any contractor or other person, through whose neglect or default any such injury may have occurred, from liability to the state; and, upon payment by the [state] of any judgment rendered under the provisions of this section, the state shall be subrogated to the rights of such injured person to recover from any such contractor or other person an amount equal to the judgment it has so paid. . . ." Therefore, if the town is responsible for creating a nuisance for which the state is held liable under § 13a-144 because the nuisance amounts to a highway defect on a road that the state is bound to maintain, the state may seek recovery of any amounts paid to the plaintiff from the town in subrogation.

the court granted the respondent's motion to dismiss and rendered judgment thereon; subsequently, the court denied the petitioner's motion to open the judgment, and the petitioner, on the granting of certification, appealed to the Appellate Court, *Flynn*, *C. J.*, and *Robinson* and *Sullivan*, *Js.*, which affirmed the habeas court's judgment, and the petitioner, on the granting of certification, appealed to this court. *Appeal dismissed.*

Temmy Ann Pieszak, chief of habeas corpus services, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *Linda N. Howe*, former senior assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The habeas court rendered judgment dismissing the petition for a writ of habeas corpus filed by the petitioner, Richard Lewis, when the petitioner failed to appear in person for trial. The respondent, the commissioner of correction, had filed a motion to dismiss the petition, which the habeas court granted. Thereafter, the habeas court denied the petitioner's motion to open the judgment in which the petitioner stated that he had failed to appear because of transportation problems. Upon the habeas court's granting of his petition for certification to appeal, the petitioner appealed from the dismissal to the Appellate Court. On appeal, he sought reversal, under the plain error doctrine, of the habeas court's dismissal of his petition for a writ of habeas corpus on a number of grounds that had not been preserved for review in the habeas court. *Lewis* v. *Commissioner of Correction*, 121 Conn. App. 693, 696, 996 A.2d 1214 (2010). The petitioner did not seek review of his unpreserved constitutional claims pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). The Appellate Court affirmed the habeas court's judgment of dismissal. *Lewis* v. *Commissioner of Correction*, supra, 698. We

then granted the petitioner's petition for certification to appeal to this court limited to the following issue: "Did the Appellate Court properly decline to (a) review and (b) reverse the petitioner's federal due process and equal protection challenges to the dismissal of his habeas corpus petition, which was based on the court's refusal to allow the petitioner to appear only through counsel?" *Lewis* v. *Commissioner of Correction*, 298 Conn. 901, 902, 3 A.3d 70 (2010).

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.

The appeal is dismissed.

EDWARD C. OKEKE *v.* COMMISSIONER OF PUBLIC HEALTH
(SC 18677)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.

Syllabus

The plaintiff appealed to the trial court from the decision of the defendant commissioner of public health denying his application, filed pursuant to statute (§ 19a-42 [d] [1]), to amend the name on his child's birth certificate to correspond with the child's name on a previously executed acknowledgement of paternity form. Following a hearing, the trial court rendered judgment dismissing the appeal, and the plaintiff appealed to the Appellate Court. The Appellate Court affirmed the trial court's judgment, concluding that the plaintiff had ignored the triggering language in § 19a-42 (b) (1) that allows the commissioner to amend a birth certificate pursuant to § 19a-42 (d) (1) "if paternity is not already shown on such birth certificate," and that because paternity was already shown on the birth certificate and there had never been a question regarding the identity of the biological father, the trial court properly had dismissed the appeal. On the granting of certification, the plaintiff appealed to this court. *Held* that the Appellate Court properly affirmed the trial court's judgment, the commissioner not having had authority under § 19a-42 (d) (1) to amend the birth certificate in this case; the clear and unambiguous language of § 19a-42 (d) (1), which involves determinations of paternity,

provides that the commissioner can only include on or amend a child's birth certificate to show paternity if paternity is not already shown on such certificate, and because the paternity of the child here has never been disputed, was already shown on the birth certificate, and the biological parents were accurately listed, there was no new information that needed to be added to the birth certificate to accurately reflect facts existing at the time of the child's birth.

Argued January 4—officially released April 10, 2012

Procedural History

Appeal from the decisions of the defendant denying the plaintiff's application to amend the birth certificate of his minor child and, thereafter, the plaintiff's motion for reconsideration, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cohn*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed to the Appellate Court, *Bishop* and *Alvord*, *Js.*, with *Borden*, *J.*, dissenting, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

Edward C. Okeke, pro se, the appellant (plaintiff).

Daniel Shapiro, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (defendant).

Opinion

EVELEIGH, J. The sole issue in this certified appeal is whether, pursuant to General Statutes § 19a-42 (d) (1),[1] the defendant, the commissioner of public health (commissioner), has the authority to amend a child's birth certificate, where the name on the birth certificate differs from that initially agreed upon by the parents on an acknowledgement of paternity form.

[1] General Statutes § 19a-42 (d) (1) provides in relevant part: "Upon receipt of . . . an acknowledgment of paternity executed in accordance with the provisions of subsection (a) of section 46b-172 by both parents of a child born out of wedlock . . . the commissioner shall include on or amend, as appropriate, such child's birth certificate to show such paternity if paternity is not already shown on such birth certificate and to change the name of the child if so indicated on the acknowledgment of paternity form . . . ."

The plaintiff, Edward C. Okeke, appeals, following our grant of his petition for certification, from the judgment of the Appellate Court affirming the judgment of the trial court dismissing his administrative appeal. We conclude that the commissioner does not have the authority to amend the birth certificate under the facts of this case and, accordingly, we affirm the judgment of the Appellate Court.

The undisputed facts of this case were fully set forth in the Appellate Court's opinion, *Okeke* v. *Commissioner of Public Health*, 122 Conn. App. 373, 999 A.2d 808 (2010). "On May 25, 2000, a male child was born to the plaintiff and Tamara A. Shockley. The parties were not married at the time of the birth of the child and have never been married to each other. The parties executed an acknowledgement of paternity pursuant to General Statutes § 46b-172.[2] Shockley affirmed the acknowledgement of paternity on May 26, 2000, and the plaintiff affirmed the acknowledgement on June 1, 2000. The name of the child on the paternity acknowledgement is stated as 'Nnamdi Ikwunne Okeke.'

"While in the hospital, at some time after the child's birth, Shockley also completed a birth certificate worksheet. Initially, she entered the child's name on the worksheet as 'Nnamdi Ikwunne Okeke.' On May 30, 2000, however, Shockley called the hospital and requested that the child's name on the birth certificate worksheet be changed to 'Nnamdi Okeke Shockley.' In response, a hospital staff person changed the name

[2] General Statutes § 46b-172 (a) (1) provides in relevant part: "In lieu of or in conclusion of proceedings under section 46b-160, a written acknowledgment of paternity executed and sworn to by the putative father of the child when accompanied by (A) an attested waiver of the right to a blood test, the right to a trial and the right to an attorney, and (B) a written affirmation of paternity executed and sworn to by the mother of the child shall have the same force and effect as a judgment of the Superior Court. It shall be considered a legal finding of paternity without requiring or permitting judicial ratification, and shall be binding on the person executing the same whether such person is an adult or a minor, subject to subdivision (2) of this subsection. . . ."

on the acknowledgement of paternity form to 'Nnamdi Okeke Shockley.' On June 5, 2000, Shockley again called the hospital and requested that her son's name be changed on the birth certificate worksheet to 'Nnamdi Ikwunne Shockley-Okeke.' In response, a hospital staff person changed the name on the birth certificate worksheet to 'Nnamdi Ikwanne Shockley-Okeke.'[3] The acknowledgement of paternity indicating the child's name as 'Nnamdi Okeke Shockley,' and the certificate of live birth indicating the child's name as 'Nnamdi Ikwanne Shockley-Okeke,' were filed with the department of public health (department). The official birth certificate of the child lists his name as 'Nnamdi Ikwanne Shockley-Okeke.'

"On April 13, 2007, the plaintiff filed with the department an '[a]pplication for [a]mendment of [m]y [s]on's birth certificate.' Pursuant to § 19a-42 (d) (1),[4] the plaintiff sought to amend the name on his son's birth certificate by removing the mother's name, Shockley, in accordance with the previously executed acknowledgement of paternity.[5] Following an evidentiary hearing, the hearing officer denied the plaintiff's application, concluding that, pursuant to § 19a-41-9 (a) of the Regu-

[3] Shockley testified that the different spelling of the child's middle name, "Ikwanne," was a clerical error. The child's correct middle name is not an issue in this appeal.

[4] General Statutes § 19a-42 (d) (1) provides: "Upon receipt of (A) an acknowledgment of paternity executed in accordance with the provisions of subsection (a) of section 46b-172 by both parents of a child born out of wedlock, or (B) a certified copy of an order of a court of competent jurisdiction establishing the paternity of a child born out of wedlock, the commissioner shall include on or amend, as appropriate, such child's birth certificate to show such paternity if paternity is not already shown on such birth certificate and to change the name of the child if so indicated on the acknowledgment of paternity form or within the certified court order as part of the paternity action."

[5] According to the plaintiff, he did not learn of the name on his son's birth certificate until May, 2001, when Shockley filed an application with the Probate Court to change the child's first name.

lations of Connecticut State Agencies,[6] the plaintiff is permitted to ask a registrar of vital statistics to make a change to his son's name only if he has a certified court order allowing the change. Because the plaintiff did not present such a court order, he [had] failed to meet this requirement. The hearing officer also concluded that the plaintiff did not meet the requirements of § 19a-41-9 (b) of the Regulations of Connecticut State Agencies because more than thirty days had passed since the child's birth, the plaintiff was not a custodial parent, and he was not seeking to rectify a typographical or clerical error.[7]

"In response to the plaintiff's motion for reconsideration, the hearing officer addressed the plaintiff's claim that he made pursuant to § 19a-42 (d) (1). The hearing officer concluded that the statute permits a change of a child's name on a birth certificate on the basis of an acknowledgement form only 'if such paternity is not already shown on the birth certificate.' Because paternity was already indicated on the birth certificate, the department's receipt of the acknowledgement of paternity form did not trigger an amendment to the birth certificate. The hearing officer accordingly denied the plaintiff's motion for reconsideration.

"Thereafter, the plaintiff timely filed an administrative appeal with the Superior Court. The plaintiff did

[6] Section 19a-41-9 (a) of the Regulations of Connecticut State Agencies provides in relevant part: "The local registrar of the town where a birth occurred or the [d]epartment shall amend a name on a birth certificate when the request for the amendment is accompanied by a certified copy of a court order granting the legal name change. . . ."

[7] Section 19a-41-9 (b) of the Regulations of Connecticut State Agencies provides in relevant part: "For up to [thirty] days following a registrant's birth, a parent may request that the registrant's name be changed to correct an obvious typographical or clerical error, by signing and presenting to the local registrar of the town in which the birth occurred, the Parent Notice issued by the birthing hospital. After said thirty-day period, a registrant, if over eighteen years old, or a custodial parent or legal guardian of the registrant, if the registrant is a minor, may request that the registrant's name be changed to correct or amend obvious typographical or clerical errors . . . ."

not take issue with any of the factual findings of the hearing officer but challenged the interpretation and application of § 19a-42 (d) (1), claiming that the commissioner must change the name on the birth certificate to the name indicated on the acknowledgement of paternity form.[8] Following a hearing, the court dismissed the plaintiff's appeal." *Okeke* v. *Commissioner of Public Health*, supra, 122 Conn. App. 375–77. The plaintiff then appealed from the judgment of the trial court to the Appellate Court.

On appeal to the Appellate Court, the plaintiff asserted that the phrase in § 19a-42 (b) (1) " 'to change the name of the child if so indicated on the acknowledg[e]ment of paternity form,' essentially directs the commissioner to ensure that the name on the birth certificate corresponds to the name on the acknowledgement of paternity form." Id., 379–80. The Appellate Court disagreed and concluded as follows: "When read in its entirety . . . we conclude that the plaintiff's contention is misplaced because the plaintiff ignores the triggering language that allows the commissioner to amend a birth certificate pursuant to § 19a-42 (d) (1): *if paternity is not already shown on such birth certificate* . . . . General Statutes § 19a-42 (d) (1). The unambiguous language of the statute involves determinations of paternity and changing a child's name when it is determined that the biological father of the child is not listed, or is incorrectly listed, on the birth certificate. Here, paternity is already shown on the birth certificate and there has never been a question regarding the identity of the biological father." (Emphasis in original; internal quotation marks omitted.) *Okeke* v. *Commissioner of Public Health*, supra, 122 Conn. App. 380. Accordingly, the Appellate Court affirmed the judgment of the trial court sustaining the commissioner's denial

[8] In his appeal to the trial court, the plaintiff did not challenge the commissioner's determination that he failed to comply with the requirements of § 19a-41-9 (a) and (b) of the Regulations of Connecticut State Agencies.

of the plaintiff's application to amend his son's birth certificate. Id., 381.

Thereafter, the plaintiff sought certification to appeal from the judgment of the Appellate Court. We granted the plaintiff's petition for certification to appeal, limited to the following issue: "Whether the Appellate Court properly concluded that under . . . § 19a-42 (d) (1), the [commissioner] had neither the duty nor the authority to amend the child's birth certificate, where the name on the birth certificate differed from that agreed by the parents on an acknowledgement of paternity form?" *Okeke* v. *Commissioner of Public Health*, 298 Conn. 915, 915–16, 4 A.3d 832 (2010).

On appeal to this court, the plaintiff contends that, pursuant to § 19a-42 (d) (1), the commissioner has both the authority and the duty to amend the child's birth certificate when the nature of the amendment is needed to protect the integrity and accuracy of the vital record. Specifically, the plaintiff asserts that, to give effect to the legislature's intent to protect the integrity and accuracy of vital records, it is imperative that the child's birth certificate be amended. The plaintiff also contends that the legislative history of the statute supports the interpretation that the commissioner is authorized and required to amend the child's birth certificate even if the child's paternity had already been determined on his birth certificate.

In response, the commissioner asserts that the plaintiff ignores the triggering language of § 19a-42 (d) (1), which provides that the commissioner shall amend a birth certificate to show paternity "if paternity is not already shown on such birth certificate . . . ." The commissioner further asserts that the Appellate Court properly concluded that the "unambiguous language of the statute involves determinations of paternity and changing a child's name when it is determined that the

biological father of the child is not listed, or is incorrectly listed, on the birth certificate." *Okeke* v. *Commissioner of Public Health*, supra, 122 Conn. App. 380. The commissioner contends that, because paternity is already listed on the birth certificate in this case, the department's authority under § 19a-42 (d) (1) is not triggered. We agree with the commissioner.

As a preliminary matter, we set forth the applicable standard of review and guiding principles. "[J]udicial review of the commissioner's action is governed by the Uniform Administrative Procedure Act [(UAPA), General Statutes §§ 4-166 through 4-189], and the scope of that review is very restricted. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Sengchanthong* v. *Commissioner of Motor Vehicles*, 281 Conn. 604, 609, 917 A.2d 942 (2007); see *Jim's Auto Body* v. *Commissioner of Motor Vehicles*, 285 Conn. 794, 803–804, 942 A.2d 305 (2008).

"A reviewing court, however, is not required to defer to an improper application of the law. . . . It is the function of the courts to expound and apply governing principles of law. . . . We previously have recognized that the construction and interpretation of a statute is a question of law for the courts, where the administrative decision is not entitled to special deference . . . . Questions of law [invoke] a broader standard of review

than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Because this case forces us to examine a question of law, namely, [statutory] construction and interpretation . . . our review is de novo. . . . We are also compelled to conduct a de novo review because the issue of statutory construction before this court has not yet been subjected to judicial scrutiny. E.g., *Tracy* v. *Scherwitzky Gutter Co.*, 279 Conn. 265, 272, 901 A.2d 1176 (2006) ([a] state agency is not entitled . . . to special deference when its determination of a question of law has not previously been subject to judicial scrutiny . . .); *Tele Tech of Connecticut Corp.* v. *Dept. of Public Utility Control*, 270 Conn. 778, 788, 855 A.2d 174 (2004) (the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation)." (Citation omitted; internal quotation marks omitted.) *Southern New England Telephone Co.* v. *Cashman*, 283 Conn. 644, 649–50, 931 A.2d 142 (2007); see also *Jim's Auto Body* v. *Commissioner of Motor Vehicles*, supra, 285 Conn. 804.

"The principles that govern statutory construction are well established. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of

such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When 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.) *Friezo* v. *Friezo*, 281 Conn. 166, 181–82, 914 A.2d 533 (2007).

Section 19a-42 (d) (1) provides in relevant part: ''Upon receipt of . . . an acknowledgment of paternity executed in accordance with the provisions of subsection (a) of section 46b-172 by both parents of a child born out of wedlock . . . the commissioner shall include on or amend, as appropriate, such child's birth certificate to show such paternity *if paternity is not already shown on such birth certificate and* to change the name of the child if so indicated on the acknowledgment of paternity form . . . .'' (Emphasis added.)

The plaintiff asserts that the language of § 19a-42 (d) (1) authorizes and requires the commissioner to amend the birth certificate to ensure that the name on the birth certificate matches the name on the acknowledgement of paternity form. We disagree. The language of § 19a-42 (d) (1) provides that the commissioner shall amend the child's birth certificate ''if paternity is not already shown on such birth certificate . . . .'' We conclude that this language clearly and unambiguously provides that the commissioner can only include on or amend a child's birth certificate to show paternity if paternity is not already shown on the birth certificate.

In the present case, the paternity of the child has never been disputed, and the paternity of the child was already shown on the birth certificate. Therefore, the

commissioner did not have the authority, pursuant to § 19a-42 (d) (1), to amend the birth certificate. General Statutes § 7-36 (10) provides that " '[a]mendment' " means to (A) change or enter new information on a certificate of birth, marriage, death or fetal death, more than one year after the date of the vital event recorded in such certificate, in order to accurately reflect the facts existing at the time of the recording of the event, (B) create a replacement certificate of birth for matters pertaining to parentage and gender change, or (C) change a certificate of birth, marriage, death or fetal death to reflect facts that have changed since the time the certificate was prepared, including, but not limited to, a legal name change or a modification to a cause of death . . . ." In the present case, the Appellate Court properly concluded that, because the plaintiff and Shockley are "accurately listed as the biological parents of the child, there is no new information that needs to be added to the birth certificate to accurately reflect the facts existing at the time of the child's birth." *Okeke* v. *Commissioner of Public Health*, supra, 122 Conn. App. 380–81. Section 19a-42 (d) (1), by its clear language, involves determinations of paternity and it does not consider the naming of the child separate and apart from that determination.

Pursuant to § 19a-42 (d) (1), the commissioner shall, if appropriate, "change the name of the child *if so indicated on the acknowledgment of paternity form* or within the certified court order as part of the paternity action." (Emphasis added.) In the present case, the acknowledgement of paternity form does not indicate that the child's name should be changed. The acknowledgement of paternity form has a line that prompts: "Change child's last name on birth certificate." The form contains both yes and no boxes to designate such a choice. In the present case, the parties did not check either box. The plaintiff suggests that the phrase "if so

indicated on the acknowledgment of paternity form" pursuant to § 19a-42 (d) (1) should be ignored; however, we have long held that "[i]nterpreting a statute to render some of its language superfluous violates cardinal principles of statutory interpretation." *American Promotional Events, Inc.* v. *Blumenthal*, 285 Conn. 192, 203, 937 A.2d 1184 (2008). In construing statutes, courts must presume that there is a purpose behind every sentence, clause or phrase used in the statute and that no part of the statute is superfluous. *Small* v. *Going Forward, Inc.*, 281 Conn. 417, 424, 915 A.2d 298 (2007). Accordingly, we conclude that the Appellate Court properly concluded that § 19a-42 (d) (1) does not authorize the commissioner to amend the birth certificate under the facts of this case.[9]

Furthermore, although § 19a-41-9 (b) of the Regulations of Connecticut State Agencies provides that clerical errors can be changed within thirty days of the birth of the child, there is no statutory authority for the commissioner to unilaterally act to amend a birth certificate for "other errors." See General Statutes § 7-36 (10). The regulations specify certain circumstances under which the department is authorized to amend a birth certificate, and the plaintiff does not meet these criteria. See Regs., Conn. State Agencies § 19a-41-9 (a) and (b). Namely, there is no court order granting the name change, the proposed amendment is not a typographical or clerical error—rather, this appears to be a dispute between Shockley and the plaintiff—and the request was not made within thirty days of the child's birth. Regs., Conn. State Agencies § 19a-41-9 (a) and (b). Therefore, § 19a-41-9 (b) does not apply.

In the absence of meeting the requirements of the regulations for corrections due to clerical errors, the

[9] Because we conclude that § 19a-42 (d) (1) is plain and unambiguous, pursuant to General Statutes § 1-2z, we do not resort to consideration of extratextual evidence.

commissioner is permitted to amend the birth certificate if the department receives a valid court order, and the plaintiff may seek such an order from a court with jurisdiction over this matter. Accordingly, we are mindful that, despite our interpretation of § 19a-42 (d) (1), there are other avenues to correct errors or resolve a dispute over a name on a birth certificate, namely, by filing an action in the court system.

We agree with the plaintiff that the legislature has placed great importance on maintaining the integrity of vital records. We previously have acknowledged that the legislature has recognized that the "accuracy and reliability of these [vital] records [are] vital to the many purposes for which they are used." *In re Michaela Lee R.*, 253 Conn. 570, 587, 756 A.2d 214 (2000). Further, the legislature has statutorily authorized the commissioner to change the records under certain prescribed circumstances. The plaintiff's situation simply does not fit within the previously referenced circumstances. The present matter appears to be a dispute between Shockley and the plaintiff that would best be resolved by a court of competent jurisdiction. We are aware of the fact that this may be viewed by some, including the plaintiff, as a harsh result. As we noted previously, however, the plaintiff is not without alternative remedies. Our function is to interpret the statutes enacted by the legislature. It is not proper for us either to rewrite the statute or interpret the statute in such a way as to be contrary to the clear intent of the legislature. "[T]his court cannot, by judicial construction, read into legislation provisions that clearly are not contained therein." (Internal quotation marks omitted.) *Stone-Krete Construction, Inc.* v. *Eder*, 280 Conn. 672, 682, 911 A.2d 300 (2006); see also *Harris Data Communications, Inc.* v. *Heffernan*, 183 Conn. 194, 198, 438 A.2d 1178 (1981) ("[t]he intent of the legislature is to be found in the meaning of the words of the statute; that is, in what

the legislature actually did say, not in what it meant to say"). We will not ascribe to the commissioner a power greater than that authorized by the legislature. Accordingly, we conclude that the Appellate Court properly held that the commissioner did not have the authority to change the birth certificate in the present case under the clear and unambiguous language of § 19a-42 (d) (1). If the legislature wishes to amend the statute so that someone in the plaintiff's position will have a remedy therein in the future, it is certainly at liberty to do so at any time.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* ADAM GAULT (SC 18112)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh, Harper and Vertefeuille, Js.

Syllabus

Pursuant to statute (§ 52-263), "if either party is aggrieved by the decision of the court or judge upon any question or questions of law arising in the trial . . . he may appeal to the court having jurisdiction from the final judgment of the court or of such judge . . . ."

The defendant was charged with kidnapping in the first degree for the purpose of committing a sexual assault of the victim. The state filed an application for an arrest warrant and requested that the trial court seal the affidavit supporting the warrant for fourteen days pursuant to the applicable rule of practice (§ 36-2). The victim thereafter filed a motion seeking to have the sealing order extended indefinitely, citing her rights under the victim's rights amendment to the state constitution to be treated with fairness and respect throughout the criminal process, and her statutory (§ 54-86e) right to keep confidential any information from which her identity as a sexual assault victim could be ascertained. She further claimed that her right to protect her identity overrode the right of the public or press to inspect the arrest warrant affidavit. The trial court held a hearing in which it balanced the presumption of full public disclosure to all court filings pursuant to the applicable rule of practice (§ 42-49A [a]) and the victim's competing constitutional and statutory rights, and then ordered that a redacted version of the affidavit be

unsealed. The court stated that the redaction had removed any information that reasonably could be used to identify or locate the victim or to subject her to any further investigation by the public, and concluded that there existed no reasonable alternative to the redaction that would adequately have protected the victim's privacy yet still preserved to the extent possible the public's right of access. From the trial court's order unsealing the redacted arrest warrant affidavit, the victim appealed. On appeal, the victim claimed that she was entitled to have the entire affidavit remain sealed and that she was entitled to challenge the trial court's order because the victim's rights amendment made her a party to the criminal action for purposes of enforcing her rights under the amendment. *Held* that the victim lacked standing to prosecute the appeal and, therefore, the appeal was dismissed for lack of subject matter jurisdiction: the right to appeal under § 52-263 is limited to a party, and in the context of a criminal proceeding, victims do not fit within the plain meaning of that term, and nothing in the victim's rights amendment or in the subsequently enacted legislation that created the office of victim advocate explicitly made victims parties to criminal prosecutions or otherwise afforded them rights to appeal, the legislative history having conclusively demonstrated that while the legislature intended to create an avenue through which victims could appear in court proceedings and articulate their positions in regard to matters relating to their rights, it did not intend that victims were to have full party status or the right to bring an appeal; furthermore, the victim also was precluded from pursuing a public interest appeal pursuant to statute (§ 52-265a) because authorization for such appeals is extended only to a party to an action.

Argued December 1, 2011—officially released April 10, 2012

Procedural History

Information charging the defendant with the crime of kidnapping in the first degree, brought to the Superior Court in the judicial district of Hartford, where the alleged victim and the state filed motions to extend the sealing of the defendant's arrest warrant affidavit; thereafter, the court, *Gold, J.*, ordered the unsealing of a redacted version of the arrest warrant and stayed the order pending the filing of an appeal, and the victim appealed; subsequently, this court granted the motion of The Hartford Courant Company to intervene for the limited purpose of responding to the claims raised by the victim on appeal. *Appeal dismissed.*

Proloy K. Das, for the appellant (victim).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attor-

ney, and *David L. Zagaja*, senior assistant state's attorney, for the appellee (state).

William S. Fish, Jr., with whom, on the brief, were *Timothy P. Jensen* and *Christopher L. Ayers*, for the appellee (intervenor The Hartford Courant Company).

Opinion

ROGERS, C. J. This appeal presents the question of whether the rights afforded to crime victims under the state constitution; see Conn. Const., amend. XXIX (victim's rights amendment);[1] are enforceable by way of an appeal filed by a victim from an order issued in a criminal case. The victim in this criminal matter appeals[2]

[1] Article first, § 8, of the constitution of Connecticut, as amended by articles seventeen and twenty-nine of the amendments, provides in relevant part: "(b) In all criminal prosecutions, a victim, as the general assembly may define by law, shall have the following rights: (1) The right to be treated with fairness and respect throughout the criminal justice process; (2) the right to timely disposition of the case following arrest of the accused, provided no right of the accused is abridged; (3) the right to be reasonably protected from the accused throughout the criminal justice process; (4) the right to notification of court proceedings; (5) the right to attend the trial and all other court proceedings the accused has the right to attend, unless such person is to testify and the court determines that such person's testimony would be materially affected if such person hears other testimony; (6) the right to communicate with the prosecution; (7) the right to object to or support any plea agreement entered into by the accused and the prosecution and to make a statement to the court prior to the acceptance by the court of the plea of guilty or nolo contendere by the accused; (8) the right to make a statement to the court at sentencing; (9) the right to restitution which shall be enforceable in the same manner as any other cause of action or as otherwise provided by law; and (10) the right to information about the arrest, conviction, sentence, imprisonment and release of the accused. The general assembly shall provide by law for the enforcement of this subsection. Nothing in this subsection or in any law enacted pursuant to this subsection shall be construed as creating a basis for vacating a conviction or ground for appellate relief in any criminal case." The foregoing provision commonly is referred to as the victim's rights amendment. *State* v. *McCahill*, 261 Conn. 492, 496, 811 A.2d 667 (2002).

[2] The victim appealed from the trial court's order to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. Prior to the case being transferred, the Appellate Court, sua sponte, ordered the parties to appear and give reasons why the victim's appeal "should not be dismissed for lack of subject matter jurisdiction because the . . . victim is not a party to the underlying

from the trial court's denial of her motion to extend indefinitely the sealing of an affidavit submitted by a police officer in support of the warrant authorizing the arrest of the defendant, Adam Gault. That sealed affidavit, which has been redacted to eliminate names and other personal information that might identify the victim, recounts statements of the victim and other individuals in regard to the defendant's kidnapping and alleged sexual assault of the victim.[3] The victim claims that the court improperly denied her motion to extend the sealing of the affidavit and, further, that she has standing to appeal from the trial court's order. The state argues in response that the victim lacks standing to pursue an appeal and, therefore, this court is without subject matter jurisdiction to decide it. The Hartford Courant Company, which was permitted to intervene in the case during the pendency of the appeal, takes no position as to the victim's standing but contests her claims regarding the propriety of the trial court's order. Because we conclude that the victim lacks standing to pursue this appeal, we dismiss the appeal without reaching its merits.

criminal action and [therefore] has no right to appeal pursuant to General Statutes § 52-263." Following the parties' appearance, the Appellate Court ordered supplemental briefing on the questions of whether the victim, pursuant to the victim's rights amendment, was a party entitled to appeal and whether the trial court's order constituted an appealable final judgment. In their briefs to this court, the parties have addressed the jurisdictional issues raised by the Appellate Court in addition to the substantive claims raised by the victim. Because the standing issue is dispositive, we do not reach the question of whether there is a final judgment or the victim's substantive claims.

[3] Although the victim alleged that the defendant had both kidnapped and sexually assaulted her, he was charged only with kidnapping in the first degree for the purpose of committing a sexual assault. See General Statutes § 53a-92 (a) (2) (A). He was not charged with sexual assault because, by the time the victim came forward with her accusations, the statute of limitations for that crime had expired. On March 5, 2008, subsequent to the filing of this appeal, the defendant pleaded guilty to the kidnapping charge. Throughout the trial court proceedings, the defendant took no position on the rulings that are at issue in the present appeal, and he has not participated in the appeal.

The following procedural history is relevant. On October 3, 2007, the state filed an application for an arrest warrant for the defendant, alleging a charge of kidnapping in the first degree for the purpose of committing a sexual assault in violation of General Statutes § 53a-92 (a) (2) (A). At that time, pursuant to the state's request, the trial court ordered that the affidavit supporting the arrest warrant be sealed for fourteen days pursuant to Practice Book § 36-2.[4] On October 17, 2007, the victim filed a motion requesting an extension of the sealing order. The victim requested that the affidavit remain sealed "indefinitely," citing, inter alia, her state constitutional right to be treated with fairness and respect throughout the criminal justice process; see

[4] Practice Book § 36-2 provides: "(a) All affidavits submitted to the judicial authority in support of the application for an arrest warrant and from which a determination of probable cause for the issuance of an arrest warrant has been made shall be filed with the clerk of the court together with the return of the arrest warrant pursuant to Section 44-11 and thereafter remain a part of the court file.

"(b) At the time the arrest warrant is issued, upon written request of the prosecuting authority and for good cause shown, the judicial authority may order that the supporting affidavits be sealed from public inspection or that disclosure be limited under such terms and conditions as it finds reasonable, subject to the further order of any judicial authority thereafter having jurisdiction of the matter. No such order shall limit their disclosure to the attorney for the accused, but the judicial authority may place reasonable restrictions on the attorney's further disclosure of the contents of the affidavits.

"(c) Any order sealing such affidavits from public inspection or limiting their disclosure shall be for a specific period of time, not to exceed two weeks from the date of arrest, and within that time period the prosecuting authority may by written motion seek an extension of the period. The original order of the court sealing the affidavit or limiting its disclosure shall remain in effect until the court issues an order on the motion. The motion to extend the period and the court's order thereon shall be made in accordance with the provisions of Section 42-49A. Affidavits which are the subject of such an order shall remain in the custody of the clerk's office but shall be kept in a secure location apart from the remainder of the court file as long as the order is in effect.

"(d) Unless the judicial authority issuing an arrest warrant has, upon written request of the prosecuting authority, entered an order limiting disclosure of the supporting affidavits, all affidavits filed pursuant to this section shall be open to public inspection and copying and the clerk shall provide copies to any person upon receipt of any applicable fee."

Conn. Const., amend. XXIX (b) (1); and General Statutes § 54-86e, which requires that information from which the identity of a sexual assault victim may be ascertained be held confidential.[5] She claimed further that, pursuant to the balancing test contemplated by Practice Book § 42-49A,[6] her right to protect her identity overrode the right of the public to inspect the arrest warrant affidavit.

Thereafter, a hearing was held over several days on the victim's motion, which various representatives of the press opposed.[7] On November 16, 2007, at the conclusion of the hearing, the trial court ordered that the redacted version of the affidavit be unsealed. According to the court, the redaction removed any information

[5] The state also filed a motion to extend the sealing of the arrest warrant affidavit, but only on the basis of § 54-86e. On appeal, the state has confined its arguments to the question of the victim's standing.

[6] Practice Book § 42-49A provides in relevant part: "(a) Except as otherwise provided by law, there shall be a presumption that documents filed with the court shall be available to the public.

"(b) Except as provided in this section and except as otherwise provided by law, including Sections 36-2, 40-29 and 40-40 through 40-43 and General Statutes § 54-33c, the judicial authority shall not order that any files, affidavits, documents, or other materials on file with the court or filed in connection with a court proceeding be sealed or their disclosure limited.

"(c) Upon written motion of the prosecuting authority or of the defendant, or upon its own motion, the judicial authority may order that files, affidavits, documents, or other materials on file or lodged with the court or in connection with a court proceeding be sealed or their disclosure limited only if the judicial authority concludes that such order is necessary to preserve an interest which is determined to override the public's interest in viewing such materials. The judicial authority shall first consider reasonable alternatives to any such order and any such order shall be no broader than necessary to protect such overriding interest. An agreement of the parties to seal or limit the disclosure of documents on file with the court or filed in connection with a court proceeding shall not constitute a sufficient basis for the issuance of such an order.

"(d) In connection with any order issued pursuant to subsection (c) of this section, the judicial authority shall articulate the overriding interest being protected and shall specify its findings underlying such order and the duration of such order. . . ."

[7] During the proceedings in the trial court, the members of the press did not move formally to intervene, but the trial court permitted them to be heard on the motions to seal.

that reasonably could be used to identify or locate the victim or to subject her to any further investigation by the public. The victim's appeal followed.[8] In a subsequent articulation, the trial court explained that in reaching its decision to release a redacted version of the affidavit, it had relied, "in the first instance . . . upon the presumption of full public access to all court filings. Practice Book § 42-49A (a). The court also determined, however, that pursuant to § 42-49A (c) there existed a competing interest—that is, a sexual assault victim's right to be treated with fairness and respect; see Conn. Const., amend. XXIX [b] [1]; and to maintain the confidentiality of his or her identifying information; see General Statutes § 54-86e—which . . . overrode the public's right to view the affidavit in its entirety. In an effort to balance these competing interests, the court redacted those portions of the affidavit which identified the victim, or which could be used to determine her identity. The court did not redact any other information from the affidavit, thereby ensuring, as directed by § 42-49A (c), that the order restricting public access to the affidavit would be no broader than necessary. In choosing to redact portions of the affidavit, the court concluded that there existed no reasonable alternative to redaction which would have adequately protected the privacy of the victim and yet still preserved, to the extent possible, the public's right of access."

The victim claims that the trial court improperly ordered that a redacted version of the affidavit be released and that, pursuant to the provision of the victim's rights amendment requiring that she be treated with fairness and respect, she was entitled to have the

[8] Subsequent to the November 16, 2007 hearing, the trial court ordered that, unless an appeal was filed by November 27, 2007, the redacted version of the arrest warrant affidavit would be unsealed on that date. The victim filed her appeal on November 26, 2007. Accordingly, the affidavit remains sealed pending the outcome of this appeal.

entire affidavit remain sealed indefinitely.[9] She contends further that she is entitled to challenge the trial court's order on appeal because the victim's rights amendment "makes [her] a party to the criminal action for purposes of enforcing her rights under the amendment." According to the victim, the constitutional grant of substantive rights to victims necessarily requires a remedy for claimed violations of those rights and, therefore, "crime victims must have standing within the criminal justice process" to vindicate those rights.[10] The

[9] Although she did not do so at the trial level, in this court the victim also claims support for her position in jurisprudence recognizing a federal constitutional right to privacy, and she further requests that this court exercise its supervisory powers to order that the affidavit remain sealed. In general, even though the affidavit has been redacted, the victim's position is that the entire document should remain sealed because third parties may use nonidentifying information contained in the affidavit to investigate and attempt to ascertain her identity, and the cited constitutional provisions give her the right to be free from what she terms "unwarranted public intrusion."

[10] The victim claims additionally that she is a party who may appeal because she "initiated" an "action" by filing a motion to seal the arrest affidavit, and it is that action that underlies this appeal. According to the victim, an action is "any judicial proceeding which seeks the redress of the law," and in some cases may be initiated by a motion. Regardless of the merits of those assertions, the victim's argument is contrary to the record. Clearly, the victim did not commence a separate proceeding by filing her motion to seal, but, rather, she filed that motion in the context of a preexisting criminal prosecution. Her attorney filed an appearance in the criminal case, her motion bears the docket number of that case, and the motion was argued before and decided by the judge assigned to the criminal matter with the participation of the state and the presence of the defendant. In this regard, the cases cited by the victim are readily distinguishable. See *Abreu* v. *Leone*, 291 Conn. 332, 348–49, 968 A.2d 385 (2009) (allowing intervening plaintiff department of children and families to appeal ruling in action plaintiff foster father commenced by filing in Superior Court motions for protective order and to quash subpoena issued in connection with separate proceedings pending before state claims commissioner); *Board of Education* v. *Tavares Pediatric Center*, 276 Conn. 544, 556, 888 A.2d 65 (2006) (allowing plaintiffs to appeal ruling in action they commenced by filing in Superior Court motions for protective order and to quash subpoena issued in connection with Rhode Island administrative proceeding); *Lougee* v. *Grinnell*, 216 Conn. 483, 487–90, 582 A.2d 456 (1990) (allowing petitioner to appeal ruling in action he commenced by filing in Superior Court motion to quash subpoena issued in connection with Texas action), overruled in part by *State* v. *Salmon*, 250 Conn. 147, 154–55, 735 A.2d 333 (1999); *Waterbury Blank Book Mfg. Co.* v. *Hurlburt*, 73 Conn. 715, 717–18, 49 A. 198 (1901) (arbitration proceeding

state claims, to the contrary, that the victim's rights amendment does not provide victims with party status.[11] It argues that the amendment, by its terms, delegates the authority for its enforcement to the General Assembly, and that body has not passed legislation providing for party status for crime victims or otherwise conveying a right to appeal. We agree with the state.

The question of the victim's standing to appeal implicates this court's subject matter jurisdiction. See *Eder Bros., Inc.* v. *Wine Merchants of Connecticut, Inc.*, 275 Conn. 363, 368, 880 A.2d 138 (2005). It presents, there-

initiated pursuant to District Court rule was " 'action' " from which dissatisfied party could appeal to Superior Court); see also *In re Investigation of the Grand Juror into the Bethel Police Dept.*, 188 Conn. 601, 606–607, 452 A.2d 935 (1982) (dismissing appeal taken from judge's order releasing grand jury report; appellant had not initiated action to suppress report via filing of petition and, "[e]ven had [he] made a proper objection [in the grand jury proceedings], an objection to the trial court's decision is not the legal equivalent of an action").

The victim also contends that this court should treat the trial court's allowance of her motion to seal as the granting of a motion to intervene. We disagree. The victim did not request intervention either as a matter of right or permissively, and accordingly, the trial court did not make findings or determinations as to the multifactor tests that govern each form of intervention. See *Kerrigan* v. *Commissioner of Public Health*, 279 Conn. 447, 456–57, 461, 904 A.2d 137 (2006). We cannot presume on a silent record that the court conducted this analysis, and we decline to undertake on appeal an inquiry entrusted, in the first instance, to a trial court. Moreover, the victim cited no authority in support of this argument until filing her reply brief, and that authority merely responds to the general proposition, asserted by the state, that third party intervention is not permissible in a criminal case.

[11] We do not construe the state's arguments, as does the victim, as also challenging the propriety of the victim's limited participation in the proceedings before the trial court. Rather, we construe the state's arguments as contesting the victim's *characterization* of her participation, namely, that her filing of a motion in the criminal prosecution and arguing in support of it rendered her a "party" who had initiated an independent "action." As we will explain hereinafter, there is statutory authorization for a victim advocate to file a limited special appearance for the purpose of advocating for a victim's rights. The victim's participation in the proceedings in the trial court, which consisted solely of her motion to seal the affidavit that identified her and oral argument related to the motion, was consistent with that statutory authorization.

fore, a threshold issue for us to resolve before we may entertain the victim's substantive claims. *Board of Education* v. *Tavares Pediatric Center*, 276 Conn. 544, 550, 888 A.2d 65 (2006). "[I]f for any reason the appellant lacks standing to appeal, there is no justiciable issue before us." *In re Investigation of the Grand Juror into the Bethel Police Dept.*, 188 Conn. 601, 603, 452 A.2d 935 (1982). Because "our jurisdiction to hear this appeal is a question of law, our review is plenary." *Board of Education* v. *Tavares Pediatric Center*, supra, 550.

"[W]e begin with the premise that, except insofar as the constitution bestows upon this court jurisdiction to hear certain cases . . . the subject matter jurisdiction of the Appellate Court and of this court is governed by statute." (Citation omitted; internal quotation marks omitted.) Id. If not constitutionally provided for, the right of appeal "is accorded only if the conditions fixed by statute and the rules of court for taking and prosecuting the appeals are met." (Internal quotation marks omitted.) *State* v. *McCahill*, 261 Conn. 492, 499, 811 A.2d 667 (2002). Typically, "[t]he ability to bring an appeal, in the civil or criminal context, depends upon the legislative authorization as contained in the General Statutes." Id.

Turning first to the constitution, a review of the language of the victim's rights amendment discloses that the amendment, while establishing many substantive rights for crime victims, does not include a right to appeal. Compare, e.g., Cal. Const., art. I, § 28 (c) (1) (2011 Sup.) ("[a] victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, may enforce the rights enumerated in subdivision [b] in any trial or appellate court with jurisdiction over the case as a matter of right").[12] Furthermore, the victim's rights

[12] The victim's rights amendment also does not provide expressly that appeals by victims are disallowed. Compare, e.g., La. Const., art. I, § 25 ("[n]othing in this [s]ection shall . . . confer upon *any person* the right to

amendment does not speak to the question of a victim's party status or standing. Compare, e.g., Tex. Const., art. I, § 30 (e) ("[a] victim or guardian or legal representative of a victim has standing to enforce the rights enumerated in this section but does not have standing to participate as a party in a criminal proceeding or to contest the disposition of any charge").

By its explicit terms, the victim's rights amendment contemplates additional implementing legislation to give effect to its provisions. As this court has explained: "Constitutional provisions are not necessarily self-executing. In so far as they either expressly or by necessary implication require legislative action to implement them, they are not effective until that legislative action is had." *State ex rel. Cotter* v. *Leipner*, 138 Conn. 153, 158, 83 A.2d 169 (1951). "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right[s] given may be enjoyed and

appeal or seek supervisory review of any judicial decision made in a criminal proceeding" [emphasis added]); Ohio Const., art. I, § 10a ("[t]his section does not confer upon *any person* a right to appeal or modify any decision in a criminal proceeding" [emphasis added]); Va. Const., art. I, § 8-A (same). The victim's rights amendment does provide that "[n]othing in [the amendment] or in any law enacted pursuant to [it] shall be construed as creating a basis for vacating a conviction or ground for appellate relief in any criminal case." Conn. Const., amend. XXIX (b). Unlike the cited provisions from our sister states' constitutions, it is unclear from the quoted text of our state constitution whether the prohibition of appeals is intended to apply to victims or only to criminal defendants. See *People* v. *Richardson*, 196 Ill. 2d 225, 230–31, 751 N.E.2d 1104 (2001) (holding identically worded provision in Illinois constitution to bar defendant's appeal based on purported violation of victim's rights, because legislature's intent was that Illinois' victim's bill of rights be used as " 'shield' " to protect victims and not as " 'sword' " to be wielded by criminal defendants), superseded by statute on other grounds, *State* v. *Hestand*, 362 Ill. App. 3d 272, 280, 838 N.E.2d 318 (2005). We have examined the legislative history of our victim's rights amendment and, although it is not illuminating on whether subsection (b) applies to bar appeals by victims, the legislators indicated at several junctures during debate on the bill that the amendment was modeled, in part, on the Illinois victim's bill of rights. See 39 H.R. Proc., Pt. 9, 1996 Sess., pp. 2822, 2825, 2851. Accordingly, it is not clear that the victim's rights amendment applies to bar the victim's present appeal.

protected, or the dut[ies] imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." (Internal quotation marks omitted.) *State* v. *Sanabria*, 192 Conn. 671, 688, 474 A.2d 760 (1984); see, e.g., id., 689–90 (when constitutional amendment stated that right to probable cause hearing was to be provided " 'in accordance with procedures prescribed by law,' " implementing statute was required to effectuate right). The victim's rights amendment provides certain rights, but does not detail procedures by which a victim may seek vindication of those rights in the event they are denied. After enumerating ten substantive rights, the victim's rights amendment provides that "[t]he [G]eneral [A]ssembly shall provide by law for the enforcement of this subsection." Conn. Const., amend. XXIX (b); see footnote 1 of this opinion. Accordingly, if there exists a right to appeal to enforce those rights, it is to be found in the General Statutes. We turn, therefore, to the General Statutes, to determine whether the legislature has provided victims with party status or, otherwise, a right to appeal from trial court orders.[13]

[13] Because the victim's rights amendment specifically directs the General Assembly to provide for its enforcement and further, as discussed herein, victims are not parties to a criminal prosecution, we must reject the claim, suggested by the victim, that a right to appeal is implicit in the amendment. Even were that not the case, courts in our sister states have declined to construe constitutional provisions affording participatory rights to victims as granting rights any broader than those that are explicitly stated. See, e.g., *Gansz* v. *People*, 888 P.2d 256, 257, 258–59 (Colo. 1995) (victim's constitutional right to be "heard when relevant . . . and present at all critical stages of the criminal justice process" did not confer legal standing on victim to appeal order dismissing criminal charges); *Hall* v. *State*, 579 So. 2d 329, 331 (Fla. App.) (victim's constitutional right "to be heard at all crucial stages of criminal proceedings" did not "permit victims or their families to actively participate in the conduct of the trial by sitting at counsel table or being introduced to the jury"), review denied, 587 So. 2d 1329 (Fla. 1991); *Reed* v. *Becka*, 333 S.C. 676, 683, 511 S.E.2d 396 (App. 1999) (victim's constitutional rights to be notified of proceedings, to be heard and to consult with prosecutor did not give victim right to veto proposed plea agreement).

Appeals to this court, and the Appellate Court, generally are authorized by General Statutes § 52-263. That statute provides in relevant part that following proceedings in the trial court, "if *either party* is aggrieved by the decision of the court or judge upon any question or questions of law arising in the trial . . . *he may appeal* to the court having jurisdiction from the final judgment of the court or of such judge . . . ." (Emphasis added.) General Statutes § 52-263. In view of the plain language of the statute, this court previously has held that "review by way of appeal pursuant to § 52-263 is available *only to parties* to an underlying action." (Emphasis added.) *State* v. *Salmon*, 250 Conn. 147, 152, 735 A.2d 333 (1999). The court explained that, "[o]rdinarily, the word party has a technical legal meaning, referring to those by or against whom a legal suit is brought . . . *the party plaintiff or defendant*, whether composed of one or more individuals and whether natural or legal persons." (Emphasis added; internal quotation marks omitted.) Id., 154. The court rejected the notion that "party," as used in § 52-263, was intended to apply more broadly, for example, to "[a] person concerned or having or taking part in any affair, matter, transaction, or proceeding . . . ." (Internal quotation marks omitted.) Id., 157–58.[14]

It is a "basic tenet of the criminal justice system that prosecutions are undertaken and punishments are sought by the state on behalf of the citizens of the state, and not on behalf of particular victims or complaining

[14] Thus, this court concluded in *State* v. *Salmon*, supra, 250 Conn. 162, that a bail bondsman could not appeal from a trial court's order to forfeit bond because he was not a party to the criminal proceedings. See also *In re Application for Pro Hac Vice Admission of Reich*, 83 Conn. App. 432, 436, 851 A.2d 308 (2004) (governor's chief of staff could not challenge on appeal order granting out-of-state attorney pro hac vice status, as he was not party to proceedings on that matter); *Leydon* v. *Greenwich*, 57 Conn. App. 727, 730–31, 750 A.2d 492 (2000) (attorney not representing any party to case could not appeal from sanctions imposed on him by trial court for his filing of amicus brief without permission of court).

witnesses." *State* v. *Barnett*, 980 S.W.2d 297, 308 (Mo. 1998), cert. denied, 525 U.S. 1161, 119 S. Ct. 1074, 143 L. Ed. 2d 77 (1999). "A criminal prosecution is a public matter and not a contest between the defendant and his victims, or their relatives." (Internal quotation marks omitted.) Id. It is axiomatic, therefore, that "[t]he parties to a criminal action are the [state], in whose sovereign name it is prosecuted, and the person accused"; *Dix* v. *Superior Court*, 53 Cal. 3d 442, 451, 807 P.2d 1063, 279 Cal. Rptr. 834 (1991); and *not* the crime victim(s). *State* v. *Harrison*, 24 P.3d 936, 945 (Utah 2001).

Section 52-263 limits the right of appeal to a "party," and, in the context of a criminal proceeding, victims do not fit within the plain meaning of that term. Since the passage of the victim's rights amendment in 1996, the legislature has not amended § 52-263 to include victims among those entitled to appeal, nor has it passed a new statute extending appellate rights to victims or conferring party status on them. Additionally, we have examined the extensive victims' rights legislation enacted subsequent to the amendment, and we conclude that the act creating the office of victim advocate; see Public Acts 1998, No. 98-231 (P.A. 98-231); and the legislative history leading to that act's passage reveal clearly the legislature's intent that victims' participation in criminal proceedings be limited in scope and not equivalent to that of a party with a right to appeal.

In 1998, responding to concerns of victim advocacy groups that passage of the victim's rights amendment had yet to result in the anticipated improved treatment of crime victims, the legislature created the office of victim advocate, which is charged, generally, with acting on behalf of victims and otherwise ensuring that their rights are respected. The newly formed office was tasked with a number of initiatives in that regard. See P.A. 98-231, § 2. In relevant part, the office of victim advocate was empowered to "[f]ile *a limited special*

appearance in any court proceeding for the purpose of advocating for a victim" the rights secured by subdivisions (4), (5), (7), (8), (9) and (10) of the victim's rights amendment. (Emphasis added.) P.A. 98-231, § 2 (5); see also footnote 1 of this opinion. Subsequently, in 2001, that charge was expanded to include advocacy "for any right guaranteed to a crime victim by the [c]onstitution of the state or any right provided to a crime victim by any provision of the general statutes . . . ." Public Acts 2001, No. 01-211, § 12 (5).[15]

The term "special appearance" is not defined in the chapter of the General Statutes pertaining to the victim advocate, nor does the term appear elsewhere in the statutes. The qualifier "limited" suggests something less than the usual court appearance. Because the precise meaning of "limited special appearance" is unclear, we consult the legislative history underlying P.A. 98-231.

As originally written, the bill that ultimately became P.A. 98-231 gave much broader powers to the victim advocate in regard to pursuing victims' rights in court and other legal proceedings. Specifically, the victim advocate was empowered to "[r]epresent any victim or appear, intervene or bring an action on behalf of any victim . . . before any court, agency, board or commission to ensure the legal, civil and special rights of victims . . . ." Substitute Senate Bill No. 449, 1998 Sess. Prior to its passage, however, the bill was amended to respond to concerns raised by the office of the chief state's attorney that the proposed legislation would result in unacceptable delays in criminal court proceedings and, consequently, potential violations of defendants' speedy trial rights and increased costs of litigation for the state. In his submitted remarks, then Chief State's Attorney John M. Bailey explained that,

[15] Public Act 98-231, § 2, and Public Act 01-211, § 12, are codified at General Statutes § 46a-13c (5).

pursuant to the legislation as initially drafted, "[i]f, at any point, a victim or his counsel believes his interests are not being served in a criminal case, this bill would permit them to file and argue motions, oppose motions filed by the state or defense and even argue to the jury. *It may also permit victims to file appeals and argue before the Connecticut Supreme Court.*" (Emphasis added.) Conn. Joint Standing Committee Hearings, Judiciary, Pt. 4, 1998 Sess., p. 1268. Bailey likened the potential appeals by victims to the reviews of court closure orders that certain nonparties may pursue under the authority of General Statutes § 51-164x,[16] and he warned of the much larger number of victims that might seek such appeals were they authorized.[17] Id., p. 1269.

Bailey "agree[d] that the constitutional amendment protecting victims' rights [was] an important landmark

[16] General Statutes § 51-164x provides in relevant part: "(a) Any person affected by a court order which prohibits any person from attending any session of court, except any session of court conducted pursuant to section 46b-11, 46b-49, 46b-122 or 54-76h or any other provision of the general statutes under which the court is authorized to close proceedings, whether at a pretrial or trial stage, shall have the right to the review of such order by the filing of a petition for review with the Appellate Court within seventy-two hours from the issuance of such court order. . . .

"(c) Any person affected by a court order that seals or limits the disclosure of any files, affidavits, documents or other material on file with the court or filed in connection with a court proceeding, except (1) any order issued pursuant to section 46b-11 or 54-33c or any other provision of the general statutes under which the court is authorized to seal or limit the disclosure of files, affidavits, documents or materials, whether at a pretrial or trial stage, and (2) any order issued pursuant to a court rule that seals or limits the disclosure of any affidavit in support of an arrest warrant, shall have the right to the review of such order by the filing of a petition for review with the Appellate Court within seventy-two hours from the issuance of such court order. . . . "

[17] According to Bailey, the number of criminal cases typically disposed of annually in Connecticut exceeded 150,000, and more than 350,000 if motor vehicle cases were included. Conn. Joint Standing Committee Hearings, Judiciary, Pt. 4, 1998 Sess., p. 1269. Bailey opined that, "[e]ven if only half of these cases results in intervention by a victim, the effect on our already overburdened criminal justice system will be devastating." Id.

in the criminal justice landscape . . . [and that] [i]t must be acknowledged and implemented with all deliberate speed . . . .'' Id., p. 1270. Bailey urged, however, that the legislature act ''consistent[ly] with the rights of criminal defendants and the equally important interests of the state in investigating and prosecuting crime.'' Id. At committee hearings on the bill, Kevin Kane and Frank Maco, then the state's attorneys from New London and Litchfield, respectively, also expressed concern about the delay that extensive victim participation in criminal proceedings might engender, as well as the potential interference with the prosecutorial function. Conn. Joint Standing Committee Hearings, Judiciary, Pt. 3, 1998 Sess., pp. 927–28.

The legislation thereafter was amended to its present, more limited form in response to the foregoing concerns. In offering the applicable amendment to the Senate, Senator Donald E. Williams explained: ''[T]his [a]mendment clarifies that while the [o]ffice of the [v]ictim [a]dvocate can appear on behalf of a victim to ensure the constitutional rights that I enumerated previously, the [o]ffice of the [v]ictim [a]dvocate *may not intervene directly into a criminal case and file any substantive motions or take any substantive action that would in any way influence the outcome of that criminal case.* . . . We wouldn't want to inadvertently be creating additional grounds for appeal in cases, or in any way upsetting the due process in our court system for criminal defendants.'' (Emphasis added.) 41 S. Proc., Pt. 8, 1998 Sess., pp. 2587–88. Similarly, Representative Michael P. Lawlor, when summarizing the amendment for members of the House of Representatives, explained that ''it limits the type of representation which the crime victim advocate can participate in.'' 41 H.R. Proc., Pt. 16, 1998 Sess., p. 5415. Specifically, ''the type of participation that the crime victim [advocate] might undertake . . . would be in the nature of a *limited special appear-*

ance rather than as a full party in a case." (Emphasis added.) Id., pp. 5417–18, remarks of Representative Lawlor. According to Representative Lawlor, the change represented "an additional, appropriate limitation on the jurisdiction of the crime victim advocate . . . ." Id., p. 5418.

Although the foregoing legislative history related to the creation of the office of the victim advocate, and the victim in the present case has appeared through privately retained counsel, we see no reason why the legislature would afford greater participatory rights to victims having their own attorneys than it would to those represented by the victim advocate, because the same concerns—delay, possible impingement on defendants' constitutional rights, increased costs to the state and interference with the prosecutorial function—still would be implicated. To reiterate, nothing in the victim's rights amendment itself or in subsequently enacted legislation explicitly makes victims parties to criminal prosecutions or otherwise affords them rights to appeal. Moreover, we conclude that this legislative history, which led to passage of an act authorizing only a "limited special appearance" for crime victims' legal representatives, conclusively demonstrates that, although the legislature intended to create an avenue through which victims could appear in court proceedings and articulate their positions in regard to matters relating to their rights, it did not intend that victims were to have full party status or the right to bring an appeal. Accordingly, we conclude that the victim lacks standing to prosecute this appeal, and that this court lacks subject matter jurisdiction to hear it.

The victim has requested that, if we conclude that we lack jurisdiction over her appeal, we instead treat it as a public interest appeal pursuant to General Statutes § 52-265a.[18] Such requests normally are directed only

[18] General Statutes § 52-265a provides: "(a) Notwithstanding the provisions of sections 52-264 and 52-265, any party to an action who is aggrieved by

to the Chief Justice of this court. General Statutes § 52-265a (b), (c) and (d). In any event, although the jurisdictional prerequisite of a final judgment may be excused for appeals otherwise meeting the requirements of § 52-265a, it nonetheless remains that the statutory authorization to bring such appeals is extended only to "any party to an action . . . ." General Statutes § 52-265a (a). Because, as we have explained, the victim was not a party to the criminal proceedings in the trial court, she also is precluded from pursuing a § 52-265a appeal.

The appeal is dismissed.

In this opinion the other justices concurred.

SUSAN BALLOU *v.* LAW OFFICES HOWARD LEE SCHIFF, P.C.
(SC 18639)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.

Syllabus

Pursuant to statute (§ 52-356d [e]), "[i]nterest on a money judgment shall continue to accrue under any installment payment order on such portion of the judgment as remains unpaid."

Pursuant further to statute (§ 37-3a [a]), "interest at a rate of ten per cent a year, and no more, may be recovered and allowed in civil actions . . . as damages for the detention of money after it becomes payable."

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an order or decision of the Superior Court in an action which involves a matter of substantial public interest and in which delay may work a substantial injustice, may appeal under this section from the order or decision to the Supreme Court within two weeks from the date of the issuance of the order or decision. The appeal shall state the question of law on which it is based.

"(b) The Chief Justice shall, within one week of receipt of the appeal, rule whether the issue involves a substantial public interest and whether delay may work a substantial injustice.

"(c) Upon certification by the Chief Justice that a substantial public interest is involved and that delay may work a substantial injustice, the trial judge shall immediately transmit a certificate of his decision, together with a proper finding of fact, to the Chief Justice, who shall thereupon call a special session of the Supreme Court for the purpose of an immediate hearing upon the appeal.

"(d) The Chief Justice may make orders to expedite such appeals, including orders specifying the manner in which the record on appeal may be prepared."

The plaintiff, who had defaulted on certain consumer credit card payments and who had two judgments rendered against her by a small claims court in connection with those defaults, brought an action in the United States District Court, contending that the defendant had overstated the amount of two debts owed by the plaintiff under those judgments, in violation of the federal Fair Debt Collection Practices Act (15 U.S.C. § 1692 et seq.). When the small claims court rendered the judgments, it also entered installment payment orders, allowing the plaintiff to pay in installments the debts owed under the judgments. The defendant did not seek an order of postjudgment interest in small claims court, and the court did not enter such an order. After the plaintiff failed to make certain installments, the defendant sought a bank execution against the plaintiff for the judgment amounts and directed the marshal to add postjudgment interest of 10 percent to the amount of the judgments. The parties filed motions for summary judgment in the District Court, and the District Court certified to this court the questions of whether § 52-356d (e) provides for the automatic accrual of postjudgment interest on all judgments for which an installment payment order has been entered by the court and, if so, what rate of postjudgment interest applies. *Held* that § 52-356d (e) does not provide for the automatic accrual of postjudgment interest on all judgments for which an installment payment order has been entered; in light of the language of § 52-356d (e) and its relationship to § 37-3a, this court concluded that § 52-356d (e) merely provides that postjudgment interest will continue to accrue on any unpaid portion of a judgment for which a court has entered an installment payment order only when the court already has awarded postjudgment interest on the judgment pursuant to § 37-3a.

(*Two justices concurring separately in one opinion*)

Argued May 18, 2011—officially released April 10, 2012

Procedural History

Action to recover damages for, inter alia, the defendant's alleged violations of the federal Fair Debt Collection Practices Act, and for other relief, brought to the United States District Court for the District of Connecticut, where the parties filed motions for summary judgment; thereafter, the District Court, *Kravitz*, *J.*, certified to this court questions pertaining to whether General Statutes § 52-356d (e) provides for the automatic accrual of postjudgment interest on all judgments in which an installment payment order has been entered by the court and, if so, the applicable rate of postjudgment interest.

Joanne S. Faulkner, for the appellant (plaintiff).

Jeanine M. Dumont, with whom were *Heath A. Tiberio* and, on the brief, *Jill Alward* and *Thomas Leghorn*, pro hac vice, for the appellee (defendant).

Opinion

PALMER, J. The dispositive issue in this case, which comes to us upon our acceptance of two certified questions from the United States District Court for the District of Connecticut pursuant to General Statutes § 51-199b (d),[1] is whether General Statutes § 52-356d (e)[2] provides for the automatic accrual of postjudgment interest on all judgments in which an installment payment order has been entered by the court. We answer that question in the negative.

[1] General Statutes § 51-199b (d) provides in relevant part: "The Supreme Court may answer a question of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state."

[2] General Statutes § 52-356d provides in relevant part: "(a) When a judgment is rendered against a natural person, the judgment creditor or judgment debtor may move the court for an order for installment payments in accordance with a money judgment. After hearing and consideration of the judgment debtor's financial circumstances, the court may order installment payments reasonably calculated to facilitate payment of the judgment.

* * *

"(c) Notwithstanding the hearing requirement of subsection (a) of this section, on motion of the judgment creditor for an order of nominal payments, the court shall issue ex parte, without hearing, an order for nominal installment payments. . . . Such an order for nominal payments may be modified on motion of either party . . . .

"(d) An installment payment order shall not be enforced by contempt proceedings, but on the judgment debtor's default on payments thereon, the judgment creditor may apply for a wage execution pursuant to section 52-361a.

"(e) Interest on a money judgment shall continue to accrue under any installment payment order on such portion of the judgment as remains unpaid.

"(f) On motion of either party and after notice and hearing or pursuant to a stipulation, the court may make such modification of an installment payment order as is reasonable."

The record certified by the District Court contains the following undisputed facts and procedural history. The plaintiff, Susan Ballou, owed balances on two different consumer credit cards. Both of these debts were purchased by Midland Funding, LLC (Midland), which subsequently brought actions on those debts in the judicial district of New Haven, Small Claims Session (small claims court). Midland obtained judgments against the plaintiff in the two cases, one in the amount of $3203.11 and the second in the amount of $997.28. The small claims court entered installment payment orders pursuant to § 52-356d requiring the plaintiff to pay $35 per week to satisfy the first judgment and $50 per month to satisfy the second judgment. The defendant, the Law Offices Howard Lee Schiff, P.C., which represented Midland in small claims court, did not apply for an order of postjudgment interest in either of the two cases, and the small claims court did not issue such an order in either case. The defendant sought a bank execution against the plaintiff for the judgment amounts and directed the marshal to add postjudgment interest of 10 percent to the amount of the judgments.

Thereafter, the plaintiff commenced an action in the United States District Court for the District of Connecticut, alleging, inter alia, that the defendant had overstated the amount of the debts in violation of the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (2006),[3] by virtue of its application for a bank execution directing the state marshal to collect postjudgment interest even though the judgments that the small claims court rendered did not contain an award of such interest. The defendant filed a motion for summary

[3] Under the Fair Debt Collection Practices Act, a debt collector is prohibited from engaging in unfair practices, including "[t]he false representation of . . . the character, amount, or legal status of any debt"; 15 U.S.C. § 1692e (2) (A) (2006); and "[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f (1) (2006).

judgment, claiming that it had not overstated the amount of the debts because, pursuant to § 52-356d (e), postjudgment interest accrues automatically at a rate of 10 percent on any unpaid balance under a judgment for which the court has entered an installment payment order. The plaintiff also filed a motion for summary judgment, claiming that, under General Statutes § 37-3a (a),[4] postjudgment interest is not automatic but, rather, is awarded in the discretion of the court upon application of the party seeking such interest.[5]

The District Court subsequently determined that the proper resolution of the parties' claims turns on the correct interpretation of §§ 52-356d (e) and 37-3a (a). The District Court further observed that the question of law presented by the parties' motions involves a matter of public interest for which there is no controlling appellate decision, constitutional provision or state statute.[6] Accordingly, the District Court certified the following two questions of law to this court, which we accepted: "(1) Does . . . § 52-356d (e) provide for the automatic accrual of [postjudgment] interest on all judgments in which an installment payment order has been entered by the court? (2) If [the first] question . . . is

[4] General Statutes § 37-3a (a) provides in relevant part: "Except as provided in sections 37-3b, 37-3c and 52-192a, interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions . . . including actions to recover money loaned at a greater rate, as damages for the detention of money after it becomes payable. . . ."

[5] As the District Court noted in its amended certification order, in the Second Circuit, a mistake of law is not a defense under the Fair Debt Collection Practices Act. *Ballou* v. *Law Offices Howard Lee Schiff, P.C.*, 713 F. Sup. 2d 79, 82 (D. Conn. 2010); see, e.g., *Pipiles* v. *Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir. 1989).

[6] At the time of the District Court's amended certification order, there was no controlling appellate decision on the issue of whether postjudgment interest automatically accrues under § 52-356d (e). As we discuss more fully hereinafter, following the District Court's amended certification order but prior to oral argument before this court, the Appellate Court issued its decision in *Discover Bank* v. *Mayer*, 127 Conn. App. 813, 819, 17 A.3d 80 (2011), in which the court held that postjudgment interest is discretionary for purposes of an installment payment order entered pursuant to § 52-356d (a).

answered in the affirmative, what rate of [postjudgment] interest applies?" Our negative answer to the first question makes it unnecessary for us to consider the second question.

The statutory language at issue in the present case is set forth in General Statutes § 52-356d (e), which provides that "[i]nterest on a money judgment shall continue to accrue under any installment payment order on such portion of the judgment as remains unpaid." In addition, § 37-3a (a) provides that a court may, in its discretion, award interest of up to 10 percent on a debt that has been reduced to a judgment but which remains unpaid. See footnote 4 of this opinion. The plaintiff maintains that there is nothing in § 52-356d to indicate that interest automatically accrues on a debt that is owed on a money judgment for which the court has entered an installment payment order. In the plaintiff's view, § 52-356d (e) merely provides that postjudgment interest that already has been awarded on a money judgment in accordance with § 37-3a *continues* to accrue on any unpaid portion of the judgment *after* the court has entered an installment payment order pursuant to § 52-356d (a). The defendant asserts that § 52-356d (e) impliedly provides for the automatic accrual of postjudgment interest on the unpaid portion of a judgment when installment payments have been ordered by the court. According to the defendant, § 52-356d (e), in providing for the *continued* accrual of postjudgment interest until the debt has been paid, necessarily also requires, as a threshold matter, that such interest shall accrue in all cases in which the court has entered an installment payment order. In other words, under the defendant's interpretation of § 52-356d (e), the legislature, in mandating that interest on a money judgment "shall continue to accrue" under an installment payment order, "merely [was] emphas[izing] that postjudgment interest accrues until the payment of the judgment

amount." We agree with the plaintiff's construction of § 52-356d (e).[7]

The issue of statutory construction that this case raises recently was addressed by the Appellate Court in *Discover Bank* v. *Mayer*, 127 Conn. App. 813, 17 A.3d 80 (2011), in which the court rejected a claim that postjudgment interest is mandatory under § 52-356d (e). See id., 818–19. In *Mayer*, the defendant, Rudolph Mayer, had entered into an agreement with the plaintiff, Discover Bank, for a credit card account. Id., 814. Mayer incurred a substantial balance on the account but failed to make any payments, and Discover Bank commenced a collection action against Mayer. Id. In addition to money damages, Discover Bank sought, inter alia, postjudgment interest under § 37-3a. Id., 815. The trial court denied Discover Bank's request for postjudgment interest, and Discover Bank appealed from that portion of the trial court's judgment to the Appellate Court, claiming that the plain language of § 52-356d (e) "requires that interest accrue automatically on any unpaid portion of a judgment when installment payments have been ordered by the court." Id., 814. The Appellate Court rejected Discover Bank's claim, reasoning as follows:

[7] We note that whether § 52-356d (e) provides for the automatic accrual of postjudgment interest presents a question of statutory interpretation. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When 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.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 720–21, 6 A.3d 763 (2010).

"Section 52-356d (e) provides that '[i]nterest on a money judgment shall continue to accrue under any installment payment order on such portion of the judgment as remains unpaid.' [Discover Bank] contends that the legislature's use of the word 'shall' makes the accrual of interest in installment payment order cases mandatory. [Discover Bank], however, ignores that the word 'shall' is juxtaposed with the word 'continue,' and not with the word 'accrue.' [Discover Bank's] reading would have the effect of rendering the word 'continue' inoperative. The word 'continue' means to 'keep up or maintain, especially without interruption, a particular condition, course, or series of actions.' [Webster's Third New International Dictionary]. The definition of the word 'continue' reveals that it presupposes, and relates in its operation, to an existing thing or condition, which in the case of § 52-356d (e), is the existence of an award of interest on a money judgment." *Discover Bank* v. *Mayer*, supra, 817.

The Appellate Court also explained the relationship between §§ 52-356d (e) and 37-3a (a). "Section 52-356d (e) is located within chapter 906 of the General Statutes, which is titled 'Postjudgment Procedures.' In General Statutes § 52-350a (15), 'postjudgment procedure is defined in relevant part as 'any procedure commenced after rendition of a money judgment . . . .' 'Money judgment' is defined in relevant part as 'a judgment, order or decree of the court calling in whole or in part for the payment of a sum of money . . . . General Statutes § 52-350a (13). Section 52-356d (a) provides in relevant part that '[w]hen a judgment is rendered against a natural person, the judgment creditor or judgment debtor may move the court for an order for installment payments in accordance with a money judgment. . . .' If a judgment debtor defaults on an installment payment order, the judgment creditor may apply for a wage execution. General Statutes § 52-356d (d). A 'money judgment may be enforced, by execution . . . to the

amount of the money judgment with (1) all statutory costs and fees as provided by the general statutes, (2) *interest as provided by chapter 673 on the money judgment* and on the costs incurred in obtaining the judgment, and (3) any attorney's fees allowed pursuant to section 52-400c.' . . . General Statutes § 52-350f. The relevant statute in chapter 673 is § 37-3a. Section 37-3a (a) provides in relevant part: "[I]nterest at the rate of ten per cent a year, and no more, *may be recovered* and allowed in civil actions . . . as damages for the detention of money after it becomes payable." (Emphasis in original.) *Discover Bank* v. *Mayer*, supra, 127 Conn. App. 817–18.

"It is apparent, therefore, that [for purposes of Discover Bank's claim under § 37-3a] the interest referred to in § 52-356d (e) is derived from an award of interest pursuant to § 37-3a. . . . '[A]n award of postjudgment interest is authorized by § 37-3a' . . . and '[a] decision to deny or grant postjudgment interest is primarily an equitable determination and a matter lying within the discretion of the trial court.' . . . Contrary to [Discover Bank's] contention, this exercise of discretion is not, in any way, circumscribed in cases [in which] installment payments have been ordered by the court. The plain language of § 52-356d (e), as well as its relationship with other statutes, makes clear that a judgment creditor may request postjudgment interest to accrue on a money judgment pursuant to § 37-3a, and that such interest, if awarded, shall continue to accrue on the unpaid portion of a money judgment in cases [in which] installment payments have been ordered by the court." (Citations omitted.) Id., 818–19. We fully agree with this analysis, which is applicable to the present case.[8]

[8] The concurrence claims that our reliance on *Discover Bank* is misplaced because that case stands for the proposition that interest on an installment payment order may be awarded under § 37-3a *only*, and not under General Statutes § 37-1, which, in contrast to § 37-3a, provides for a mandatory award of interest. See General Statutes § 37-1 (a) ("[t]he compensation for forbearance of property loaned at a fixed valuation, or for money, shall, in

In support of its contrary position, the defendant contends that the word "continue," as used in § 52-356d (e), refers to the continued or ongoing accrual of interest until all of the required installment payments have been made and the judgment finally has been satisfied. Under this interpretation of § 52-356d (e), the legislature necessarily intended for postjudgment interest to be awarded when the court enters an installment payment order because such interest could not "continue" to accrue under § 52-356d (e) unless that interest already had been awarded by the court in connection with the installment payment order. The defendant further claims that postjudgment interest is mandatory under § 52-356d (e) because that provision states that interest "*shall* continue to accrue" on the portion of the judgment that remains unpaid. (Emphasis added.) Although acknowledging that § 52-356d is silent with respect to the rate of interest, the defendant maintains that that rate is presumptively 10 percent, which is the maximum rate allowed under § 37-3a. See footnote 4 of this opinion.

At the very least, the defendant's construction is strained because it is predicated on a reading of § 52-356d (e) that attributes to the legislature an intent to provide for a mandatory award of postjudgment interest only indirectly or impliedly. It seems highly unlikely that the legislature would have established such a man-

the absence of an agreement to the contrary, be at the rate of eight per cent a year"). The concurrence misreads *Discover Bank*, which speaks in terms of § 37-3a, because the sole issue in that case, as in the present case, concerned the interrelationship between §§ 52-356d (e) and 37-3a (a). See *Discover Bank* v. *Mayer*, supra, 127 Conn. App. 814–15. There is nothing in *Discover Bank* to suggest that § 37-1 is inapplicable generally to installment payment orders because § 37-1 simply was not implicated in that case. Indeed, the court's decision in *Discover Bank* contains no reference to § 37-1. Thus, we agree with the reasoning and holding of *Discover Bank* because the court in that case correctly analyzed the statutory provisions at issue, namely, §§ 52-356d (e) and 37-3a (a), in concluding that interest is discretionary under those specific provisions. See id., 818–19.

datory requirement in terms so indefinite and indirect. We also are dubious about the interpretation that the defendant urges because there is nothing in the language of § 52-356d (e) to suggest a presumptive rate of interest, let alone a rate of interest of 10 percent. Even if we were to assume, however, that the defendant's interpretation of § 52-356d (e) is a plausible one, the construction that the plaintiff advances—a construction that is based on the plain import of the statutory language—is far more consonant with that language and, therefore, represents the more reasonable construction.

Our conclusion is buttressed by several other compelling considerations. First, § 52-356d (e) provides for "[i]nterest on a money judgment," not interest on an installment payment order. Each of these terms has a distinct meaning for purposes of the relevant statutory scheme, which, as we noted previously, is set forth in chapter 906 of the General Statutes. See General Statutes § 52-350a (9) and (13) (respectively defining terms "installment payment order" and "money judgment").[9] Although, as a practical matter, a money judgment and an installment payment order may be rendered at the same time, the statutory scheme presumes a judgment preceding an installment payment order. See General Statutes § 52-350a (15) (defining " '[p]ostjudgment procedure' " as "any procedure commenced *after rendi-*

[9] General Statutes § 52-350a provides in relevant part: "For the purposes of this chapter and section 49-51, unless the context otherwise requires:

* * *

"(9) 'Installment payment order' means the fixing by the court of a sum to be paid periodically by the judgment debtor until satisfaction of a *money judgment*.

* * *

"(13) 'Money judgment' means a judgment, order or decree of the court calling in whole or in part for the payment of a sum of money, other than a family support judgment. Money judgment includes any such money judgment of a small claims session of the Superior Court . . . ." (Emphasis added.)

tion of a money judgment, seeking or otherwise involving a discovery procedure, a placing of a lien on property, a modification or discharge of a lien, a property execution under section 52-356a, a turnover order, *an installment payment order*, a wage execution, a modification of a wage execution, a compliance order, a protective order or a determination of exemption rights" [emphasis added]). It is apparent, therefore, that § 52-356d (e) addresses the situation in which the court already has awarded interest on the money judgment in the exercise of its discretion under § 37-3a (a), and, thereafter, either the judgment creditor or the judgment debtor seeks and obtains an installment payment order from the court. When that occurs, § 52-356d (e) simply provides that the interest awarded on the money judgment prior to the entry of the installment payment order continues to accrue on the remaining balance on the judgment until all installment payments have been made. In light of this temporal relationship between the money judgment and the installment payment order, the reference in § 52-356d (e) to the *continuation* of the accrual of interest pertains to a preexisting order of interest on the money judgment, not to the imposition of interest triggered by the entry of an installment payment order.

In addition, when the legislature chooses to provide that interest shall be awarded as of right, it invariably uses language that expressly mandates the assessment of such interest. See, e.g., General Statutes § 5-158h (b) ("installments shall include interest at five per cent a year"); General Statutes § 12-655 (b) ("interest shall accrue . . . at the rate of one per cent per month from the due date of such tax to the date of payment"); General Statutes § 17b-320 (c) ("interest at the rate of one per cent per month or fraction thereof shall accrue on such user fee from the due date of such user fee until the date of payment"); General Statutes § 25-93

("[delinquent assessments] shall be subject to interest from the due date at the [rate provided by statute]"). In view of the fact that an award of postjudgment interest ordinarily is a matter that falls within the sound discretion of the trial court; see General Statutes § 37-3a (a); we are disinclined to presume that the legislature intended to require an award of such interest unless that result is dictated either by the express statutory language or by necessary implication from that language. No such language appears in § 52-356d (e).

Our conclusion that postjudgment interest is not automatic under § 52-356d (e) also is bolstered by the fact that § 52-356d (e) does not specify an interest rate that would be applicable when the court has not set a rate of interest. In other statutes that authorize the imposition of interest, either as a matter of right or as a matter of discretion, the legislature has specified a rate of interest, has specified a means by which to determine a rate of interest or has incorporated by reference some other statute that establishes a rate of interest. Indeed, several statutes specifically incorporate by reference § 37-3a. See, e.g., General Statutes § 4-61 (a) (involving actions against state on highway and public works contracts); General Statutes § 12-159a (a) (involving court orders in actions contesting validity of tax collector's deed); General Statutes § 31-300 (involving awards in workers' compensation cases); General Statutes § 36a-50 (b) (involving enforcement actions by banking commissioner).

Many other statutes authorize installment payments, and interest routinely is assessed under those provisions. All of those statutes, however, have two significant features that distinguish them from § 52-356d: the legislature expressly mandates the assessment of interest, and a rate of interest is specified. See, e.g., General Statutes § 5-158h (b) ("If [an] employee is financially unable to make [a] lump sum payment, the employee

and the Retirement Commission may enter into a contract for payment of such amount in not more than one hundred thirty-one equal biweekly installments. Such installments *shall include interest at five per cent a year*, and the transfer to part A [of the retirement system] shall not be effective until all such installments have been paid." [Emphasis added.]); General Statutes § 5-175b ("If [an] employee is financially unable to complete the payment of the required contributions for [service] credit prior to such date, the Retirement Commission and the employee may enter into a contract for payment of such amount in not more than fifty-two equal biweekly installments. *Such installments shall include interest at five per cent per year*, and such service credit shall not be granted unless payment of installments is completed." [Emphasis added.]); General Statutes § 12-146 ("If any tax due in a single installment or if any installment of any tax due in two or more installments is not paid in full . . . [by a specified date] on which it became due and payable, the whole or such part of such installment as is unpaid shall thereupon be delinquent and *shall be subject to interest* from the due date of such delinquent installment. Except for unpaid real estate taxes the collection of which was, or is, deferred under the provisions of section 12-174, and any predecessor and successor thereto, which unpaid real estate taxes continue to be subject to the provisions of such deferred collection statutes, the delinquent portion of the principal of any tax *shall be subject to interest at the rate of eighteen per cent per annum* from the time when it became due and payable until the same is paid . . . ." [Emphasis added.]); General Statutes § 12-376b (a) ("[t]he amount of tax paid in . . . installments shall bear interest in relation to the unpaid portion of [the succession and transfer] tax from the expiration of six months after the death of the decedent until such tax is paid *at the rate of one*

per cent per month or fraction thereof" [emphasis added]); see also General Statutes § 25-93 ("[a]ny assessment against benefited property not paid within thirty days of the due date shall thereupon be delinquent and *shall be subject to interest from the due date at the same interest rate and in the same manner as provided by the general statutes in the case of delinquent taxes, provided, in the case of an assessment payable in installments, interest shall be computed on the entire unpaid balance of such assessment from the due date of the last installment which was paid, or from the due date of the assessment if no previous installment has been paid*" [emphasis added]). The absence of those features from § 52-356d (e) is strong evidence that the legislature did not intend to mandate interest under that statute. Indeed, it is highly unlikely that the legislature would intend for interest to accrue automatically without identifying an interest rate. Cf. General Statutes § 37-3c (providing that judgments in condemnation cases "shall include interest at a rate that is reasonable and just" and that, "[i]f a court does not set a rate of interest on the amount of compensation awarded, the interest shall be calculated [on the basis of the] . . . one-year constant maturity yield of United States Treasury securities . . . [and] shall accrue from the date of taking to the date of payment").

The defendant makes several arguments in support of its interpretation of § 52-356d (e), none of which is persuasive. The defendant contends that certain legislative history pertaining to § 37-3a reflects a legislative awareness that § 52-356d (e) provides for a mandatory award of postjudgment interest. In particular, the defendant refers to the 2003 testimony of Grace Rollins, a consumer advocate, before the judiciary and public health committees, concerning proposed amendments to § 37-3a. See Conn. Joint Standing Committee Hearings, Public Health, Pt. 2, 2003 Sess., pp. 495–97; Conn.

Joint Standing Committee Hearings, Judiciary, Pt. 6, 2003 Sess., pp. 1832–33. According to the defendant, Rollins' testimony reflects her belief that postjudgment interest is mandatory under § 52-356d (e). The defendant further asserts that, because no legislator took issue with Rollins' understanding of the import of § 52-356d (e), we must presume that those legislators shared that understanding. Although Rollins' view of the precise scope of § 52-356d (e) is by no means clear from her testimony, her view is wholly irrelevant to our construction of that provision because, contrary to the defendant's assertion, no inference possibly can be drawn from the mere fact that one or more legislators who may have been present at the committee hearings greeted Rollins' testimony with silence.

The defendant further asserts that § 52-356d (e) must be interpreted to provide for the automatic accrual of interest because a contrary interpretation will result in some judgment creditors being unable to recover the full amount of their judgments for a considerable period of time without any compensation for the economic loss associated with that delay. The defendant contends that this is an untenable result that the legislature could not have intended. This argument also lacks merit. As we previously explained, the legislature, by virtue of its enactment of § 37-3a, has afforded trial courts the discretion to award postjudgment interest or to deny it. Thus, the legislature necessarily is aware that a judgment creditor will not always receive interest on the unpaid portion of a money judgment. Moreover, although the defendant asserts that postjudgment interest is more important in installment payment cases because creditors are more likely to experience a delay in collecting on the judgment, there is nothing in § 37-3a (a) or § 52-356d (e) that prevents a trial court from awarding postjudgment interest when circumstances so warrant, and the defendant candidly acknowledges

as much. Merely because the legislature has elected to require that judgment creditors seek postjudgment interest in cases involving installment payment orders does not mean that courts will not award such interest when it is appropriate to do so. Indeed, it bears noting that the defendant never sought such interest in the present case.

The defendant also claims that this court should construe § 52-356d (e) to mandate the automatic accrual of interest when a trial court orders installment payments because other jurisdictions have enacted statutes to achieve that result. As we previously explained, however, the legislature expressly has provided that, under § 37-3a (a), awards of postjudgment interest ordinarily are discretionary, and § 52-356d (e), fairly construed, contains no exception to that general rule. But cf. General Statutes § 37-3b (a) (postjudgment interest mandatory in cases involving negligence). The fact that other jurisdictions have enacted statutes pursuant to which postjudgment interest accrues automatically at the same rate for all judgments sheds no light on the intention of our legislature, which has charted a different course.

The defendant next asserts that § 52-356d (e) must be construed to impose interest automatically on installment payments because, "[in the absence of] the payment of interest, the judgment debtor has no incentive to pay off the judgment . . . . In fact, there are no other consequences to a judgment debtor for failure to pay a judgment." (Citations omitted.) The defendant is incorrect. General Statutes § 52-356d (d) specifically provides that, upon "the judgment debtor's default on payments . . . the judgment creditor may apply for a wage execution pursuant to section 52-361a." Indeed, after the plaintiff in the present case failed to make several installment payments, the defendant secured a bank execution for the entire amount of the judgments.

Finally, the defendant claims that *Sears, Roebuck & Co.* v. *Board of Tax Review*, 241 Conn. 749, 699 A.2d 81 (1997) (*Sears*), and *Suffield Development Associates Ltd. Partnership* v. *National Loan Investors, L.P.*, 97 Conn. App. 541, 905 A.2d 1214, cert. denied, 280 Conn. 942, 943, 912 A.2d 479 (2006) (*Suffield Development*), support its contention that § 52-356d (e) provides for mandatory postjudgment interest at a rate of 10 percent in cases in which an installment payment order has been entered. Contrary to the defendant's claim, neither case bears on the proper interpretation of § 52-356d (e). In *Sears*, this court concluded, inter alia, that § 37-3a (a) provides for a *maximum* rate of interest of 10 percent, with discretion afforded to the trial court to order interest at a lesser rate. *Sears, Roebuck & Co.* v. *Board of Tax Review*, supra, 765–66. In *Suffield Development*, the Appellate Court merely explained that, under § 37-3a (a), an interest rate of less than 10 percent is presumptively valid, and therefore will be upheld, unless the party challenging the rate set by the court can demonstrate that it represents an abuse of discretion. See *Suffield Development Associates Ltd. Partnership* v. *National Loan Investors, L.P.*, supra, 568–71. It is apparent that these cases are irrelevant to our resolution of the present case.[10]

[10] The concurrence asserts that the present case necessarily implicates General Statutes § 37-1; see footnote 8 of this opinion; and therefore maintains that we have "not fully address[ed]" the certified questions in the present case because we have not addressed § 37-1. For this reason, and in order to "clarify that the majority opinion should not be read as altering this court's precedent concerning the application of § 37-1, which allows for parties to agree to nonusurious rates of postjudgment interest," the concurrence discusses § 37-1 at length.

Because § 37-1 has no bearing on the present case, it is inappropriate to address it. As the concurrence concedes, at no time during the litigation of this matter, either in the District Court or in this court, has the defendant ever argued that § 37-1 supports its claim of entitlement to postjudgment interest under the facts of this case. Indeed, the defendant expressly alleged, as an affirmative defense to the plaintiff's claim under the federal Fair Debt Collection Practices Act, that, at all relevant times, it "has *relied* [*on*] *§ 52-356d (e) as authority for the imposition of postjudgment interest* against a debtor who has made payments on the judgment amount under an install-

ment payment order . . . .” (Emphasis added.) Thus, the defendant has elected to defend against the plaintiff's action under the Fair Debt Collection Practices Act, both as a matter of fact and as a matter of law, based solely and exclusively on its purported right to interest under § 52-356d (e), with the amount of interest to be governed by § 37-3a (a). In fact, the clarity of the defendant's position is reflected in the District Court's explanation for seeking certification. In its amended certification order, the District Court stated that it is “clear . . . that this case turn[s] on an important undecided question of state law” that involves the interpretation of “§ 37-3a (a)” and “§ 52-356d.” *Ballou* v. *Law Offices Howard Lee Schiff, P.C.*, 713 F. Sup. 2d 79, 80–81 (D. Conn. 2010). Consistent with its claim concerning the applicability of § 52-356d (e) only, the defendant has not briefed the issue of how § 37-1 is relevant to the present case, and, consequently, the defendant has waived any claim that it conceivably might have raised under § 37-1. See, e.g., *State* v. *Saucier*, 283 Conn. 207, 223, 926 A.2d 633 (2007) (claim that has not been briefed generally is considered abandoned). Moreover, the defendant is a law firm specializing in creditors' rights and collection law, and we cannot imagine that a party so sophisticated in the area of law involved in this appeal would inadvertently fail to identify § 37-1 as a basis for obtaining postjudgment interest. On the contrary, we must presume that the defendant's failure even to mention § 37-1 reflects the defendant's considered view that § 37-1 provides no support for its contention that it did not violate the provisions of the Fair Debt Collection Practices Act—a presumption that is confirmed by the complete absence of any facts in the record to support a claim under § 37-1, such as an agreement by the parties concerning interest. In addition, because the parties have not briefed the issue of the possible applicability of § 37-1, it would be improper for us to address that question, at least without affording the parties an opportunity to brief it. See, e.g., *Sequenzia* v. *Guerrieri Masonry, Inc.*, 298 Conn. 816, 821, 9 A.3d 322 (2010) (“We long have held that, in the absence of a question relating to subject matter jurisdiction, the [reviewing] [c]ourt may not reach out and decide a case before it on a basis that the parties never have raised or briefed. . . . To do otherwise would deprive the parties of an opportunity to present arguments regarding those issues.” [Internal quotation marks omitted.]).

Furthermore, because we do not address the applicability of § 37-1, we do not understand the asserted need of the concurrence to address § 37-1 for the purpose of “clarify[ing]” that the majority opinion “should not be read as altering this court's precedent concerning the application of § 37-1 . . . .” We do not see how our opinion possibly could be construed as altering this court's jurisprudence concerning § 37-1 in view of the fact that we expressly decline to address that provision.

Finally, it is by no means clear that an extension of credit pursuant to a credit card agreement represents the kind of loan agreement that falls within the purview of § 37-1. Indeed, the concurrence does not cite any Connecticut case that so holds. Because the present case does not implicate § 37-1, there simply is no reason to address that unresolved, and potentially thorny, issue of first impression.

In sum, we would not hesitate to exercise our authority to expand the certified question if we believed that doing so would assist the District Court

The answer to the first certified question is: No.[11]

No costs shall be taxed in this court to either party.

In this opinion ROGERS, C. J., and NORCOTT, EVELEIGH and HARPER, Js., concurred.

ZARELLA, J., with whom McLACHLAN, J., joins, concurring. I agree with the majority's conclusion that General Statutes § 37-3a does not provide for the automatic award of interest when a court enters an installment payment order pursuant to General Statutes § 52-356d. I write separately for two reasons. First, I clarify that the majority opinion should not be read as altering this court's precedent concerning the application of General Statutes § 37-1, which allows for parties to agree to nonusurious rates of postjudgment interest. Second, I express my disagreement with the majority's reliance on the reasoning and holding of *Discover Bank* v. *Mayer*, 127 Conn. App. 813, 17 A.3d 80 (2011), as being determinative of the issue presented by the certified questions. In particular, I am concerned that the language in *Discover Bank* on which the majority relies inaccurately portrays the operation of our interest and postjudgment procedure statutes.

I

The first certified question before this court is whether § 52-356d (e) provides for the automatic accrual of postjudgment interest on any judgment for

in its resolution of the matter before it. For the foregoing reasons, however, we conclude that an expansion of the certified questions, as the concurrence urges, is inappropriate in this instance, both because it would serve no useful purpose and because there are compelling countervailing reasons not to do so.

[11] Because we answer the first certified question in the negative, we need not answer the second certified question.

which an installment payment order has been entered.[1] As the majority correctly concludes, the answer to that question must be no. Simply put, § 52-356d (e) merely informs the parties and the court that, when a judgment is accompanied or modified by an installment payment order, it does not affect any interest accruing on the judgment.[2] In more practical terms, the statute requires a debtor to continue paying postjudgment interest even under an installment payment order. This response, however, does not fully address the underlying issue presented by the certified questions—when does postjudgment interest apply? The majority opinion comprehensively addresses our recent decisions concerning the nature of when interest may be awarded as damages under § 37-3a (a).[3] Apart from the majority's reliance

[1] The first certified question is: "Does . . . § 52-356d (e) provide for the automatic accrual of [postjudgment] interest on all judgments [for] which an installment payment order has been entered by the court?" The second certified question is: "If [the first] question . . . is answered in the affirmative, what rate of [postjudgment] interest applies?"

[2] In that connection, I note: "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When 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.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 301 Conn. 323, 338, 21 A.3d 737 (2011).

[3] General Statutes § 37-3a (a) provides in relevant part: "[I]nterest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions . . . *as damages* for the detention of money after it becomes payable. . . ." (Emphasis added.)

on *Discover Bank*, I generally agree with the majority's reasoning and conclusion. Nevertheless, I believe that an analysis of the relationship between interest and installment payment orders requires this court to address § 37-1.[4] As I explain in this opinion, § 37-1 and our related precedents clearly delineate certain instances in which interest attaches to, and accrues automatically on, a judgment. If a judgment with accompanying postjudgment interest under § 37-1 is subject to an installment payment order, that order does not affect the initial interest award, just as it would not affect damages in the form of postjudgment interest under § 37-3a. Simply put, it is either the parties' agreement and § 37-1, or a court's discretionary award of interest as damages, that determines whether and at what rate interest accrues on a money judgment, not any provision in § 52-356d.[5] Section 52-356d (e) merely informs the court and the parties that, as to installment payment orders, interest continues to accrue only on the unpaid portion of the money judgment, as diminished over time by each installment payment.

Before proceeding, I address the majority's contention that analyzing § 37-1 exceeds the scope of our review because "at no time during the litigation of this matter, either in the [United States] District Court or in this court, has the defendant ever argued that § 37-1 supports its claim of entitlement to postjudgment

[4] General Statutes § 37-1 provides: "(a) The compensation for forbearance of property loaned at a fixed valuation, or for money, shall, in the absence of any agreement to the contrary, be at the rate of eight per cent a year; and, in computing interest, three hundred and sixty days may be considered to be a year.

"(b) Unless otherwise provided by agreement, interest at the legal rate from the date of maturity of a debt shall accrue as an addition to the debt."

[5] In stating this, I do not mean to foreclose the possibility that there may be instances in which a judgment creditor can obtain interest pursuant to both §§ 37-1 and 37-3a, as we apparently have not yet reached that issue.

interest under the facts of this case."[6] Footnote 10 of the majority opinion. I do not dispute that the defendant has relied on § 37-3a (a), but I do not agree that the certified question prevents us from clarifying the proper application of § 37-1 and its relationship to § 52-356d (e). Indeed, the first certified question is, by its own wording, open-ended. The question asks only whether § 52-356d (e) provides for interest. The simple answer, as noted previously, is no. Yet, it cannot be that the District Court would expect this court to refrain from expanding on that answer. By addressing § 37-1, I engage in the same analysis of the interplay between § 52-356d (e), our statutes and precedents governing interest on judgments as the majority does in addressing § 37-3a (a). I fail to understand how answering the question presented by the District Court, on a matter of statutory interpretation over which we exercise plenary

[6] On the basis of the record provided to this court in this case, the majority limits its statutory analysis to § 37-3a (a). This court, however, is not limited to the factual record when reviewing a pure issue of statutory construction of Connecticut law presented by a federal court. See, e.g., *Board of Education* v. *St. Paul Fire & Marine Ins. Co.*, 261 Conn. 37, 41 n.3, 801 A.2d 752 (2002) ("We point out [in deciding the certified question] that the issue of whether the bus driver was in fact negligent ultimately will be decided by the trier of fact. [Thus] [o]ur analysis is based on the allegations of the . . . complaint [in a separate case seeking to recover damages from the bus driver's employer] and not on the likelihood that the [plaintiffs in that separate case] will prevail at trial."); *Perodeau* v. *Hartford*, 259 Conn. 729, 734–63, 792 A.2d 752 (2002) (answering pure questions of law without regard to underlying facts of case before United States District Court); *C. R. Klewin, Inc.* v. *Flagship Properties, Inc.*, 220 Conn. 569, 579–84 and n.8, 600 A.2d 772 (1991) (deciding certified questions with extensive analysis of common law, and noting, without expressing opinion on, fact that "one of the issues before the Second Circuit was whether there was a genuine issue of material fact as to whether the oral agreement [at issue] could have been performed within a year"); see also *Teresa T.* v. *Ragaglia*, 272 Conn. 734, 742, 865 A.2d 428 (2005) ("[i]ssues of statutory construction present questions of law, over which we exercise plenary review"). Significantly, although the District Court has provided this court with a stipulation of certain facts that it believes are relevant to the certified questions, as well as a limited record of the prior proceedings, the District Court has not asked us to apply our law to the facts of the underlying case.

review, constitutes an "expansion of the certified questions . . . serv[ing] no useful purpose . . . ."[7] Id.

In sum, I address § 37-1 to offer a complete analysis of all statutes relevant to the certified questions pre-

[7] A review of the purpose of answering certified questions of Connecticut law presented by a federal court is additionally helpful in this regard. When a federal court must decide an issue based on an area of Connecticut law for which there is no clear precedent, that court may certify a question to this court in order to understand the proper application of our law. See General Statutes § 51-199b (d) ("[t]he Supreme Court may answer a question of law certified to it by a court of the United States or by the highest court of another state or of a tribe, *if the answer may be determinative of an issue in pending litigation in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state*" [emphasis added]). Indeed, the Court of Appeals for the Second Circuit, in which the United States District Court for the District of Connecticut sits, has expressly stated that, in certifying questions of law to this court, this court should not be constrained by the formulation of the question, but rather should address any and all issues presented by the certified question. *Arrowood Indemnity Co.* v. *King*, 605 F.3d 62, 65, 80 (2d Cir. 2010) ("We conclude that this case requires us to resolve significant questions concerning the appropriate construction of the relevant policy language, involving interpretation of Connecticut insurance law and implicating public policy considerations for Connecticut. For these reasons and those that follow, we certify . . . several questions to the Supreme Court of Connecticut. . . . *In formulating the questions for certification as we have, we do not mean to limit the Connecticut Supreme Court's response. The certified questions may be expanded to cover any further pertinent questions of Connecticut law that the Supreme Court deems appropriate to answer in connection with these issues. The Connecticut Supreme Court's guidance is welcomed on any state law issues presented by this appeal.*" [Emphasis added.]).

The scope of our analysis of Connecticut law is particularly important in this case, in which the underlying complaint in federal court arises out of a claim under the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. With such a claim, the exact nature of the debt, including the amount of interest, if any, owed thereon, may be dispositive of the outcome. In order for the District Court to properly adjudicate these claims, which may, in some cases, involve a determination of whether the debt continued to accrue interest pursuant to an agreement, a complete and thorough analysis of all relevant areas of Connecticut law on interest and judgments is necessary. See 15 U.S.C. § 1692f (2006) ("[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: [1] [t]he collection of any amount [*including any interest*, fee, charge, or expense incidental to the principal obligation] *unless such amount is expressly authorized by the agreement creating the debt or permitted by law*" [emphasis added]). Again, I reiterate that, because

sented by the District Court's amended certification order: "[T]he [District] Court departs from its preferred practice in this case for three reasons [and certifies a question of law to the Connecticut Supreme Court notwithstanding a disagreement between the parties over the issue presented]. First, despite the parties' inability to cooperate, there is essentially no disagreement about the underlying facts of this case. Second, the questions raised by the parties' [summary judgment] motions are important *and potentially affect thousands of cases pending in and already decided by Connecticut courts*.[8] In each of those cases, collectors seeking to collect interest on court judgments could face liability under the [federal Fair Debt Collection Practices Act (act), 15 U.S.C. § 1692 et seq.] if the court [in each case had] entered an installment payment order. Third, the [District] Court is confident that if it were to decide this issue itself and the losing party were to take an appeal, the Second Circuit would certify the questions in this case to the Connecticut Supreme Court."

the defendant has not relied on § 37-1 during the litigation of this matter, it is unlikely that the statute is applicable in this case. The foregoing reasoning, however, demonstrates the importance of providing the District Court with a clear analysis of the operation of our statutes governing interest. My goal, as I stated at the outset of this opinion, is to ensure that the District Court fully understands, in this case and in future cases, the interplay between our laws on interest and postjudgment procedures.

Finally, I note that, although the defendant did not address § 37-1, the plaintiff's attorney, pursuant to Practice Book § 67-10, filed a supplemental letter with this court, on September 19, 2011, specifically citing *Little* v. *United National Investors Corp.*, 160 Conn. 534, 537, 280 A.2d 890 (1971), as providing additional legislative history on postjudgment interest in Connecticut under both §§ 37-1 and 37-3a.

[8] This statement particularly evinces the District Court's expectation of an analysis that is broad in scope, signaling to this court that we should not limit our response to the narrow question presented if doing so would leave related issues unanswered. Indeed, when viewed through the lens of judicial economy, it becomes even more crucial to provide a thorough analysis of the law. Federal courts in Connecticut will certainly face other legally similar, though not necessarily factually similar, claims raised under the act. The analysis herein provides the federal courts in Connecticut with additional tools to resolve future disputes under the act that implicate Connecticut law on interest and judgments.

(Emphasis added.) *Ballou* v. *Law Offices Howard Lee Schiff, P.C.*, 713 F. Sup. 2d 79, 80 (D. Conn. 2010); see also id., 82 ("[b]efore this [c]ourt holds that every collector who added interest to a judgment to be paid in installments is in violation of Connecticut law, and thus the [act] if within the one-year statute of limitations, the [c]ourt seeks to clarify this unsettled question of Connecticut law by certifying it to the Connecticut Supreme Court"). Accordingly, I find it necessary to address certain additional issues of law and statutory construction.

A brief review of our decisions regarding interest, damages and judgments is necessary to shed additional light on the issues presented by the certified questions. For more than 200 years, Connecticut has allowed parties to include nonusurious interest in contracts. See, e.g., *Selleck* v. *French*, 1 Conn. 32, 33 (1814) ("[i]nterest by our law is allowed on the ground of some contract express or implied to pay it, or as damage for the breach of some contract, or the violation of some duty"). Although usury laws limited the maximum rate of interest, parties were otherwise free to set interest rates among themselves. See, e.g., *Little* v. *United National Investors Corp.*, 160 Conn. 534, 537, 280 A.2d 890 (1971) ("the General Assembly [has] recognized the right of the parties to agree on interest rates, subject to the limitations imposed by the usury statutes"). For agreements that contemplate interest but do not specify an interest rate, the legislature long has provided for a legal rate of interest. General Statutes § 37-1; see, e.g., *Hubbard* v. *Callahan*, 42 Conn. 524, 527 (1875) ("[i]f no rate of interest is specified, [6 percent] is the legal rate; but if the parties agree [on] the rate in writing, then the agreed [on] rate becomes the legal rate in that case"). For example, in *Hubbard*, the court determined the validity of a contract providing for interest at a rate of 15 percent after maturity of the promissory note. See

id. The court, faced with the issue of whether parties could contract to set interest after maturity at a rate greater than the legal rate, responded: "Why not? If we may take the language of the statute [governing the legal rate of interest] in its common acceptation, no one would entertain a doubt that the parties could contract for a rate of interest after the money is due and while it remains unpaid, as well as before. There is no exception, qualification or limitation in the statute." Id. We have reiterated this general proposition on various occasions since *Hubbard*; see, e.g., *Little* v. *United National Investors Corp.*, supra, 537–38; *Globe Investment Co.* v. *Barta*, 107 Conn. 276, 279–80, 140 A. 202 (1928); and there has been no legislative response to the contrary. Indeed, the current embodiment of this rule is manifest in § 37-1, which has endured largely unchanged from previous versions of the statute.

"The language of [the] predecessor statutes [to § 37-1] and the construction placed on them by this court confirms the clearly expressed intention of the legislature in the enactment of these statutes. As distinguished from prohibitions against usury, the legal rate of interest appears to have been first set in chapter 16 of the Public Acts of 1872. [The statute] provided: 'When there is no agreement for a different rate of interest of money, the same shall be at the rate of six dollars [on] one hundred dollars'. In 1874 this statute was amended solely to change the rate from 6 percent to 7 percent. Public Acts 1874, c. 108. In 1877, the rate was changed back to 6 percent and the language was altered to [provide]: 'The compensation for [the] forbearance of property loaned at a fixed valuation, or for money, shall in the absence of any agreement to the contrary be at the rate of six per cent a year'. Public Acts 1877, c. 151. This provision has continued without change and is the present § 37-1 [a] of the General Statutes defining 'legal interest'." *Little* v. *United National Investors Corp.*,

supra, 160 Conn. 538. Since *Little* was decided, the legislature has amended the legal rate of interest under § 37-1, raising the rate to the current rate of 8 percent in 1979. Public Acts 1979, No. 79-364, § 1.

In addition to allowing prematurity and postmaturity interest on agreements to loan property or money, "Connecticut has . . . long provided for interest on judgments. . . . [T]he common-law impediment to interest on judgments does not exist in Connecticut. The common-law principle was predicated on the theory that the note or contract [that] was the subject of [the action] merged in the judgment and technically there could be no agreement concerning the judgment. . . . [General Statutes (Rev. to 1968) § 52-349, however] expressly provides for legal interest on judgments and § 37-1 expressly provides [for a] legal rate of interest . . . 'in the absence of any agreement to the contrary.' . . . Implicit in § 37-1 is the provision that if the parties have agreed on a rate of interest not prohibited by the usury law then that rate is the legal rate and only in the absence of such an agreement is it [the legal rate established by § 37-1]." (Citation omitted.) *Little* v. *United National Investors Corp.*, supra, 160 Conn. 537–38.

In *Little*, the court considered the aforementioned statutes and precedents, and concluded that, "since the agreement of the defendant [judgment debtor] was that 'interest shall accrue at the rate of [9 percent] per annum on unpaid principal balances, before and after maturity, by acceleration or otherwise' the rate of 'legal interest' was thus fixed by the agreement of the parties and under the provisions of General Statutes [(Rev. to 1968) §] 52-349[9] and [§] 37-1 the plaintiffs were entitled to

[9] General Statutes (Rev. to 1968) § 52-349 has since been repealed; however, General Statutes § 52-350f, which I discuss in detail in part III of this opinion, is substantively similar in that both statutes allow judgments to be enforced with interest.

interest on the judgment at that rate." (Emphasis added.) Id., 542.

This result has since been codified by the legislature, which resolved any potentially lingering ambiguities. Following *Little*, § 37-1 was amended by adding subsection (b); see Public Acts 1971, No. 783, § 1; which specifically provides: "Unless otherwise provided by agreement, interest at the legal rate from the date of maturity of a debt shall accrue as an addition to the debt." General Statutes § 37-1 (b). Thus, when viewed through the proper lens of relevant precedent and predecessor statutes, the current version of § 37-1 embodies two basic principles long espoused by this court and the legislature. First, parties may always contract to provide any nonusurious rate of interest as compensation for the forbearance of property or money, which may accrue before and after the date of maturity, including any postjudgment period. Second, if the agreement contemplates interest, explicitly or implicitly, but the parties fail to define a rate, § 37-1 provides the legal rate of interest, currently at 8 percent, which may accrue before and after the date of maturity.

II

Separate and distinct from interest pursuant to agreements are awards of damages for the wrongful detention of money, which the majority addresses in its analysis of § 37-3a. In addition to the majority's analysis, the following discussion serves to explain the difference between our interest and damages statutes.

In *Beckwith* v. *Trustees of Hartford, Providence & Fishkill Railroad*, 29 Conn. 268 (1860), we stated that "interest can only be claimed under a contract to pay it, either express or implied"; id., 270; and, in an action to recover money wrongfully detained by another, "the sum recoverable for such detention is treated as damages for the breach of the contract, rather than interest

for the money loaned . . . .'' Id. Some fifteen years after *Beckwith* and a change in the relevant statutes relating to interest on debts and judgments, we further outlined the distinction between actions to recover interest and those to recover damages on debts past due: ''[I]nterest may be recovered [on] the arrears of interest due, if there is an express promise to pay such interest. . . .

''In these cases it is called interest and not damages. But there are cases [in which] interest is allowed 'by way of,' or 'in the nature of' damages.

* * *

''This rule of allowing interest as damages originated in the desire of the courts to adhere to certain technical rules [at common law precluding interest on judgments], and at the same time [to] do justice to the parties. *Interest could only be allowed on the ground of an express or an implied contract to pay it.* In case therefore of an express written contract covering the subject matter, but which was silent as to interest, the express contract could not be enlarged by adding a promise to pay interest, and there was no ground or right to imply such a promise. But as it was extremely unjust to allow the defendant to have the use of the money loaned without compensation, interest was allowed, in the nature of damages, *for the detention of the money*.

''But it is a perversion or misapplication of this principle to apply it to an express written promise to pay interest after maturity. . . . [W]here, in a bill or note, interest after maturity is expressly reserved, *it is treated as interest* . . . and *never as damages*.'' (Citations omitted; emphasis added.) *Hubbard* v. *Callahan*, supra, 42 Conn. 529–30.

In that connection, we have defined the proper application of General Statutes (Rev. to 1962) § 37-3,[10] the predecessor statute to § 37-3a: "The statute is applicable to '*damages* for the detention of money after it becomes payable' in those cases in which the contract makes no provision as to the rate of interest after maturity but is not applicable [to] those in which . . . a rate of interest, otherwise lawful, is prescribed as applying from and after the time when the principal becomes payable." (Emphasis added.) *Little* v. *United National Investors Corp.*, supra, 160 Conn. 540. Section 37-3a effected no substantive change of its predecessor and, therefore, no deviation from its application, as defined in *Little*, is necessary.

III

The foregoing analysis makes clear that the two primary situations in which postjudgment interest may accrue is either pursuant to an agreement or to a court-ordered award.[11] As I noted previously, the majority focuses on the specific relationship between § 52-356d (e) and court-ordered awards of interest as damages under § 37-3a, in large part because the parties in this case have litigated the matter by relying on § 37-3a. In doing so, the majority adopts much of the reasoning from the Appellate Court's decision in *Discover Bank* v. *Mayer*, supra, 127 Conn. App. 813. Although I agree with the majority insofar as it concludes that a party is not entitled to automatic postjudgment interest pursuant to § 37-3a when a court enters an installment payment order, I disagree with the majority's reliance

[10] General Statutes (Rev. to 1962) § 37-3 was repealed in 1971. See Public Acts 1971, No. 783, § 2.

[11] There are, of course, other specific situations envisioned in title 37 of the General Statutes that involve an award of postjudgment interest. See, e.g., General Statutes § 37-3b (mandatory postjudgment interest in negligence actions). I focus on § 37-1 because it speaks directly to interest on which the parties agree, as opposed to interest mandated by statute or awarded in a court's discretion.

on *Discover Bank* to reach this result. In particular, I disagree with certain sweeping language and reasoning in *Discover Bank*'s holding as well as the majority's conclusion that it is wholly applicable to the facts and circumstances of the present case.

In reaching its conclusion in *Discover Bank*, the Appellate Court determined that (1) the use of the language " '[i]nterest . . . shall continue to accrue' " in § 52-356d (e) presupposes an award of interest on a money judgment; id., 817; (2) General Statutes § 52-350f, which concerns the enforcement of money judgments, governs the application of § 52-356d (e); see id., 818; and (3) because § 52-350f requires that interest in connection with enforcement of a money judgment be imposed "as provided by chapter 673,"[12] the "interest referred to in § 52-356d (e) is derived from an award of interest pursuant to § 37-3a . . . and [a] decision to deny or grant postjudgment interest is primarily an equitable determination and a matter lying within the discretion of the trial court." (Internal quotation marks omitted.) Id. The Appellate Court thus concluded that "[t]he plain language of § 52-356d (e), as well as its relationship with other statutes, makes clear that a judgment creditor may request postjudgment interest to accrue on a money judgment pursuant to § 37-3a, and that such interest, if awarded, shall continue to accrue on the unpaid portion of a money judgment in cases [in which] installment payments have been ordered by the court." Id., 818–19.

I disagree with this analysis and, therefore, with the majority's partial reliance on it.[13] First, the interest pro-

[12] Chapter 673 of the General Statutes comprises title 37, of which § 37-3a is a part.

[13] The majority alters some of the language that it quotes from *Discover Bank* in order to clarify the nature and scope of the holding in that case. Nevertheless, this partial remedy does not address the other problems present in the court's analysis in *Discover Bank*, which I discuss in the text of this opinion.

vision set forth in § 52-350f applies to certain enforcement procedures applicable to money judgments but not necessarily to installment payment orders.[14] General Statutes § 52-350f specifically provides that a "money judgment may be *enforced, by execution or by foreclosure of a real property lien* . . . ." An installment payment order is not an execution or foreclosure but "the fixing by the court of a sum to be paid periodically by the judgment debtor until satisfaction of a money judgment." General Statutes § 52-350a (9). This distinction is evident not only from the foregoing language defining an installment payment order but from language in General Statutes § 52-356d (b), which provides that "compliance with [an] installment payment order . . . shall stay any property execution or foreclosure pursuant to [the] judgment . . . ." Section 52-356d, by definition, is one of the *post*judgment procedures provided for by the General Statutes. See General Statutes § 52-350a (15) (defining " '[p]ostjudgment procedure' " as "a discovery procedure, a placing of a lien on property, a modification or discharge of a lien, a property execution . . . a turnover order, *an installment payment order*, a wage execution, a modification of a wage execution, a compliance order, a protective order or a determination of exemption rights" [emphasis added]). In other words, when a court enters an installment payment order under § 52-356d, it is effectively providing a court sanctioned delay to the full satisfaction of the judgment by the judgment debtor. Accordingly, the

[14] General Statutes § 52-350f provides in relevant part: "The money judgment may be enforced, *by execution or by foreclosure of a real property lien*, to the amount of the money judgment with (1) all statutory costs and fees as provided by the general statutes, (2) *interest as provided by chapter 673* on the money judgment and on the costs incurred in obtaining the judgment, and (3) any attorney's fees allowed pursuant to section 52-400c." (Emphasis added.) As I noted elsewhere in this opinion, chapter 673, which is also title 37 of the General Statutes, provides for a "legal rate" of interest unless otherwise provided by the parties' agreement; General Statutes § 37-1 (b); as well as a rate when awarding "damages for the detention of money after it becomes payable." General Statutes § 37-3a (a).

directive in § 52-350f that interest may be imposed on money judgments "as provided by chapter 673" is inapplicable to the present analysis, and the majority's conclusion to the contrary is without support.[15]

IV

The foregoing analysis can be summarized through the following conclusions. First, contracting parties can agree to nonusurious rates of interest on loans of property or money; this interest may accrue before and after the date of maturity of the loan. Unless otherwise provided, the postmaturity interest will continue to accrue on any judgment rendered on the contract or

[15] Even if it is assumed that § 52-350f applies, the court in *Discover Bank* improperly restricts the meaning of the statutory language "interest as provided by chapter 673" to interest under § 37-3a and neglects to address the other statutes within that chapter that provide interest under varying circumstances, in particular, § 37-1. The court in *Discover Bank* does not explain why § 37-3a is exclusively the relevant statute in chapter 673, insofar as the application of § 52-350f is concerned. Only a thorough reading of *Discover Bank* and the briefs filed in connection with that case suggests that the Appellate Court based its reasoning on the parties' reliance on § 37-3a as the only relevant statutory provision providing for postjudgment interest. That may explain the court's somewhat conclusory statement that "[t]he relevant statute in chapter 673 is § 37-3a." *Discover Bank* v. *Mayer*, supra, 127 Conn. App. 818. It does not, however, necessarily lead to the broader holding in *Discover Bank* that "the interest referred to in § 52-356d (e) is derived from an award of interest pursuant to § 37-3a." Id.

In addition to ignoring the plain language of the statutes, the court, in reasoning as it did, also failed to address the distinction between interest pursuant to an agreement and discretionary, court awarded damages. See, e.g., *Middlesex Mutual Assurance Co.* v. *Walsh*, 218 Conn. 681, 701–702, 590 A.2d 957 (1991) ("[i]n accordance with the permissive language of § 37-3a . . . we have stated that [t]he allowance of interest *as an element of damages* is primarily an equitable determination and a matter within the discretion of the trial court" [citation omitted; emphasis added; internal quotation marks omitted]); *Cecio Bros., Inc.* v. *Feldmann*, 161 Conn. 265, 275, 287 A.2d 374 (1971) ("[t]he real question in each case is whether the detention of money is or is not wrongful under the circumstances"). Under this interpretation, the statute would provide that "damages awarded on a money judgment under § 37-3a shall continue to accrue . . . ." This is simply not the language of the statute as written. Even if one were to ignore the confusion over interest and damages, such a result cannot be accepted. Rather, the most appropriate reading of § 52-356d (e) would not alter any interest that may attach to a money judgment.

note. Second, if contracting parties agree to or contemplate interest but fail to set a rate of interest, § 37-1 (a) provides that interest will accrue at the legal rate of 8 percent up to the date of maturity, and § 37-1 (b) provides that interest will continue to accrue at the legal rate of 8 percent from the date of maturity. Third, when a party has wrongfully detained money, and the parties have not contemplated interest on the transaction, the court, in its discretion, may award damages in the form of interest, up to a rate of 10 percent on the judgment, under § 37-3a (a).[16] Such an award is properly considered damages, and not interest, as evidenced both by the language of the statutes and our precedent.[17]

With this understanding of interest on money judgments, it is unquestionably evident that installment payment orders entered pursuant to § 52-356d do not affect the rate of postjudgment interest. The proper analysis for determining whether a judgment carries interest postjudgment is to look for an underlying agreement between the parties and apply the foregoing principles, grounded in our precedent and § 37-1. If the parties

[16] An example may help illustrate when § 37-3a is clearly applicable. Consider a divorce proceeding in which the wife is required to transfer a liquidated sum of money to the husband as part of the divorce settlement. If the wife fails to effect the transfer within the specified period, and the husband brings an action against her, the husband may seek, and the court may award, damages for the wife's wrongful detention of money, namely, interest at a rate of up to 10 percent on the value of the judgment under § 37-3a (a). See, e.g., *Sosin* v. *Sosin*, 300 Conn. 205, 210, 14 A.3d 307 (2011) ("[w]e conclude that the Appellate Court properly determined that the trial court's order directing the plaintiff to pay the defendant $3,828,081 did not constitute an improper modification of the original judgment and that the trial court had the discretion to award interest pursuant to § 37-3a because it reasonably could have concluded that the plaintiff had wrongfully withheld payment of the $3,828,081 to the defendant").

[17] The distinction between interest and damages is more than semantics. Interest, pursuant to § 37-1 and our case law, as described in this opinion, is not discretionary but, rather, based on the underlying transaction and agreement between the parties. By comparison, an award of damages is inherently discretionary in nature, and, in the case of § 37-3a, requires a court to determine whether there was a wrongful detention of money. See footnote 15 of this opinion.

have contemplated or agreed to have interest continue to accrue after a debt matures, that interest will further continue to accrue postjudgment, at the rate agreed on by the parties or, in the absence of an agreed on rate, the legal rate set forth in § 37-1. If there is no agreement, or the agreement does not contemplate interest, a party may seek an award of interest under § 37-3a in the form of damages. The court, in its discretion, may choose to award interest on the judgment, up to the rate provided by statute. In that connection, the sole purpose of § 52-356d (e) is to direct the court and the parties that, when an installment payment order is entered, postjudgment interest will continue to accrue *only* on the unpaid portion of the money judgment, as diminished by each installment payment. The phrase, "[i]nterest on a money judgment" in § 52-356d (e) refers to the fact that the interest must be awarded on the sum of the money judgment itself, not the individual installments or any other figure. Similarly, "shall continue to accrue . . . on such portion of the judgment as remains unpaid" means that the interest must continue to accrue on the balance of the money judgment, not the individual payments. General Statutes § 52-356d (e). Section 52-356d does not otherwise alter or affect the rate of interest on the judgment. Accordingly, I concur in the majority's answer to the first certified question only to the extent that it stands for the proposition that § 52-356d (e) does not itself provide for an award of interest on a judgment.

STATE OF CONNECTICUT *v.* JOHN JACKSON (SC 18194)

Rogers, C. J., and Palmer, Zarella, McLachlan, Eveleigh, Harper and Vertefeuille, Js.

Syllabus

Convicted of the crime of murder in connection with the bludgeoning death of his former girlfriend in New Haven, the defendant appealed to this

court. After the couple had ended their relationship, the victim allowed the defendant to move in with her temporarily. On July 20, 2004, the day the defendant was supposed to move out of the victim's apartment, the victim's boyfriend, J, dropped the victim off at her apartment. The victim's neighbor, A, heard screams coming from the victim's apartment but believed that the victim and the defendant were merely having an argument. A then tried unsuccessfully to reach the victim on her cell phone. The following morning, the defendant checked into a hotel in New York City using a fake name and several hours later attempted to kill himself by jumping out of the hotel window. The defendant survived the fall after landing on a hotel rooftop three floors below him, and he was brought to the hospital suffering from two broken legs and a broken arm. After New York City police officers were notified of the suicide attempt, they went to the hotel, entered the defendant's room and gathered items of clothing that they found inside, including a pair of pants with a belt. Thereafter, J learned of the defendant's suicide attempt and that the victim had not gone to work that day, became concerned for the victim's welfare, and went to her apartment. J tried unsuccessfully to enter the apartment and the police then found the victim dead inside her apartment. The following day, New Haven police officers traveled to New York to investigate whether the person who had attempted suicide at the hotel was the defendant because he had been identified as a suspect in the victim's murder. The New Haven police officers then went to the hotel from which the defendant had jumped and they discovered and seized additional items of the defendant's clothing, including his socks that were visible on the hotel rooftop. The New Haven police officers then questioned the defendant at the hospital where he was recovering. All of the evidence seized from the defendant's hotel room and from the hotel rooftop was given to the New Haven police department, and subsequent forensic tests conducted pursuant to search warrants revealed the victim's DNA. At trial, the defendant moved to suppress the clothing evidence seized by the police on the ground that it had been seized without a warrant in violation of his rights under the state and federal constitutions. The trial court denied the motion, concluding that the New York City police had a right to enter the defendant's hotel room because the suicide attempt constituted a public safety issue and they were entitled to seize the items of clothing for safekeeping. That court also concluded that the New Haven police had lawfully seized the defendant's socks because they were in plain view on the hotel rooftop after the defendant's suicide attempt. That court determined that the defendant had abandoned any reasonable expectation of privacy in the seized items when he jumped out of the hotel window and that there was a valid exception to the warrant requirement because the search was conducted pursuant to an emergency. On appeal, the defendant challenged several evidentiary rulings by the trial

court and also claimed that the trial court improperly had denied his request to charge the jury on third party culpability. *Held*:

1. The trial court properly denied the defendant's motion to suppress the items of his clothing that were seized by the police at the scene of his suicide attempt, that court having properly determined that the defendant had abandoned any reasonable expectation of privacy with respect to the seized items:

   a. The defendant had no reasonable expectation of privacy in the hotel room or in the personal effects that he left there after he jumped out of the hotel window, and even if he had not manifested a subjective intent to abandon the hotel room, the New York City police officers' initial entry into the hotel room was justified under the emergency exception to the warrant requirement because they reasonably could have believed that there might be other persons in the hotel room who were injured or who needed assistance and, therefore, they were not required to obtain a search warrant before seizing the defendant's clothes for safekeeping pursuant to their community caretaking function; furthermore, the mere transfer of the items from the New York City police to the New Haven police did not violate the defendant's fourth amendment rights, the transfer having involved no additional intrusion into the defendant's privacy and the subsequent forensic testing of the defendant's pants and belt having been performed pursuant to a search warrant.

   b. The defendant had relinquished any reasonable expectation of privacy in his socks that were discovered on the rooftop of the hotel by the New Haven police and his possessory interest in them, the New Haven police officers' presence in the defendant's hotel room not having violated the fourth amendment because the defendant had abandoned the room, the rooftop was a public place, open to the view of anyone who happened to look out a window of the hotel and accessible to the hotel personnel, the socks were left on the hotel rooftop for twenty-one hours before being discovered, and no exception to the abandonment doctrine was found to apply; moreover, the subsequent testing of the socks did not violate the defendant's fourth amendment rights because the police obtained a search warrant for the testing.

2. The trial court did not abuse its discretion in denying the defendant's motion to preclude certain DNA evidence that the state had failed to produce within the statutorily (§ 54-86k) prescribed period of twenty-one days before trial and by ordering, sua sponte, a continuance, that court having concluded that there was no bad faith on the part of the state or any intent to conceal the evidence; although the state had sent the defendant's belt and socks to the state forensic laboratory for testing in 2006, and for unknown reasons they were not tested until some time in 2007 and the results were given to the defendant only six days before the start of trial, the court continued the trial as permitted under § 54-86k to allow the defendant to obtain independent testing and to prepare

his trial strategy, and the defendant failed to establish either that there were exceptional circumstances that required the preclusion of the evidence or that he was prejudiced by the late disclosure.

3. The defendant could not prevail on his claim that the trial court improperly denied his motion to suppress certain statements that he made to the New Haven police officers while in the hospital, that court having properly found that the statements were not the product of custodial interrogation and that the statements were voluntarily made; the defendant was informed that he was not under arrest, the defendant was immobilized for medical treatment and not for purposes of interrogation, a reasonable person in the defendant's circumstances would not have believed that he was in police custody of the degree associated with a formal arrest, there was no evidence that the defendant's age or intelligence rendered him especially vulnerable to police intimidation, and the defendant was alert, coherent and capable of speaking with the police officers.

4. The trial court did not abuse its discretion in denying the defendant's request to charge the jury on third party culpability, that court having properly determined that the evidence presented by the defendant did not establish a direct connection between J and the victim's murder; there was no evidence that J was in the victim's apartment on the night of the murder, while there was ample evidence that the defendant was there, the minor inconsistencies in J's testimony concerning his unsuccessful attempt to enter the victim's apartment and his explanation to the police of the parties' relationships did not support an inference that J killed the victim, and the defendant pointed to no evidence that J had ever expressed any jealousy or anger toward the victim because of her living arrangement with the defendant.

Argued January 12—officially released April 17, 2012

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of New Haven, where the court, *Holden*, *J.*, denied the defendant's motions to suppress certain evidence; thereafter, the case was tried to the jury before *Holden*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

James B. Streeto, assistant public defender, for the appellant (defendant).

Raheem L. Mullins, assistant state's attorney, with whom, on the brief, was *Michael Dearington*, state's attorney, for the appellee (state).

Opinion

ROGERS, C. J. The defendant, John Jackson, was convicted, after a jury trial, of murder in violation of General Statutes § 53a-54a. The defendant appealed from the judgment of conviction directly to this court[1] claiming that the trial court improperly: (1) denied his motion to suppress certain evidence seized by the police without a search warrant; (2) denied his motion to preclude certain evidence that the state had disclosed in an untimely manner in violation of General Statutes § 54-86k; (3) denied his motion to suppress certain statements that he gave to the police; and (4) denied his request to give an instruction to the jury on third party culpability. We affirm the judgment of conviction.

The jury reasonably could have found the following facts. The defendant and the victim, Desti Parnell, had a son, Devon, who was six years old in 2004. The victim and Devon lived on the first floor of an apartment building at 672 Legion Avenue in New Haven. In the spring of 2004, the victim permitted the defendant, with whom she was no longer romantically involved, to move into her apartment. The defendant agreed that he would move out of the apartment on July 20, 2004.

On Monday, July 19, 2004, the victim spent the night at the house of her boyfriend, Lawrence Jackson (Jackson),[2] while her son was out of state on vacation. On Tuesday, July 20, 2004, Jackson drove the victim back to her apartment at approximately 2:30 p.m. and then went to work. At about 4:30 p.m., the victim's upstairs neighbor, Inez Alvarez, went to the victim's apartment

[1] The defendant brought his appeal to this court pursuant to General Statutes § 51-199 (b).

[2] Jackson is not related to the defendant.

to borrow some cleaning supplies. After Alvarez obtained the supplies, she and the victim stood in the common hallway talking and the defendant walked past them into the victim's apartment. Alvarez then returned to her own apartment.

About fifteen minutes later, Alvarez' niece, who was staying with her, told Alvarez that she heard someone screaming inside the apartment building. Alvarez went with her niece to the top of the staircase leading down to the first floor to determine the source of the screaming. After the screaming stopped, Alvarez heard the victim say, "Don't do this," followed by the defendant saying, "Get the fuck off me." Believing that the victim and the defendant were just having an argument, Alvarez returned to her apartment. Approximately five minutes later, Alvarez returned to the hallway and heard the victim say, "Oh my God, oh my God." Alvarez, who was by that time "freaked . . . out" and "panicking," gathered the cleaning supplies that she had borrowed from the victim, went down to the victim's apartment and knocked on the door. She initially heard someone moving around inside the apartment, but it then became quiet. Alvarez then returned to her apartment. She called the victim's cell phone several times that evening, but the victim did not answer. That night close to midnight, Alvarez heard the light sensor click on in the hallway downstairs, indicating that someone had entered the hallway.

At 2:10 a.m. on Wednesday, July 21, 2004, the defendant checked into the Carter Hotel in New York City, registering under the name Shawn Stokes. Later that day, at about 8:48 p.m., he jumped out of the hotel window in an attempt to kill himself. He landed on a third floor roof, three stories below his room. He survived, but broke both of his legs and one of his arms. He was transported to St. Vincent's Hospital in New York City for treatment.

Meanwhile, the victim had failed to appear at her job on the afternoon of Wednesday, July 21, 2004. When Jackson heard about the defendant's suicide attempt and learned that the victim had not gone to work, he became concerned about her welfare. In the early morning hours of July 22, he went to the victim's apartment, knocked on the door and windows, and tried unsuccessfully to open them. There was no response from anyone inside the apartment. Jackson then rang the doorbell of one of the victim's neighbors, Tamara Moore, who helped Jackson in his attempts to rouse the victim. When the victim failed to respond, Jackson called the police.

New Haven police and firemen arrived at the scene within minutes of Jackson's telephone call. One of the firemen entered the victim's apartment through an unlocked window and opened the door for the police officers, who discovered the victim's body in the bedroom of the apartment. The victim's wrists and ankles had been tied together behind her back with an electronic cable. Her shirt had been pulled below her chest, her skirt had been pulled up to her waist, and her underwear had been pulled down and completely off one leg. The victim had been stabbed multiple times in the forehead, ears, jaw, left cheek and rear left shoulder. She had defensive knife wounds to her hands and wrists, and her right arm was broken. The victim had been strangled and her skull had been shattered with a blunt instrument, leaving several pieces of the skull on the bedroom floor.[3] A knife and a hammer, both

[3] The medical examiner testified that the victim's strangulation injuries were life threatening, but she was unable to determine whether strangulation was the cause of death. She also testified that the victim could not have survived more than a few hours with such a severe skull fracture. The medical examiner ultimately certified that the cause of death was multiple blunt traumatic head injuries.

The victim was pronounced dead at 1:35 a.m. on July 22, 2004, soon after her body was discovered. The medical examiner did not make a specific determination as to the time of death. She testified, however, that rigor

covered with the victim's blood, were found on her bed. The defendant's semen was later found in vaginal swabs taken from the victim and on the rug under the victim's body.

The defendant subsequently was charged with and convicted of the victim's murder. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We first address the defendant's claim that pursuant to the fourth amendment of the United States constitution[4] and article first, § 7, of the constitution of Connecticut,[5] the trial court improperly denied his motion to suppress certain evidence, namely, a belt and four socks belonging to him that were seized by the police at the scene of his attempted suicide at the Carter Hotel in New York City. We conclude that the trial court properly

mortis had set in when an investigator from her office arrived at the crime scene at 12:45 p.m. on July 22. The medical examiner further testified that, as a general rule, rigor mortis develops within two to three hours of death and lasts for approximately twenty-four hours, although those time periods can vary based on the decedent's level of activity before death and the ambient room temperature.

[4] The fourth amendment to the United States constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[5] Article first, § 7, of the constitution of Connecticut provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

Although the defendant relies on cases in which this court has construed the scope of article first, § 7, of the state constitution, he has not separately briefed his claim under the state constitution or argued that this provision provides broader protection than this court previously has recognized under the specific facts and circumstances of the present case. Accordingly, we limit our analysis to well established principles of state constitutional law.

determined that the defendant had abandoned his expectation of privacy with respect to the seized items and, accordingly, that it properly denied the defendant's motion to suppress.

The record reveals the following additional facts relevant to our resolution of this issue that either were found by the trial court or are undisputed. At approximately 8:48 p.m. on July 21, 2004, Kevin Neafsey, a police officer with the New York City police department, received an emergency dispatch advising him of a possible suicide jumper at the Carter Hotel. Upon his arrival at the hotel, hotel personnel brought him and two other police officers to the defendant's room and opened the door for them. Neafsey gathered the items of clothing that he found in the room, including a pair of pants with the belt still on them, and placed them in a brown paper bag for safekeeping. Neafsey brought the bag containing the clothing to the police station, where it was placed in a locked property locker.

On the basis of their discussions with Jackson and Alvarez at the scene of the victim's murder, the New Haven police had identified the defendant as a suspect in the killing. On the afternoon of Thursday, July 22, 2004, Detectives Lawrence Mazzola and Herbert Johnson and Sergeant Moller[6] of the New Haven police department traveled to New York City to investigate whether the person who had attempted suicide at the Carter Hotel the previous day was the defendant. The officers first went to a police station and met with the New York City police detectives who were investigating the defendant's attempted suicide. At approximately 5:30 p.m., the New Haven police officers went to the defendant's room at the Carter Hotel, where New York City police officers were already present. Mazzola looked out of the window and saw clothing and foot-

[6] Moller's first name is not apparent from the record.

wear on the roof in the area where the defendant had fallen some twenty-one hours earlier. He then went down to the third floor, gained access to the rooftop through one of the hotel rooms, and seized the items, including four socks.[7]

The New Haven police officers then went to St. Vincent's Hospital to question the defendant. Johnson asked the defendant if he knew why he was in the hospital, and the defendant responded that he wanted to die, that "no one cares," and that he had nothing to live for.[8] Johnson also questioned the defendant about his identity and told him about the murder. The defendant ultimately admitted that his name was not Shawn Stokes, but denied knowing about the murder. The interview lasted approximately one hour and the defendant appeared to understand the nature of the conversation.

After leaving the hospital, the police officers went to the New York City police station where the items taken from the defendant's hotel room were being held. The New York City police gave the items to the New Haven police, who brought them back to the New Haven police department. Thereafter, the New Haven police obtained a search warrant for the forensic testing of reddish-brown stains that had been found on the belt seized from the defendant's hotel room and the socks taken from the roof where he fell. The tests revealed that the

[7] No evidence was presented at the suppression hearing as to how the socks and other items of clothing had been removed from the defendant's body. Mazzola testified at trial that he had been told that the socks had been removed from the feet of the person who jumped out of the hotel window, but he did not indicate who had removed them.

[8] The testimony regarding the events at the hospital was provided at a hearing on the defendant's motion to suppress certain statements he made at the hospital, not at the hearing on the motion to suppress the evidence seized from the hotel. The state asked the trial court to consider this testimony in ruling on the motion to suppress the evidence seized from the hotel, however, and the trial court did so.

substances on the belt and the socks contained DNA consistent with the victim's DNA profile.[9]

At trial, the defendant filed a motion to suppress the items of evidence seized in his hotel room and from the rooftop on the ground that they had been seized without a search warrant in violation of his constitutional rights. The trial court conducted an evidentiary hearing on the motion, at which the defendant testified. When the state's attorney asked him if it was his "intention to go back and retrieve [his] clothes in [his] room," he responded, "My [intention] was to kill myself." When the defendant was asked if he ever expected to see his clothing again, he stated, "[I]f I was trying to kill myself, then I . . . think that that question answers itself." There was conflicting testimony as to whether the defendant had paid for one night or two nights at the hotel, a hotel clerk having testified that the defendant had paid for one night, and the defendant having testified that he had paid for two nights.

The trial court denied the defendant's motion to suppress, finding that the New York City police had a right to enter the hotel room because the suicide attempt constituted a "public safety issue" and they were entitled to seize the defendant's belongings for safekeeping. The court further concluded that the New Haven police had lawfully seized the defendant's socks because they were in plain view on the hotel roof twenty-one hours after the defendant's suicide attempt. Thereafter, the defendant filed a motion for articulation of the trial court's reasons for denying his motion to suppress, which the trial court granted. In its articulation, the trial court stated that it had denied the motion because it concluded that the defendant had abandoned any

[9] For both the substance on the belt and the substance on the socks, the tests revealed that the expected frequency of individuals who could not be eliminated as the source of the DNA was less than one in seven billion individuals for the African-American, Hispanic and Caucasian populations.

expectation of privacy in the items in his hotel room and on the rooftop when he jumped out of the window of the hotel room. In addition, the court stated that it had been guided by the principle that there is an exception to the fourth amendment requirement for a search warrant when a search is conducted pursuant to an emergency. On appeal, the defendant contends that the trial court improperly found that: (1) he had no reasonable expectation of privacy in the items taken from his hotel room and from the rooftop; and (2) even if he did have a reasonable expectation of privacy, the seizure of the items fell into an exception to the constitutional requirement for a search warrant.

We begin our analysis with the standard of review. "[T]he standard of review for a motion to suppress is well settled. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] . . . our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. . . . [W]here the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts [found by the trial court] . . . ." (Internal quotation marks omitted.) *State* v. *Boyd*, 295 Conn. 707, 717, 992 A.2d 1071 (2010), cert. denied, 562 U.S. 1224, 131 S. Ct. 1474, 179 L. Ed. 2d 314 (2011).

"A seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property. . . . If a seizure has occurred, then the court must engage in a complex

inquiry to determine whether that seizure was reasonable. . . .

"With regard to the reasonableness requirement, [i]n the ordinary case, the [United States Supreme] Court has viewed a seizure of personal property as per se unreasonable within the meaning of the [f]ourth [a]mendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized. . . . [That court] has nonetheless made it clear that there are exceptions to the warrant requirement. When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the [c]ourt has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." (Citations omitted; internal quotation marks omitted.) *Fleming* v. *Bridgeport*, 284 Conn. 502, 520–21, 935 A.2d 126 (2007).

In determining whether a person has a reasonable expectation of privacy in an invaded place or seized effect, "a two-part subjective/objective test must be satisfied: (1) whether the [person contesting the search] manifested a subjective expectation of privacy with respect to [the invaded premises or seized property]; and (2) whether that expectation [is] one that society would consider reasonable. . . . This determination is made on a case-by-case basis. . . . Whether a defendant's actual expectation of privacy . . . is one that society is prepared to recognize as reasonable involves a fact-specific inquiry into all the relevant circumstances. . . . The burden of proving the existence of a reasonable expectation of privacy rests on the defendant." (Citation omitted; internal quotation marks omitted.) *State* v. *Boyd*, supra, 295 Conn. 718.

This court previously has held that, "[w]here the presence of the police is lawful and [the defendant has left

property] in a public place where the defendant cannot reasonably have any continued expectancy of privacy in the discarded property, the property will be deemed abandoned for purposes of search and seizure." (Internal quotation marks omitted.) *State* v. *Oquendo*, 223 Conn. 635, 658, 613 A.2d 1300 (1992). "The fourth amendment's protections . . . do not extend to abandoned property." (Internal quotation marks omitted.) *United States* v. *Lee*, 916 F.2d 814, 818 (2d Cir. 1990).

Although courts occasionally have "used the term abandonment in its common law sense of a voluntary and intentional renunciation of ownership . . . it is clear that the proper test for abandonment in the search and seizure context is distinct from the property law notion of abandonment: it is possible for a person to retain a property interest in an item, but nonetheless to relinquish his or her reasonable expectation of privacy in the object." (Citation omitted; internal quotation marks omitted.) *State* v. *Mooney*, 218 Conn. 85, 106–107, 588 A.2d 145, cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991). Accordingly, "[a]lthough whether a reasonable person would view property to have been abandoned may be relevant to whether the owner or possessor had abandoned his expectation of privacy therein, that is not the end of the inquiry for fourth amendment purposes. The test is whether, under all the facts, the owner or possessor may fairly be deemed as a matter of law to have relinquished his expectation of privacy in the object [or area] in question . . . ." Id., 108. Abandonment may be found when the specific facts and circumstances of the case show an "element of conduct manifesting [an] intent to relinquish an expectation of privacy in the [item or area searched]." Id., 109.

A

With these basic principles in mind, we first address whether the defendant had a reasonable expectation

of privacy in the hotel room and the personal effects that he kept there and, if so, whether the search of that room, the seizure of his clothing and the transfer of the clothing from the New York City police to the New Haven police fall within any exception to the constitutional requirement for a search warrant.[10] A person who has rented a hotel room generally has a reasonable expectation of privacy in that location. *State* v. *Benton*, 206 Conn. 90, 95, 536 A.2d 572, cert. denied, 486 U.S. 1056, 108 S. Ct. 2823, 100 L. Ed. 2d 924 (1988). A person who leaves a hotel room without any intent to return to it, however, has relinquished any such expectation of privacy. *United States* v. *Gulma*, 563 F.2d 386, 389–90 (9th Cir. 1977) (when defendant relinquished key to motel room to confederate and had no intent to return to room, defendant had no reasonable expectation of privacy in room); *United States* v. *James*, United States District Court, Docket No. CR-06-0265 (D. Minn. January 3, 2007) (when defendant fled hotel room with no intent to return, room was abandoned for fourth amendment purposes even though defendant had reserved room through next day); *People* v. *Parson*, 44 Cal. 4th 332, 345, 187 P.3d 1, 79 Cal. Rptr. 3d 269 (2008) ("when a day-to-day room guest of a hotel or motel departs without any intention of occupying the room any longer and without making any arrangement for payment of his bill, an inference arises that he has abandoned his

[10] The defendant makes no claim that New York state constitutional law is different than federal constitutional law in this context. Accordingly, in determining whether the conduct of the New York police was constitutional, we apply federal fourth amendment principles.

The defendant appears to concede twice in his brief to this court that the New York City police were entitled to seize the clothing from his hotel room for safekeeping pursuant to their community caretaking function. He also argues, however, that he did not abandon the hotel room and that the emergency exception to the constitutional requirement for a warrant did not justify the police officers' entry into the room. Accordingly, it is necessary for us to explain why the police were entitled to enter the defendant's hotel room before seizing the items.

tenancy" [internal quotation marks omitted]), cert. denied, 556 U.S. 1185, 129 S. Ct. 1984, 173 L. Ed. 2d 1090 (2009); *Commonwealth* v. *Paszko*, 391 Mass. 164, 185, 461 N.E.2d 222 (1984) (when evidence supported inference that, at time of search, defendant had no intent to return to motel room, defendant had abandoned expectation of privacy in room even though rental period had not expired).

In the present case, the defendant manifested an intent never to return to his hotel room when he jumped out of the hotel window in an attempt to kill himself. Moreover, there is no reason to believe that, when he fortuitously survived the fall, his intent to return to the room was somehow revived. Indeed, within one day after jumping out of the window, the defendant was conscious and capable of having a sustained, intelligent conversation with the police, and he expressed no interest at that time, or, as far as the record shows, at any later time, either in returning to the hotel room, in regaining possession of the items that he had left there or in arranging for another person to retrieve the items for him. Accordingly, we conclude that the defendant had no reasonable expectation of privacy in the hotel room or in the personal effects that he had left there after jumping out of the window.

Moreover, even if the defendant had not manifested a subjective intent to abandon the hotel room when he left it by way of the window, we conclude that the trial court properly found that the police officers' initial entry into the hotel room was justified under the emergency exception to the warrant requirement. This exception "allows police to enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury." (Internal quotation marks omitted.) *State* v. *Fausel*, 295 Conn. 785, 794, 993 A.2d 455 (2010). Under this exception, "the

state actors making the search must have reason to believe that life or limb is in immediate jeopardy and that the intrusion is reasonably necessary to alleviate the threat. . . . The police, in order to avail themselves of this exception, must have valid reasons for the belief that an emergency exists, a belief that must be grounded in empirical facts rather than subjective feelings . . . . It is an objective and not a subjective test. The test is not whether the officers actually believed that an emergency existed, but whether a reasonable officer would have believed that such an emergency existed." (Internal quotation marks omitted.) Id., 795. "The state bears the burden of demonstrating that a warrantless entry falls within the emergency exception." (Internal quotation marks omitted.) Id.

We conclude that, upon learning that the defendant had fallen from the hotel window, the New York City police officers reasonably could have believed that there might be other persons in the hotel room who were injured or who needed assistance. See id., 802 (rejecting argument that "[a] mere concern that someone *might* be inside and *might* be in need of immediate assistance does not warrant police intrusion into a private dwelling under the emergency doctrine" as inconsistent with objectively reasonable standard [emphasis in original; internal quotation marks omitted]). The police had no way of knowing whether the defendant had jumped, had been pushed or had fallen out of the window and, if he had been pushed or fallen, whether other persons were still in the room or whether they were injured.[11] They also could not know whether there

[11] Cf. *Mincey* v. *Arizona*, 437 U.S. 385, 392, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) ("when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises"); see also *State* v. *Fausel*, supra, 295 Conn. 800 (emergency exception "must be applied by reference to the circumstances then confronting the officer, including the need for a prompt assessment of sometimes ambiguous information concerning potentially serious consequences" [internal quotation marks omitted]); 3 W. LaFave,

were others in the hotel room, such as small children, who would be helpless in the defendant's absence and might require their assistance. Under these circumstances, the police officers reasonably could have believed that an emergency might exist and that they would be derelict in their duty if they failed to enter the room to ensure that it was unoccupied. See id., 800 ("[a]s one court usefully put it, the question is whether the officers would have been derelict in their duty had they acted otherwise" [internal quotation marks omitted]).

Thus, the police were entitled to enter the hotel room under either the abandonment doctrine or the emergency exception to the warrant requirement. In either case, they reasonably could have believed upon learning that the hotel room was unoccupied that the defendant intended to relinquish his possession and any expectation of privacy in both the room and the personal effects that he had left there. Although, as the defendant claims, he may have retained an ownership interest in his belongings, he relinquished any reasonable expectation that they would be protected from observation and possession by others when he left the hotel room with no intent to return. *State* v. *Mooney*, supra, 218 Conn. 107 ("it is possible for a person to retain a property interest in an item, but nonetheless to relinquish his or her reasonable expectation of privacy in the object" [internal quotation marks omitted]). We therefore conclude that the New York City police were not required to obtain a search warrant before seizing the defendant's clothing for safekeeping pursuant to their community caretaking function. See *United States* v. *O'Bryant*, 775

Search and Seizure (4th Ed. 2004) § 6.6 (a), p. 457 ("[i]f the police learn that there has been a shooting at a particular place and that one victim has been taken to the hospital seriously wounded, the possibility that others may have been injured and may have been abandoned on the premises provides a sufficient basis for an immediate entry to render aid to anyone in distress" [internal quotation marks omitted]).

F.2d 1528, 1534 (11th Cir. 1985) (police officer may reasonably seize, inspect and inventory abandoned property to deter false claims of loss made against police departments and to safeguard against theft or careless handling of property); cf. *State* v. *Joyce*, 229 Conn. 10, 14, 639 A.2d 1007 (1994) (before severely injured defendant was suspected of any crime, police seized his clothing for safekeeping pursuant to community caretaking function, and parties did not dispute constitutionality of seizure), on appeal after remand, 243 Conn. 282, 705 A.2d 181 (1997), cert. denied, 523 U.S. 1077, 118 S. Ct. 1523, 140 L. Ed. 2d 674 (1998).

We next consider the constitutionality of the transfer of the defendant's clothing from the New York City police to the New Haven police. Numerous courts have held that, when property has been lawfully seized by the police for safekeeping, a subsequent seizure and inspection of the seized property by a different state actor for a different purpose does not trigger fourth amendment protections, at least when the subsequent seizure does not involve a greater intrusion into the defendant's privacy interests than the initial one.[12]

[12] See *United States* v. *Turner*, 28 F.3d 981, 983 (9th Cir. 1994) (when property has been lawfully seized and searched, subsequent warrantless search of property by different state actor does not violate fourth amendment), cert. denied, 513 U.S. 1158, 115 S. Ct. 1117, 130 L. Ed. 2d 1081 (1995); *United States* v. *Thompson*, 837 F.2d 673, 676 (5th Cir.) (when state police lawfully seized defendant's property for inventory search pursuant to arrest, defendant had no reasonable expectation of privacy in property and subsequent seizure by federal agent did not require warrant), cert. denied, 488 U.S. 832, 109 S. Ct. 89, 102 L. Ed. 2d 65 (1988); *United States* v. *Gargotto*, 476 F.2d 1009, 1014 (6th Cir. 1973) ("[e]vidence legally obtained by one police agency may be made available to other such agencies without a warrant, even for a use different from that for which it was originally taken"); *Addleman* v. *King County*, United States District Court, Docket No. CV-05-0709-JCC (W.D. Wn. May 14, 2007) ("[o]nce evidence has been validly seized, it is not a violation of the [f]ourth [a]mendment for one police agency to transfer legally seized evidence to another police agency"); *Wallace* v. *State*, 373 Md. 69, 93, 816 A.2d 883 (2003) (when defendant's belongings were taken from him after arrest for purpose of being inventoried and stored in police property room for safekeeping, subsequent warrantless inspection

Although many of these cases involve property that was initially seized by the police for inventorying after the defendant had been arrested and incarcerated, we can perceive no reason why a different result should be required when the owner of the property is suspected of no crime at the time of the initial seizure. In both situations, the initial seizure is pursuant to the community caretaking function of the police, not their investigatory function. See, e.g., *State* v. *Gasparro*, 194 Conn. 96, 107–108, 480 A.2d 509 (1984) ("In the performance of their community caretaking functions, the police are frequently obliged to take automobiles into their custody. . . . A standardized procedure for making a list or inventory as soon as reasonable after reaching the

of belongings by different police officer in connection with investigation of second crime did not violate fourth amendment); *State* v. *Motley*, 153 N.C. App. 701, 707, 571 S.E.2d 269 (2002) (transfer of seized property from one law enforcement agency to another does not constitute search or seizure subject to constitutional scrutiny because defendant no longer possesses reasonable expectation of privacy in property once it is lawfully seized); *Oles* v. *State*, 993 S.W.2d 103, 110 (Tex. Crim. App. 1999) (defendant lacks reasonable expectation of privacy in items that have been lawfully seized by police); *Williams* v. *Commonwealth*, 259 Va. 377, 386, 527 S.E.2d 131 (2000) (citing cases and stating that "when a person . . . has been lawfully arrested and his property has been lawfully seized by law enforcement personnel pursuant to that arrest, the arrestee has no reasonable expectation of privacy in that property, and later examination of the property by another law enforcement official does not violate the [f]ourth [a]mendment"); *State* v. *Cheatam*, 150 Wn. 2d 626, 642, 81 P.3d 830 (2003) ("Once police have conducted a valid inventory search of an inmate's clothing and other effects at booking, and have placed them in storage for safekeeping in accord with a proper inventory procedure, the inmate has lost any privacy interest in those items that have already lawfully been exposed to police view. He or she is no longer entitled to hold a privacy interest in the already searched items free from further governmental searches. It makes no difference . . . that an investigation is being conducted into a different crime than the one the inmate was arrested for, because one's privacy interest does not change depending on which crime is under investigation once lawful exposure has already occurred."); cf. *Hell's Angels Motorcycle Corp.* v. *Monterey*, 89 F. Sup. 2d 1144, 1150 (N.D. Cal. 2000) (principle that defendant loses reasonable expectation of privacy in items that have been seized by police pursuant to warrant does not apply when subsequent search involves more extensive search of seized items).

stationhouse not only deters false claims but also inhibits theft or careless handling of articles taken from the arrested person." [Citations omitted; internal quotation marks omitted.]), cert. denied, 474 U.S. 828, 106 S. Ct. 90, 88 L. Ed. 2d 74 (1985). Accordingly, having concluded that the defendant's belongings were lawfully seized by the New York City police pursuant to their community caretaking function, we further conclude that the mere transfer of the items to the New Haven police without a search warrant did not violate the defendant's fourth amendment rights. Although the New Haven police were acting pursuant to their investigatory function, the transfer involved no additional intrusion into the defendant's privacy. It is also clear that the subsequent forensic testing of the defendant's belt did not violate the fourth amendment because the testing was performed pursuant to a search warrant. Accordingly, we conclude that the trial court properly denied the defendant's motion to suppress the evidence derived from the belt seized from his hotel room.

The defendant suggests, however, that this conclusion is inconsistent with this court's decision in *State* v. *Joyce*, supra, 229 Conn. 10. In that case, emergency medical personnel responding to a report of an explosion found the defendant standing in a nearby river. Id., 12. He had severe burn injuries and his clothes were burned and smoldering. Id. An emergency medical technician cut off the defendant's clothes in order to treat him and left the clothes by the side of the road. Id., 12–13. Local police then took possession of the clothes and brought them to the police station for safekeeping. Id., 14. The next day, after the defendant had become a criminal suspect in the explosion, the police gave the clothing to the fire marshal for forensic testing, which revealed the presence of gasoline. Id., 14–15. This court concluded that the testing of the defendant's

clothing without a search warrant violated article first, § 7, of the constitution of Connecticut. Id., 27.

To the extent that the defendant contends that *Joyce* stands for the principle that, under our state constitution, the police cannot seize abandoned property for safekeeping pursuant to their community caretaking function and then transfer the property to another state actor for use as evidence in a criminal investigation, we disagree because we conclude that this reading of *Joyce* is overly broad.[13] In *Joyce*, this court assumed that the police lawfully had seized the defendant's clothing for safekeeping. Id., 14 (trial court's finding that police had taken lawful custody of defendant's clothing pursuant to their community caretaking function was not challenged by either party on appeal). This court then concluded that, because the forensic testing of the clothing after it had been transferred to the fire marshal constituted a more intrusive search than the police initially had conducted, and no exigent circumstances or any other recognized exception to the warrant requirement existed, the additional invasion of the defendant's privacy constituted a new search subject to the constitutional requirements of probable cause and a warrant. Id., 27. In contrast, in the present case, the mere transfer of the defendant's lawfully seized clothes from the New York City police to the New Haven police did not result in any greater intrusion into the defendant's privacy than had occurred during the initial lawful seizure, and the New Haven police obtained a search warrant before they subjected the clothes to forensic testing. Accordingly, we conclude that *Joyce* is not applicable here.

[13] Although *Joyce* was decided pursuant to our state constitution and, therefore, would not necessarily apply to the conduct of the New York police, *Joyce* does apply to the conduct of the New Haven police after they received the defendant's clothing from the New York police.

B

We next consider whether the trial court properly denied the defendant's motion to suppress the evidence derived from the socks seized by Mazzola from the rooftop the day after the defendant had jumped out of the hotel window. The defendant contends that, contrary to the trial court's conclusion, clothing that has been removed by medical personnel for purposes of treatment cannot be deemed abandoned. The defendant presented no evidence at the suppression hearing, however, that medical personnel had removed his socks; see footnote 7 of this opinion; and made no claim that, even if the police otherwise reasonably could have believed that the defendant had abandoned the socks, the fact that they had been removed by medical personnel rendered the abandonment doctrine inapplicable. Although this claim is unpreserved, the defendant has asked this court to review any unpreserved claims pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[14] Because the record is adequate for review[15] and the claim is of constitutional magnitude,

[14] Under *State* v. *Golding*, supra, 213 Conn. 239–40, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original.)

[15] The evidence presented at the suppression hearing established that the defendant jumped out of the hotel window, that he landed on the rooftop three stories below, that he was severely injured and was treated by medical personnel on the rooftop, that he was admitted to the hospital for further treatment of his injuries, and that the socks were found in the area where he fell. Even if the record is inadequate to determine that the defendant's socks were removed by medical personnel and not by the defendant or by the force of the fall, it is reasonable to infer that the defendant left the socks on the rooftop because he required medical treatment at a hospital and he could not have personally retrieved the socks from the rooftop even

we conclude that it is reviewable. We further conclude that the claim fails under the third prong of *Golding* because there was no clear constitutional violation.

We begin our analysis by reiterating the general principle that "[w]here the presence of the police is lawful and [the property has been left] in a public place where the defendant cannot reasonably have any continued expectancy of privacy in the discarded property, the property will be deemed abandoned for purposes of search and seizure." (Internal quotation marks omitted.) *State* v. *Oquendo*, supra, 223 Conn. 658. In the present case, the presence of the New Haven police in the hotel room, from which Mazzola spotted the socks on the rooftop below, did not violate the fourth amendment because, as we have concluded, the defendant had abandoned the hotel room.[16] In addition, the rooftop

if he had wanted to because of his injuries. These facts and circumstances are close enough to the facts and circumstances of cases involving the removal of clothing by medical personnel; see, e.g., *State* v. *Joyce*, supra, 229 Conn. 12–13; to permit meaningful review of the defendant's claim by this court.

[16] The defendant claims that the presence of the New Haven police was illegal because they were not authorized to search a location or seize property in New York. Because this claim was not raised at trial, we review it pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40. Although it may be true that the New Haven police had no statutory authority to search a location in New York; see *State* v. *Miller*, 227 Conn. 363, 370–72 and n.11, 630 A.2d 1315 (1993) (local police have statutory authority to obtain search warrant only for location within their territorial jurisdiction); this court has rejected the argument that the constitutional "prohibition [on] unreasonable seizures encompasses the legislature's territorial restrictions on police conduct." Id., 375; see also 1 W. LaFave, Search and Seizure (4th Ed. 2004) § 1.5 (b), pp. 163–64 (violation of statute requiring that warrant must be executed by officer who is within territorial jurisdiction does not violate fourth amendment). The defendant has provided no authority, and we have found none, for the proposition that a different result is required when the police conduct occurred not just in a different town, as in *Miller*, but in a different state. More fundamentally, we conclude in the present case that the taking of the socks did not constitute a seizure for fourth amendment purposes because they were abandoned, and the defendant has provided no authority for the proposition that Connecticut police are not authorized to travel to another state to investigate a crime or to take possession of

was a public place, open to the view of anyone who happened to look out a window of the hotel, and it was accessible at least to hotel personnel. Moreover, the defendant's socks had been left there for approximately twenty-one hours before Mazzola seized them, and the defendant expressed no interest when Johnson interviewed him in the hospital, or, as far as the record shows, at any later time, in regaining possession of the socks. Accordingly, we conclude that the socks were abandoned and therefore, unless the defendant can establish that some exception to the abandonment doctrine applied, their seizure did not implicate the fourth amendment.

In support of his claim that the abandonment doctrine does not apply to items of clothing that have been removed for purposes of emergency medical treatment, the defendant again relies on *State* v. *Joyce*, supra, 229 Conn. 10. In *Joyce*, this court concluded that the defendant had not manifested any intent to relinquish his expectation of privacy in the burned clothing that had been removed by medical personnel and left at the side of the road because "he merely left [it] behind him, more or less of necessity, making no attempt, however, to discard it or disassociate it from himself." (Internal quotation marks omitted.) Id., 21, quoting *State* v. *Philbrick*, 436 A.2d 844, 855 (Me. 1981), on remand, 481 A.2d 488 (Me. 1984); see also *State* v. *Joyce*, supra, 22 n.13 ("the record in the present case discloses no conduct by the defendant manifesting an intent to relin-

abandoned property in a foreign jurisdiction. Even if we were to assume, however, that the police had no statutory authority to take possession of the defendant's socks under the specific circumstances of this case, we conclude that conduct by a local Connecticut police department that would be constitutional if it occurred in this state does not violate the fourth amendment merely because it occurred in another state. The fourth amendment to the United States constitution and its analog in our state constitution are intended to protect the privacy of individuals, not to guard against jurisdictional incursions.

quish his expectation of privacy in his clothing''). We acknowledge that this language suggests that this court concluded in *Joyce* that the defendant had not abandoned his clothing. As we have indicated, however, this court assumed in *Joyce* that the police lawfully had seized the defendant's clothes for safekeeping. *State* v. *Joyce*, supra, 14. Indeed, on a later appeal to this court after our remand in *Joyce*, this court explicitly rejected the defendant's claim that we had determined in the earlier appeal that taking possession of the defendant's clothing constituted an illegal seizure. *State* v. *Joyce*, 243 Conn. 282, 293, 705 A.2d 181 (1997), cert. denied, 523 U.S. 1077, 118 S. Ct. 1523, 140 L. Ed. 2d 674 (1998). Rather, "[t]he plain language of our decision in *Joyce* was limited to the determination of whether the chemical analysis constituted an illegal search.'' Id. It is clear, therefore, that this court believed that, for fourth amendment purposes, the defendant *had* relinquished his possessory interest in the clothing itself and his expectation of privacy in its outer physical appearance—in other words, that he had abandoned it.[17] Otherwise, there would have been no justification for its seizure without a warrant. We conclude, therefore, that *Joyce* merely stands for the proposition that, when the police have lawfully seized for safekeeping an item that the owner has left in the open, not by choice but by necessity, and the police know who the owner is, the owner of the item has not relinquished any expectation that the item's *hidden* information will remain private.[18]

[17] Because *State* v. *Joyce*, supra, 229 Conn. 10, was internally inconsistent to the extent that it assumed both that the defendant's clothing had been lawfully seized and that the defendant had not abandoned *any* expectation of privacy in the clothing, we hereby explicitly disavow our statement in that case that "the record . . . discloses no conduct by the defendant manifesting an intent to relinquish his expectation of privacy in his clothing . . . ." Id., 22 n.13. It would have been more precise for this court to state that the defendant did not relinquish *all* of his expectations of privacy in the clothing when he was forced to leave it by the side of the road.

[18] This court in *Joyce* apparently analogized the invisible information in the defendant's clothing that could be obtained only from forensic testing

Compare *Holt* v. *United States*, 675 A.2d 474, 478–79 (D.C. 1996) (when police seized clothes that had been removed from defendant by medical personnel so that they could treat gunshot wound, trial court properly denied motion to suppress because defendant had no expectation of privacy in outer appearance of clothes), cert. denied, 519 U.S. 866, 117 S. Ct. 176, 136 L. Ed. 2d 117 (1996), with *State* v. *Batiste*, 445 So. 2d 1323, 1324 (La. App. 1984) (when police seized envelopes that fell from defendant's jacket in hospital emergency room where he was in semiconscious state and was being treated for gunshot wound, trial court improperly denied motion to suppress contents of envelopes because "envelopes were not transparent and were sealed [and] there was nothing to immediately indicate to the officer that the envelopes might contain marijuana").[19]

In the present case, because the defendant's socks were left for the better part of a day in a place that was open to the public, we conclude that the defendant had relinquished any reasonable expectation of privacy in the outer appearance of the socks and his possessory

to the contents of a closed container, and concluded that the defendant had not abandoned his privacy interest *in that information* by leaving the clothing by the side of the road. See, e.g., *State* v. *Mooney*, supra, 218 Conn. 111–12 (when police had lawfully seized duffel bag, defendant was unable to reassert possessory rights in duffel bag because he was in police custody, and police knew that defendant owned duffel bag, defendant still retained expectation of privacy in *contents* of duffel bag).

[19] The defendant also relies on *United States* v. *Neely*, 345 F.3d 366, 370 (5th Cir. 2003) (defendant did not forfeit possessory interest in his clothing by entering hospital), and *People* v. *Tyler*, 210 Ill. App. 3d 833, 839, 569 N.E.2d 240 (1991) (defendant had reasonable expectation of privacy in clothing placed in basket under defendant's gurney at hospital). Even if we were to assume, however, that a person generally does not relinquish his or her reasonable expectation of privacy or possessory interest in personal effects by entering a hospital, it does not follow from this principle that a person retains a reasonable expectation of privacy or possessory interest in personal effects that the person has left in the open before seeking treatment in a hospital.

interest in them. Moreover, the police were lawfully present and we have concluded that no exception to the abandonment doctrine applies. We conclude, therefore, that the mere seizure of the socks did not implicate the fourth amendment. In addition, as with the testing of the defendant's belt, we conclude that the subsequent forensic testing of the socks did not violate the fourth amendment because the police obtained a search warrant for the testing. We therefore conclude that the trial court properly denied the defendant's motion to suppress the evidence derived from the socks.

II

We next address the defendant's claim that the trial court improperly denied his motion to preclude certain DNA evidence that the state had produced in an untimely manner in violation of General Statutes § 54-86k[20] and ordered a continuance of the trial, sua sponte. We disagree.

The following undisputed facts and procedural history are relevant to our resolution of this claim. At some point in 2006, the state sent the defendant's belt and socks to the state forensic laboratory (laboratory) for DNA testing. For unknown reasons, the laboratory did not test the items at that time. On October 10, 2007, during jury selection, the state realized that the labora-

[20] General Statutes § 54-86k provides in relevant part: "(a) In any criminal proceedings, DNA (deoxyribonucleic acid) testing shall be deemed to be a reliable scientific technique and the evidence of a DNA profile comparison may be admitted to prove or disprove the identify of any person. . . .

"(c) At least twenty-one days prior to commencement of the proceeding in which the results of a DNA analysis will be offered as evidence, the party intending to offer the evidence shall notify the opposing party, in writing, of the intent to offer the analysis and shall provide or make available copies of the profiles and the report or statement to be introduced. In the event that such notice is not given, and the person proffers such evidence, then the court may in its discretion either allow the opposing party a continuance or, under the appropriate circumstances, bar the person from presenting such evidence. . . ."

tory had not tested the items and the state resubmitted them for testing. On October 30, 2007, after the jury had been empanelled and six days before trial was scheduled to start, the state received the results of the DNA testing, which revealed the presence of the victim's DNA on both items. The state immediately gave the testing report to the defendant. The defendant then filed a motion to preclude the report as untimely under § 54-86k, which requires that DNA test results be disclosed at least twenty-one days before trial.

On November 5, 2007, the trial court conducted a hearing on the defendant's motion to preclude at which the defendant argued that the evidence should be precluded because of the late disclosure, regardless of the reason for the delay. The defendant also argued that he would need at least four weeks to obtain independent testing of the evidence. The state acknowledged that it may have lacked diligence in following up on the DNA testing,[21] but argued that there had been no bad faith or intent to conceal the evidence. The state agreed that the court should grant a continuance so that the defendant could perform independent tests of the evidence, but argued that, in the absence of any showing of bad faith, the evidence should not be precluded.

The trial court concluded that there was no bad faith or intent to conceal the evidence on the part of the state and denied the defendant's motion to preclude the evidence. The court also concluded that any prejudice to the defendant could be avoided if he was provided with additional time to obtain independent testing of the evidence and to prepare a new trial strategy and, therefore, ordered a continuance of the trial without

[21] The state's attorney stated, "I don't excuse myself from being more diligent, but we were under the impression that [the evidence] was going to be tested over a year ago, it wasn't, and I suppose it was our responsibility to be aware of that, but when we became aware of it fairly recently we sent it up again."

specifying a new trial date. The trial ultimately began on December 10, 2007, forty-one days after the defendant received the DNA report from the state. The defendant claims on appeal that the trial court improperly denied his motion to preclude the evidence when the state had failed to establish good cause for the late disclosure.

Whether to grant a motion to preclude evidence that was untimely disclosed is a matter within the discretion of the trial court. *Viera* v. *Cohen*, 283 Conn. 412, 457, 927 A.2d 843 (2007); see also *Berry* v. *Loiseau*, 223 Conn. 786, 800, 614 A.2d 414 (1992) ("[a] trial court's decision on whether to impose the sanction of excluding the testimony of a party's expert witness rests within the court's sound discretion" [internal quotation marks omitted]). "The action of the trial court is not to be disturbed unless it has abused its broad discretion, and in determining whether there has been such abuse every reasonable presumption should be made in favor of its correctness." (Internal quotation marks omitted.) *Berry* v. *Loiseau*, supra, 800.

We conclude in the present case that the trial court did not abuse its discretion when it denied the defendant's motion to preclude the DNA testing results produced by the state shortly before trial was scheduled to begin. In essence, the defendant requests that we presume bad faith whenever the state has failed to comply with the timing requirements of § 54-86k, and that we require preclusion of untimely disclosed DNA evidence regardless of whether the defendant has suffered any prejudice.[22] By its express terms, however,

[22] The defendant contends in his brief to this court that he was prejudiced because he "had picked a jury and prepared his case without knowing about this evidence. . . . Thirty days might be a lengthy continuance, but it is a short space of time in which to rethink and rework a defense case in a murder trial." The defendant ignores the fact, however, that the state was not required to produce the evidence until twenty-one days before trial pursuant § 54-86k. In determining whether the defendant was prejudiced by the untimely disclosure, we must compare what actually happened with what should have happened. In fact, the trial did not start until forty-one

§ 54-86k permits the trial court to order a continuance if the state has failed to comply with the timing requirements of the statute, unless "appropriate circumstances" justify barring the evidence.[23] In general, the trial court should avoid a drastic remedy if a less severe remedy is sufficient to obviate any prejudice. See, e.g., *State* v. *Ortiz*, 280 Conn. 686, 702, 911 A.2d 1055 (2006) ("[i]f curative action can obviate the prejudice, the drastic remedy of a mistrial should be avoided" [internal quotation marks omitted]). Because the defendant in the present case established neither that there were exceptional circumstances requiring preclusion nor that he would be prejudiced by the late disclosure even if the trial court granted a continuance, we conclude that the trial court properly denied his motion to preclude the DNA evidence.[24]

III

We next address the defendant's claim that the trial court improperly denied his motion to suppress the

days after the state disclosed the DNA evidence. Because this was a longer period than required by statute, we fail to see how the defendant could have been prejudiced by the state's failure to comply with the statute. To the extent that the defendant claims that he should have been allowed to pick an entirely new jury after the state disclosed the new evidence, any such claim was not preserved for review, and the defendant does not seek review of that claim under *Golding*.

[23] We decline the defendant's invitation to exercise our supervisory powers to adopt a rule requiring the preclusion of DNA evidence whenever the state has negligently failed to disclose the evidence in a timely manner. "[O]ur supervisory powers are invoked only in the rare circumstance [in which the] traditional protections are inadequate to ensure the fair and just administration of the courts . . . ." (Internal quotation marks omitted.) *Smith* v. *Andrews*, 289 Conn. 61, 79, 959 A.2d 597 (2008). Although preclusion of the evidence may be appropriate as a punitive sanction if the state withholds DNA evidence in bad faith, the granting of a continuance ordinarily will be an adequate remedy when the nondisclosure was unintentional.

[24] On appeal, the defendant has pointed to no evidence that, even if the trial court reasonably could have believed that he would suffer no prejudice as a result of the late disclosure if the court granted a continuance, he was in fact prejudiced for reasons that the court could not have foreseen. The only prejudice that he points to is the delay of the trial itself. If that were

statements that he made to the New Haven police at St. Vincent's Hospital in New York City. We disagree.

The following facts that the trial court reasonably could have found are relevant to our resolution of this claim. As we already have indicated, at some point during the evening of July 22, 2004, approximately twenty-four hours after the defendant had jumped out of the hotel window, the New Haven police officers went to St. Vincent's Hospital, where the defendant was being treated, to interview him. The defendant was in a surgical care unit. A New York City police officer was present in the hospital room because the defendant had attempted suicide and they did not know his identity. Before entering the hospital room, Detective Johnson of the New Haven police department spoke to a nurse who told him that the defendant was receiving pain medication, but he was "up" and was able to talk. Upon entering the room, Johnson noticed that the defendant had leg injuries, that he had bandages on his head and on one of his hands, and that he was receiving intravenous pain medication.[25] Johnson asked the New York City police officer to leave the room. He then asked the defendant if he knew why he was in the hospital, and the defendant responded that he wanted to die and had nothing to live for. When Johnson asked the defendant his name, the defendant said that it was Shawn Stokes. Johnson told the defendant that he did not believe him. During this discussion, the defendant did not indicate that he did not want to speak with Johnson, and Johnson never told that defendant that he was under arrest.

After approximately thirty minutes, the defendant admitted his identity, at which point Johnson read him

sufficient harm to warrant reversal, however, the granting of a continuance would never be an appropriate remedy.

[25] Johnson did not testify as to the nature of the injuries to the defendant's legs and arm at the suppression hearing. He did testify, however, at trial that the defendant had broken his legs and one of his arms.

a standard *Miranda*[26] waiver. The defendant declined to sign the waiver, but indicated that he was willing to talk to Johnson and asked why he was under arrest. Johnson told the defendant that he was not under arrest, and then asked him if he knew what had happened to the victim. When the defendant said that he did not know, Johnson told him that she had been murdered. The defendant showed no emotion, but just looked up at Johnson and said, "[S]he was murdered?" Johnson then asked the defendant when he had last seen the victim, and the defendant said that he had been at the victim's apartment on Sunday, July 18, 2004. The entire interview lasted approximately one hour. Johnson testified that, during the interview, the defendant "was clear and he understood everything that [Johnson] was saying."

Before trial, the defendant filed a motion to suppress the statements that he made to Johnson while he was in the hospital on the grounds that he had been interrogated without being advised of his constitutional right to remain silent and that any waiver of that right and subsequent statements made during the course of the interrogation were neither voluntary nor intelligent because of his serious injuries and the pain medication that he was receiving. The trial court conducted an evidentiary hearing on the motion to suppress and ultimately denied it. Thereafter, Johnson testified about his interview of the defendant while he was in the hospital.

After this appeal was filed, the defendant filed a motion for articulation of the reasons for the denial of his motion to suppress, which the trial court granted. In the articulation, the trial court found that the defendant was not in custody when he made the statements because "[t]he only restraints placed upon him at the

[26] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

time of the interview were those attendant to medical treatment occasioned by the defendant's suicide attempt." The court further found that the only statement that the defendant made before waiving his rights was giving his name, which was not an incriminatory statement, and his *Miranda* waiver was knowing and intelligent. On appeal, the defendant claims that the trial court improperly denied his motion to suppress Johnson's testimony regarding his statements on the ground that the statements were not the product of a custodial interrogation and were voluntary.

We first consider whether the trial court properly found that the defendant was not in custody. "Two threshold conditions must be satisfied in order to invoke the warnings constitutionally required by *Miranda*: (1) the defendant must have been in custody; and (2) the defendant must have been subjected to police interrogation. . . . [A]lthough the circumstances of each case must certainly influence a determination of whether a suspect is in custody for purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. . . . Further, the United States Supreme Court has adopted an objective, reasonable person test for determining whether a defendant is in custody. . . . Thus, in determining whether *Miranda* rights are required, the only relevant inquiry is whether a reasonable person in the defendant's position would believe that he or she was in police custody of the degree associated with a formal arrest. . . .

"Furthermore, we note that [n]o definitive list of factors governs a determination of whether a reasonable person in the defendant's position would have believed that he or she was in custody. Because, however, the *Miranda* court expressed concern with protecting defendants against interrogations that take place in a

police-dominated atmosphere containing inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely . . . circumstances relating to those kinds of concerns are highly relevant on the custody issue. . . .

"The defendant bears the burden of proving custodial interrogation. . . . The trial court's determination of the historical circumstances surrounding the defendant's interrogation are findings of fact . . . which will not be overturned unless they are clearly erroneous. . . . In order to determine the [factual] issue of custody, however, we will conduct a scrupulous examination of the record . . . in order to ascertain whether, in light of the totality of circumstances, the trial court's finding is supported by substantial evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *Atkinson*, 235 Conn. 748, 757–59, 670 A.2d 276 (1996). The ultimate inquiry as to whether, in light of these factual circumstances, "a reasonable person in the defendant's position would believe that he or she was in police custody of the degree associated with a formal arrest"; id., 758; "calls for application of the controlling legal standard to the historical facts [and] . . . therefore, presents a . . . question of law . . . over which our review is de novo." *State* v. *Kirby*, 280 Conn. 361, 394, 908 A.2d 506 (2006).

When a defendant has been questioned by the police in a hospital, factors that this court has considered in determining whether the defendant was in custody for *Miranda* purposes include whether the police "physically restrained the defendant in any way or ordered the medical attendants to restrain him physically"; *State* v. *DesLaurier*, 230 Conn. 572, 579, 646 A.2d 108 (1994); whether the police "took advantage of an inherently coercive situation created by any physical restraint that the medical attendants may have asserted against him

for purposes of his treatment"; id.; whether the defendant was able "to converse with . . . other people, express annoyance or request assistance from them"; id., 581; and the duration of the questioning. Id. Other factors that courts have considered include whether "the police took a criminal suspect to the hospital from the scene of a crime, monitored the patient's stay, stationed themselves outside the door, [or] arranged an extended treatment schedule with the doctors"; *United States* v. *Martin*, 781 F.2d 671, 673 (9th Cir. 1985); and the time of day, the "mood and mode" of the questioning, whether there were indicia of formal arrest, and the defendant's age, intelligence and mental makeup. *People* v. *Vasquez*, 393 Ill. App. 3d 185, 192, 913 N.E.2d 60 (2009).

In the present case, the defendant was immobilized for medical treatment, not for purposes of interrogation; there was no evidence that the defendant could not have asked the police to leave the hospital room or asked hospital personnel to assist him to terminate the questioning; *State* v. *DesLaurier*, supra, 230 Conn. 581 (suspect's ability "to converse with . . . other people, express annoyance or request assistance from them" supports finding that suspect was not in custody); the police did not arrange for any restraints on or extended treatment of the defendant by medical personnel; id., 579; the questioning was neither prolonged nor aggressive; see *People* v. *Vasquez*, supra, 393 Ill. App. 3d 192 (questioning for thirty-five minutes in hospital "is not atypical of noncustodial interviews"); and Johnson told the defendant that he was not under arrest. Although the New York City police accompanied the defendant to the hospital and remained with him there until Johnson entered the hospital room, the reason for their presence was his suicide attempt, not their belief that he had been involved in a crime. See *State* v. *Szabo*, 166 Conn. 289, 293–94, 348 A.2d 588 (1974) (when police accompa-

nied defendant to hospital in ambulance, defendant was not in custody when "police were unaware that a crime had been committed, they had not yet shifted from their investigation of a relatively routine mishap to accusatorial criminal police work or focused upon the defendant as a potential target of criminal allegations"). Thus, there was no reason for the defendant to feel intimidated by the presence of the police inside the hospital room before Johnson arrived and outside the room thereafter. Finally, with respect to the defendant's age, intelligence and mental makeup, there is no evidence that his age or intelligence rendered him especially vulnerable to police intimidation and, although he may have been despondent and was receiving pain medication for his injuries, the nurse indicated that he was capable of speaking with the police, and Johnson testified that he was alert and coherent. We conclude that a reasonable person in these circumstances would not believe that "he or she was in police custody of the degree associated with a formal arrest." (Internal quotation marks omitted.) *State* v. *Atkinson*, supra, 235 Conn. 758. Accordingly, we conclude that the trial court properly determined that the defendant was not in custody for purposes of triggering the *Miranda* requirements.

We next consider whether the defendant's statements to the police were voluntary.[27] "Whether a confession

[27] The defendant appears to assume that the trial court could not have found that his statements to the police in the hospital were involuntary unless it found that he was in custody, while the state appears to assume that, even if the defendant was in custody, if the defendant voluntarily waived his *Miranda* rights, any subsequent statements would not have been involuntary. Whether the defendant was in custody and whether the defendant's statements were voluntary are, although related, analytically separate inquiries. *State* v. *Porter*, 178 Ohio App. 3d 304, 310, 897 N.E.2d 1149 (2008) ("[v]oluntariness of a confession and compliance with *Miranda* are analytically separate inquiries"), appeal denied, 120 Ohio St. 3d 1525, 901 N.E.2d 245 (2009). A statement may be suppressed as involuntary even if the defendant was not in custody, and even if the defendant was in custody but waived his *Miranda* rights. Id., 311 ("[a] confession may be involuntary even when *Miranda* warnings are given, or even if *Miranda* warnings are

is involuntary because it was coerced rests upon factual determinations regarding the circumstances surrounding the defendant's confession. . . . Although the ultimate question of voluntariness is one of law over which our review is plenary, the factual findings underpinning that determination will not be overturned unless they are clearly erroneous. . . . As in other cases in which the factual findings implicate a defendant's constitutional rights and the credibility of witnesses is not the primary issue, we will, however, undertake a scrupulous examination of the record to ensure that the findings are supported by substantial evidence." (Citations omitted.) *State* v. *Mullins*, 288 Conn. 345, 358, 952 A.2d 784 (2008).

"The determination of whether a confession is voluntary must be based on a consideration of the totality of circumstances surrounding it . . . including both the characteristics of the accused and the details of the interrogation. . . . Factors that may be taken into account, upon a proper factual showing, include: the youth of the accused; his lack of education; his intelligence; the lack of any advice as to his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment, such as the deprivation of food and sleep. . . . Under the federal constitution . . . coercive police activity is a necessary predicate to the finding that a confession is not voluntary . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Correa*, 241 Conn. 322, 328, 696 A.2d 944 (1997). The state is required to prove the voluntariness of a confession by a preponderance of the evidence. *State* v. *Lawrence*, 282 Conn. 141, 177, 920 A.2d 236 (2007).

not required"). Conversely, the mere fact that the defendant was in custody does not mean that his waiver of rights and his statement were involuntary. See *State* v. *Jenkins*, 298 Conn. 209, 251, 3 A.2d 806 (2010) ("the fact of custody alone has never been enough in itself to demonstrate a coerced confession" [internal quotation marks omitted]).

As the foregoing demonstrates, there is considerable overlap between the factors that courts should consider in determining whether a defendant is in custody for *Miranda* purposes and the factors that courts should consider in determining whether a defendant's statements were voluntary. Accordingly, for the same reasons that we have concluded that the defendant was not in custody when he gave his statements to the police while he was hospitalized, we conclude that his statements to the police were voluntary. See *State* v. *Roseboro*, 221 Conn. 430, 442–43, 604 A.2d 1286 (1992) (when defendant was questioned in hospital after undergoing surgery and while medicated, statements were voluntary when police relied on nursing personnel for determination that defendant was lucid, defendant had been advised of *Miranda* rights on previous occasions, defendant readily answered questions, interviews were of relatively short duration and defendant seemed alert); compare *Mincey* v. *Arizona*, 437 U.S. 385, 398–400, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) (statements to police determined to be involuntary when hospitalized defendant was " 'depressed almost to the point of coma,' " had " 'unbearable' " leg pain, was "evidently confused and unable to think clearly about either the events [under investigation] or the circumstances of his investigation," and had repeatedly and "clearly expressed his wish not to be interrogated"). Having concluded that the defendant was not in custody when Johnson questioned him in the hospital and that his statements to Johnson were voluntary, we conclude that the trial court properly denied the defendant's motion to suppress those statements.

IV

Finally, we address the defendant's claim that the trial court improperly denied his request to charge the jury on third party culpability. We disagree.

The record reveals the following facts that the trial court reasonably could have found that are relevant to our resolution of this claim. Jackson testified that he spent the night of Monday, July 19, 2004, with the victim, and dropped her off near her apartment at approximately 2:30 p.m. on Tuesday, July 20, 2004. Jackson also testified that he went to work after bringing the victim home, although the evidence showed that he usually did not work on Tuesdays. Alvarez testified that someone was in the hallway outside the victim's apartment at around midnight on July 20, 2004.

Jackson further testified that, when he went to the victim's apartment in the early morning hours of July 22, 2004, he attempted unsuccessfully to open certain windows in an attempt to gain entry. A New Haven firefighter entered the victim's apartment through an unlocked window. When police interviewed Jackson at the scene of the murder, Jackson told them that the victim was the defendant's girlfriend. He also told the police that he was the victim's friend. Jackson testified at trial that he did not tell the police that he was in a romantic relationship with the victim because they never asked him. Jackson's conversation with the police at the scene of the murder lasted approximately one minute.[28]

On the basis of this evidence, the defendant submitted to the trial court a request to charge on the issue of third party culpability.[29] The trial court denied the

[28] The defendant points out that he later gave a tape-recorded statement to Johnson at the New Haven police department. The substance of that interview, however, was not in evidence.

[29] The defendant submitted the following request to charge: "You have heard evidence in this case that someone other than [the defendant] committed this crime. This type of evidence is known as third party guilt.

"As I have already made clear to you, the [s]tate has the burden of proving the [d]efendant's guilt beyond a reasonable doubt. It must prove all of the elements of the crime, including that it was the [d]efendant and not some other person, who was the perpetrator. This burden rests on the state at all times; the [d]efendant has no burden of proof whatsoever, on this or any other issue.

request. On appeal, the defendant contends that the trial court improperly determined that the instruction on third party culpability was not supported by the evidence and that the trial court's refusal to charge the jury violated his constitutional right to raise a defense.

"In 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 which is relevant to the issues of [a] case and which 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." (Internal quotation marks omitted.) *State* v. *Arroyo*, 284 Conn. 597, 607–608, 935 A.2d 975 (2007).

"It is well established that a defendant has a right to introduce evidence that indicates that someone other than the defendant committed the crime with which the defendant has been charged. . . . The defendant must, however, present evidence that directly connects a third party to the crime. . . . It is not enough to show that another had the motive to commit the crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which

"The question presented by third party culpability evidence is not whether the guilt of another person has been proven, but whether, after a full consideration of all of the evidence in this case, there is a reasonable doubt that [the defendant] was the perpetrator. Evidence that a third party may have committed this crime may, if credited, tend to raise a reasonable doubt as to . . . whether the [s]tate has met its required burden to prove the identity of the [d]efendant as the perpetrator. If, after considering all of the evidence, you have a reasonable doubt as to the [d]efendant's guilt, you must find the [d]efendant not guilty."

the defendant is accused." (Internal quotation marks omitted.) Id., 609.

"Because the standards governing the admissibility of third party culpability evidence require that the trial court determine that such evidence be relevant to the jury's determination of whether a reasonable doubt exists as to the defendant's guilt, we conclude that those same standards should govern whether a trial court should give an appropriate instruction on third party culpability. Put another way, if the evidence pointing to a third party's culpability, taken together and considered in the light most favorable to the defendant, establishes a direct connection between the third party and the charged offense, rather than merely raising a bare suspicion that another could have committed the crime, a trial court has a duty to submit an appropriate charge to the jury." Id., 610. The trial court's determination as to whether evidence of third party culpability is relevant and probative is subject to review for an abuse of discretion. *State* v. *Ferguson*, 260 Conn. 339, 354, 796 A.2d 1118 (2002).

We conclude that the trial court in the present case did not abuse its discretion when it determined that the evidence of third party culpability did not establish a direct connection between Jackson and the victim's murder. Indeed, we find it questionable whether the evidence raised even a bare suspicion that Jackson might have committed the crime. First, we do not agree with the defendant that the fact that Jackson claimed that he went to work after dropping the victim off at her apartment at approximately 2:30 p.m. on Tuesday, July 20, 2004, even though he ordinarily did not work on Tuesdays, supports an inference that he was the person who Alvarez heard in the hallway of the apartment building near midnight that evening. Even if we were to assume that the evidence could support a very tenuous inference that Jackson lied about going to work

after dropping the victim off, there was *no* evidence that he was in the victim's apartment that evening, while there was ample evidence that the defendant was there.[30] Cf. *Paige* v. *St. Andrew's Roman Catholic Church Corp.*, 250 Conn. 14, 18, 734 A.2d 85 (1999) ("it is well established that, although the [fact finder] is entitled to disbelieve any evidence, it may not draw a contrary inference on the basis of that disbelief").

With respect to the possible minor inconsistency in the evidence as to whether one of the windows to the victim's apartment was unlocked, the defendant has failed to explain in any way how this inconsistency would support an inference that Jackson killed the victim. See, e.g., *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 120, 830 A.2d 1121 (2003) ("[a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly" [internal quotation marks omitted]). With respect to Jackson's statement to the police, we conclude that the fact that, during his one minute conversation with the police at the murder scene, he described himself as the victim's friend and described the defendant, who was the father of the victim's child and who had been living in the victim's apartment, as her "boyfriend," instead of providing a detailed explanation of their respective relationships, does not support an inference that he killed the victim. Moreover, the defendant has pointed to no evidence that Jackson, who had been aware for some time that the defendant had been living in the victim's

[30] The defendant contends that it is absurd for the state to argue that the defendant brutally murdered the victim at approximately 5 p.m. on July 20, 2004, and then stayed at the crime scene for seven hours before leaving at midnight. Even if that were true—which we do not believe—it is even more absurd for the defendant to argue that, because he would not have been in the hallway at midnight if he had murdered the victim at 5 p.m., Jackson must have been in the hallway. The defendant has pointed to *no* evidence to support that inference.

apartment, had ever expressed any jealousy or anger toward the victim because of the living arrangement.[31] Accordingly, we conclude that the trial court did not abuse its discretion when it denied the defendant's request for a jury charge on the issue of third party culpability.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* SHERI PAIGE (SC 18495)

Palmer, Zarella, McLachlan, Eveleigh, Harper and Vertefeuille, Js.

Syllabus

The defendant attorney appealed to the Appellate Court from her conviction, after a jury trial, of nine charges, including perjury, relating to the theft of assets from the estate of an elderly client, B. The defendant had prepared a living will for B after she had suffered a stroke and then arranged for another attorney to draft a new will for B in which her caregivers, C and H, were named as the beneficiaries. The defendant subsequently engaged in various schemes in which she depleted the assets of B's estate, arranged for B to purchase a life insurance policy establishing a life insurance trust and naming the defendant as trustee to receive the proceeds of the insurance policy, and facilitated the sale of certain properties owned by B with the proceeds distributed in part to the defendant, C and H, and in part to the trust. Following B's death, the defendant persuaded C and H to hire her to represent them in order

[31] The defendant counters that the state failed to establish that he had any motive to kill the victim. The undisputed evidence shows, however, that the victim and the defendant had had an intimate relationship at one time and had a child together, that the victim asked the defendant to move out of her apartment on July 20, 2004, that the defendant and the victim had a violent argument at approximately 5 p.m. on that date, that they engaged in sexual relations at some point between the time that the defendant entered the apartment at approximately 4:30 p.m. and the time that he left the apartment to go to the Carter Hotel, and that the defendant stated that he jumped out of the hotel window the next day because no one cared about him. This evidence amply supports an inference that the defendant was distraught over the victim's termination of her relationship with him or her termination of his living arrangement, or both.

to receive payment on the life insurance policy in exchange for 25 percent of the proceeds recovered from the policy. Thereafter, the insurance company paid on the policy and the defendant wrote checks from the trust payable to the defendant's mortgage company in amounts corresponding to her legal fees and the 25 percent contingency fee on the insurance proceeds. Subsequently, C and H discovered that the trust in B's name had been nearly depleted and they filed an application for a prejudgment remedy against the defendant to recover the funds taken from the trust. In their accompanying complaint, C and H alleged, inter alia, larceny, conspiracy, legal malpractice, and breach of a fiduciary duty. During the trial in that civil litigation, the defendant presented a letter purportedly from the insurance company stating its intention to rescind the policy due to B's failure to disclose certain material medical conditions. The trial court found the letter to be fraudulent, but also denied the application for a prejudgment remedy on the ground that C and H were complicit in the schemes to defraud B, and the court referred the matter to the state's attorney's office and the statewide grievance committee. In the subsequent criminal action, the defendant was charged with, inter alia, several counts of larceny and perjury relating to statements made during or in connection with the civil litigation. With respect to the perjury count alleging that the defendant knowingly had testified falsely in a deposition about the source of the letter from the insurance company, the trial court instructed the jury that the state had the burden of proving specific elements to prove perjury, including that the statement by the defendant was material. The court then stated that B's statement was in fact material and that the jury did not have to consider that element. On appeal to the Appellate Court, the defendant claimed that the evidence was insufficient to support the convictions and that it was unconstitutional to fail to submit the materiality element of the perjury charge to the jury for its determination. The Appellate Court reversed the defendant's conviction only on two counts of larceny, and affirmed the judgment in all other respects. That court acknowledged that the defendant was constitutionally entitled to have every element of the perjury charge submitted to the jury, that the defendant had submitted a request to charge the jury that it must decide whether a particular statement at issue was material, and that the state had conceded that it was improper for the trial court to have instructed the jury that the state had proven that element as a matter of law. That court also concluded, however, that the defendant had waived her claim of instructional error by failing to object on the specific ground raised on appeal, by expressly agreeing with the proposition that materiality was a question of law for the court and should not be submitted to the jury, and by her response to the trial court when it indicated that it intended to provide such an instruction to the jury. On the defendant's appeal following this court's granting of certification, *held* that the Appellate Court improperly determined that the defendant had waived her

right to challenge the trial court's jury instruction pertaining to the perjury charge; the defendant submitted a request to charge that included an instruction on perjury that the state must prove every element of the charge beyond a reasonable doubt including whether the defendant's statement at issue was material to the proceedings, this court has never required a party who has submitted a request to charge also to take an exception to a contrary charge, as such a requirement would be in contravention of the plain language of the rule of practice (§ 16-20) pertaining to requests to charge and exceptions, and the defendant never withdrew her request and there was nothing in the record to suggest that the trial court understood her to have done so.

State v. *Greenberg* (92 Conn. 657), to the extent that it held that the element of materiality in a perjury case presents a question of law for the court to decide, overruled.

Argued February 2—officially released April 17, 2012

Procedural History

Substitute information charging the defendant with six counts of the crime of larceny in the first degree, three counts of the crime of perjury and one count each of the crimes of tampering with or fabricating physical evidence, forgery in the second degree and larceny in the second degree, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the jury before *Holden*, *J.*; after the court granted the defendant's motion for a judgment of acquittal as to two counts of perjury, verdict and judgment of guilty of five counts of larceny in the first degree and one count each of perjury, tampering with or fabricating physical evidence, forgery in the second degree and larceny in the second degree, from which the defendant appealed to the Appellate Court, *DiPentima*, *Beach* and *Robinson*, *Js.*, which reversed in part the trial court's judgment and remanded the case with direction to render judgment of not guilty of larceny in the second degree and one count of larceny in the first degree, and the defendant, on the granting of certification, appealed to this court. *Reversed in part; new trial.*

Alexander H. Schwartz, for the appellant (defendant).

Marjorie Allen Dauster, senior assistant state's attorney, with whom, on the brief, were *Kevin T. Kane*, chief state's attorney, *John H. Malone*, senior assistant state's attorney, and *Maura K. Coyne*, assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. Following a jury trial, the defendant, Sheri Paige, then an attorney, was convicted of nine charges relating to the theft of assets from an elderly client, including one count of perjury in violation of General Statutes § 53a-156.[1] The defendant appealed from the judgment of conviction to the Appellate Court, challenging the sufficiency of the evidence and the propriety of the jury instruction on the perjury charge. *State* v. *Paige*, 115 Conn. App. 717, 720, 727 n.4, 974 A.2d 782 (2009). The Appellate Court concluded that there was insufficient evidence to convict the defendant on two of the larceny counts, but affirmed the judgment in all other respects. Id., 752. With respect to the perjury instruction, although the defendant had submitted a request to charge the jury that it must decide whether a particular statement at issue was material and the state had conceded that it was improper for the trial court to have instructed the jury that the state had

[1] The defendant was convicted of the following charges: perjury in violation of § 53a-156 (a) (count two); tampering with or fabricating physical evidence in violation of General Statutes § 53a-155 (a) (2) (count four); forgery in the second degree in violation of General Statutes § 53a-139 (a) (1) (count five); larceny in the second degree in violation of General Statutes §§ 53a-119 (2) and 53a-123 (a) (5) (count six); larceny in the first degree in violation of General Statutes §§ 53a-119 (2), 53a-121 (b) and 53a-122 (a) (2) (count seven); two counts of larceny in the first degree in violation of §§ 53a-119 (1), 53a-121 (b) and 53a-122 (a) (2) (counts eight and nine); and two counts of larceny in the first degree in violation of §§ 53a-119 (1) and 53a-122 (a) (2) (counts ten and twelve). The jury found the defendant not guilty on count eleven, larceny in the first degree in violation of §§ 53a-119 (2) and 53a-122 (a) (2), and the court, *Holden, J.*, granted the defendant's motion for judgment of acquittal of two other counts of perjury in violation of § 53a-156 (a) (counts one and three).

proven this element as a matter of law, the Appellate Court determined that the defendant had waived her right to challenge the instruction that was given. Id., 746. This court thereafter granted the defendant's petition for certification to appeal limited to the issue of whether "the Appellate Court properly determine[d] that the defendant [had] waived any challenge to the jury instruction regarding the materiality of the defendant's testimony at a deposition . . . ." *State* v. *Paige*, 294 Conn. 911, 983 A.2d 275 (2009). We conclude that the defendant did not waive her right to challenge the instruction and, therefore, we reverse the judgment in part.

The Appellate Court's opinion sets forth in substantial detail the facts that the jury reasonably could have found to support the various charges of which the defendant was convicted. See *State* v. *Paige*, supra, 115 Conn. App. 720–27. For purposes of the issue in the present case, we briefly summarize those facts. In 1999, Kriemhilde Byxbee, then a widow and eighty-four years of age, lived alone in her home in Stamford. Byxbee had suffered a stroke and was unable to care for herself but did not want to leave her home. Following the stroke, she had increased difficulty understanding what was going on around her. Beverly Cogswell and Heidi Hemingway, both of whom had been cleaning Byxbee's house for many years prior to the death of Byxbee's husband in 1997, thereafter assumed additional duties that enabled Byxbee to remain in her home. In April, 1999, Cogswell and Hemingway asked the defendant, with whom Hemingway had had prior legal dealings, to come to Byxbee's house to discuss having Byxbee execute a living will. The defendant met with Byxbee at her home and subsequently prepared a living will, which Byxbee signed.

After that meeting, the defendant asked Hemingway about Byxbee's assets. Learning that Byxbee owned

two properties in addition to her home and did not have any children, the defendant advised Hemingway that Byxbee should execute a will so that Hemingway could "get something out of . . . Byxbee for . . . services rendered." The defendant arranged for another attorney to come to Byxbee's home to draft a new will, which Byxbee executed. The new will made Hemingway and Cogswell the sole beneficiaries of Byxbee's estate.

The defendant thereafter concocted various schemes whereby, with the aid of Hemingway and Cogswell, they would deplete Byxbee's assets, without Byxbee's knowledge, purportedly to avoid estate taxes. The defendant directed Cogswell and Hemingway to trick Byxbee into writing checks to various individuals who later would cash the checks and give the money to Hemingway or Cogswell. At the defendant's instruction, Byxbee's money market account was closed and approximately $200,000 of those funds was distributed to Hemingway, Cogswell and the defendant. The defendant also arranged for Byxbee to purchase a $400,000 life insurance policy, despite Byxbee's refusal to purchase such a policy. The defendant established the Kriemhilde Byxbee life insurance trust (Byxbee trust), naming herself as trustee, to receive the proceeds of the insurance policy. In the last year of Byxbee's life, the defendant facilitated the sale of the three properties Byxbee owned, including the sale of Byxbee's residence, furniture and personal effects after Byxbee had been moved into an assisted living facility following a period of hospitalization. The proceeds from those sales were distributed in part to the defendant, Hemingway and Cogswell, either directly or through family members, and in part to either Byxbee's bank account or the Byxbee trust.

After Byxbee died on September 27, 2000, the defendant persuaded Cogswell and Hemingway that the insurance company would resist paying out the

$400,000 policy on Byxbee's life and that they should hire her to represent them in collecting on it in exchange for 25 percent of the proceeds recovered from the policy. Shortly thereafter, the insurance company paid out the policy and returned the premium. The defendant then wrote checks from the Byxbee trust payable to the bank that held the mortgage on the defendant's house in amounts corresponding to the legal fees charged by the defendant and the 25 percent contingency fee for recovery of the insurance policy proceeds and premium.

Subsequently, Hemingway learned from the defendant that the Byxbee trust account had been nearly depleted. In November, 2001, Hemingway and Cogswell filed an application for a prejudgment remedy against the defendant seeking to recover the funds she had taken from the Byxbee trust account. The accompanying complaint alleged larceny, conspiracy, conversion, legal malpractice, breach of a fiduciary duty, tortious interference with an expectancy or inheritance, breach of contract, and violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. *Cogswell* v. *Paige*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-01-0186822-S (May 22, 2003) (34 Conn. L. Rptr. 683).

The record reveals the following additional facts and procedural history. During trial in the civil litigation, the defendant proffered a letter, dated a few weeks prior to receipt of payment on the life insurance policy, purportedly from the insurance company stating its intention to rescind the policy due to Byxbee's failure to "fully disclose material medical conditions on her insurance application." The trial court, *D'Andrea*, *J.*, found that the letter was fraudulent, prepared by or at the direction of the defendant for the purpose of attempting to justify the 25 percent contingency fee she had received. Id. The court ultimately denied the

application for a prejudgment remedy on the ground that Cogswell and Hemingway were complicit in the defendant's criminal schemes to defraud Byxbee and stated its intention to refer the matter to both the state's attorney's office and the statewide grievance committee. Id.

Thereafter, the defendant was charged in the present criminal case with, inter alia, five counts of larceny in the first degree and one count of larceny in the second degree. The state also charged the defendant with three counts of perjury relating to statements made during or in connection with the civil litigation (counts one, two and three of the substitute information). Count two alleged that the defendant knowingly had testified falsely in a deposition about the source of the letter from the insurance company purporting to rescind the policy on Byxbee's life. After the close of the state's case, the defendant moved for a directed verdict on various counts. On March 9, 2006, the trial court, *Holden*, *J.*, granted the defendant's motion for a judgment of acquittal on counts one and three, but denied the defendant's motion on count two and the other counts.

At the close of trial, the court instructed the jury with respect to count two that the state must prove specific elements to meet its burden of establishing that the defendant had committed perjury, one being that the statement made by the defendant was material. The court then stated: "[T]hat is a matter of law. The test of materiality is whether the false statement testimony was capable of influencing or had the potential to influence the fact finder in deciding the issues. . . . [A]s a matter of law I will tell you that it was material, so at least you don't have to concern yourself when you get to that element; it's a matter of law, the testimony was material, and that it was capable of influencing or had the potential to influence the fact finder." Later, when

restating the elements of perjury, the court again instructed the jury that "whether or not the testimony was material, [that is] not for your consideration. That you will find as a matter of law."

The jury returned a verdict of guilty on nine of the ten counts that were submitted to it, including count two alleging perjury. See footnote 1 of this opinion. After trial, the defendant filed another motion for a verdict of acquittal on count two and two other counts charging larceny in the first degree, as well as a motion for a new trial, both of which the court denied. The trial court thereafter rendered judgment in accordance with the verdict and sentenced the defendant to a total effective sentence of twelve years imprisonment, a $100,000 fine and five years of special parole.

The defendant thereafter appealed to the Appellate Court, claiming that the evidence was insufficient to support the convictions and that it was unconstitutional to fail to submit the materiality element of the perjury charge to the jury for its determination. *State* v. *Paige*, supra, 115 Conn. App. 720. The Appellate Court reversed the judgment with respect to counts six and seven, larceny in the second degree and larceny in the first degree, respectively, for insufficient evidence and affirmed the judgment in all other respects. Id., 752. With respect to the defendant's challenge to the jury instruction on perjury, the court acknowledged that the defendant was constitutionally entitled to have every element of the perjury charge submitted to the jury, that the defendant had filed a preliminary request to charge that included an instruction on the element of materiality and that the state had requested that the court instruct the jury that the element of materiality was not for its consideration. Id., 748–51. Nonetheless, the Appellate Court concluded that the defendant had waived this claim by failing to object on the specific ground raised on appeal, by expressly agreeing with

the proposition that materiality is a question of law for the court and should not be submitted to the jury, and by her response to the trial court when it indicated that it intended to provide such an instruction to the jury. Id., 750–51. The defendant's certified appeal to this court followed.

The defendant contends that she properly preserved her right to raise this issue on appeal by submitting a request to charge on the matter and that no authority requires her also to take exception to a charge that conflicts with such a request. The defendant acknowledges that it is possible to waive an instructional error after submitting a request to charge, but contends that her comments to the trial court, read in light of the record as a whole, demonstrate that she did not engage in the kind of unequivocal conduct that would demonstrate waiver. The defendant further contends that she should not be penalized by an error of law that was induced by the state. In response, the state contends that the defendant waived her claim by not only acquiescing to the law proffered by the state on this issue but also by affirmatively adopting the case proffered by the state as the law of the case and by failing to bring contrary authority to the court's attention. We conclude that the Appellate Court improperly determined that the defendant waived this claim.

It is well settled that rights of constitutional magnitude may be waived. See *State* v. *Fabricatore*, 281 Conn. 469, 478, 915 A.2d 872 (2007). This court specifically has concluded that "waiver of the right to require the state to prove each element of a crime may be made by counsel . . . ." (Internal quotation marks omitted.) Id., 480, quoting *State* v. *Cooper*, 38 Conn. App. 661, 679, 664 A.2d 773, cert. denied, 235 Conn. 908, 665 A.2d 903 (1995), cert. denied, 517 U.S. 1214, 116 S. Ct. 1837, 134 L. Ed. 2d 940 (1996); see *State* v. *Duncan*, 96 Conn. App. 533, 560, 901 A.2d 687, cert. denied, 280 Conn. 912,

908 A.2d 540 (2006); accord *State* v. *Darryl W.*, 303 Conn. 353, 366, 367 n.15, 33 A.3d 239 (2012). Waiver can be effectuated expressly or implicitly. See *State* v. *Thomas W.*, 301 Conn. 724, 731–32, 22 A.3d 1242 (2011); *State* v. *Fabricatore*, supra, 478–80. Applying plenary review, "[s]uch a determination by the reviewing court must be based on a close examination of the record and the particular facts and circumstances of each case." (Internal quotation marks omitted.) *State* v. *Thomas W.*, supra, 734.

The following facts and circumstances of the present case are relevant to our determination of the waiver issue in the present case. The issue of materiality first arose on February 28, 2006, in connection with testimony by Neal Rogan, the attorney who had represented Cogswell and Hemingway in various civil proceedings. The state proffered Rogan's testimony in relation to count one, also alleging that the defendant had committed perjury in statements she had made in a deposition that Rogan had conducted. After the state asked Rogan what role the subject at issue had in the objective of the deposition, the defendant objected on grounds of relevance. When the state explained that the question was intended to establish the materiality of the alleged perjury, the defendant again objected, arguing that Rogan could not testify about materiality. Thereafter, the trial court excused the jury and asked the state for an offer of proof as to the substance of Rogan's testimony on this subject. The state explained, inter alia, that Rogan needed to testify regarding the materiality of the defendant's statement as it related to the purpose of the deposition because materiality was an element of the state's case for the jury to decide. Defense counsel objected to this line of testimony, arguing: "I think materiality is a legal issue which the judge can charge on and so forth. On the other hand, the issue is whether it's material to the process and not whether it was

material to [Rogan] and what he was doing. I mean, do we then bring in [the defendant's] lawyer to say that it wasn't material as far as he was concerned? It just seems to me that I don't think you can prove materiality by asking him why he was doing what he was doing." In response, the state explained that "Rogan is going to tell the jury why this particular falsehood was material to the purpose of the deposition" and emphasized the necessity of this testimony to prove to the jury an essential element of perjury. Defense counsel then reiterated his previous concerns: "I don't think you prove materiality by proving what he's attempting to do. . . . To have him define materiality which is a legal issue by saying what he was trying to prove . . . . I just think if you let a lawyer who has a financial interest in this thing testify as to what he thought was material and what is material legally, it just seems to me, it really gets us in serious problems." Ultimately, the trial court informed the state: "[I]f you want him to testify about some materiality, that's a legal claim as—counsel is correct. You need to direct me to some case law that is insightful on this issue and I'll review it."

On the next day of trial, March 1, 2006, just before Rogan's testimony continued, the state provided the court with a copy of a century old case, *State* v. *Greenberg*, 92 Conn. 657, 103 A. 897 (1918). That case did not address the permissible scope of witness testimony on materiality. Rather, in *Greenberg*, the defendant challenged his conviction for perjury, claiming that the trial court improperly had failed to charge the jury that the testimony set forth in the information upon which the charge of perjury was based was not material to the issue involved in the trial and improperly left to the jury the decision of whether the alleged perjured testimony was material. Id., 660. This court held: "In this case all of the facts which the [s]tate claimed proved that the testimony was material were before the court,

and if the jury found these facts to have been established it became the duty of the court to instruct the jury whether the testimony was material or not. The question of materiality, as we think, is, on the better reason and the better authority, in the final analysis, a question of law. . . . The court was in error in leaving the determination of the materiality of the testimony to the jury, but the error was harmless, since the verdict of the jury meant that it found the testimony to be material, and we think this was the conclusion which the court should have reached." (Citations omitted.) Id., 660–61.

After the trial court confirmed that the state had provided a copy of *Greenberg* to the defendant, the state recommenced its direct examination of Rogan, asking him what he was trying to accomplish in the defendant's deposition. Defense counsel objected, arguing that the matter was not relevant and, further, that "in terms of the issue of materiality, the case given, the *Greenberg* case, indicates that . . . it's a legal question for the court and . . . ." The court cut defense counsel off and overruled his objection. Defense counsel later renewed his objection to this line of questioning, stating: "Again, relevance. It's a legal issue. It goes to the process itself and not [Rogan's] view of it, and I don't think he can give an opinion on an issue that is for the court." The state argued in response that "the jury has to decide materiality if the court sends it to the jury so I'd submit that how this question relates to the object indicates how it is material. And materiality is allowed under the cases cited." The court sustained the defendant's objection and directed the state to rephrase the question.

On March 6, 2006, the defendant submitted a preliminary request to charge, which included an instruction on perjury providing that the state must prove all of the elements of the charge beyond a reasonable doubt, including whether the statement made by the defendant

was material to the proceedings. On that same date, the defendant also filed a motion for a judgment of acquittal on various counts including the three perjury counts, claiming that the statement at issue in each perjury count "was, as a matter of law, not material to the proceeding in question."

On March 8, 2006, the trial court heard argument on the defendant's motion for judgment of acquittal and on both parties' requests to charge. The court noted that, with respect to the three perjury charges, the state had requested the court to instruct the jury that materiality was not for it to decide and that as a matter of law the statements at issue were material to the proceeding in which they were made. The court then asked the defendant whether she had any objection. Defense counsel responded: "The answer is yes. That's what *Greenberg* said. On the other hand, [in] *Greenberg* . . . they appeared to have the whole transcript of the trial in front of them and so forth. I don't think in this particular case . . . you have sufficient evidence on your own to decide as a matter of law—it was my claim that as a matter of law, there isn't enough. . . . [Y]ou know, if in fact there are sufficient facts before the court, I would agree with *Greenberg*, it's strictly a matter of law.

"I just don't think the record here is sufficient for the court to make that determination as a matter of law. Inevitably, it's a mixed—it can be described as a mixed issue of fact and law. The court there in *Greenberg*, they said exactly what [the witness'] testimony was. . . . [T]hey said that [it] went to his credibility in the trial . . . so as a matter of law, it shouldn't have gone to the jury." Defense counsel then explained why he thought the evidence was insufficient and asserted that this argument also related to the defendant's "initial claim that as a matter of law it is not material."

The trial court then inquired of the state whether, in light of the defendant's arguments, "the material issue should go to the jury. That's the gravamen of the argument, whether or not [the jury] should make a finding if the—if it was material pursuant to the elements of the crime, or the court should tell [the jury] as you request as a matter of law pursuant to what you believe in *Greenberg* that that element has been satisfied." The state replied that, according to *Greenberg* or *State* v. *Fasano*, 119 Conn. 455, 462–63, 177 A. 376 (1935), another case that counsel had discussed, materiality was a matter for the court. The court did not state at that time how it intended to instruct the jury. The court did note, however, a concern about the sufficiency of the evidence regarding materiality on the perjury charges for purposes of the motion for a judgment of acquittal.

The following day, March 9, 2006, the trial court noted on the record that it had granted the defendant's motion for a judgment of acquittal on counts one and three alleging perjury but had denied the motion in all other respects. Defense counsel then inquired about a "discussion yesterday concerning the background state of the record. I'd like to know whether the court is going to charge the jury as a matter of law that—on count two, that the alleged perjury was material to the . . . ." Before defense counsel could complete his sentence, the court stated: "The answer to that is yes." Defense counsel responded: "Okay. Thank you."

Closing arguments then ensued, following which the trial court gave instructions to the jury, including the one with respect to count two alleging perjury that we previously have noted, stating that the court had determined that the alleged statement was, as a matter of law, material to the proceeding in which it had been made. At the end of the jury charge, neither party took an exception to the instructions as given. The jury there-

after returned a verdict of guilty on nine of the ten counts submitted to it, including count two alleging perjury. See footnote 1 of this opinion.

The defendant timely filed a motion for a new trial, claiming, inter alia, "errors in the charge." In the supporting memorandum of law she later filed, the defendant pointed to a perjury case in which the United States Supreme Court squarely held, in accordance with fundamental principles that a criminal defendant has a constitutional right to demand that a jury find him or her guilty of all of the elements of a crime charged and, accordingly, that a trial court is prohibited from incorporating into its jury instructions evidentiary presumptions that have the effect of relieving the state of its burden of proving every essential element of the crime, that materiality, even if a mixed question of fact and law, must be decided by the jury.[2] *United States*

[2] The court explained: "Deciding whether a statement is 'material' requires the determination of at least two subsidiary questions of purely historical fact: (a) 'what statement was made?' and (b) 'what decision was the agency trying to make?' The ultimate question: (c) 'whether the statement was material to the decision,' requires applying the legal standard of materiality (quoted above) to these historical facts. What the [g]overnment apparently argues is that the [c]onstitution requires only that (a) and (b) be determined by the jury, and that (c) may be determined by the judge. We see two difficulties with this. First, the application-of-legal-standard-to-fact sort of question posed by (c), commonly called a 'mixed question of law and fact,' has typically been resolved by juries. . . .

"The second difficulty with the [g]overnment's position is that it has absolutely no historical support. If it were true, the lawbooks would be full of cases, regarding materiality and innumerable other 'mixed-law-and-fact' issues, in which the criminal jury was required to come forth with 'findings of fact' pertaining to each of the essential elements, leaving it to the judge to apply the law to those facts and render the ultimate verdict of 'guilty' or 'not guilty.' We know of no such case. Juries at the time of the framing could not be forced to produce mere 'factual findings,' but were entitled to deliver a general verdict pronouncing the defendant's guilt or innocence." (Citations omitted.) *United States* v. *Gaudin*, 515 U.S. 506, 512–13, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). The court did acknowledge that some courts had required the trial court to decide the element of materiality in perjury cases specifically, but noted a lack of any consistent historical tradition. Id., 517–18.

v. *Gaudin*, 515 U.S. 506, 513–14, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). In opposing the motion, the state argued that *Greenberg* was the law before the trial court at the time of trial, that this court never has overruled the law as stated therein and that the materiality issue in the present case was different than in *Gaudin*, the former being a pure question of law whereas the latter was a mixed question of fact and law. The trial court orally denied the motion, stating in relevant part: "The motion for a new trial based on the court's instructions pursuant to the law as counsel for the state has placed on the record, that issue was argued at some length in the course of this trial. The court, relying and trusting instruction based upon the issue of materiality as an issue of law not fact, *State* v. *Greenberg* [supra, 92 Conn. 660–61]."

With the specific circumstances of the present case in mind, we note the following additional principles relevant to the defendant's claim that she did not waive her right to contest the jury instruction. The issue of waiver in the context of a claim of instructional error typically arises when considering whether a defendant is entitled to review of an unpreserved claim. See, e.g., *State* v. *Collins*, 299 Conn. 567, 596–97, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011); *State* v. *Brewer*, 283 Conn. 352, 358–60, 927 A.2d 825 (2007). In such cases, the defendant has failed to follow one of the two routes by which he or she could preserve the claim of instructional error, by either submitting a written request to charge on the matter

It appears that this court's decision in *Greenberg* rested on the presumption that the jury could find the subsidiary questions of purely historical fact and then the judge could decide the ultimate question of materiality by applying the law to these facts. See *State* v. *Greenberg*, supra, 92 Conn. 660–61 ("[i]n this case all of the facts which the [s]tate claimed proved that the testimony was material were before the court, and *if the jury found these facts to have been established* it became the duty of the court to instruct the jury whether the testimony was material or not" [emphasis added]).

at issue or taking an exception immediately after the charge is given. See Practice Book § 16-20; *State* v. *Darryl W.*, supra, 303 Conn. 367–68. We never have required, however, a defendant who has submitted a request to charge also to take an exception to a contrary charge, and such a requirement would contravene the plain language of § 16-20.

Nonetheless, even if a claim of instructional error is initially preserved by compliance with Practice Book § 16-20, the defendant may thereafter engage in conduct that manifests an intention to abandon that claim. See *State* v. *Thomas W.*, supra, 301 Conn. 732 (waiver found when, after defendant objected to proposed instruction, he expressed satisfaction with trial court's proposed curative instruction and did not thereafter object to instruction as given); *State* v. *Mungroo*, 299 Conn. 667, 676, 11 A.3d 132 (2011) (waiver found when, after reviewing court's charge that differed from defendant's proposed instruction at charging conference, defense counsel withdrew his request to charge and accepted trial court's charge); *State* v. *Whitford*, 260 Conn. 610, 632–33, 799 A.2d 1034 (2002) (waiver found when defendant objected to initial instruction, trial court issued supplemental instruction after receiving input from defense counsel, and defense counsel did not object to instruction as given); *State* v. *Jones*, 193 Conn. 70, 87–88, 475 A.2d 1087 (1984) (waiver found when defendant timely took exception after instruction was given, court consulted with defendant in fashioning supplemental instruction and defendant raised no further objection to either initial charge or supplemental instruction). In each of these cases, the trial court had taken some curative action to address the defendant's initial objection or the defendant had engaged in affirmative conduct that unequivocally demonstrated his intention to abandon the previously preserved objection, such as withdrawing a request to charge.

In the present case, the evidence is at best ambiguous as to whether the defendant effectively withdrew her request to charge that initially preserved this issue for appeal. Significantly, there were several issues relating to materiality that the defendant raised before the trial court. First, the defendant contended that Rogan could not testify as to the legal question of whether the statement at issue was material. It is evident that the defendant essentially was contending that Rogan could not offer an opinion as to that ultimate issue. See Conn. Code Evid. § 7-3 (a) (witness generally barred from offering opinion on ultimate issue); see also *State* v. *Finan*, 275 Conn. 60, 66, 881 A.2d 187 (2005) ("an ultimate issue [is] one that cannot reasonably be separated from the essence of the matter to be decided [by the trier of fact]" [internal quotation marks omitted]). Second, the defendant contended that the court should determine, as a matter of law, that there was insufficient evidence to prove materiality, thus, entitling her to a judgment of acquittal. See Practice Book § 42-40 ("[a]fter the close of the prosecution's case in chief or at the close of all the evidence, upon motion of the defendant or upon its own motion, the judicial authority shall order the entry of a judgment of acquittal as to any principal offense charged . . . for which the evidence would not reasonably permit a finding of guilty"). Third, the defendant's request to charge sought to submit to the jury the issue of materiality if the court concluded that the state had presented sufficient evidence on that matter. We note that the first two positions are wholly consistent with the defendant's request to charge the jury on the issue of materiality.

The defendant never withdrew her request to charge and there is nothing in the record to suggest that the trial court understood her to have done so. Although the defendant appears to have agreed that *Greenberg* was a correct statement of the law as a general matter,

she also made clear her view that the rule applied in that case did not apply in the present case. In support of that position, the defendant not only asserted that the evidence of materiality was insufficient to allow the court to decide this issue as a matter of law, she also took the position, consistent with the authority on which she relies on appeal, that the issue of materiality in the present case was a mixed question of fact and law that must be presented to the jury. See footnote 2 of this opinion. The trial court's last question to the state before deciding what instruction to give clearly indicated that it understood the defendant's position to be that materiality must be decided by the jury. The court stated that the "gravamen of the argument" between the parties was "whether or not [the jury] should make a finding . . . if it was material pursuant to the elements of the crime, or the court should tell them as [the defendant] request[s] as a matter of law pursuant to what [the defendant] believe[s] in *Greenberg* that that element has been satisfied." The court's explanation for denying the defendant's motion for a new trial similarly indicates that it understood the parties to disagree as to whether *Greenberg* applied.

Contrary to the view of the state and the Appellate Court, we ascribe no weight to the fact that, after the court responded in the affirmative to defense counsel's inquiry as to whether the court was going to charge the jury as the state had requested, defense counsel responded: "Okay. Thank you." In so responding, defense counsel simply may have been acknowledging the court's answer rather than indicating his acquiescence to or approval of the charge to be given. Moreover, given that the defendant consistently had argued that the jury should decide materiality unless the court determined that there was insufficient evidence as a matter of law to submit the perjury charge to the jury, we cannot view this ambiguous comment as effectively withdrawing the request to charge the jury on that issue.

Cf. *State* v. *Akande*, 299 Conn. 551, 559, 11 A.3d 140 (2011) (defendant responded in negative when trial court inquired whether counsel had "other thoughts," "any comments," and "anything else" relating to instruction). Finally, to the extent that there was an obligation to bring binding law to the trial court's attention that conflicted with *Greenberg*, that obligation was equally borne by the state and the defendant. Therefore, we conclude that the Appellate Court improperly determined that the defendant waived her objection to the court's instruction.

In light of this conclusion, the defendant's perjury conviction must be reversed and the case remanded for a new trial on that charge. As the state now properly concedes, this court is bound by *United States* v. *Gaudin*, supra, 515 U.S. 506. Although prior to *Gaudin* this court long had recognized the fundamental principles on which *Gaudin* relied and since has cited *Gaudin* for these very principles; see *State* v. *Faust*, 237 Conn. 454, 469, 678 A.2d 910 (1996); we never have expressly overruled *State* v. *Greenberg*, supra, 92 Conn. 657, or otherwise addressed the question of whether a defendant is entitled to have a jury decide materiality in a perjury case. We now take the occasion to expressly overrule *Greenberg* insofar as it concluded that materiality presents a question of law for the court to decide.

The judgment of the Appellate Court is reversed only as to the defendant's conviction of perjury on count two of the substitute information and the case is remanded to that court with direction to remand the case to the trial court for a new trial on that charge; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

HARRY KRAIZA, JR. *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF HARTLAND (SC 18667)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.

Syllabus

The plaintiff appealed to the Appellate Court from the judgment of the trial court, which upheld the decision of the defendant planning and zoning commission of the town of Hartland denying the plaintiff's application for subdivision approval. The subdivision application proposed the construction of a street, H Lane, approximately 1100 feet in length with a cul-de-sac at its end, to provide access to the subdivision lots. H Lane would connect with an existing road, E Drive, which provides access to an adjoining subdivision. E Drive intersects with a main road to the west, extends for about 850 feet and then forms a loop that is approximately 2650 feet in length. H Lane would intersect at a right angle with the top portion of the loop. In denying the application, the commission determined that H Lane and E Drive would combine to form an extended dead-end street with a total length in excess of 1200 feet, in violation of Hartland subdivision regulations. The trial court upheld the denial of the plaintiff's application, and, on the plaintiff's appeal, the Appellate Court affirmed the trial court's judgment. The Appellate Court concluded, inter alia, that a loop road such as E Drive fits within the definition of a dead-end street because it has only one means of ingress and egress and that the applicable regulations apply to both existing and newly proposed dead-end streets. On appeal to this court upon the granting of certification, the plaintiff argued that the commission improperly denied his application because it incorrectly determined that H Lane is an extension of E Drive and that the combined length of the two roads forms a single dead-end street that exceeds the length permitted under the applicable regulations. *Held* that, on the basis of the plain language of the zoning and subdivision regulations, the Appellate Court incorrectly concluded that H Lane constituted an extension of E Drive and that they formed one dead-end street that exceeded the maximum length allowed by the regulations for permanent dead-end streets: H Lane and E Drive were separate and distinct and could not be combined to determine compliance with the regulations, H Lane having intersected E Drive at a perfect right angle rather than being laid out as a continuation of E Drive, thus conforming with the language in the regulations referring to two separate streets, the subdivision plan having indicated that H Lane was not intended to be a continuation of E Drive, and E Drive having provided access only to the adjoining subdivision and H Lane having provided access only to the plaintiff's proposed subdivided lots; furthermore, H Lane itself satisfied the definition of a permanent dead-end street in the applicable regulations because

it was less than 1200 feet in length, was equipped with a turnaround and a right-of-way at its closed end, and had only one means of ingress and egress, namely, its intersection with E Drive.

Argued January 9—officially released April 24, 2012

Procedural History

Appeal from the decision of the defendant denying the plaintiff's application for subdivision approval, brought to the Superior Court in the judicial district of Litchfield, where the court, *Pickard*, *J.*, granted the motion to intervene filed by Roy Champagne; thereafter, the matter was tried to the court; judgment dismissing the appeal, from which the plaintiff, on the granting of certification, appealed to the Appellate Court, *Gruendel* and *Beach*, *Js.*, with *Borden*, *J.*, dissenting, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Reversed*; *judgment directed*.

Kenneth R. Slater, *Jr.*, for the appellant (plaintiff).

Mary E.R. Bartholic, with whom was *Thomas W. Witherington*, for the appellee (defendant).

Opinion

ZARELLA, J. The plaintiff, Harry Kraiza, Jr., appeals from the judgment of the Appellate Court affirming the trial court's dismissal of his appeal from the denial of his subdivision application by the defendant, the planning and zoning commission of the town of Hartland (commission).[1] On appeal, the plaintiff claims that the Appellate Court incorrectly interpreted the Hartland zoning and subdivision regulations[2] when it agreed with the commission that the proposed dead-end street that provides the only access to the subdivided lots on his property constitutes an extension of an existing loop

[1] Roy Champagne, an owner of property abutting the plaintiff's property, intervened in the trial court proceedings. He did not participate in this appeal.

[2] We refer to the "Hartland Requirements for Subdivision Plans" as the Hartland subdivision regulations, which are to be distinguished from the Hartland zoning regulations. We hereinafter refer to the zoning and subdivision regulations collectively as the regulations.

road on adjacent property and that the combined length of the two roads exceeds the permissible length for a permanent dead-end street. The commission responds that the Appellate Court correctly interpreted the regulations. We agree with the plaintiff and reverse the judgment of the Appellate Court.

The following relevant facts and procedural history are set forth in the opinion of the Appellate Court. "On or about June 11, 2007, the plaintiff filed an application with the commission seeking approval of a proposed eight lot subdivision on his 19.57 acre property, located in the town of Hartland. The east side of the plaintiff's property adjoins Hartland's boundary with the town of Granby. The south side of the plaintiff's property adjoins the Eastwood subdivision. Access to the lots in the Eastwood subdivision is provided by Eastwood Drive . . . which was approved as part of that subdivision plan. Eastwood Drive intersects with Route 20 and extends into the Eastwood subdivision for approximately 850 feet, where it divides into two sections forming a loop. Ten lots are located on the outside of the loop and four lots within it. The total length of Eastwood Drive, including the loop, is approximately 3500 feet. Included on the Eastwood final subdivision plan is a [50] foot wide reserve strip labeled 'Reserved For Future Road,' which runs from the loop section of Eastwood Drive to the boundary of the plaintiff's property. The plaintiff's proposal included a dead-end street, Hazel Lane, to provide access to the lots by connecting to Eastwood Drive over the reserve strip. Hazel Lane extends approximately 1100 feet into the subdivision, forming a cul-de-sac. . . .

"The commission hired Martin J. Connor, a planning consultant, to offer his expert opinion as to whether the plaintiff's proposal complied with the regulations. Connor opined that Hazel Lane did comply with the 1200 foot regulatory limitation for permanent dead-end streets because it measured only 1100 feet in length. He further opined that the length of Hazel Lane should

not be combined with that of Eastwood Drive when assessing whether the plaintiff's proposal complied with the regulations.[3]

"Notwithstanding Connor's recommendation, and after concluding a public hearing on November 19, 2007, that had extended over multiple evenings, the commission, on January 17, 2008, unanimously voted to deny the plaintiff's application, finding that it was in violation of §§ [I-1 J][4] and [I-6 A 2][5] of the [subdivision] regulations

[3] Connor further explained: "Eastwood [Drive] would not be described as a permanent dead-end street according to the [r]egulations. It is not 'equipped with a turn-around roadway with a minimum radius of forty-five (45) feet for the outside curb at the closed end.' It would be better described as a 'loop' or 'lollipop' road. A permanent dead-end road is usually described as a cul-de-sac. If Hazel Lane is approved by the [c]ommission, Eastwood [Drive] would not meet the definition of a dead-end street as there would be more than one means of ingress or egress. One could enter or exit Eastwood [Drive] from Hartland [Boulevard] (Route 20) or from Hazel Lane. Hazel Lane clearly would meet the definition of a permanent dead-end street but it is less than 1200 feet in length. In reviewing the approved Eastwood [s]ubdivision [p]lan it is clearly marked on the plan that the land between lots 8 and 9 was to be reserved for a future road. This plan approved by the [c]ommission clearly alerted the public and buyers in that subdivision of a future plan for a roadway extension into the land owned by Harry Kraiza. This is further evidence the [c]ommission did not intend for Eastwood [Drive] to be a permanent dead-end street. In my opinion Hazel Lane meets the definition of a permanent dead-end street but with the approval of Hazel Lane, Eastwood Drive would no longer be considered a dead-end street because you can enter or leave it on two different streets, Hartland [Boulevard] (Route 20) and . . . Hazel Lane."

[4] Section I-1 J of the Hartland subdivision regulations provides: " 'Dead-end Street' shall mean any street described in paragraph D of this Section which is used for access to any current lot of record, and which presently provides only one means of ingress or egress."

Section I-1 D of the Hartland subdivision regulations provides in relevant part: " 'Street' shall mean, for purposes of these subdivision regulations, any private street and any public street, as further defined herein. 'Public street' shall mean any street already dedicated and accepted for public travel (i) by the . . . General Statutes or (ii) by the Town of Hartland pursuant to procedures substantially similar to those set forth in Section I-6-(D) hereof or by legislative action of the Town of Hartland. 'Private street' shall mean any street that is not a public street, including any right of way recorded in the Land Records of the Town of Hartland which is used or to be used for public access to (a) any lot of record or (b) any lot sold or set apart in accordance with the Zoning Regulations and amendments thereto."

[5] Section I-6 A 2 of the Hartland subdivision regulations provides in relevant part: "Arrangement of streets shall provide for the continuation of the

because Eastwood Drive and Hazel Lane combined to form an extended dead-end street with a total length exceeding the 1200 foot regulatory limitation. The plaintiff appealed to the Superior Court, which, on December 17, 2008, affirmed the commission's denial of his application."[6] (Citations omitted.) *Kraiza* v. *Planning & Zoning Commission*, 121 Conn. App. 478, 480–82, 997 A.2d 583 (2010). Thereafter, the plaintiff, on the granting of certification, appealed to the Appellate Court.

In affirming the trial court's judgment, the Appellate Court concluded that the plain language and context of the regulations demonstrate that they apply to both existing and newly proposed dead-end streets; id., 485–86, 490; and that a loop road, such as Eastwood Drive, fits within the definition of a dead-end street because it has only one means of ingress or egress. Id., 495–96. The court also concluded that the commission had not arbitrarily reinterpreted the subdivision regulations in considering the plaintiff's application and determining that Eastwood Drive is a dead-end street because there was no evidence in the record regarding the commission's reasons for approving the Eastwood subdivision, and, therefore, its approval did not constitute proof that

principal streets in adjoining subdivision, or for their proper projection when adjoining property is not subdivided. Permanent dead-end streets shall not exceed 1200 feet in length and shall be equipped with a turn-around roadway with a minimum radius of forty-five (45) feet for the outside curb at the closed end. Such turn-around roadway shall include a right of way with a minimum width of fifty (50) feet, measured from the outside curb at the closed end and continuing to an adjoining property line. . . ."

[6] The trial court concluded that "the commission was well within its proper discretion in determining that these two dead-end streets must be added together to determine whether they exceed 1200 feet. There is nothing in the regulations which says that when additions are made to an existing road each new addition is considered a new road for purposes of the 1200 foot limitation. . . . The commission's interpretation is in accord with the plain language of the applicable sections of the regulations. . . .

"Contrary to the plaintiff's argument, the commission correctly determined that Eastwood Drive is a dead-end street because it meets the definition of a dead-end street in [§] I-1 J: It provides access to current lots and has only one means of ingress and egress at the intersection with Route 20."

Eastwood Drive is not a dead-end street. Id., 496–97. This court subsequently granted the plaintiff's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly determine that the [commission] properly denied the plaintiff's application to subdivide his property?" *Kraiza* v. *Planning & Zoning Commission*, 298 Conn. 904, 3 A.3d 70 (2010).

On appeal, the plaintiff argues that the commission improperly denied his application on the ground that Hazel Lane is an extension of Eastwood Drive and that the combined length of the two roads forms a single dead-end street that exceeds the length permitted under the subdivision regulations.[7] The commission responds that it properly viewed the two roads as forming one continuous road and properly applied the regulations on the basis of that understanding because Route 20 provides the only means of ingress and egress to the Eastwood subdivision and the plaintiff's property. We agree with the plaintiff.

We begin with the applicable standard of review. "Generally, it is the function of a zoning board . . . to decide within prescribed limits and consistent with the exercise of [its] legal discretion, whether a particular section of the zoning regulations applies to a given situation and the manner in which it does apply. [In turn] [t]he . . . court ha[s] to decide whether the board correctly interpreted the section [of the regulations] and applied it with reasonable discretion to the facts. . . . In applying the law to the facts of a particular case, the board is endowed with . . . liberal discretion,

[7] The plaintiff specifically claims that the Appellate Court incorrectly concluded that (1) the length of Hazel Lane should be determined by aggregating its length with Eastwood Drive, and (2) the length limitation for dead-end streets applies to Eastwood Drive, which is configured as a loop. We consider these two claims, however, as different ways of articulating a single claim that the Appellate Court incorrectly concluded that Hazel Lane is a continuation of Eastwood Drive and, therefore, that the combined length of the two roads exceeds the permissible length of a permanent dead-end street.

and its action is subject to review . . . only to determine whether it was unreasonable, arbitrary or illegal. . . . Moreover, the plaintiffs bear the burden of establishing that the board acted improperly. . . .

"Ordinarily, this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . [A]n agency's factual and discretionary determinations are to be accorded considerable weight. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when [an] agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . [I]t is for the courts, and not administrative agencies, to expound and apply governing principles of law. . . . These principles apply equally to regulations as well as to statutes." (Internal quotation marks omitted.) *Alvord Investment, LLC* v. *Zoning Board of Appeals*, 282 Conn. 393, 408–409, 920 A.2d 1000 (2007).

We have also stated that "zoning regulations are local legislative enactments . . . and, therefore, their interpretation is governed by the same principles that apply to the construction of statutes. . . . Moreover, regulations must be interpreted in accordance with the principle that a reasonable and rational result was intended . . . . The process of statutory interpretation involves the determination of the meaning of the statutory language [or in this case, the relevant zoning regulation] as applied to the facts of the case, including the question of whether the language does so apply. . . .

"Because zoning regulations are in derogation of common-law property rights, they must be strictly con-

strued and not extended by implication. . . . Whenever possible, the language of zoning regulations will be construed so that no clause is deemed superfluous, void or insignificant. . . . The regulations must be interpreted so as to reconcile their provisions and make them operative so far as possible. . . . When more than one construction is possible, we adopt the one that renders the enactment effective and workable and reject any that might lead to unreasonable or bizarre results." (Citations omitted; internal quotation marks omitted.) *Graff* v. *Zoning Board of Appeals*, 277 Conn. 645, 652–53, 894 A.2d 285 (2006).

Section II-5 of the zoning regulations provides that a "[s]ubdivision shall be permitted only in conformance with the regulations governing the subdivision of land entitled 'Requirements for the Approval of Subdivision Plans in the Town of Hartland' . . . ."

Section I-1 D of the subdivision regulations defines "street" as "any private street and any public street, as further defined herein. 'Public street' shall mean any street already dedicated and accepted for public travel (i) by the . . . General Statutes or (ii) by the Town of Hartland . . . . 'Private street' shall mean any street that is not a public street, including any right of way recorded in the Land Records of the Town of Hartland, which is used or to be used for public access to (a) any lot of record or (b) any lot sold or set apart in accordance with the Zoning Regulations and amendments thereto." Section I-1 E further defines "reserve strip" as meaning and including "areas for which future public use is intended for street connections and for street or pedestrian ways giving access to land dedicated to public use."

Insofar as the subdivision regulations address design specifications, § I-6 A 1 provides in relevant part that, "[e]xcept where impracticable because of topography

or other conditions, all [private streets not already dedicated and accepted for public travel by the state and the town of Hartland] shall join each other so that for a distance of at least one hundred (100) feet before joining the street is at right angles or radial to the street it joins . . . . No streets shall intersect or meet at an angle of less than sixty (60) degrees or more than one hundred and twenty (120) degrees." The subdivision regulations also provide that "[n]o subdivision shall be approved unless the area to be subdivided shall have frontage on and access from [an] existing public street . . . . Proposed streets shall be in harmony with existing or proposed arterial streets . . . especially with regard to safe intersections with such thoroughfares."[8]

With respect to dead-end streets, § I-1 J of the subdivision regulations defines such a street as "any street described in paragraph D of this Section which is used for access to any current lot of record, and which presently provides only one means of ingress or egress." In addition, § I-6 A 2 provides in relevant part: "Arrangement of streets shall provide for the continuation of the principal streets in adjoining subdivision, or for their proper projection when adjoining property is not subdivided. Permanent dead-end streets shall not exceed 1200 feet in length and shall be equipped with a turn-around roadway with a minimum radius of forty-five (45) feet for the outside curb at the closed end. Such turn-around roadway shall include a right of way with a minimum width of fifty (50) feet, measured from the outside curb at the closed end and continuing to an adjoining property line. . . ."

We conclude, on the basis of the plain language of the regulations, that the Appellate Court incorrectly

[8] We note that this provision was added to the regulations in 2005 but was not assigned a number.

determined that Hazel Lane constitutes an extension of Eastwood Drive and that the combined length of the two roads exceeds the permissible length for a permanent dead-end street. Hazel Lane and Eastwood Drive are separate and distinct roads, and thus cannot be combined to determine compliance with the regulations, because Hazel Lane, as proposed in the site development plan, is not laid out as a continuation of Eastwood Drive but intersects with Eastwood Drive in conformance with § I-6 A 1 of the subdivision regulations. As previously discussed, § I-6 A 1 provides that, in cases of intersecting streets, meaning more than one street, "all streets shall join each other so that for a distance of at least one hundred (100) feet before joining the street is at right angles or radial to the street it joins . . . ." In this case, the site development plan shows Hazel Lane not only intersecting with Eastwood Drive at a perfect right angle but continuing into the subdivided property for approximately 365 feet, far more than the required 100 feet, before curving gently in a more northerly direction toward its terminus. Moreover, Eastwood Drive does not make an abrupt right angle turn where Hazel Lane begins—which might be reason to conclude that Hazel Lane represents an extension of an existing road—but continues past Hazel Lane to form a one-half mile loop. Accordingly, Eastwood Drive and Hazel Lane intersect in a manner conforming with language in the subdivision regulations clearly referring to *two* separate roads.

In addition, the approved Eastwood subdivision plan describes the fifty foot wide reserve strip from Eastwood Drive to the subdivided property over which Hazel Lane is located as "Reserved For Future Road," thus indicating not only that such a road was always contemplated by the local authorities but that the road was not intended to be a continuation of Eastwood Drive.

The subdivision regulations also repeatedly state that the function of streets is to provide "access" to land, specifically, "public access to (a) any lot of record or (b) any lot sold or set apart in accordance with the Zoning Regulations and amendments thereto"; Hartland Subdivision Regs., § I-1 D; "access to land dedicated to public use"; id., § I-1 E; and "access to any current lot of record . . . ." Id., § I-1 J. Although the term "access" is not defined in the subdivision regulations, it is commonly understood in the context of real property law to mean "the right vested in the owner of land which *adjoins* a road or other highway to go and return from his own land to the highway without obstruction." (Emphasis added.) Black's Law Dictionary (6th Ed. 1990); see also 83 Am. Jur. 2d 179, Zoning and Planning § 163 (2003) (defining "access" as "a landowner's legal right to pass from his land to the highway and to return without being obstructed"). Consequently, because Hazel Lane provides access only to the plaintiff's subdivided lots and Eastwood Drive provides access only to lots within the Eastwood subdivision, Eastwood Drive and Hazel Lane must be considered two separate roads.

Furthermore, both the trial court and the Appellate Court expressly recognized that Eastwood Drive does not provide access to the subdivided lots and distinguished between the two roads, thus indirectly acknowledging that Eastwood Drive and Hazel Lane cannot be considered one continuous road. The trial court stated in its memorandum of decision that "[a]ccess to the lots within the Eastwood subdivision is provided by a public road known as Eastwood Drive" and that the plaintiff's proposed eight lot subdivision "includes access into the property on a proposed road (to be known as Hazel Lane) which will connect to Eastwood Drive over the reserve strip . . . ." Similarly, the Appellate Court stated in its decision that "[t]he plaintiff's proposal included a dead-end street, Hazel

Lane, to provide access to the lots by connecting to Eastwood Drive over the reserve strip." *Kraiza* v. *Planning & Zoning Commission*, supra, 121 Conn. App. 480–81.

Finally, the commission's planning consultant, Connor, implicitly recognized that Eastwood Drive and Hazel Lane are two separate roads by repeatedly distinguishing between them in his analysis and describing them in different terms. See footnote 3 of this opinion. The fact that the roads have two different names is also evidence of their separate, physical identity. Accordingly, the cumulative effect of these considerations supports the conclusion that Eastwood Drive and Hazel Lane are two distinct roads, and the commission should not have considered them as one combined road in applying the regulations.

Having concluded that Hazel Lane is not a continuation of Eastwood Drive, we further conclude that Hazel Lane satisfies the definition of a permanent dead-end street. It is less than 1200 feet in length and is equipped with a turnaround and a right-of-way at its "closed end" that comply with the subdivision regulations. In addition, Hazel Lane has only one means of ingress and egress, namely, its intersection with Eastwood Drive.

To the extent the commission argues that the plaintiff's application should not be approved because Eastwood Drive is a dead-end street and one dead-end street should not be allowed to branch off another,[9] there is nothing in the record to support it. The subdivision regulations do not provide that a dead-end street must intersect with a through road or a principal thoroughfare, nor do they prohibit a subdivision plan in which

[9] This is essentially identical to the commission's argument that Eastwood Drive and Hazel Lane constitute one, long dead-end street for which the only means of ingress and egress is the intersection of Eastwood Drive and Route 20.

one dead-end street branches off another.[10] Moreover, even if we agreed in theory with the commission that the subdivision regulations do not allow for one dead-end street to branch off another, we do not agree that Eastwood Drive satisfies the definition of a dead-end street.

As previously noted, "[t]he regulations must be interpreted so as to reconcile their provisions and make them operative so far as possible." (Internal quotation marks omitted.) *Graff* v. *Zoning Board of Appeals*, supra, 277 Conn. 653; accord *Planning & Zoning Commission* v. *Gilbert*, 208 Conn. 696, 706, 546 A.2d 823 (1988). The subdivision regulations, considered in their totality, set forth two basic requirements, in addition to the limitation on length, for a street to be designated as a dead-end street. Section I-1 J first provides that a " '[d]ead-end [s]treet' " must have only "one means of ingress or egress." Section I-6 A 2 further provides that "[p]ermanent dead-end streets . . . shall be equipped with a turn-around roadway with a minimum radius of forty-five (45) feet for the outside curb at the closed end. Such turn-around roadway shall include a right of way with a minimum width of fifty (50) feet, measured from the outside curb at the closed end and continuing to an adjoining property line."

Eastwood Drive fails to satisfy the first requirement that there be only one means of ingress or egress because vehicles located on any part of the loop may travel in either direction to reach the stem and exit onto Route 20. In other words, there are two means of ingress and egress from any lot on the loop, depending on whether one chooses to travel in a clockwise or counterclockwise direction. Moreover, the road is

[10] Accordingly, we are not persuaded by the commission's contention that the only means of ingress and egress for Hazel Lane is by way of Route 20 because it is a through street, unlike Eastwood Drive.

designed so that even if drivers at the top of the stem want to turn their vehicles around, they may travel around the loop in either direction before returning to the stem and exiting onto Route 20. The Appellate Court reached a similar conclusion when it considered whether a loop road fit within the definition of a "cul-de-sac." *200 Associates, LLC* v. *Planning & Zoning Commission*, 83 Conn. App. 167, 173–74, 851 A.2d 1175 (ordinary meaning of cul-de-sac "is a blind alley or a street open at one end only, or a street closed at one end, usually with a turnaround at the closed end, which does not describe . . . a loop road that allows traffic to flow in two directions"), cert. denied, 271 Conn. 906, 859 A.2d 567 (2004); see also *Springborn* v. *Falmouth*, 769 A.2d 852, 857 (Me. 2001) (concluding that looping design of circular drives within subdivision did not create "dead-end condition" because they did not have "a single 'point of turnaround' " but "circle[d] around, without definite terminus," thus "allow[ing] each individual lot to be approached from two directions"). Eastwood Drive also fails to satisfy the single means of ingress or egress requirement because, as expressed in the professional opinion of the commission's planning consultant, the road considered in its entirety would have more than one means of ingress and egress following the construction of Hazel Lane, namely, Route 20 and Hazel Lane.

The second requirement of a turnaround roadway with a closed end is no less problematic. Although the subdivision regulations contain no definition of "turnaround," the term in common parlance means "a space (as in a widened section of a driveway) designed to permit the turning around of a vehicle . . . ." Webster's Third New International Dictionary; see also The American Heritage Dictionary of the English Language (5th Ed. 2011) ("turnaround" is "[a] space, as in a driveway, permitting the turning around of a vehicle"). Accord-

ingly, we agree with the dissenting justice in the Appellate Court that "[t]he language 'turn-around roadway' strongly suggests that a dead-end street is one in which drivers would have to turn around in order to get out; hence, the minimum radius requirement for the turn-around. The language 'closed end' also strongly suggests the same thing, namely, that a dead-end street is one that has an end that is closed to getting out; hence, the requirement that there be a right-of-way with a minimum width at the closed end." *Kraiza* v. *Planning & Zoning Commission*, supra, 121 Conn. App. 501 (*Borden*, *J.*, dissenting). In other words, a "turn-around," as used in Hartland's specifications for constructing a dead-end street, means a constricted space sufficient to enable a vehicle to turn around and reverse direction without backing up. Eastwood Drive consists of a 2650 foot loop containing four interior and ten exterior lots located at the end of an 850 foot stem that connects with Route 20. This loop cannot, by any reasonable stretch of the imagination, be regarded as a "turn-around roadway" with a "closed end" in the manner contemplated by the subdivision regulations. Hartland Subdivision Regs., § I-6 A 2. "Because zoning [and subdivision] regulations are in derogation of common-law property rights, they must be strictly construed and not extended by implication." *Graff* v. *Zoning Board of Appeals*, supra, 277 Conn. 653. We therefore conclude that Eastwood Drive does not fit within the definition of a "dead-end street."

We finally observe that the fact that the subdivision regulations do not include the terms "cul-de-sac" or "loop road" does not mean that such roads do not exist or that they must be considered under another category included in the regulations, such as a dead-end street. See *Kraiza* v. *Planning & Zoning Commission*, supra, 121 Conn. App. 502 (*Borden*, *J.*, dissenting). The record demonstrates that the commission has amended the

subdivision regulations at least twice in the fairly recent past, and, accordingly, if it wishes to amend them again to address matters previously neglected, it has the authority and opportunity to do so. For all of the foregoing reasons, we conclude that the Appellate Court incorrectly determined that the commission properly denied the plaintiff's application to subdivide his property.[11]

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the trial court's judgment and to remand the case to the trial court with direction to render judgment sustaining the plaintiff's appeal.

In this opinion the other justices concurred.

JUDY RETTIG ET AL. *v.* TOWN OF WOODBRIDGE ET AL.
(SC 18312)
(SC 18422)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.

Syllabus

The plaintiff, who was employed as an animal control officer for the district animal control, an intermunicipal district established pursuant to statute (§ 7-330) to serve the animal control needs of the defendant towns of Bethany, Orange, Prospect and Woodbridge, sought damages from the towns, among other defendants, for injuries that she had sustained when she slipped and fell in the course of her employment. Under an agreement entered into by the towns, the district animal control is managed by a district board. The district board hires animal control officers and determines their compensation and terms of employment. The trial court granted the defendants' motions for summary judgment and rendered judgment thereon for the defendants, concluding that the plaintiff was

[11] We do not address the plaintiff's claim that the Appellate Court improperly supplied legislative intent to a land use regulation when the legislative history of the regulation is silent and the language of the regulation reveals no particular legislative purpose because we find no ambiguity in the meaning of the regulations and thus need not turn to the legislative history.

an employee of the towns and, therefore, that her claims were barred by the exclusivity provision (§ 31-284 [a]) of the Workers' Compensation Act (§ 31-275 et seq.). The plaintiff appealed, claiming that she was not an employee of the towns. *Held* that the trial court properly granted the defendants' motions for summary judgment and correctly determined that the plaintiff was an employee of the towns and that her claims therefore were barred by § 31-284 (a); because the district board exercised its authority on behalf of the towns that it served in managing the district animal control, and on the basis of this court's prior precedent holding that members of a local board of education were officers of the town that they served and that persons employed by the board in the performance of its statutory functions were employees of the town, this court concluded that an employee of the district animal control is an employee of the towns served by the district animal control for purposes of the exclusivity provision of the Workers' Compensation Act.

Argued December 2, 2011—officially released April 24, 2012

Procedural History

Action to recover damages for personal injuries sustained as a result of the alleged negligence of the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of New Haven, where the district animal control intervened as a plaintiff; thereafter, the case was transferred to the judicial district of Waterbury, Complex Litigation Docket; subsequently, the court, *Scholl, J.*, granted the motions filed by the named defendant et al. to strike certain counts of the complaint and rendered judgment for those defendants on the stricken counts, and the plaintiff Christine Santoro appealed; thereafter, the court granted the motions for summary judgment filed by the named defendant et al. with respect to the counts of the complaint in which the named plaintiff sought damages for negligence and nuisance and rendered judgment for the named defendant et al.; subsequently, the named plaintiff filed a separate appeal. *Affirmed.*

David N. Rosen, with whom was *Maureen E. Driscoll*, for the appellants (named plaintiff et al.).

Thomas R. Gerarde, with whom was *Bethany B. Karas*, for the appellees (named defendant et al.).

Michael F. O'Connor, with whom, on the brief, was *Scott R. Ouellette*, for the appellees (defendant town of Orange et al.).

Opinion

PALMER, J. The dispositive issue in these consolidated appeals[1] is whether an employee of a municipal district established pursuant to General Statutes § 7-330[2] is an employee of the towns comprising the district for purposes of General Statutes § 31-284 (a),[3] the exclu-

[1] The consolidated appeals that are the subject of this opinion are Docket No. SC 18422, which was filed by the named plaintiff, Judith Rettig, and Docket No. SC 18312, which was filed by the plaintiff Christine Santoro. As we explain more fully hereinafter; see footnote 8 of this opinion; our resolution of the appeal in Docket No. SC 18422 is dispositive of the appeal in Docket No. SC 18312. Unless otherwise indicated, all references in this opinion are to the appeal in Docket No. SC 18422.

[2] General Statutes § 7-330 provides: "Any two or more towns, cities or boroughs may, by vote of their legislative bodies, vote to form a district for the performance of any municipal function which the constituent municipalities of such district may, under any provision of the general statutes or of any special act, perform separately. The affairs of any such district shall be managed by a board consisting of two members from each constituent municipality appointed by the board of selectmen of towns, the council or board of aldermen of cities and the board of burgesses of boroughs. Any town, city or borough having a population of more than five thousand inhabitants as determined by the last-completed federal census shall be entitled to one additional representative for each additional five thousand population or part thereof. The board shall, at its first meeting, determine by lot which members shall serve for one, two or three years, provided the terms of office of not more than fifty per cent of the board shall expire in any one year. Thereafter, the terms of office shall be for three years. Such board shall choose by ballot from its membership a chairman, a secretary and a treasurer. Such treasurer shall give bond to the board to the satisfaction of its members, the cost of such bond to be borne by the board."

[3] General Statutes § 31-284 (a) provides: "An employer who complies with the requirements of subsection (b) of this section shall not be liable for any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment or on account of death resulting from personal injury so sustained, but an employer shall secure compensation for his employees as provided under this chapter, except that compensation shall not be paid when the personal injury has been caused by the wilful and serious misconduct of the injured employee or by his intoxication. All rights and claims between an employer who complies with

sivity provision of the Workers' Compensation Act (act), General Statutes § 31-275 et seq. The named plaintiff, Judy Rettig,[4] appeals[5] from the judgment rendered by the trial court in favor of the named defendant, the town of Woodbridge, and the defendant towns of Bethany, Orange and Prospect, among other defendants.[6] The plaintiff commenced this action against the defendants pursuant to General Statutes § 52-557n,[7]

the requirements of subsection (b) of this section and employees, or any representatives or dependents of such employees, arising out of personal injury or death sustained in the course of employment are abolished other than rights and claims given by this chapter, provided nothing in this section shall prohibit any employee from securing, by agreement with his employer, additional compensation from his employer for the injury or from enforcing any agreement for additional compensation."

[4] Christine Santoro also is a plaintiff. In addition, the district animal control intervened as a plaintiff. In the interest of simplicity, we refer to Rettig, the named plaintiff, as the plaintiff throughout this opinion.

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

[6] The complaint also named as defendants Advanced Paving and Excavating, Inc., as well as the following officers of the defendant towns: Warren Connors; Robert Chatfield; Edwin Lieberman; Clifford Rosson; Amey Marrella; Judith Schwartz; Joseph Calistro; Christian Sorenson; James Sabshin; Edward Sheehy; Steven Bortner; Mitchell Goldblatt; James Zeoli; Joseph Blake; Richard Meisenheimer; Dorothy Berger; Ralph Okenquist; Patricia Pearson; Roy Cuzzocreo; Derrylyn Gorski; Steven Thornquist; and Walter Briggs. Prior to judgment, the plaintiff withdrew her claims against Advanced Paving and Excavating, Inc. All of the original defendants except Advanced Paving and Excavating, Inc., are parties to this appeal. In the interest of simplicity, all references to the defendants in this opinion are to the defendant towns.

[7] General Statutes § 52-557n provides in relevant part: "(a) (1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by . . . (C) acts of the political subdivision which constitute the creation or participation in the creation of a nuisance; provided, no cause of action shall be maintained for damages resulting from injury to any person or property by means of a defective road or bridge except pursuant to section 13a-149. (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct; or (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

seeking damages for injuries that she sustained when she slipped and fell in the course of her employment as an animal control officer for the district animal control. The district animal control was established by the defendants pursuant to § 7-330, which permits two or more towns to form a "district" for the performance of any municipal function that the member towns may, under any provision of the General Statutes, perform separately. On appeal, the plaintiff claims that the trial court incorrectly concluded that the defendants were her employer and, therefore, that her claims were barred by the exclusivity provision of the act. We disagree and, accordingly, affirm the judgment of the trial court.[8]

The following undisputed facts and procedural history are relevant to our disposition of this appeal. In 1988, in accordance with the provisions of General Statutes (Rev. to 1987) § 22-331a (a),[9] the defendants

[8] Because we reject the plaintiff's claim in the appeal corresponding to Docket No. SC 18422, and because the claim in the appeal corresponding to Docket No. SC 18312 is derivative of the claim in Docket No. SC 18422, the claim in Docket No. SC 18312 also must fail. Christine Santoro, who filed the appeal in Docket No. SC 18312, was joined in a civil union with the plaintiff on April 9, 2006, and asserted a claim for loss of consortium against the defendants in the plaintiff's action. The trial court granted the defendants' motions to strike Santoro's claim on the ground that Santoro and the plaintiff had not been joined in a civil union when the plaintiff sustained her injuries. Santoro appealed but acknowledged that her loss of consortium claim is derivative of the plaintiff's claims and, therefore, that she cannot prevail on appeal if we conclude that the trial court correctly determined that the plaintiff's claims are barred by the exclusivity provision of the act. Because we reject the plaintiff's claim in Docket No. SC 18422, we reject Santoro's claim in Docket No. SC 18312. Therefore, we affirm the trial court's judgment.

[9] General Statutes (Rev. to 1987) § 22-331a (a) provides in relevant part: "Any two or more contiguous towns each of which has a population of less than twenty-five thousand, and which have or will provide a dog pound facility within their region, by action of their legislative bodies, may agree to be served by a regional canine control officer. Upon certification of such agreement to the commissioner with assurances from the towns so certifying that they will provide and continue to provide adequate facilities, the commissioner may, after giving due regard to the regional aspects of the proposed

entered into an agreement to establish a regional dog pound at 135 Bradley Road in the town of Woodbridge. Under that agreement, the defendants agreed to be served by a regional canine control officer provided by the state department of agriculture. In 1992, the state notified the defendants that it no longer would provide an animal control officer for the region. In light of the state's withdrawal of support, the defendants dissolved the regional dog pound and converted it to a municipal district in accordance with § 7-330. Under the municipal animal control district agreement entered into by the defendants, the animal control facility that had served as the regional dog pound continued to serve as the animal control facility for the newly formed district, with each town paying its proportionate share of the cost of maintaining that facility. With respect to the governance, staffing and finance of the district animal control, the agreement provided in relevant part: "The affairs of the [d]istrict hereby established shall be managed by a [b]oard consisting of two (2) members from each constituent municipality, appointed by the [b]oard of [s]electmen, the [t]own [c]ouncil, or [b]oard of [a]ldermen for each [t]own, as applicable. . . .

"Current operating expenses for the [d]istrict shall be borne by each [t]own in proportion to the following percentages, which are calculated based upon the 1990 census: [Bethany, 13.9 percent; Orange, 38.7 percent; Woodbridge, 23.9 percent; and Prospect, 23.5 percent]. . . .

facilities and whether the proposed region would be in the best interests of the towns so certifying, establish such region. Upon establishing such region, the commissioner shall appoint a full-time regional canine control officer and such assistants as are deemed necessary to administer and enforce the laws relating to dogs. . . . All costs of maintaining and operating such pounds and administering and enforcing the laws relating to dogs within such regions shall be paid in accordance with the provisions of subsection (b)."

"Each [t]own hereby agrees to make a yearly budget appropriation sufficient to pay its financial obligations under this [a]greement, upon a payment schedule agreed to by at least three of the four chief elected officials of the member [t]owns.

"Each annual operating budget must be approved by the [d]istrict [b]oard and by the chief elected officials of at least three of the four member [t]owns. . . .

"The [d]istrict is formed to furnish or provide, for the joint use and benefit of the member [t]owns, services, personnel, facilities, equipment and other property or resources for the purpose of administering and enforcing the laws relating to dogs and other animals. The [d]istrict shall be served by a [d]istrict animal control officer and such assistants as shall be deemed necessary by the [d]istrict [b]oard, to be appointed by the [d]istrict [b]oard, who shall also be appointed by the proper appointing authority in each [t]own as the municipal control officer or such assistants in such member [t]own for the administration and enforcement of laws related to dogs and other animals within the limits of all member [t]owns. The working conditions, compensation, benefits, personnel rules, appointment and removal of such animal control officer or assistants . . . shall be determined solely by the [d]istrict [b]oard. The [b]oard is hereby authorized to sell, lease, acquire, contract for and otherwise arrange for the real or personal property, equipment and services necessary or advisable for the conduct of the [d]istrict's business; subject, however, to the budget approval process set forth . . . above, and subject also to the further proviso that any expenditure in excess of [$2000] shall be subject to the prior written approval of at least three of the respective chief elected officials of the member [t]owns."

The plaintiff was hired by the district animal control in 2001 to serve as its animal control officer. In accor-

dance with the provisions of the municipal animal control district agreement, the district animal control paid her salary and benefits out of its budget and purchased workers' compensation insurance on her behalf. On January 9, 2005, while in the course of performing her duties, the plaintiff slipped and fell in the driveway of the district animal control, sustaining a serious ankle injury, among other injuries. The plaintiff filed a timely workers' compensation claim against the district animal control, which it accepted and ultimately settled for $800,000. The plaintiff also commenced this action against the defendants pursuant to § 52-557n, alleging, inter alia, negligence and nuisance. The defendants asserted several special defenses, including that the plaintiff's claims were barred (1) by the exclusivity provision of the act, (2) pursuant to the exclusivity of the remedy provided under the highway defect statute; see General Statutes § 13a-149; and (3) under § 52-557n, which limits the liability of municipalities under certain circumstances. The defendants subsequently filed motions for summary judgment, relying on the claims raised in their special defenses.

In opposing the defendants' motions for summary judgment, the plaintiff argued, inter alia, that the exclusivity provision of the act does not bar her claims because the defendants lacked the requisite control over her employment to satisfy the jurisdictional standard of an employer under the act. See *Doe* v. *Yale University*, 252 Conn. 641, 680–81, 748 A.2d 834 (2000) ("[t]he right to control test determines the [relationship between a worker and a putative employer] by asking whether the putative employer has the right to control the means and methods used by the worker in the performance of his or her job" [internal quotation marks omitted]). In support of this contention, the plaintiff relied primarily on the municipal animal control district agreement, pursuant to which the defendants had

agreed to delegate to the district animal control board (district board) sole control over the terms and conditions of her employment. The plaintiff noted that, under that agreement, the district board had exclusive authority to set her hours, assign her duties, supervise her work, fix her salary and determine her benefits. The plaintiff maintained that, to the extent that the municipal animal control district agreement did not establish conclusively that the district animal control was her employer rather than the defendants, it at least raised a genuine issue of material fact as to that issue sufficient to survive a motion for summary judgment.

The trial court disagreed, concluding that the district board was analogous to a municipal board of education. The trial court explained that, under *Wallingford* v. *Board of Education*, 152 Conn. 568, 573, 210 A.2d 446 (1965), members of a local board of education are deemed to be officers of the municipality they serve, whereas employees of the district board are considered employees of the municipalities served by the district board. The court further observed that, in *Mase* v. *Meriden*, 164 Conn. 65, 66–67, 316 A.2d 754 (1972), this court relied on *Wallingford* in concluding that, for purposes of applying the exclusivity provision of the act, an employee of a local board of education was an employee of the town served by the board. The trial court reasoned that, "[i]nasmuch as the legislature has deemed local and regional boards of education identical, there is no logical reason to conclude that an employee of a regional board of education would not be an employee of the towns that participate in the regional board of education." The trial court also explained that, "[j]ust as members of the [district] board . . . are officers of the towns they serve, so, too, are the employees of the district animal control facility employees of the towns participating in the facility." Having determined that the plaintiff's claims were controlled by *Mase*, the trial

court did not reach the defendants' other special defenses. This appeal followed.

On appeal, the plaintiff renews her argument that the act is inapplicable to her claims because the record makes clear that she and the defendants were never in an employment relationship. The plaintiff contends that the trial court, in reaching a contrary conclusion, misconstrued *Mase* as having created an exception to the right to control test set forth in *Doe*. The plaintiff maintains that, although *Mase* held that employees of a local board of education are employees of the town served by the board, that holding was limited to cases in which a municipality, pursuant to its authority under the Home Rule Act, General Statutes § 7-188, can impose the civil service requirements of its town charter on board employees. The plaintiff further argues that, because she is not subject to the civil service requirements of the defendant towns, the reasoning in *Mase* is inapplicable. Finally, the plaintiff contends that the trial court, in addition to misconstruing our holding in *Mase*, extrapolated several principles from the case that are unwarranted, including that the district board is analogous to a municipal board of education, that employees of a regional board of education necessarily would be considered employees of each of the municipalities comprising the region, and that the same rules that apply to local boards of education should apply to district boards. The plaintiff proffers several reasons as to why these principles are unfounded. We find none of the plaintiff's arguments persuasive and conclude that the trial court correctly determined that an employee of the district animal control is an employee of the municipalities served by the district for purposes of the exclusivity provision of the act.[10]

[10] We note, preliminarily, that our review of the plaintiff's claims is guided by the well established principles governing motions for summary judgment. "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

We begin our review of the plaintiff's claim by setting forth certain relevant statutory provisions. General Statutes § 7-193 (b) provides in relevant part that "[e]ach municipality may have any municipal officers, departments, boards, commissions and agencies which are specifically allowed by the general statutes or which are necessary to carry out any municipal powers, duties or responsibilities under the general statutes. . . ." One such municipal responsibility is the duty to maintain a dog pound or, alternatively, to participate in a regional dog pound. See General Statutes § 22-336. Under General Statutes § 7-330, "[a]ny two or more towns, cities or boroughs may . . . vote to form a district for the performance of any municipal function which the constituent municipalities of such district may, under any provision of the general statutes or of any special act, perform separately. The affairs of any such district shall be managed by a board consisting of two members from each constituent municipality appointed by the board of selectmen of towns, the council or board of aldermen of cities and the board of burgesses of boroughs." Under General Statutes § 7-331, "[t]he proportional share of each constituent municipality of the indebtedness and current expenditures of the district for its projects under the provisions of sections 7-330 to 7-332, inclusive, shall be determined by the board, which board shall have all the powers and duties with regard to such

party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court. . . . Our review of the trial court's decision to grant [a party's] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Southwick at Milford Condominium Assn., Inc.* v. *523 Wheelers Farm Road, Milford, LLC*, 294 Conn. 311, 318, 984 A.2d 676 (2009).

projects as such constituent municipalities would have severally." Under General Statutes § 7-332, a municipality "may, by vote of its legislative body, elect to withdraw from such district, but such withdrawal shall not be effective until six months after such vote, nor shall such withdrawal relieve such municipality of any liability which it incurred as a member of such district."

This appeal also implicates the workers' compensation statutes and, in particular, the exclusivity provision of the act. "The purpose of the [act] . . . is to provide compensation for injuries arising out of and in the course of employment, regardless of fault. . . . Under the statute, the employee surrenders his right to bring a common law action against the employer, thereby limiting the employer's liability to the statutory amount. . . . In return, the employee is compensated for his or her losses without having to prove liability. . . . In a word, these statutes compromise an employee's right to a common law tort action for work related injuries in return for relatively quick and certain compensation. . . . The intention of the framers of the act was to establish a speedy, effective and inexpensive method for determining claims for compensation." (Citations omitted; internal quotation marks omitted.) *Doe* v. *Yale University*, supra, 252 Conn. 672.

"The entire statutory scheme of the [act] is directed toward those who are in the employer-employee relationship as those terms are defined in the act and discussed in our cases. That relationship is threshold to the rights and benefits under the act . . . . Just as a claimant may invoke the act's remedies only if the claimant satisfies the jurisdictional requirement of an employee as set forth in [General Statutes] § 31-275 (9) . . . only those defendants who satisfy the requisite jurisdictional standard of an employer as set forth in § 31-275 (10) may successfully assert the exclusivity of the act as a bar to a common-law action by an alleged

employee." (Citations omitted; internal quotation marks omitted.) Id., 680. "In short, if the defendant was the plaintiff's employer, the plaintiff [is] relegated to the remedies afforded by the [act]." *Velardi* v. *Ryder Truck Rental, Inc.*, 178 Conn. 371, 376, 423 A.2d 77 (1979).

We now turn to the specific question raised by the plaintiff's claim, that is, can she recover damages against the defendants for injuries arising out of her employment or is she barred from doing so by the exclusivity provision of the act? Although this question presents an issue of first impression for this court, our answer is dictated by our prior precedent. We previously have held "that members of a local board of education are officers of the town they serve and that the persons employed by them in the performance of their statutory functions are employees of the town." *Cheshire* v. *McKenney*, 182 Conn. 253, 259–60, 438 A.2d 88 (1980); accord *Wallingford* v. *Board of Education*, supra, 152 Conn. 573. In *Mase* v. *Meriden*, supra, 164 Conn. 66–67, we relied on this principle in affirming the trial court's determination that the negligence action of the plaintiff, Rickey P. Mase, was barred by the exclusivity provision of the act. Mase, a nonprofessional employee of the Meriden board of education, had brought the action against the city of Meriden (city) to recover for injuries that he sustained when he slipped and fell in the course of his employment. Id., 66. Following the accident, the board paid Mase workers' compensation benefits under a policy that it had purchased on behalf of its employees. See id. In reliance on this court's statement in *Wallingford* that employees of a board of education are employees of the town served by the board, the trial court in *Mase* granted the city's motion for summary judgment on the ground that Mase's claim was barred by the exclusivity of the act. See *Mase* v. *Meriden*, Superior Court, New Haven County at New Haven, Docket No. 12 21 39 (March 7, 1972). In doing so,

the trial court observed, contrary to Mase's contentions, that it was "of no moment" that the Meriden board of education "may have purchased [workers'] [c]ompensation coverage for persons hired by it . . . . The premium was obviously paid with [money] supplied by the [c]ity . . . ." Id.

In a per curiam opinion, we upheld the trial court's determination, stating: "In *Wallingford* v. *Board of Education*, [supra, 152 Conn. 573–74], we specifically held that although [local] boards of education are agencies of the state in charge of education in the towns, members of the board of education are, nevertheless, also officers of the town and that persons employed by the board in the performance of its statutory functions are employees of the town and are thus subject to the provisions of the town charter relating to civil service. Our holding in the *Wallingford* case that persons employed by the board of education are town employees was not limited only to situations [in which] there was a requirement that the board select its nonprofessional employees under those civil service requirements." *Mase* v. *Meriden*, supra, 164 Conn. 67.

In the present case, the plaintiff contends that *Mase* does not control her claim because, among other reasons, the employment relationship that was found to exist in *Mase* was predicated on the city's right to require the Meriden board of education to comply with the civil service requirements of the city charter. See id. The plaintiff argues that, because she is not subject to the civil service requirements of any of the defendant towns, they lack the requisite control over her employment to satisfy the jurisdictional standard of an employer under *Mase*. We disagree.

No doubt because we viewed the employment relationship in *Mase* to be self-evident, we did not engage in a lengthy analysis of the issue, nor did we directly

address Mase's arguments to the contrary. Notwithstanding the rather summary nature of our opinion in *Mase*, however, we explicitly stated that the holding in *Wallingford*, on which the trial court in *Mase* relied in concluding that Mase was a city employee, "*was not limited* only to situations [*in which*] *there was a requirement that the board select its nonprofessional employees* [*in accordance with the*] *civil service requirements* [*of the city*]." (Emphasis added.) Id. Our review of the record in that case indicates that this statement was made in response to Mase's claim on appeal that the trial court's reliance on *Wallingford* was misplaced because *Wallingford* did not involve a claim for workers' compensation benefits but, rather, whether the Wallingford town charter authorized the town of Wallingford to control the manner in which its local board of education hired its nonprofessional staff.[11] See

[11] In *Wallingford*, the town of Wallingford (town) brought a declaratory judgment action against the Wallingford board of education, seeking a determination of whether the town, pursuant to its authority under the Home Rule Act, could require the board to comply with the town's civil service requirements in the hiring of its nonprofessional staff. *Wallingford* v. *Board of Education*, supra, 152 Conn. 570. In opposing the town's action, the board argued that the statutory powers delegated to it by the state to implement the state's educational policies necessarily entailed the power to employ, on whatever terms it deemed fit, the personnel necessary to carry out its duties. Id., 573. We framed the issue presented as "whether the implied power, which the [board of education] concededly possess[es], to employ the personnel necessary to carry out [its] obligations as [an agent] of the state is improperly invaded by a requirement that [it] observe the civil service requirements of the [local] charter in the employment of [its] nonprofessional personnel." Id., 574.

In resolving that issue, we set forth several undisputed principles, including that (1) a local board of education is an agency of the state, (2) members of a board of education are officers of the town served by the board, (3) the persons that the board employs are employees of the town, and (4) "local charter powers must yield to the superior power of the state when the two enter a field of statewide concern." Id., 572–74. Applying these principles, we concluded that "[t]he institution of civil service for town employees is a matter of local concern to the town . . . ." Id., 574. We further concluded that "[t]here [was] nothing in the [statutory] powers to be implied . . . [that] would deny to [the town] the power to embrace, within its civil service system, the nonprofessional employees of the board

Mase v. *Meriden*, Conn. Supreme Court Records & Briefs, October Term, 1972, Pt. 1, Plaintiff's Brief pp. 4–6. Mase contended, therefore, that, when the court in *Wallingford* stated that a board of education employee is an employee of the town served by the board, it was not in the context of deciding whether an employment relationship existed under the act, and the court did not apply the right to control test in deciding the issue. See id., p. 6. Mase further contended that, in applying the right to control test to the facts of his case, it was clear that he and the city were not in an employment relationship because the city did not exercise any control over the terms of his employment. See id., p. 5. Specifically, Mase argued that the board, as an agent of the state, "employed [him], directed his activities, and had the power to fire him," whereas "[t]he [c]ity . . . had no power to hire, fire, or direct him in his duties." Id.

By way of rebuttal, the city argued that the trial court correctly had concluded, in reliance on *Wallingford*, that the city exercised control over Mase through its officers on the board, which was sufficient to satisfy the jurisdictional requirements of an employer under the act. Id., Defendant's Brief pp. 2–4. When read in context of the parties' arguments, therefore, it is apparent that our statement in *Mase* that the holding in *Wallingford* was not limited to cases in which a municipality has authority under its charter to prescribe the manner in which a board hires its nonprofessional staff was intended to indicate our agreement with the city that

of education. . . . The ability to perform the statutory duties imposed on the board are not destroyed or interfered with in any unreasonable way by a requirement that the selection of nonprofessional employees be made from a classified list of persons whose qualifications have been determined on a uniform basis applicable to other town employees similarly situated and whose rights and responsibilities thereafter are fixed by regulations designed to serve the mutual benefit of the employee and the community." Id., 574–75.

the requirements of the act were met in *Mase* not because the city possessed independent authority over Mase's employment but because the members of the board, as officers of the city, exercised *their* authority on behalf of the city. See, e.g., *Cheshire* v. *McKenney*, supra, 182 Conn. 259 ("The members of local boards of education are invested with the powers of their office by municipal action. They are either elected by local constituencies . . . or, pursuant to the town charter, are appointed by an elected officer or body of the municipality." [Citation omitted.]). We can perceive of no reason why the same reasoning should not apply to the present case. Just as local boards of education exercise their authority on behalf of the municipalities they serve, so, too, do the members of the district board exercise their authority on behalf of the defendant towns.

Indeed, it bears emphasis that the issue of whether an employee of a municipal board is also an employee of the municipality served by the board has arisen only in the context of boards of education. That the issue has arisen at all stems from the fact that "our jurisprudence has created a dichotomy in which local boards of education are agents of the state for some purposes and agents of the municipality for others." *Purzycki* v. *Fairfield*, 244 Conn. 101, 112, 708 A.2d 937 (1998); see also *Board of Education* v. *New Haven*, 237 Conn. 169, 181, 676 A.2d 375 (1996) ("A local board of education acts as an agent of the state when it performs those duties delegated to it by the state. . . . A board of education acts as an agent of its respective municipality when it performs those functions originally entrusted by the state to the municipality that the municipality has subsequently delegated to the board of education; e.g., the construction of schools or the acquisition of capital equipment. While acting as an agent of the municipality, the local boards of education must comply

with the municipality's charter, ordinances and established fiscal procedures." [Citations omitted.]).

Thus, on those few occasions when we have considered the issue, it has been in connection with an effort—either by the employee of a board of education or by a board of education itself—to exploit this dichotomy to some advantage by claiming that board of education employees are employees of the board alone rather than the municipality served by the board. See, e.g., *Board of Education* v. *State Employees Retirement Commission*, 210 Conn. 531, 543–45, 556 A.2d 572 (1989) (determining whether board of education employees were employees of municipality such that their wages were subject to social security taxation); *Cheshire* v. *McKenney*, supra, 182 Conn. 257–61 (determining whether board of education employee was employee of municipality and therefore subject to local charter provision prohibiting municipal employees from serving as members of town council); *Mase* v. *Meriden*, supra, 164 Conn. 66–67 (determining whether board of education employee was employee of municipality for purposes of applying exclusivity provision of act). We rejected this claim in each of the foregoing cases, concluding that the board's dual agency in no way undercut the employer-employee relationship between the municipality and the board's employees. See *Board of Education* v. *State Employees Retirement Commission*, supra, 545; *Cheshire* v. *McKenney*, supra, 261; *Mase* v. *Meriden*, supra, 67.

There is, of course, no similar dichotomy in the present case. When the district board carries out its duties pursuant to the provisions of § 7-330 and the municipal animal control district agreement, it does so solely on behalf of the defendant towns, pursuant to the authority delegated to it by those towns. See General Statutes § 7-331 (district board "shall have all the powers and duties with regard to [district] projects as such constit-

uent municipalities would have severally"). Accordingly, to the extent that the plaintiff contends that *Mase* is inapplicable to the present case because of the unique nature of boards of education relative to the straightforward nature of other municipal boards, that contention is without merit. Whatever differences exist between them clearly militate in favor of our conclusion that the defendants and the plaintiff were in an employment relationship.[12]

We also are not persuaded by the plaintiff's contention that the structure of the district animal control "reflects policy choices that . . . are inconsistent with a finding that the towns were [the] plaintiff's employer." Specifically, the plaintiff contends that, by organizing the district animal control so that its employees were employees of the district animal control rather than of each of the individual towns, the defendants "insulated themselves from a series of burdens that they quite reasonably thought it [was] very useful to avoid. These burdens include [financial] obligations both to [the] plaintiff and for [the] plaintiff's conduct that might potentially injure others." The plaintiff does not explain, however, and we are unable to discern, how the defendants have insulated themselves from any of the bur-

[12] We therefore reject the plaintiff's contention that the trial court improperly extrapolated from *Mase* that an employee of a regional board of education would be treated as an employee of the municipalities participating in the regional school district for purposes of applying the exclusivity provision of the act. Apart from identifying several largely irrelevant differences between regional and single-municipality school districts, the plaintiff does not offer a single reason why regional school board employees should be treated differently except that they are not subject to the civil service rules of the individual municipalities comprising the district. As we previously have explained, however, we concluded in *Mase* that whether the employees of a single-municipality school district were subject to the civil service rules of the municipality was irrelevant to our determination that the employees and the municipality were in an employment relationship. See *Mase* v. *Meriden*, supra, 164 Conn. 67. Our reasoning in *Mase* is equally applicable to regional school board employees.

dens that she describes in light of the fact that, under both the municipal animal control district agreement and § 7-331, the defendants are wholly liable for all of the expenses of the district animal control, including the expenses relating to the plaintiff's employment.[13] We also find no merit in the plaintiff's contention that, because district animal control employees are not employees of each of the towns individually and, therefore, are not entitled to participate in the pension plans of any of the individual towns or to receive the same benefits as persons employed by the towns, she and the defendants were not in an employer-employee relationship. The fact that the plaintiff's employment was structured so that she served as an employee of the district animal control rather than of any one of the individual towns simply reflects the practical realities of establishing and administering such a regional district. The manner in which the employment arrangement is structured pales in significance to the fact that the defendant towns control the district board and the budget, the fact that they are liable for all expenses and debts incurred by the district animal control, and

[13] Indeed, as the defendants note, in contrast to other intermunicipal agencies, there is nothing in our statutes to suggest that the district animal control has an independent legal existence apart from the defendants or that it otherwise may sue or be sued in its own capacity. Cf. General Statutes § 7-130d (intermunicipal authority established pursuant to General Statutes § 7-130b "is authorized and empowered: [a] [t]o have existence for such term of years as is specified by the participating municipalities; [b] to contract and be contracted with; to sue and be sued; to make and, from time to time, amend and repeal bylaws, rules and regulations not inconsistent with general law to carry out its purposes"); General Statutes § 7-233e (b) ("[a] municipal electric energy cooperative created in the manner provided in this chapter . . . shall have the . . . [power] . . . [2] [t]o sue and be sued"); General Statutes § 7-479d ("[a]n interlocal risk management agency may sue or be sued and shall appoint a natural person residing in this state or a corporation authorized to do business in this state as its agent for service of process and notify the insurance commissioner of such appointment"). But even if it could, the plaintiff does not dispute that the defendants would be wholly liable for any judgment against it.

the fact that they created the district animal control, as expressly authorized by § 7-330, solely for the purpose of avoiding duplication of animal control services in the discharge of their statutory duty to provide such services.

Finally, it is axiomatic that municipal boards and agencies are extensions of the towns they serve, created for the purpose of performing those functions that towns are statutorily required or permitted to perform. See, e.g., General Statutes § 7-193 (b) ("[e]ach municipality may have any municipal officers, departments, boards, commissions and agencies which are specifically allowed by the general statutes or which are necessary to carry out any municipal powers, duties or responsibilities under the general statutes"). They are, in effect, alter egos of the towns. The district animal control is no different. Indeed, the only thing that distinguishes it from a single-municipality agency or board, tasked with performing the same quintessentially municipal function, is that the district animal control serves more than one town. That its structure or organization may differ on account of this fact does not alter its fundamental character as an agent of the defendant towns.[14] Nor does it alter the fundamental nature of the relationship between the defendant towns and district animal control employees as that of employer and employee.

To conclude otherwise, as the trial court aptly explained, "would subject a town [that] participates in

[14] The plaintiff asserts that the district animal control is more analogous to a corporate subsidiary or joint venture than to a municipal board or agency, and that we should treat the district animal control as such an entity for purposes of determining whether it is the plaintiff's employer under the act. Beyond her assertion, however, the plaintiff fails to explain why the district animal control is similar to a corporate board or joint venture. In any event, to the extent that any parallels may be drawn between those entities and the district animal control, we are fully persuaded that the district animal control is far more comparable to a municipal board or agency.

a municipal district to liability for a worker's on-the-job injury claim twice, once through assessment for sums to provide workers' compensation coverage through the district and then directly for the injury itself. [This] cannot be the intent of the legislature in providing for the regionalization of municipal services. The obvious purpose of the statutes . . . allowing the regionalization of services by towns, which, because of their size, would make the individual provision of such service by one town alone economically unfeasible, would be defeated if such regionalization would operate to strip the town of the protections it would have had if it provided the service alone."

For the foregoing reasons, we agree with the trial court that the defendants are the plaintiff's employer for purposes of the act, and, therefore, the plaintiff's claims are barred by the exclusivity provisions of the act. Accordingly, the trial court properly granted the defendants' motions for summary judgment, and we reject the plaintiff's claim in Docket No. SC 18422. Because the claim in Docket No. SC 18312 is controlled by our resolution of the appeal in Docket No. SC 18422; see footnote 8 of this opinion; we reject the claim in Docket No. SC 18312 as well.

The judgment is affirmed.

In this opinion the other justices concurred.

CARMEN I. PEREZ-DICKSON *v.* CITY OF BRIDGEPORT ET AL.
(SC 18401)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.

Syllabus

The plaintiff school principal sought to recover damages from the defendants, the board of education of the city of Bridgeport and two public

school administrators, for alleged racial discrimination and intentional infliction of emotional distress. The plaintiff, who had filed two reports of suspected child abuse with the department of children and families concerning two teachers, also claimed that the defendants improperly had disciplined her for exercising her rights under the first amendment to the federal constitution in violation of the statutes (§§ 31-51q and 17a-101e) that, respectively, prohibit an employer from disciplining an employee for exercising first amendment rights, and prohibit an employer from discharging, discriminating or retaliating against an employee who makes a required report of suspected child abuse. After filing the reports, the plaintiff was, inter alia, transferred to a smaller school, and she alleged that she was subject to a campaign of harassment. When the plaintiff subsequently was accused of abusing a student, she alleged, inter alia, that she had been treated differently than similarly situated employees, in that, unlike certain white employees who were accused of abusing students, she was not given specific information about the allegations or an opportunity to respond to the allegations before she was placed on administrative leave. The jury returned a verdict for the plaintiff and the defendants moved for a directed verdict. The trial court denied that motion and rendered judgment for the plaintiff, from which the defendants appealed. *Held*:

1. The trial court improperly denied the defendants' motion for a directed verdict with respect to the plaintiff's claim that the defendants had violated § 31-51q by disciplining her for exercising her first amendment rights, that claim having been barred by the rule set forth in *Garcetti* v. *Ceballos* (547 U.S. 410), which held that public employees who make statements pursuant to their official duties are not speaking as citizens for first amendment purposes and the federal constitution does not insulate their communications from employer discipline, and the plaintiff here not having claimed that she was speaking in an unofficial capacity when she reported the instances of suspected child abuse; furthermore, the plaintiff could not prevail on her claim that the judgment could be affirmed on the alternate ground that the defendants violated § 31-51q by disciplining her for exercising her speech rights under the state constitution, the plaintiff having failed to make that claim to the trial court and there having been no exceptional circumstances here to support review of the plaintiff's unpreserved claim, as the plaintiff had ample opportunity to raise the claim at trial, the trial court had authority to rule on the claim, there was no intervening change in the law, the claim was not of constitutional magnitude, and the plaintiff received a fair trial.

2. The trial court lacked subject matter jurisdiction over the plaintiff's claim pursuant to § 17a-101e, there having been nothing in the plain and unambiguous text of that statute to suggest that the legislature intended to authorize private citizens to bring actions on their own behalf pursuant

to § 17a-101e, as the statute specifically authorizes the attorney general to bring an action against an employer who violates the statute.

3. The trial court improperly denied the defendants' motion for a directed verdict as to her claim of racial discrimination, the plaintiff having failed to prove her claim of racial discrimination by a preponderance of the evidence; the plaintiff's circumstantial and ambiguous statistical evidence that the defendants had treated seven white employees and four African-American employees more favorably than they had treated her when she was accused of abusing a student was insufficient as a matter of law to raise an inference of intentional racial discrimination, and the jury could not reasonably have concluded on the basis of that evidence that the defendants intentionally discriminated against her on the basis of her race.

4. The trial court improperly denied the defendants' motion for a directed verdict on the plaintiff's claim of intentional infliction of emotional distress, this court having concluded that no reasonable juror could find that the defendants' conduct in the present case, which included informing the plaintiff that her career was in jeopardy during a performance evaluation, transferring her to a different school and placing her on administrative leave, constituted conduct that was beyond all possible bounds of decency; there was no evidence that the plaintiff was subjected to any unduly humiliating, embarrassing or denigrating language or conduct, intentionally or otherwise, there was no evidence of fabrication or personal animus, and there was no evidence that the plaintiff was in distress for an extended period or that she sought medical treatment.

(*One justice concurring separately*)

Argued May 18, 2011—officially released May 1, 2012

Procedural History

Action to recover damages arising from, inter alia, the defendants' alleged unlawful employment practices, brought to the Superior Court in the judicial district of Fairfield, where the matter was tried to a jury before *Gilardi*, *J.*; verdict for the plaintiff awarding economic, noneconomic and punitive damages; subsequently, the court denied the defendants' motion for a directed verdict, to set aside the verdict and for judgment notwithstanding the verdict, granted in part the defendants' motion for remittitur and reduced the award of damages, and rendered judgment for the plaintiff; thereafter, the defendants appealed and the plaintiff cross appealed. *Reversed; judgment directed.*

Steven D. Ecker, with whom was *Gavan F. Meehan*, for the appellants-cross appellees (defendants).

Max F. Brunswick, with whom were *Valerie Adams Baker* and *Josephine Smalls Miller* for the appellee-cross appellant (plaintiff).

Marc P. Mercier filed a brief for the Connecticut Employment Lawyers Association as amicus curiae.

Opinion

ROGERS, C. J. The plaintiff, Carmen I. Perez-Dickson, brought this action claiming that the defendants, the board of education of the city of Bridgeport (board), Henry R. Kelly, the former assistant superintendent of the Bridgeport public schools (school district), and Daniel Shamas,[1] the former acting superintendent of the school district, disciplined her for exercising her rights guaranteed by the first amendment to the United States constitution[2] and article first, §§ 3, 4 and 14, of the Connecticut constitution[3] in violation of General

[1] Although the caption of the present case refers to the City of Bridgeport et al., the real party in interest is the board. Also named as defendants at trial were the Connecticut Education Association, Jack Reh, the Bridgeport Education Association, Mary Loftus Levine, the department of children and families and Maria Melendez. Because these defendants are not involved in the present appeal, references to the defendants are to the board, Kelly and Shamas.

[2] The first amendment to the United States constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[3] The constitution of Connecticut, article first, § 3, provides: "The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in the state; provided, that the right hereby declared and established, shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state."

The constitution of Connecticut, article first, § 4, provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

The constitution of Connecticut, article first, § 14, provides: "The citizens have a right, in a peaceable manner, to assemble for their common good,

Statutes §§ 31-51q[4] and 17a-101e,[5] discriminated against her on the basis of her race in violation of 42 U.S.C. §§ 1981[6] and 1983,[7] and intentionally caused her severe emotional distress. The jury returned a verdict in favor of the plaintiff on all counts and awarded compensatory and punitive damages of $2,003,000, which the trial court subsequently reduced to $1,003,000. Thereafter, the trial court awarded attorney's fees and offer of

and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance."

[4] General Statutes § 31-51q provides in relevant part: "Any employer, including the state and any instrumentality or political subdivision thereof, who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages. . . ."

[5] General Statutes § 17a-101e provides in relevant part: "(a) No employer shall discharge, or in any manner discriminate or retaliate against, any employee who in good faith makes a report pursuant to sections 17a-101a to 17a-101d, inclusive, and 17a-103, testifies or is about to testify in any proceeding involving child abuse or neglect. The Attorney General may bring an action in Superior Court against an employer who violates this subsection. The court may assess a civil penalty of not more than two thousand five hundred dollars and may order such other equitable relief as the court deems appropriate. . . ."

[6] Section 1981 (a) of title 42 of the United States Code provides in relevant part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ."

[7] Section 1983 of title 42 of the United States Code provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

judgment interest to the plaintiff and rendered judgment in accordance with the verdict. The defendants then appealed[8] claiming that the trial court improperly denied their motion for a directed verdict, to set aside the verdict, and for judgment notwithstanding the verdict on the grounds that: (1) the defendants did not violate § 31-51q because any relevant speech by the plaintiff had been pursuant to her official job duties and such speech is not protected by the first amendment; (2) the plaintiff failed to prove her claim of racial discrimination pursuant to 42 U.S.C. §§ 1981 and 1983; and (3) the plaintiff failed to prove that the defendants had intentionally inflicted severe emotional distress on her. In addition, the defendants claim that the trial court lacked subject matter jurisdiction over the plaintiff's claim pursuant to § 17a-101e, improperly admitted certain newspaper articles as evidence at trial, and improperly calculated offer of judgment interest. The plaintiff filed a cross appeal claiming that the trial court improperly had reduced the damage award and improperly calculated offer of judgment interest. In addition, she contends that her claim pursuant to § 31-51q may be affirmed on the alternate ground that the defendants disciplined her for exercising her speech rights under article first, §§ 3, 4 and 14, of the state constitution, which protect an employee's speech pursuant to official job duties. We agree with the defendants' first three claims and with their claim that the trial court lacked jurisdiction over the plaintiff's claim pursuant to § 17a-101e. We also conclude that the plaintiff's alternate ground for affirmance was not preserved for review. Accordingly, we reverse the judgment of the trial court and direct judgment for the defendants.[9]

[8] The defendants 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.

[9] Accordingly, we need not reach the defendants' other claims or the plaintiff's claims on cross appeal.

The jury reasonably could have found the following facts. In 1998, the plaintiff, who is of African-American and Puerto Rican descent, was appointed as the principal of Beardsley School in the school district. In December of that year, she noticed that a white male teacher, V.L., was repeatedly mistreating a sixth grade student. At one point, the student came to the plaintiff and showed her his hand, which was red and swollen. The student told her that V.L. had followed him as he entered the lavatory and had squeezed his hand around the doorknob so hard that he caused the injury. The plaintiff took the student to the school nurse and instructed her to report the injury to the department of children and families (department). The plaintiff also telephoned Kelly and told him what had happened. In addition, she sent a memorandum to Kelly about the incident. V.L. was placed on paid administrative leave several months after the incident.

In January, 1999, Kelly asked all of the school district principals, including the plaintiff, to come individually to his office to discuss what they had achieved during the first half of the school year. During his meeting with the plaintiff, Kelly stated that he was concerned about the climate at Beardsley School and that the plaintiff's career was in jeopardy.[10] The plaintiff "got choked up" and was frightened. Kelly also told the plaintiff at one point that she should not "make waves" at the school and that, if she intended to walk around the school and visit classrooms, she should carry keys in her pocket and jingle them so that the teachers could hear her coming and "behave."

[10] The plaintiff testified at trial that a small group of disgruntled teachers had resisted her efforts to improve the academic situation at Beardsley School. These efforts included prohibiting teachers from showing movies or videos in the classroom unless they were related to the subject being taught, visiting each classroom every day to ensure that the teachers were following lesson plans, prohibiting teachers from eating snacks in the classroom and being an advocate for the children.

In April, 1999, a parent of a student at Beardsley School told the plaintiff that a teacher, T.B., had thrown the student against the wall and physically and verbally abused him. The plaintiff reported the abuse to the department and to Kelly. Kelly came to the plaintiff's office and interviewed the student about the incident. After reviewing the student's school record, Kelly observed that the student had moved frequently and told the student that he seemed to be a problem. The plaintiff told Kelly that the student was the victim and the fact that he moved around a lot did not justify the abuse. Kelly then gave the plaintiff "a look" and raised his eyebrows. T.B. ultimately was placed on paid administrative leave for six weeks.

At the end of the 1998–1999 school year, Kelly prepared a written evaluation of the plaintiff's performance in which he directed the plaintiff to "adjust her managerial style, as necessary, to better ensure effective communication, collaboration and mutual high expectations of students and staff alike" and to "improve in her efforts to identify, address, and (where possible) resolve staff issues, to improve staff morale." The plaintiff wrote on the appraisal form that test scores and student attendance had improved during the course of the year.

In December, 1999, the plaintiff was quoted in a newspaper article as saying that, as a parent and a child advocate, she did not agree with the discipline that V.L. and T.B. had received, and thought that it should have been more aggressive. Shortly thereafter, she received a letter from attorneys for the board requesting that she come to a meeting to discuss whether she had revealed confidential information to the newspaper. The plaintiff told the attorneys at the meeting that the newspaper had misquoted her and that she did not know what the outcome of the abuse cases had been.

At the end of the 1999–2000 school year, Shamas transferred the plaintiff to Newfield School in the school district. Kelly told the plaintiff that she was being transferred because too many teachers were transferring away from Beardsley School. The plaintiff viewed the transfer as a demotion because Newfield School, which had fewer than 300 students, was much smaller than Beardsley School, which had approximately 750 students, and she would be paid $1000 less per year. In 2003, the plaintiff was transferred to Roosevelt School in the school district, which had approximately 900 students.

In 2000, the plaintiff filed a complaint alleging, inter alia, that, from 1998 through 2000, Kelly, joined by Shamas, had engaged in "a campaign of harassment, discrimination and retaliation directed against [her] in response for her cooperation with [the department] and its investigation of the assaults" by V.L. and T.B. and that because, in reporting the alleged assaults to the department, she had "exercised her rights guaranteed by the first amendment to the United States constitution and/or [§§] 3, 4, and 14 of article first of the constitution of the state of Connecticut," the defendants' alleged conduct had violated §§ 31-51q and 17a-101e. In addition, she claimed that the defendants' conduct had been motivated by race in violation of 42 U.S.C. § 1981 and that it had constituted intentional and negligent infliction of emotional distress.

On November 17, 2005, Teresa Carroll, a school board administrator, telephoned the plaintiff and asked her to come to a meeting the next morning. Because Carroll refused to tell the plaintiff what the meeting was about, the plaintiff called John Ramos, the superintendent of the school district.[11] Ramos told the plaintiff that he

[11] Kelly testified that Carroll had informed him about the accusations against the plaintiff and he, in turn, had informed Ramos. Kelly asked to be recused from any investigatory process because of his involvement in the present litigation, which was initiated in 2000.

knew the purpose of the meeting, but that he would not discuss it with her at that time. Carroll informed the plaintiff at the meeting that she had been accused of abusing a student, that she was being placed on paid administrative leave immediately and that she would not be allowed to return to work. The plaintiff became very upset and asked who she had been accused of abusing and the details of the accusation. Carroll refused to answer her questions.

Ramos made the decision to place the plaintiff on administrative leave. He testified at trial that he had become superintendent in June, 2005, that he was not aware of the plaintiff's history in the school system and that his decision was based solely on the gravity of the allegations against her and the fact that the accusation had been made by an adult staff member.

The plaintiff ultimately discovered from reading the newspaper that she had been accused of sexually abusing a male student. The fact that she had been accused of student abuse was reported in a number of newspaper articles. The plaintiff also eventually learned that Deborah Santacapita, an assistant principal at Roosevelt School, had reported to Carroll that she had observed the plaintiff hugging a fourteen year old boy while cupping his buttocks in her hands, "nuzzling" his neck and telling him that he smelled good. The department, which had been notified about the allegations of abuse against the plaintiff and had conducted an investigation, ultimately determined that the allegations were unsubstantiated, and the plaintiff returned to work in January, 2006.[12]

[12] John Di Donato, the assistant superintendent for youth development for the school district, wrote a letter to the plaintiff on February 28, 2006, indicating that three reports had been filed with the department concerning the plaintiff's conduct with students, and that he had met with the plaintiff to discuss the reports. Di Donato stated that the department "could not substantiate the allegations contained in the . . . reports. However, I noted [at the meeting with the plaintiff] that their findings did include a number of areas of concern," including the plaintiff's physical contact with students.

In 2007, the plaintiff filed a fifth revised complaint in which she repeated the previous allegation that she had been subjected to a campaign of harassment in retaliation for the exercise of her constitutional speech rights from 1998 through 2000 in violation of §§ 31-51q and 17a-101e,[13] and added a claim that the defendants' response to the abuse accusation against her in 2005 had violated those statutes. In addition, as in her original complaint, she alleged that the defendants had discriminated against her on the basis of her race in violation of 42 U.S.C. §§ 1981 and 1983 and had intentionally inflicted severe emotional distress on her.

After the plaintiff rested her case at trial, the defendants made an oral motion for a directed verdict in their favor. They argued that, under *Garcetti* v. *Ceballos*, 547 U.S. 410, 427, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006), "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for [f]irst [a]mendment purposes." (Internal quotation marks omitted.) Id., 421 ("[w]e hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for [f]irst [a]mendment purposes, and the [c]onstitution does not insulate their communications from employer discipline"). They further argued that, because the plaintiff had testified that she reported the abuse as a mandated reporter pursuant to General

Di Donato stated that he had advised the plaintiff "to limit [her] physical contact with students," and had warned her that failure to comply with this instruction could result in further disciplinary action, including separation from employment.

[13] Specifically, the plaintiff claimed that Kelly had interfered with her efforts to evaluate and discipline teachers and staff members at Beardsley School, had denied her requests to participate in programs for professional development and her requests for adequate staffing and supplies, had subjected her to disciplinary measures to which other principals had not been subjected, had subjected her to threats of official discipline by the board's attorneys, had demoted her unjustifiably and had unfairly evaluated her work performance.

Statutes § 17a-101a et seq., and because she was subject to the school district's policy regarding the reporting of student abuse, under *Garcetti*, the trial court should render "judgment as a matter of law that [the plaintiff's] activity could not constitute a matter of public concern."[14] In response, the plaintiff argued that "Connecticut [c]ourts have not yet ruled upon whether or not *Garcetti* applies to state statutes such as § 31-51q" and that "it would make very little sense for the Connecticut courts to decide that a specific state statute can be overruled or undermined in this way."[15] In turn, the defendants claimed that, because the scope of speech protected by the first amendment was a federal issue,

[14] In support of this argument, the defendants relied on *Pagani* v. *Board of Education*, United States District Court, Docket No. 3:05-CV-01115 JCH (D. Conn. December 19, 2006). In that case, the District Court held that, under *Garcetti*, the plaintiff's conduct in reporting the abusive conduct of a fellow teacher to the department was undertaken as a teacher performing an official duty and, therefore, was not protected under the first amendment. Accordingly, the court concluded that the plaintiff could not prevail in his retaliation claim pursuant to federal law.

[15] In support of this argument, the plaintiff relied on the trial court's decision in *Schumann* v. *Dianon Systems, Inc.*, Superior Court, judicial district of Fairfield, Docket No. CV-05-5000747-S (September 24, 2007). The court in *Schumann* noted that there was a split among the decisions of the Superior Court as to whether *Garcetti* applied to speech made by a *private* employee, but concluded that it need not decide that question in order to rule on the defendant's motion for summary judgment because there was a genuine issue of material fact as to whether the plaintiff's statements had been made as part of his official job duties. See also *St. Fleur* v. *R.C. Bigelow, Inc.*, Superior Court, judicial district of Fairfield, Docket No. CV-06-5004575-S (April 16, 2007) (same). Thus, neither *Schumann* nor *St. Fleur* supports the plaintiff's argument to the trial court in the present case that *Garcetti* does not apply to claims made pursuant to § 31-51q that implicate the exercise of first amendment rights. Indeed, as the defendants point out, there is no authority to support that argument and the plaintiff has not renewed it on appeal.

The trial court in *Schumann* ultimately concluded that *Garcetti* does not apply to private employers and, after a jury trial, rendered judgment for the plaintiff. In *Schumann* v. *Dianon Systems, Inc.*, 304 Conn. 585, 43 A.2d 111 (2012), which was released on the same date as this opinion, this court concluded that *Garcetti* does apply to claims against private employers pursuant to § 31-51q and reversed the judgment of the trial court.

Garcetti controlled. The trial court reserved its decision on the motion for a directed verdict until the completion of trial.

The jury returned a verdict for the plaintiff and awarded $3000 in economic damages; $250,000 in noneconomic damages and $250,000 in punitive damages on the claim pursuant to §§ 31-51q and 17a-101e; $250,000 in noneconomic damages and $250,000 in punitive damages on the claim pursuant to 42 U.S.C. §§ 1981 and 1983; and $500,000 in noneconomic damages and $500,000 in punitive damages on the claim of intentional infliction of emotional distress. Thus, the total damage award was $2,003,000.

After trial, the defendants filed a renewed motion for a directed verdict, to set aside the verdict and for judgment notwithstanding the verdict (motion for a directed verdict) and, in the alternative, for remittitur. In support of this motion, they again argued that, under *Garcetti*, "the [f]irst [a]mendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities." *Garcetti* v. *Ceballos*, supra, 547 U.S. 424. They further argued that, as a matter of law, such speech "simply does not constitute a matter of public concern" under *Garcetti*.

In her opposition to the defendants' motion, the plaintiff argued that *Garcetti* did not apply to claims pursuant to § 17a-101e. She further argued that, "in the absence of any clear direction from Connecticut appellate courts that employees such as [the plaintiff] cannot be protected from retaliation for making reports of child abuse, this court may not state as a matter of law that [the plaintiff's] claim under § 31-51q must fail." Without mentioning *Garcetti*, the trial court denied the defendants' motion for a directed verdict.[16]

[16] Thereafter, the defendants filed a motion for articulation of, among other things, the trial court's reasons for rejecting their claim pursuant to

The court granted the motion for remittitur in part, however, and eliminated the awards of $500,000 for noneconomic damages on the intentional infliction of emotional distress claim and reduced the punitive award for that claim from $500,000 to attorney's fees and nontaxable costs, resulting in a damages award of $1,003,000. Thereafter, the court awarded the plaintiff attorney's fees of $250,000 and offer of judgment interest in the amount of $596,878 and rendered judgment in accordance with the verdict. This appeal and cross appeal followed.[17]

I

We first address the defendants' claims related to the verdict in favor of the plaintiff on her claims pursuant to §§ 31-51q and 17a-101e.[18]

A

We begin with the defendants' claim that the trial court improperly concluded that the plaintiff's claim that the defendants had disciplined her for exercising her first amendment rights in violation of § 31-51q is

Garcetti, which the trial court denied. The defendants then filed in this court a motion for review of the trial court's denial of their motion for articulation, which this court denied in relevant part.

[17] After this appeal and cross appeal were filed, we granted the application of the Connecticut Employment Lawyers Association to file an amicus curiae brief in support of the plaintiff's position in her claim pursuant to § 31-51q.

[18] The trial court submitted two interrogatories to the jury in connection with the plaintiff's claims of retaliation. The first interrogatory asked: "Has [the plaintiff] proven by a preponderance of the evidence that [the defendants] retaliated against her for filing reports of child abuse with [the department] taken against her prior to 2005?" The second interrogatory asked: "Has [the plaintiff] proven by a preponderance of the evidence that [the defendants] retaliated against her when she was placed on administrative leave on November 29, 2005, allegedly for student abuse?" The interrogatories did not specify the statute under which the claims of retaliation were being brought. The plaintiff claims on appeal that the jury reasonably could have answered "yes" to both questions pursuant to either § 31-51q or § 17a-101e. Accordingly, we address the defendants' claims relating to both statutes together.

not barred by *Garcetti* v. *Ceballos*, supra, 547 U.S. 410.[19] In that case, the United States Supreme Court concluded that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for [f]irst [a]mendment purposes, and the [c]onstitution does not insulate their communications from employer discipline." Id., 421. The plaintiff does not dispute this principle on appeal, nor does she claim that she was not speaking pursuant to her official

[19] The plaintiff contends that this claim was not preserved for review because, even though the defendants cited *Garcetti* in both their oral motion for a directed verdict and in their posttrial motion for a directed verdict, their argument was not that a public employee's speech pursuant to official job duties is not protected by the first amendment per se, but that such speech is not a matter of public concern. We conclude that the defendants adequately put the plaintiff and the trial court on notice of the nature of their claim pursuant to *Garcetti* v. *Ceballos*, supra, 547 U.S. 421, by arguing that " 'when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for [f]irst [a]mendment purposes . . . .' " Moreover, the holding of *Garcetti* that a public employee's speech pursuant to official job duties is not constitutionally protected is unmistakably clear upon a simple reading of that case.

The trial court instructed the jury that, in order to find that the plaintiff's speech was constitutionally protected, it must find that "her activity constituted a matter of public concern." In addition, the court instructed the jury that, pursuant to § 31-51q, it must find that the plaintiff's "activity did not substantially or materially interfere with her bona fide job performance or the working relationship between herself and the defendants." Although the basis for the court's "public concern" instruction is not entirely clear, the United States Supreme Court, before it decided *Garcetti*, held that speech by a public employee is constitutionally protected only if the speech is on a matter of public concern and the employee's free speech interest is not outweighed by the interest of the employer "in promoting the efficiency of the public services it performs through its employees." *Connick* v. *Myers*, 461 U.S. 138, 142, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); see also *DeMartino* v. *Richens*, 263 Conn. 639, 664–67, 822 A.2d 205 (2003). We emphasize that we express no opinion here as to whether the court in *Garcetti* modified the *Connick* standard or whether it simply applied its precedent for the first time to speech by a public employee pursuant to his or her job duties. Although the defendants in the present case did not object to the jury instruction after it was given, it was implicit in their motion for a directed verdict that the jury should not receive *any* instruction on the plaintiff's claim pursuant to § 31-51q because the claim was barred as a matter of law under *Garcetti*.

duties when she reported that V.L. and T.B. had abused students.[20] Accordingly, it is undisputed that the plaintiff's claim that the defendants had violated § 31-51q by disciplining her for exercising her rights under the first amendment is barred by *Garcetti*. As a result, the trial court improperly denied the defendants' motion for a directed verdict.

With respect to the plaintiff's claim that the judgment can be affirmed on the alternate ground that the defendants violated § 31-51q because they disciplined her for exercising her speech rights under the state constitution, which are broader than her rights under the first amendment, we conclude that this claim was not preserved for review because she never made that claim to the trial court. Accordingly, the trial court and the defendants were entitled to assume that her speech rights under the state constitution were coextensive with her first amendment rights. See *State* v. *Gore*, 288 Conn. 770, 776 n.7, 955 A.2d 1 (2008) (when party does not provide separate analysis of jury trial right under state constitution, this court treats claim as if rights under state and federal constitutions are coextensive).[21]

This court previously has held that "[o]nly in [the] most exceptional circumstances can and will this court

[20] The amicus argues that, when an employer has violated General Statutes § 31-51m, which prohibits employers from retaliating against their employees for whistle-blowing activities, the violation can form the basis of a claim pursuant to § 31-51q, even if the employee was not exercising constitutional speech rights. We disagree. The remedy provided by § 31-51q plainly and unambiguously is limited to cases in which an employee has disciplined or discharged an employee "on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state . . . ." In any event, the plaintiff has not claimed that the defendants violated § 31-51m.

[21] Although this principle is one of appellate review, we see no reason why the trial court should not also be entitled to assume that the state constitution and the federal constitution are coextensive in the absence of any claim to the contrary by the party raising the constitutional issue.

consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . This rule applies equally to alternate grounds for affirmance." (Citation omitted; internal quotation marks omitted.) *New Haven* v. *Bonner*, 272 Conn. 489, 498, 863 A.2d 680 (2005); see also *Thomas* v. *West Haven*, 249 Conn. 385, 390 n.11, 734 A.2d 535 (1999) ("[t]he appellee's right to file a [Practice Book] § 63-4 [a] [1] statement has not eliminated the duty to have raised the issue in the trial court" [internal quotation marks omitted]), cert. denied, 528 U.S. 1187, 120 S. Ct. 1239, 146 L. Ed. 2d 99 (2000); *Peck* v. *Jacquemin*, 196 Conn. 53, 62 n.13, 491 A.2d 1043 (1985) ("compliance with [Practice Book § 63-4 (a) (1)] is not to be considered in a vacuum; particularly to be considered is its linkage with [Practice Book § 60-5] which provides in part that this court 'shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial' ").[22] "Such exceptional circum-

[22] The plaintiff in the present case did not file a statement of alternate grounds on which the judgment could be affirmed in compliance with Practice Book § 63-4 (a) (1). This court generally has reviewed alternate grounds for affirmance even though the appellee has not complied with the requirement to identify such claims in a preliminary statement, when doing so would not prejudice the appellant. See *Connecticut Ins. Guaranty Assn.* v. *Fontaine*, 278 Conn. 779, 784 n.4, 900 A.2d 18 (2006) (when alternate ground for affirmance was raised in trial court, failure to comply with Practice Book § 63-4 [a] [1] did not render claim unreviewable when all parties briefed claim); *Skuzinski* v. *Bouchard Fuels, Inc.*, 240 Conn. 694, 702–703, 694 A.2d 788 (1997) (reviewing alternate grounds for affirmance that were raised in trial court even though trial court failed to rule on claims); *Chotkowski* v. *State*, 240 Conn. 246, 256 and n.17, 690 A.2d 368 (1997) (reviewing alternate grounds for affirmance that were not included in preliminary statement of issues when claims were raised in trial court); cf. *State* v. *Cruz*, 269 Conn. 97, 98–99, 848 A.2d 445 (2004) (reviewing state's alternate ground for affirming Appellate Court's judgment, even though state had not expressly raised as alternate ground for affirmance, without addressing question of whether claim had been raised in Appellate Court); *Stepney Pond Estates, Ltd.* v. *Monroe*, 260 Conn. 406, 423 n.19, 797 A.2d 494 (2002) (alternate grounds for affirmance that plaintiff had not expressly characterized as such were reviewable when claims had been fully briefed; court did not address question of whether claims had been raised in trial

stances may occur where a new and unforeseen constitutional right has arisen between the time of trial and appeal or where the record supports a claim that a litigant has been deprived of a fundamental constitutional right and a fair trial. . . . An exception may also be made where consideration of the question is in the interest of public welfare or of justice between the parties."[23] (Internal quotation marks omitted.) *Lopiano* v. *Lopiano*, 247 Conn. 356, 373, 752 A.2d 1000 (1998).

court); *Stepney Pond Estates, Ltd.* v. *Monroe*, supra, 420 and n.15 (at least some alternate grounds for affirmance had been raised in trial court); *Culver* v. *Culver*, 127 Conn. App. 236, 252–53, 17 A.3d 1048 (reviewing alternate grounds for affirmance that had not been expressly characterized as such without addressing question of whether claims had been raised in trial court), cert. denied, 301 Conn. 929, 23 A.3d 724 (2011); *Mannweiler* v. *LaFlamme*, 65 Conn. App. 26, 34 n.6, 781 A.2d 497 (2001) (same). We have reviewed alternate grounds for affirmance that were not raised in the trial court, however, only in exceptional cases. See footnote 23 of this opinion.

[23] See, e.g., *Vine* v. *Zoning Board of Appeals*, 281 Conn. 553, 568–70, 916 A.2d 5 (2007) (addressing unpreserved alternate ground for affirmance when failure to do so would have been unfair because appellant relied on factual basis for alternate ground for affirmance in support of her claim on appeal, claim involved pure question of law, there was no possibility that court would be usurping discretion of decision maker, record was adequate for review and, because issue had been fully briefed, there was no possibility of prejudice to parties); *State* v. *Osuch*, 124 Conn. App. 572, 580, 5 A.3d 976 (reviewing alternate ground for affirmance that could not have been raised in trial court because issue did not arise until after judgment), cert. denied, 299 Conn. 918, 10 A.3d 1052 (2010); see also *Gerardi* v. *Bridgeport*, 294 Conn. 461, 466–67, 985 A.2d 328 (2010) (reviewing alternate ground for affirmance that was not raised in trial court when claim implicated trial court's subject matter jurisdiction, which may be raised at any time).

This court also has addressed unpreserved claims raised as alternate grounds for affirmance in criminal cases under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). See, e.g., *State* v. *Singleton*, 292 Conn. 734, 759, 974 A.2d 679 (2009). Although *Golding* had been applied in civil cases; see *Bennett* v. *New Milford Hospital, Inc.*, 300 Conn. 1, 32, 12 A.3d 865 (2011); the plaintiff in the present case has not requested *Golding* review. More fundamentally, although the plaintiff's claim implicates her constitutional speech rights because her employer is public, she has not raised a claim that the defendants violated her constitutional rights, but instead has raised a claim implicating her statutory rights under § 31-51q. Accordingly, *Golding* does not apply. See *State* v. *Golding*, supra, 239–40 (to be reviewable under *Golding*, claim must be of constitutional magnitude).

We perceive no such exceptional circumstances in the present case. The plaintiff had ample opportunity at trial to raise the claim that *Garcetti* does not bar her claim pursuant to § 31-51q because the state constitution provides broader protection than the federal constitution, the trial court had the authority to rule on the issue, there has been no intervening change in the law, the plaintiff's claim is not of constitutional magnitude,[24] and the plaintiff received a fair trial.

Moreover, even if we were to assume that a lack of prejudice to an appellant would justify review of an alternate ground for affirmance that was not raised in the trial court, even in the absence of other exceptional circumstances, the plaintiff in the present case has not established that the defendants would not be prejudiced if we were to review this claim.[25] First, even if we

[24] See footnote 23 of this opinion.

[25] After oral argument before this court, we ordered the parties to submit supplemental briefs on the following questions: (1) Under the facts of this case are the defendants prejudiced if this court considers the unpreserved issue of whether the plaintiff's speech was protected under the state constitution?; and (2) When an appellee has raised, for the first time on appeal, an alternative ground for affirmance, who has the burden of demonstrating prejudice or lack thereof? Because the plaintiff is asking for an exception to the general rule that we will not review claims that were not raised in the trial court, we conclude that the burden is on the plaintiff to prove that the defendants will not be prejudiced by our review of the claim. For the reasons stated in this opinion, we conclude that the plaintiff has not met that burden.

The plaintiff contends, however, that "[i]t was never [her] obligation . . . to raise in the trial court or in this appeal as an alternate ground for affirmance the issue of whether her speech was protected because the issue, as raised by the defendants, clearly is subsumed within and is completely intertwined with [§] 31-51q . . . ." The plaintiff also makes the remarkable claim that *she* would be prejudiced if this court were to consider the defendants' arguments against her unpreserved claim that the state constitution is broader than the federal constitution in this context because the defendants did not claim at trial that her claim pursuant to § 31-51q is barred by the state constitution. The plaintiff fails to recognize that the defendants were entitled to assume that the scope of the state constitution is coextensive with the scope of the federal constitution in the absence of any claim to the contrary. *State* v. *Gore*, supra, 288 Conn. 776 n.7.

assume that the trial court's denial of the defendants' motion for a directed verdict and instructions to the jury were proper under the state constitution, because the defendants believed—rightly—that the plaintiff's claims under the first amendment are barred by *Garcetti*, and they properly presumed that the state constitution provides no broader protection, the defendants may have made the tactical decision to avoid the expense and inconvenience of calling a large number of witnesses to testify in support of *other* potential defenses to the plaintiff's claims. The defendants should not be punished for their failure to present all possible evidence at the first trial when they had every reason to believe that, even if they presented *no* evidence, the plaintiff's claim was barred by *Garcetti*. Accordingly, if we were to conclude that *Garcetti* does not bar the plaintiff's claim under the state constitution, we would be required to afford the defendants an opportunity to present additional evidence under the new standard. See *Oram* v. *Capone*, 206 App. Div. 2d 839, 840, 615 N.Y.S.2d 799 (1994) ("[a]n issue may not be raised for the first time on appeal . . . where it could have been obviated or cured by factual showings or legal countersteps in the trial court" [internal quotation marks omitted]); *Outdoor Media Dimensions, Inc.* v. *State*, 331 Or. 634, 660, 20 P.3d 180 (2001) ("even if the record contains evidence sufficient to support an alternative basis for affirmance, if the losing party might have created a *different* record below had the prevailing party raised that issue, and that record could affect the disposition of the issue, then we will not consider the alternative basis for affirmance" [emphasis in original]); cf. *State* v. *DeJesus*, 288 Conn. 418, 437–38 n.14, 953 A.2d 45 (2008) (when judgment of conviction is reversed because of change in settled law, case should be remanded for new trial even when it is unlikely that state could present new evidence that would satisfy

new standard because "it is not the function of this court, as an appellate tribunal, to deprive the state of that opportunity"); *State* v. *Lawrence*, 282 Conn. 141, 156, 920 A.2d 236 (2007) (function of appellate tribunal is "to *review*, and not to retry, the proceedings of the trial court" [emphasis added; internal quotation marks omitted]). Thus, the defendants would be subject, through no fault of their own, to the great expense and inconvenience of a second trial. Such a result would be inconsistent with the purpose of waiver and forfeiture rules, namely, to "ensure that parties can determine when an issue is out of the case, and that litigation remains, to the extent possible, an orderly progression. The reason for the rules is not that litigation is a game, like golf, with arbitrary rules to test the skill of the players. Rather, litigation is a winnowing process, and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided." (Internal quotation marks omitted.) *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 488 n.6, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008); see also id., 487 (recognizing that party can raise new argument on appeal in support of properly preserved claim, but rejecting suggestion that "a litigant could add new constitutional claims as he went along, simply because he had 'consistently argued' that a challenged [action] was unconstitutional").

Second, the plaintiff's alternate ground for affirmance raises a question of first impression for this court, and it is not at all clear that a conclusion that *Garcetti* does not apply to claims pursuant to the state constitution would require this court to conclude that the trial court instructed the jury as to the proper legal standard. We note, for example, that before its decision in *Garcetti*, the United States Supreme Court had held that speech by a public employee was protected by the first amendment only if the speech was on a matter of public

concern and the employee's free speech interest was not outweighed by the employer's interest "in promoting the efficiency of the public services it performs through its employees." (Internal quotation marks omitted.) *Connick* v. *Myers*, 461 U.S. 138, 142, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). If we were to conclude that the *Connick* standard applies to a public employee's speech pursuant to his or her official duties under the state constitution, we would be required to reverse the judgment and to remand the case for a new trial because the trial court's instruction to the jury was more liberal than that standard.[26]

[26] Pursuant to the trial court's instruction, the jury could render a verdict for the plaintiff if it found that: (1) the plaintiff's speech was constitutionally protected because it constituted a matter of public concern; and (2) pursuant to § 31-51q, the plaintiff's "activity did not substantially or materially interfere with her bona fide job performance or the working relationship between herself and the defendants." See footnote 19 of this opinion. If a jury were instructed pursuant to *Connick*, however, it could find that the plaintiff's speech was not constitutionally protected in the first instance if it found that, although her speech constituted a matter of public concern, her free speech interest was outweighed by the defendants' interest in efficiently operating the school system. For example, the jury might find that, although the defendants had transferred the plaintiff at least in part because of her reports of abuse, they also did so because some teachers had become hostile to the plaintiff, thereby impairing her effectiveness in that particular school. In that case, the jury could not render a verdict for the plaintiff on her claims pursuant to § 31-51q, even if the plaintiff's conduct did not substantially interfere with her job performance or with her working relationship with the defendants. In addition, this court could conclude that, although *Garcetti* does not apply to claims under the state constitution, the *Connick* standard is too liberal as applied to speech pursuant to official job duties in light of the concerns raised in *Garcetti*. Cf. *Wickwire* v. *State*, 725 P.2d 695, 703 (Alaska 1986) (*Connick* balancing test applies under state constitution, although public concern criteria may be broader under state constitution than federal constitution; court did not consider whether employee's speech was pursuant to official duties); *Kaye* v. *Board of Trustees of the San Diego County Public Law Library*, 179 Cal. App. 4th 48, 59, 101 Cal. Rptr. 3d 456 (2009) (*Garcetti* applies under state constitution); *Kemp* v. *Board of Agriculture*, 790 P.2d 870, 872–73 (Colo. App. 1989) (*Connick* balancing test applies under state constitution; court did not consider whether employee's speech was pursuant to official duties), aff'd, 803 P.2d 498 (Colo. 1990), cert. denied, 501 U.S. 1205, 111 S. Ct. 2798, 115 L. Ed. 2d 972 (1991); *Acevedo* v. *Muskogee*, 897 P.2d 256, 265 (Okla. 1995) (Opala, J., concurring) (arguing

Third, affirming the damage award for the plaintiff's claim pursuant to § 31-51q would prejudice the defendants because the plaintiff's failure to raise the state constitutional issue in a timely manner deprived them of the opportunity to evaluate and possibly to settle the claim before the jury returned its verdict.[27] Accordingly, we conclude that the claim is unreviewable. We conclude, therefore, that the trial court improperly denied the defendants' motion for a directed verdict in their favor on the plaintiff's claim pursuant to § 31-51q, and that the judgment for the plaintiff may not be affirmed on the alternate ground that the plaintiff's speech was protected by the state constitution.

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that, under Oklahoma constitution, before government may dismiss employee for speech, "government must demonstrate some *overriding interest* of *vital importance* in maintaining its efficiency, which outweighs any benefit to be derived from free speech" without considering whether employee's speech was pursuant to official duties [emphasis in original]); see also *Edwards* v. *Dept. of Transportation*, 66 Wn. App. 552, 559 n.3, 832 P.2d 1332 (1992) (state balancing test that incorporated *Connick* provided adequate protection under state constitution; court did not consider whether employee's speech was pursuant to official duties).

We recognize that the defendants did not claim at trial or on appeal that the jury instructions were defective not only because the plaintiff's claim pursuant to § 31-51q was barred under *Garcetti*, but also because the instructions incorrectly stated the standard that predated *Garcetti*. As we have indicated, however, the defendants were not required to raise every possible defense to the plaintiff's § 31-51q claim if they believed that their *Garcetti* claim was dispositive. Because we *agree* that the defendants' claim pursuant to *Garcetti* is dispositive of the § 31-51q claim as it was actually litigated, the defendants should prevail on appeal unless the *plaintiff* can show that the defendants would not be prejudiced by an affirmance based on her unpreserved state constitutional claim because the trial court gave a proper jury instruction on that issue. Of course, if we had disagreed with the defendants' claim pursuant to *Garcetti*, any claim that the judgment of the trial court should be reversed because the jury instructions were improper for other reasons would be unpreserved.

[27] The specific amount awarded to the plaintiff on her claim pursuant to § 31-51q is not clear from the record because when the trial court found that the separate awards for noneconomic and punitive damages pursuant to this claim and the discrimination claim were duplicative and reduced the cumulative $1,000,000 award for both claims to $500,000, it did not allocate the new award between the claims.

B

We next address the defendants' claim that the trial court lacked subject matter jurisdiction over the plaintiff's claim pursuant to § 17a-101e because that statute does not create a private cause of action. The plaintiff contends that the defendants' failure to raise this claim at trial renders it unreviewable on appeal. We conclude that the defendants' claim is reviewable and that the trial court lacked subject matter jurisdiction over the plaintiff's claim.

We first address the plaintiff's claim that the defendants' claim is unreviewable. The claim that § 17a-101e does not provide a private cause of action implicates the plaintiff's standing to raise a claim pursuant to that statute. See *Burton* v. *Dominion Nuclear Connecticut, Inc.*, 300 Conn. 542, 555, 23 A.3d 1176 (2011) ("[S]tatutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." [Internal quotation marks omitted.]). "If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause." (Internal quotation marks omitted.) Id., 550. "[A] claim that a court lacks subject matter jurisdiction may be raised at any time during the proceedings . . . including on appeal . . . ." (Citation omitted; internal quotation marks omitted.) *Bacon Construction Co.* v. *Dept. of Public Works*, 294 Conn. 695, 704 n.9, 987 A.2d 348 (2010). Because the defendants' claim implicates the trial court's subject matter jurisdiction, we conclude that it is reviewable even though the defendants have raised it for the first time on appeal.

Turning to the merits of the claim that § 17a-101e does not provide a private cause of action, "[w]e begin

our analysis with the well settled fundamental premise that there exists a presumption in Connecticut that private enforcement does not exist unless expressly provided in a statute. In order to overcome that presumption, the [plaintiff bears] the burden of demonstrating that such an action is created implicitly in the statute. . . . In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff one of the class for whose . . . benefit the statute was enacted . . . ? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . .

"Consistent with the dictates of [General Statutes] § 1-2z, however, we do not go beyond the text of the statute and its relationship to other statutes unless there is some textual evidence that the legislature intended, but failed to provide expressly, a private right of action. Textual evidence that would give rise to such a question could include, for example, language granting rights to a discrete class without providing an express remedy or language providing a specific remedy to a class without expressly delineating the contours of the right." (Citations omitted; internal quotation marks omitted.) *Gerardi* v. *Bridgeport*, 294 Conn. 461, 468–69, 985 A.2d 328 (2010).

Whether § 17a-101e provides a private cause of action is a question of statutory interpretation over which our review is plenary. See id., 467. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seek-

ing to determine that meaning . . . § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) Id., 467–68.

Section 17a-101e provides in relevant part: "(a) No employer shall discharge, or in any manner discriminate or retaliate against, any employee who in good faith makes a report pursuant to sections 17a-101a to 17a-101d, inclusive, and 17a-103, testifies or is about to testify in any proceeding involving child abuse or neglect. The Attorney General may bring an action in Superior Court against an employer who violates this subsection. . . ."

Both the contours of the right created by § 17a-101e and the specific remedy for a violation of the right are plain and unambiguous. Nothing in the text of the statute even remotely suggests that, contrary to this plain and unambiguous language, the legislature intended to authorize private citizens to bring actions on their own behalf pursuant to the statute. Indeed, the plaintiff does not contend otherwise. Rather, she claims only that the defendants' claim that § 17a-101e does not create a private cause of action is unreviewable, a claim that we have rejected. Accordingly, we conclude that § 17a-101e does not provide a private cause of action and that the trial court therefore lacked subject matter jurisdiction over the plaintiff's claim pursuant to that statute.

II

We next address the defendants' claim that the plaintiff failed to establish a prima facie case that they had discriminated against her on the basis of her race in

violation of 42 U.S.C. §§ 1981 and 1983 or, in the alternative, that she failed to prove racial discrimination by a preponderance of the evidence.[28] We conclude that the plaintiff failed to prove her case.

The following additional facts that the jury reasonably could have found are relevant to our resolution of this claim.[29] The board had a written policy concerning child abuse that required all allegations of abuse to be reported to the board's director of social work who, together with the principal of the school where the abuse had occurred, or the principal's designee, would then "decide how to conduct [an] . . . internal investigation . . . ." At trial, the plaintiff presented documentary evidence that, when a teacher or administrator was accused of abusing a student, the board had a regular practice of interviewing the person who had been accused before taking any action against the

[28] The defendants raised this claim in their oral motion for a directed verdict and in their posttrial motion for a directed verdict.

[29] In her fifth revised complaint, the plaintiff alleged that the defendants' conduct toward her in 1998 through 2000 had been motivated by racial discrimination. The jury interrogatories, however, allowed the jury to find that the defendants had engaged in racial discrimination only with respect to their response to the allegations of abuse against the plaintiff in 2005, when they placed the plaintiff on administrative leave. In addition, the trial court instructed the jury that "[t]he plaintiff claims that the defendants discriminated against her by putting her on administrative leave . . . ." The court did not refer to the defendants' conduct in 1998 through 2000 in connection with its instructions on the plaintiff's claim of racial discrimination. Accordingly, the plaintiff has abandoned any claim that the defendants' conduct toward her in 1998 through 2000 was motivated by racial discrimination. Moreover, the plaintiff has made no argument on appeal that the defendants' conduct toward her in 1998 through 2000 would support a conclusion that they discriminated against her on the basis of her race in 2005, and she has pointed to no evidence that would support a finding that the defendants' conduct in 1998 through 2000 was motivated by racial discrimination and not by some other reason, proper or improper. See *Fisher* v. *Vassar College*, 114 F.3d 1332, 1338 (2d Cir. 1997) ("[i]f the circumstances show that the defendant gave the false explanation to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent").

employee.[30] In addition, the plaintiff testified that, while she was the principal at Beardsley School, a white female teacher had been accused of physically abusing a student. Susan Smith, the board's director of social work, had asked the plaintiff whether the accusation was "in the realm of possibility . . . ." When the plaintiff said that it was not, there was no further action against the teacher. In another case, a white female teacher had been accused of "hurting" a student while the plaintiff was the principal of Roosevelt School, and the plaintiff had interviewed the teacher as part of her investigation.[31] The teacher was not placed on administrative leave.

Kelly testified on cross-examination that, when a white male principal, L.R., had been accused by a parent of physically abusing a student, the board had conducted a thorough investigation, including interviewing a teacher, attempting to interview L.R., and requesting that the school social worker prepare a written summary of interviews by the department. The incident occurred in 1998. Kelly also testified that, in a case in which an elementary school had been accused of physically neglecting a student, the white female principal of the school, A.E., had been provided with an opportunity to respond to the accusation. The incident occurred in 2000.

Smith testified that in 2003 or 2004, the board stopped its practice of conducting extensive investigations of

[30] The plaintiff sought to present as evidence of this practice memoranda memorializing the board's investigatory efforts in seventeen cases of alleged abuse of a student by a school district employee. The trial court concluded that the memoranda were cumulative and that introducing them as evidence potentially could violate the privacy of the subjects of the investigation. The court allowed the plaintiff, however, to introduce one of the memoranda, in a redacted form, and to inform the jury that the other sixteen cases had been handled in a similar manner. The record does not reflect the races of the teachers or students involved in these seventeen cases.

[31] The plaintiff did not identify these two white female teachers by name.

abuse allegations against school district employees in cases where the department was also conducting an investigation. She stopped the practice because it was her understanding that the department was concerned that investigations by the board could taint witnesses and interfere with the department's investigations. Carroll testified, however, that, after the plaintiff was placed immediately on administrative leave in the fall of 2005, as the result of the allegation that she had abused a student, Carroll investigated a number of claims that school administrators had abused students and interviewed the alleged perpetrator as part of the investigation. In one case, Carroll interviewed a male African-American principal about an alleged incident of physical abuse that had occurred on October 13, 2006.[32] In another case involving the plaintiff herself, Carroll interviewed the plaintiff about a parent's allegation that she had abused a student on February 15, 2008. No one from the board ever interviewed the plaintiff or the student she had been accused of abusing concerning the allegations of abuse that led to her administrative leave in 2005.

Ramos testified that, during the fall of 2005, he became aware of pending allegations that a white male principal in the school district, A.C., had engaged in sexual harassment. He further testified that, when the board became aware of allegations that A.C. had abused students, it placed him on administrative leave without first investigating the allegations or interviewing him.[33]

[32] Carroll did not identify this school principal by name.

[33] Kelly testified that he became aware of the allegations against A.C. in the fall of 2005, and that he placed him on administrative leave immediately. Ramos testified that he became aware of the allegations against A.C. during the fall of 2005, and that Kelly conducted a meeting at which A.C. was placed on administrative leave. The plaintiff produced documentary evidence, however, showing that allegations of abuse had been made against A.C. in July, 2004. The evidence also showed that A.C. was placed on administrative leave on June 3, 2005, after an investigation established that he had violated the school district's sexual harassment policy. In addition, the evidence indicated that A.C. was assigned to the city of Bridgeport's adminis-

Kelly testified that an African-American female principal, S.A., who had been accused of physically abusing a student in 2001, was given an opportunity to respond to the accusation and was not placed on administrative leave until the board received reports of additional abuse. Kelly also testified that a male African-American principal, J.A., who had been accused of physically abusing a student on April 27, 2006, was provided with specific information about the allegations against him and was given an opportunity to respond.

At the conclusion of the plaintiff's case, the defendants made an oral motion for a directed verdict on the plaintiff's claim pursuant to 42 U.S.C. §§ 1981 and 1983 on the ground, inter alia, that the evidence would not support a finding of racial discrimination. The trial court reserved its decision on the motion until the conclusion of trial. The defendants renewed their claim in their posttrial motion for a directed verdict. The trial court denied that motion.

With this background in mind, we first set forth our standard of review. "The standards for appellate review of a directed verdict are well settled. Directed verdicts are not favored. . . . A trial court should direct a verdict only when a jury could not reasonably and legally have reached any other conclusion. . . . In reviewing the trial court's decision to direct a verdict in favor of a defendant we must consider the evidence in the light most favorable to the plaintiff. . . . Although it is the jury's right to draw logical deductions and make reasonable inferences from the facts proven . . . it may not resort to mere conjecture and speculation. . . . A

trative offices during his leave. Ramos testified that he became school superintendent on June 6, 2005. It is unclear from the record whether there were two separate allegations of abuse against A.C. and two separate administrative leaves, or whether Kelly and Ramos were mistaken about the dates that they had learned about the allegations and that A.C. had been placed on leave.

directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party." (Internal quotation marks omitted.) *Coughlin* v. *Anderson*, 270 Conn. 487, 497–98, 853 A.2d 460 (2004).

We next turn to the law governing claims of racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983. To prevail on her claim pursuant to 42 U.S.C. § 1983, the plaintiff must establish that the defendants intentionally discriminated against her. *Bennett* v. *Roberts*, 295 F.3d 687, 699 (7th Cir. 2002). "When a plaintiff claims disparate treatment under a facially neutral employment policy, this court employs the burden-shifting analysis set out by the United States Supreme Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under this analysis, the employee must first make a prima facie case of discrimination. The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias. Id., 802–804." *Craine* v. *Trinity College*, 259 Conn. 625, 636–37, 791 A.2d 518 (2002). The *McDonnell Douglas Corp.* burden-shifting analysis is applicable to claims brought pursuant to 42 U.S.C. §§ 1981 and 1983. See *Lockridge* v. *Board of Trustees of the University of Arkansas*, 315 F.3d 1005, 1009–10 (8th Cir. 2003).

"The burden of establishing a prima facie case [of discrimination] is a burden of production, not a burden of proof, and therefore involves no credibility assessment by the fact finder. . . . The level of proof required to establish a prima facie case is minimal and need not reach the level required to support a jury verdict in the plaintiff's favor." (Citation omitted.) *Craine* v. *Trinity*

College, supra, 259 Conn. 638. To establish a prima facie case of discrimination in the employment context, the plaintiff must present evidence that: (1) she belongs to a protected class; (2) she was subject to an adverse employment action; and (3) the adverse action took place under circumstances permitting an inference of discrimination.[34] See id. To establish the third prong, a litigant may present circumstantial evidence from which an inference may be drawn that similarly situated individuals were treated more favorably than she was. Id., 639; see also *Paylan* v. *St. Mary's Hospital Corp.*, 118 Conn. App. 258, 266, 983 A.2d 56 (2009). To be probative, this evidence must establish that the plaintiff and the individuals to whom she seeks to compare herself were "similarly situated in all *material* respects . . . ." (Emphasis added; internal quotation marks omitted.) *Paylan* v. *St. Mary's Hospital Corp.*, supra, 269; see also *Shumway* v. *United Parcel Service, Inc.*, 118 F.3d 60, 64 (2d Cir. 1997). "[A]n employee offered for comparison will be deemed to be similarly situated in all material respects if (1) . . . the plaintiff and those he maintains were similarly situated were subject to the same workplace standards and (2) . . . the conduct for which the employer imposed discipline was of comparable seriousness. *Graham* v. *Long Island Rail Road*, [230 F.3d 34, 40 (2d Cir. 2000)]." (Internal quotation marks omitted.) *Paylan* v. *St. Mary's Hospital Corp.*, supra, 269.

[34] In some employment contexts, such as claims involving hiring, promoting or granting tenure, the plaintiff must show that she was qualified to hold her employment position. *Craine* v. *Trinity College*, supra, 259 Conn. 638. The test for establishing disparate treatment in employment cases is flexible, however. *Alvarez* v. *Royal Atlantic Developers, Inc.*, 610 F.3d 1253, 1264 (11th Cir. 2010) ("[t]he methods of presenting a prima facie case [under *McDonnell Douglas Corp.*] are flexible and depend on the particular situation"). Because, in the present case, the question of whether the plaintiff was qualified for her position is not relevant to the question of whether she was subjected to harsher discipline than other employees on the basis of her race, we conclude that it is not an element of her prima facie case.

"Upon the defendant's articulation of . . . a non-discriminatory reason for the employment action, the presumption of discrimination arising with the establishment of the prima facie case drops from the picture. See [*St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 510–11, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)]; *Fisher* [v. *Vassar College*, 114 F.3d 1332, 1336 (2d Cir. 1997)]." *Weinstock* v. *Columbia University*, 224 F.3d 33, 42 (2d Cir. 2000), cert. denied, 540 U.S. 811, 124 S. Ct. 53, 157 L. Ed. 2d 24 (2003). If the jury disbelieves the nondiscriminatory reason proffered by the employer, the burden is then on the plaintiff to prove by a preponderance of the evidence that the real reason for the disparate treatment was discrimination on the basis of membership in the protected class. *St. Mary's Honor Center* v. *Hicks*, supra, 519 ("[i]t is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination" [emphasis in original]); id., 515 ("a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason" [emphasis in original]); see also *Weinstock* v. *Columbia University*, supra, 42 (if jury disbelieves employer's explanation for disparate treatment, "the question becomes whether the evidence, taken as a whole, supports a sufficient rational inference of discrimination"); *Board of Education* v. *Commission on Human Rights & Opportunities*, 266 Conn. 492, 512, 832 A.2d 660 (2003) (when employee established prima facie case of discrimination and fact finder reasonably disbelieved reasons for disparate treatment proffered by employer, sole remaining issue was "whether the [fact finder] reasonably could have inferred from the evidence before it that the [employer] intentionally discriminated against [the employee] on the basis of race or color").

When the employer has rebutted the presumption of discrimination arising from the plaintiff's prima facie

case by providing reasons for the disparate treatment, "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) *may*, together with the elements of the prima facie case, suffice to [satisfy the plaintiff's ultimate burden of proving] intentional discrimination." (Emphasis added.) *St. Mary's Honor Center* v. *Hicks*, supra, 509 U.S. 511. "Certainly [however] there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. See *Aka* v. *Washington Hospital Center*, 156 F.3d [1284, 1291–92 (D.C. Cir. 1998) (en banc)]; see also *Fisher* v. *Vassar College*, [supra, 114 F.3d 1338] ([i]f the circumstances show that the defendant gave the false explanation to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent)." (Internal quotation marks omitted.) *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

In summary, when a plaintiff attempts to establish racial discrimination through the use of circumstantial evidence, the plaintiff must first present some evidence from which an inference may be drawn that other similarly situated individuals not in the protected class were treated more favorably than the plaintiff. See *Craine* v. *Trinity College*, supra, 259 Conn. 639. If the defendant then articulates a nondiscriminatory reason for the dis-

parate treatment, the presumption of discrimination arising from the prima facie case "drops from the picture." *Weinstock* v. *Columbia University*, supra, 224 F.3d 42. The burden will then be on the plaintiff to prove by a preponderance of the evidence that the employment action was discriminatory. Id. Finally, although the evidence that a plaintiff presented in support of her prima facie case *may* be sufficient to satisfy her ultimate burden of proof, that will not necessarily be the case. *Reeves* v. *Sanderson Plumbing Products, Inc.*, supra, 530 U.S. 148; see also *Craine* v. *Trinity College*, supra, 638 ("[t]he level of proof required to establish a prima facie case is minimal and need not reach the level required to support a jury verdict in the plaintiff's favor").

This court previously has recognized that "[s]tatistical evidence in a disparate treatment case, in and of itself, rarely suffices to rebut an employer's legitimate, nondiscriminatory rationale for its [adverse employment] decision . . . . This is because a[n] [employer's] overall employment statistics will, in at least many cases, have little direct bearing on the specific intentions of the employer . . . . Without an indication of a connection between the statistics, the practices of the employer, and the employee's case, statistics alone are likely to be inadequate to show that the employer's decision . . . was impermissibly based on [a protected trait]."[35] (Internal quotation marks omitted.) *Board of*

[35] See also *Timmerman* v. *U. S. Bank, N.A.*, 483 F.3d 1106, 1114–15 (10th Cir. 2007) (in individual disparate treatment actions, "[s]tatistics taken in isolation are generally not probative of . . . discrimination . . . and statistical evidence on its own will rarely suffice to show pretext" [citation omitted; internal quotation marks omitted]); *Bacon* v. *Honda of America Mfg., Inc.*, 370 F.3d 565, 575 (6th Cir. 2004) (evidence showing pattern or practice of discrimination is not probative in individual disparate treatment action), cert. denied, 543 U.S. 1151, 125 S. Ct. 1334, 161 L. Ed. 2d 115 (2005); *Plair* v. *E.J. Brach & Sons, Inc.*, 105 F.3d 343, 349 (7th Cir. 1997) ("[s]tanding virtually alone . . . statistics cannot establish a case of individual disparate treatment" [internal quotation marks omitted]); *LeBlanc* v. *Great American Ins. Co.*, 6 F.3d 836, 848 (1st Cir. 1993) ("statistical evidence in a disparate

Education v. *Commission on Human Rights & Opportunities*, supra, 266 Conn. 516. Standing alone, statisti-

treatment case, in and of itself, rarely suffices to rebut an employer's legitimate, nondiscriminatory rationale for its decision to dismiss an individual employee"), cert. denied, 511 U.S. 1018, 114 S. Ct. 1398, 128 L. Ed. 2d 72 (1994); *Walther* v. *Lone Star Gas Co.*, 977 F.2d 161, 162 (5th Cir. 1992) (in individual disparate treatment case, "proof of pretext, hence of discriminatory *intent*, by statistics *alone* would be a challenging endeavor" [emphasis in original]); *Barnes* v. *GenCorp, Inc.*, 896 F.2d 1457, 1469 (6th Cir. 1990) (The employer's reasons for its treatment of the plaintiffs "cannot be rebutted by reference to the statistics already presented [in support of the prima facie case when] the statistics . . . do not tend to establish that [membership in the protected class] played a factor in any *particular* decision. Unless the plaintiffs can show that the defendants' explanations are inherently suspect or can present other direct or circumstantial evidence suggesting that the proffered reasons are not true, then the defendants are entitled to summary judgment." [Emphasis in original.]), cert. denied, 498 U.S. 878, 111 S. Ct. 211, 112 L. Ed. 2d 171 (1990); *Carmichael* v. *Birmingham Saw Works*, 738 F.2d 1126, 1131 (11th Cir. 1984) ("statistics alone cannot make a case of individual disparate treatment"); *Hudson* v. *International Business Machines Corp.*, 620 F.2d 351, 355 (2d Cir. 1980) (statistics, standing alone, cannot prove discrimination in individual disparate treatment action), cert. denied, 449 U.S. 1066, 101 S. Ct. 794, 66 L. Ed. 2d 611 (1980); *Ficken* v. *Clinton*, 771 F. Sup. 2d 79, 85–86 (D.D.C. 2011) (in disparate treatment case, summary judgment for defendant is ordinarily appropriate if plaintiff relies solely on statistical evidence); *Ivy* v. *Oxford Municipal Separate School District*, United States District Court, Docket No. 3:10CV024-A-A (N.D. Miss. June 29, 2011) ("while statistical evidence could be relevant [in individual disparate treatment case], bare allegations and numbers alone without more context provided are not sufficient"); *Reynolds* v. *Barrett*, 741 F. Sup. 2d 416, 427 (W.D.N.Y. 2010) ("[s]tatistical evidence can be used to bolster an individual claim of disparate treatment, but [s]tatistics alone are insufficient in a disparate-treatment claim because an individual plaintiff must prove that he or she in particular has been discriminated against" [internal quotation marks omitted]); *Booker* v. *Massachusetts Dept. of Public Health*, 527 F. Sup. 2d 216, 227 (D. Mass. 2007) ("[s]tatistical evidence is of marginal assistance in a disparate treatment case because unless very powerful, it reveals little of an individual plaintiff's circumstances, particularly with respect to co-workers with whom she seeks to compare herself"), aff'd, 612 F.3d 34 (1st Cir. 2010); *Simpson* v. *Leavitt*, 437 F. Sup. 2d 95, 104 (D.D.C. 2006) (statistics, standing alone, cannot prove discrimination in individual disparate treatment action); *Bussey* v. *Phillips*, 419 F. Sup. 2d 569, 583 (S.D.N.Y. 2006) (same); *Byrnie* v. *Cromwell Public Schools*, 73 F. Sup. 2d 204, 218 (D. Conn. 1999) (in individual disparate treatment case, "raw statistical data, in the absence of any effort to account for other causes of the under-representation of [members of the protected class in the class of persons employed by the defendant], does not support an inference of . . . discrimination"), rev'd in part on other grounds, 243 F.3d 93 (2d Cir. 2001).

cal evidence is sufficient to establish discriminatory intent in individual disparate treatment actions only when it shows a "stark pattern of discrimination . . . ." (Internal quotation marks omitted.) *Aragon* v. *Republic Silver State Disposal, Inc.*, 292 F.3d 654, 663 (9th Cir. 2002); id. ("statistics must show a stark pattern of discrimination unexplainable on grounds other than [discrimination on the basis of membership in the protected class]" [internal quotation marks omitted]); see also *Ottaviani* v. *State University of New York*, 875 F.2d 365, 371 (2d Cir. 1989) (in individual disparate treatment actions, "[w]here *gross* statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination" [emphasis added; internal quotation marks omitted]), cert. denied, 493 U.S. 1021, 110 S. Ct. 721, 107 L. Ed. 2d 740 (1990); *Chesna* v. *United States Dept. of Defense*, 850 F. Sup. 110, 117–18 (D. Conn. 1994) (to prove intentional discrimination in violation of equal protection clause through circumstantial evidence of disparate treatment, plaintiff must show stark pattern of discrimination); *Life Technologies* v. *Superior Court*, 197 Cal. App. 4th 640, 650, 130 Cal. Rptr. 3d 80 (2011) ("Statistical evidence may . . . be utilized in a disparate treatment case. However, because discriminatory intent must be shown in such a case, statistical evidence must meet a more exacting standard."); *Smith College* v. *Massachusetts Commission Against Discrimination*, 376 Mass. 221, 228 n.9, 380 N.E.2d 121 (1978) (in individual disparate treatment action, "*gross* statistical disparities alone may constitute prima facie proof of a practice of discrimination" [emphasis added]).[36]

[36] In addition, a number of courts have held that, for purposes of proving discriminatory intent in individual disparate treatment cases, "statistical evidence derived from an extremely small universe . . . has little predictive value and must be disregarded." (Internal quotation marks omitted.) *Aragon* v. *Republic Silver State Disposal, Inc.*, supra, 292 F.3d 663; see also *Mayor* v. *Educational Equality League*, 415 U.S. 605, 621, 94 S. Ct. 1323, 39 L. Ed. 2d 630 (1974) (in action for intentional discrimination in violation of equal protection clause, use of straight percentage comparison was meaningless

With these principles in mind, we turn to the defendants' claim in the present case that the plaintiff failed to establish that they had discriminated against her on the basis of her race. The plaintiff contends that the evidence established that the defendants had treated her differently than other similarly situated school district employees. Specifically, she claims that, unlike six white employees who were accused of abusing students,[37] she was not given specific information about the allegations against her or provided with an opportunity to respond to the allegations before she was placed on administrative leave.

The defendants contend that, to the contrary, because the other employees who had been accused of abusing students were not similar to the plaintiff in all material respects, the plaintiff has not established a prima facie case that the defendants discriminated against her on the basis of her race. Specifically, they point out that the plaintiff was a principal; she was accused of sexually abusing a young student; she was accused by her assistant, who was a trained mandated reporter; and she was disciplined by Ramos. In contrast, V.L. and T.B. were teachers, and they, along with L.R., had been accused of physical and verbal abuse, not sexual abuse; they had been accused six years earlier than the plain-

because sample size was small); *Pollis* v. *New School for Social Research*, 132 F.3d 115, 121 (2d Cir. 1997) (in individual disparate treatment case, "[t]he smaller the sample, the greater the likelihood that an observed pattern is attributable to other factors and accordingly the less persuasive the inference of discrimination to be drawn from it"); *Harper* v. *Trans World Airlines, Inc.*, 525 F.2d 409, 412 (8th Cir. 1975) (statistical evidence derived from extremely small sample must be disregarded). The reason is that, when the number of comparators is small, "slight changes in the data can drastically alter the result." *Aragon* v. *Republic Silver State Disposal, Inc.*, supra, 663.

[37] The white employees to whom the plaintiff compares herself are: the teacher who Smith had asked the plaintiff to vouch for while she was the principal at Beardsley School; the teacher who the plaintiff had interviewed while she was the principal at Roosevelt School; the principals L.R. and A.E.; and the teachers V.L. and T.B.

tiff; they had not been disciplined by Ramos;[38] and the initial accusations against them had not been made by a trained mandated reporter, but by students and, in the case of T.B., a student and a parent. With respect to the two white teachers who the plaintiff had been involved in investigating, and the principal, A.E., the defendants contend that the plaintiff failed to present sufficient information about them to provide a meaningful comparison. The defendants further claim that A.C. was the only individual who was similarly situated to the plaintiff because he was a principal, he had been accused of sexual abuse, he had been disciplined by Ramos, and he was treated the same as the plaintiff.[39] In addition, the defendants claim that, even if the plaintiff established a prima facie case that she had been treated differently than other similarly situated employees, the facts that a mandated reporter had accused the plaintiff and that the allegations of sexual abuse against her were more serious than those against the other employees justified their treatment of her. Finally, the defendants claim that the plaintiff's concession that "similarly situated non-black employees [were] treated in the same manner as [the] plaintiff and other black employees were treated more favorably" is fatal to her claim of intentional discrimination.

[38] See *Shumway* v. *United Parcel Service, Inc.*, supra, 118 F.3d 64 (when plaintiff was disciplined by different supervisor than comparator employees who were treated less severely, and when plaintiff's supervisor treated all employees the same, plaintiff was not treated differently than others similarly situated); see also *Radue* v. *Kimberly-Clark Corp.*, 219 F.3d 612, 618 (7th Cir. 2000) (because different supervisors may exercise discretion differently, employee is rarely similarly situated to employee who has different supervisor).

[39] As we have indicated, the evidence was ambiguous as to whether Ramos had been involved in disciplining A.C. and whether A.C. was treated the same as the plaintiff. See footnote 33 of this opinion. The plaintiff does not dispute the defendants' claim that they treated A.C. the same as the plaintiff, however, and she expressly concedes that the defendants treated "similarly situated nonblack employees . . . in the same manner as [the] plaintiff," although she did not identify these employees.

We conclude that we need not decide whether the plaintiff was similarly situated to the employees to whom she compares herself because, even if we assume that she was, she has not satisfied her ultimate burden of proof.[40] Specifically, we must conclude that the plaintiff's circumstantial evidence that the defendants treated seven white employees[41] and four African-American employees[42] more favorably than they treated her when she was accused of abusing a student in 2005 is insufficient as a matter of law to raise an inference of intentional racial discrimination. Although "evidence establishing the falsity of the legitimate, nondiscriminatory reasons advanced by the employer *may* be, in and of itself, enough to support the trier of fact's ultimate finding of intentional discrimination" when the evidence of falsity is strong; (emphasis added) *Board of Education* v. *Commission on Human Rights & Opportunities*, supra, 266 Conn. 511; see also id., 511–12 (commission reasonably could have concluded that employer's failure to comply fully with affirmative action plan, weaknesses, contradictions, inconsistencies and implausibilities in employer's explanations and absence of *any* African-American employees in relevant employment position, combined with employee's prima facie case, were sufficient to prove falsity of employer's

[40] Because the defendants articulated legitimate reasons for their treatment of the plaintiff, the burden was on her to establish by a preponderance of the evidence that the defendants were motivated by discrimination even if the jury disbelieved the defendants' reasons. *Weinstock* v. *Columbia University*, supra, 224 F.3d 42; see also *St. Mary's Honor Center* v. *Hicks*, supra, 509 U.S. 519 ("[i]t is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination" [emphasis in original]).

[41] These employees are the six employees to whom the plaintiff seeks to compare herself; see footnote 37 of this opinion; and A.C., whom the jury reasonably could have concluded was treated more favorably than the plaintiff. See footnote 33 of this opinion.

[42] These employees are the male African-American principal who was accused in 2006, the plaintiff herself when she was accused in 2008, S.A. and J.A.

explanation and to satisfy employee's ultimate burden of proof); ambiguous statistical evidence, standing alone, is insufficient as a matter of law to support such a finding. See id., 515–16 (employee's statistical evidence was "weak and perhaps meaningless when considered in isolation"); id., 516 ("statistics alone are likely to be inadequate to show that the employer's decision . . . was impermissibly based on [a protected trait]" [internal quotation marks omitted]). The evidence in the present case simply does not reveal *any* pattern of disparate treatment on the basis of race, much less the " 'stark pattern' " or " 'gross statistical disparities' " that are required to prove such claims.[43] *Aragon* v. *Republic*

[43] The plaintiff cites *Graham* v. *Long Island Rail Road*, supra, 230 F.3d 43–44, for the proposition that, when a plaintiff is relying *solely* on circumstantial statistical evidence to prove intentional discrimination, evidence that the employer has treated some employees of the plaintiff's race more favorably than the plaintiff, and that it has treated some employees of a different race the same, is not insufficient as a matter of law to prove that the employer was motivated by racial discrimination. In *Graham*, the court stated that, "[s]ince [the] principal focus [of Title VII of the Civil Rights Act of 1964 (Title VII)] is on protecting individuals, rather than a protected class as a whole, an employer may not escape liability for discriminating against a given employee on the basis of race simply because it can prove it treated other members of the employee's group favorably. See *Connecticut* v. *Teal*, 457 U.S. 440, 453–55, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (1982); [*Equal Employment Opportunity Commission* v. *Staten Island Savings Bank*], 207 F.3d 144, 151 & n.5 (2d Cir. 2000). Only where overwhelming evidence exists that an employer acted for reasons other than discrimination will the proof submitted by the plaintiff as to similarly situated employees be negated. Cf. *Montana* [v. *First Federal Savings & Loan Assn. of Rochester*, 869 F.2d 100, 106–107 (2d Cir. 1989)] . . . ." *Graham* v. *Long Island Rail Road*, supra, 43–44. Because *Graham* is inconsistent with the well reasoned cases holding that circumstantial statistical evidence is probative of intentional discrimination only when it shows a stark pattern of discrimination or a gross statistical disparity; see, e.g., *Aragon* v. *Republic Silver State Disposal, Inc.*, supra, 292 F.3d 663; *Ottaviani* v. *State University of New York*, supra, 371; and because the cases cited by the court in *Graham* do not support that court's conclusion; see *Connecticut* v. *Teal*, supra, 453–55 (when plaintiff has *established* disparate impact claim under Title VII, employer cannot justify discrimination against plaintiff by establishing that it has treated other members of protected group more favorably); *Equal Employment Opportunity Commission* v. *Staten Island Savings Bank*, supra, 151 and n.5 (same); *Montana* v. *First Federal Savings & Loan Assn. of Rochester*, supra, 107 (trial court properly granted summary judgment because evidence that

Silver State Disposal, Inc., supra, 292 F.3d 663 ("the statistics must show a stark pattern of discrimination unexplainable on grounds other than [discrimination on the basis of membership in the protected class]" [internal quotation marks omitted]); *Ottaviani* v. *State University of New York*, supra, 875 F.2d 371 (only " 'gross statistical disparities' " can support inference of intentional discrimination); see also *Bush* v. *Commonwealth Edison Co.*, 990 F.2d 928, 931 (7th Cir. 1993) ("A plaintiff cannot establish a prima facie case of racial discrimination by showing that . . . a coworker of another race was treated more favorably than he, though other coworkers of his race were treated more favorably than other coworkers of other races. Such a pattern, in which blacks sometimes do better than whites and sometimes do worse, being random with respect to race, is not evidence of racial discrimination.").[44] Because the jury could not reasonably have concluded on the basis of the circumstantial evidence presented by the plaintiff that the defendants intentionally discriminated against her on the basis of her race, we conclude that the trial court improperly denied the defendants' motion for a directed verdict on the plaintiff's claim pursuant to 42 U.S.C. §§ 1981 and 1983.[45]

defendant retained six male employees but did not retain plaintiff, without more, did not support finding of gender discrimination); we find *Graham* unpersuasive.

[44] Of course, if a plaintiff can point to direct evidence that the employer discriminated against him or her on the basis of race, the plaintiff need not establish any pattern of disparate treatment. We conclude only that, if a plaintiff is relying *solely* on circumstantial statistical evidence that the employer has treated him or her differently than similarly situated employees who are not in the protected class to prove discriminatory intent, and the evidence fails to show a stark pattern of discrimination, then the plaintiff has failed to prove an intent to discriminate as a matter of law.

[45] When a plaintiff attempts to satisfy the ultimate burden of proving discriminatory intent by presenting circumstantial evidence of disparate treatment, the plaintiff must show "that the better-treated workers with whom the plaintiff compares herself are a representative sample of all the workers who are comparable to her. . . . She must not pick and choose [comparators]." (Citations omitted.) *Crawford* v. *Indiana Harbor Belt Rail-*

III

Finally, we address the defendants' claim that the trial court improperly denied their motion for a directed

road Co., 461 F.3d 844, 845 (7th Cir. 2006); see also *Simpson* v. *Kay Jewelers*, 142 F.3d 639, 646–47 (3d Cir. 1998) (to prove age discrimination, plaintiff cannot "pick and choose a person she perceives is a valid comparator who was allegedly treated more favorably, and completely ignore" other relevant comparators); *Simpson* v. *Kay Jewelers*, supra, 645 (plaintiff cannot selectively choose comparator); *Simpson* v. *Kay Jewelers*, supra, 645 ("the mere favorable treatment of [a member of an unprotected class] as compared to [a member of a protected class] may not be sufficient to infer . . . discrimination"); *Soria* v. *Ozinga Bros., Inc.*, 704 F.2d 990, 996 (7th Cir. 1983) (in disparate treatment action, when sample included only fifteen recorded disciplinary actions and plaintiff chose to omit thirteen unwritten disciplinary incidents, trial court "was well justified in considering . . . flawed and incomplete disciplinary statistics to be of 'minimal assistance' "). These cases recognize that no rational inference of discriminatory intent can be made merely because the employer treated the plaintiff differently than *some*, arbitrarily selected, comparators; rather, the plaintiff must establish an overall pattern of disparate treatment based on membership in the protected class. Cf. *Wilson* v. *B/E Aerospace, Inc.*, 376 F.3d 1079, 1088–89 (11th Cir. 2004) (for purposes of establishing prima facie case of disparate treatment on basis of sex, evidence that two women were chosen for promotion out of forty-four open positions had no probative value when plaintiff had not provided other relevant information, such as number of women who sought promotion); *Hillstrom* v. *Best Western TLC Hotel*, 354 F.3d 27, 32 (1st Cir. 2003) (for purposes of proving claim of disparate treatment on basis of age and gender, statistical evidence that 75 percent of individuals terminated by supervisor were over age of forty and 87 percent were male was not probative "absent evidence of the characteristics of the universe of employees supervised by [the supervisor]"); *Montana* v. *First Federal Savings & Loan Assn. of Rochester*, 869 F.2d 100, 107 (2d Cir. 1989) (sex discrimination claim was properly dismissed when plaintiff presented no evidence of total number of male and female managers, overall percentage of males and females affected by employment action or that employer had discriminatory attitude toward women); *Hagans* v. *Andrus*, 651 F.2d 622, 627 (9th Cir.) (for purposes of establishing prima face case of disparate treatment on basis of sex, fact that low percentage of employees in high positions were women was meaningless without evidence of pool of qualified women applicants), cert. denied, 454 U.S. 859, 102 S. Ct. 313, 70 L. Ed. 2d 157 (1981); *Weaks* v. *North Carolina Dept. of Transportation*, 761 F. Sup. 2d 289, 308–309 (M.D.N.C. 2011) (anecdotal evidence that nine white employees were promoted while three African-American employees were not was not probative in absence of evidence regarding qualified labor pool). Accordingly, when a plaintiff has failed to present evidence regarding the employer's

verdict with respect to the plaintiff's claim of intentional infliction of severe emotional distress. We agree.

The following procedural history is relevant to our resolution of this claim. At the conclusion of the plaintiff's case, the defendants made an oral motion for a directed verdict on the plaintiff's claim of intentional infliction of emotional distress on the ground that no reasonable person could conclude that the defendants' conduct was sufficiently extreme and outrageous to meet the relevant legal standard. The trial court reserved its decision on the motion until the conclusion of trial. The defendants renewed their claim in their posttrial motion for a directed verdict. The trial court denied that motion.

We begin our analysis with the standard of review. "In order for the plaintiff to prevail in a case for liability . . . [alleging intentional infliction of emotional distress], four elements must be established. It must be shown: (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct;

treatment of all relevant comparators, or at least a representative sample thereof, evidence that the employer has treated some employees more favorably than the plaintiff, standing alone, will be insufficient to establish that the employer displayed a pattern of treating the plaintiff and other members of the protected class worse than other similarly situated employees and, therefore, it will be insufficient to prove discriminatory intent.

The evidence in the present case showed that at least seventeen administrators were accused of abusing students during the relevant time period. See footnote 30 of this opinion. The plaintiff has not explained why not all of these administrators were similarly situated to her or why she was unable to use them as comparators, and we have no way of knowing whether the sample that she chose was representative. Because we have concluded, however, that the circumstantial evidence presented by the plaintiff in the present case did not show a pattern of discriminatory conduct, even if it is assumed that the plaintiff compared herself to all of the relevant comparators, and because the defendants have raised no claim in the present case that the plaintiff failed to identify all relevant comparators, we need not consider whether or how these principles would apply here.

(2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe. . . . Whether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous is initially a question for the court to determine. . . . Only where reasonable minds disagree does it become an issue for the jury. . . .

"Liability for intentional infliction of emotional distress requires conduct that exceeds all bounds usually tolerated by decent society . . . . Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous! . . . Conduct on the part of the defendant that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress." (Citations omitted; internal quotation marks omitted.) *Appleton* v. *Board of Education*, 254 Conn. 205, 210–11, 757 A.2d 1059 (2000).

We conclude that no reasonable juror could find that the defendants' conduct in the present case met this high threshold. With respect to the defendants' conduct in 1998 and 1999, when Kelly told the plaintiff that her career was in jeopardy during a performance evaluation and Shamas transferred the plaintiff to Newfield School, no juror could conclude that the conduct was "beyond all possible bounds of decency . . . atrocious, and utterly intolerable in a civilized community." (Internal quotation marks omitted.) Id., 211; see id., 210–11 (trial court properly granted defendant's motion for summary

judgment on plaintiff's claim for intentional infliction of emotional distress when defendants made condescending comments about plaintiff in front of colleagues, questioned plaintiff's vision and ability to read, informed plaintiff's daughter that she was acting differently and should take time off, asked police to escort plaintiff from school, required plaintiff to subject herself to psychiatric testing, forced plaintiff to take leave of absence, suspended plaintiff, and forced plaintiff to resign); *Tracy* v. *New Milford Public Schools*, 101 Conn. App. 560, 567–70, 922 A.2d 280 (trial court properly granted motion to strike plaintiff's claim for intentional infliction of emotional distress when plaintiff claimed that defendants conspired to engage in pattern of harassment including denial of position, initiated disciplinary actions without proper investigation, and defamed and intimidated plaintiff), cert. denied, 284 Conn. 910, 931 A.2d 935 (2007). Indeed, there is no evidence that Kelly or Shamas subjected the plaintiff to any unduly humiliating, embarrassing or denigrating language or conduct, intentionally or otherwise. Rather, they subjected her to actions that individuals in the workplace reasonably should expect. See *Perodeau* v. *Hartford*, 259 Conn. 729, 757, 792 A.2d 752 (2002) ("individuals [in the workplace] reasonably should expect to be subject to . . . performance evaluations, both formal and informal; [and] decisions related to such evaluations, such as those involving transfer, demotion, promotion and compensation" and "reasonably should expect to experience some level of emotional distress, even significant emotional distress, as a result"). Moreover, even if we were to assume that the defendants were wrongfully motivated in subjecting the plaintiff to this conduct, wrongful motivation by itself does not meet the standard for intentional infliction of severe emotional distress; rather, "it is the act itself which must be outrageous." (Internal quotation marks omit-

ted.) *Aquavia* v. *Goggin*, 208 F. Sup. 2d 225, 237 (D. Conn. 2002); see *Parsons* v. *United Technologies Corp.*, 243 Conn. 66, 89, 700 A.2d 655 (1997) ("[t]he mere act of firing an employee, even if wrongfully motivated, does not transgress the bounds of socially tolerable behavior" [internal quotation marks omitted]). Finally, the only evidence of severe emotional distress that the plaintiff presented with respect to this conduct is that she became frightened and choked up upon being told that her career might be in jeopardy. There was no evidence that the plaintiff was in distress for an extended period or that she sought medical treatment. No reasonable juror could conclude that this constituted severe emotional distress.

With respect to the defendants' conduct in 2005, when they placed her on paid administrative leave without first providing her with an opportunity to respond to the abuse allegations, the plaintiff contends that the jury reasonably could have found that, "[b]ecause neither the plaintiff nor the alleged victim was questioned by the defendants and [the department] found *no truth* to the allegations, the jury could have and reasonably did conclude that the entire matter was intentionally fabricated and that the defendants were the perpetrators." (Emphasis in original.) The plaintiff made no claim and presented no evidence at trial, however, that Santacapita had fabricated the allegations against her or that the defendants had to have known immediately that the allegations were either false or grossly exaggerated. See *Tracy* v. *New Milford Public Schools*, supra, 101 Conn. App. 568 (trial court properly granted motion to strike claim for intentional infliction of emotional distress on ground that "[s]ubjecting an employee to discipline without proper investigation [was] a far cry from fabricating disciplinary actions" [internal quotation marks omitted]). Indeed, although the plaintiff testified that the department ultimately found that the

allegations against her were "unsubstantiated," the record does not reveal whether the department found that the plaintiff had never engaged in the alleged conduct or, instead, that the conduct did not rise to the level of abuse. The record does reveal, however, that the department had found that the plaintiff's manner of physical contact with students was one of several "areas of concern . . . ." See footnote 12 of this opinion.

Moreover, Ramos, who made the decision to place the plaintiff on administrative leave, testified that he was not aware of the plaintiff's history in the school system and, therefore, had no motive to retaliate against her. There was no contrary evidence that Ramos harbored personal animus toward the plaintiff. Even if we were to assume that Ramos made an error in judgment as to the truth or seriousness of the allegations, or in the manner in which he responded to them, and that the plaintiff was subject to extreme embarrassment as the result of his conduct, as a matter of law, mere errors in judgment do not rise to the level of extreme and outrageous conduct. See *Appleton* v. *Board of Education*, supra, 254 Conn. 210–11 (trial court properly granted defendant's motion for summary judgment on plaintiff's claim for intentional infliction of emotional distress when defendants forced plaintiff to take leave of absence, suspended plaintiff, and forced plaintiff to resign); *Tracy* v. *New Milford Public Schools*, supra, 101 Conn. App. 568–69 (initiating disciplinary action without conducting investigation did not constitute extreme and outrageous conduct). We therefore conclude that the trial court improperly denied the defendants' motion for a directed verdict on the plaintiff's claim for intentional infliction of extreme emotional distress.

The judgment is reversed and the case is remanded with direction to grant the defendants' motion for a

directed verdict, to set aside the verdict and for judgment notwithstanding the verdict, and to render judgment thereon for the defendants.

In this opinion NORCOTT, ZARELLA, McLACHLAN, EVELEIGH and HARPER, Js., concurred.

PALMER, J., concurring. I join parts I B, II and III of the majority opinion. I also join that portion of part I A of the majority opinion in which the majority concludes that *Garcetti* v. *Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006), entitles the defendants, the board of education of the city of Bridgeport, Henry R. Kelly and Daniel Shamas, to judgment as a matter of law on the claim of the plaintiff, Carmen I. Perez-Dickson, alleging a violation of her first amendment right to free speech in contravention of General Statutes § 31-51q. Although I also agree with the conclusion of the majority in part I A of its opinion that the plaintiff is not entitled to review of her unpreserved alternative ground for affirmance under § 31-51q that the defendants violated her free speech rights under the state constitution, I am unable to join that portion of part I A of the majority opinion because I disagree with certain aspects of the majority's reasoning and analysis. Specifically, I do not agree with the majority that (1) the *Golding* doctrine[1]

[1] Under *State* v. *Golding*, 213 Conn. 233, 239, 567 A.2d 823 (1989), a defendant in a criminal case is entitled to appellate review of an unpreserved claim if the claim is of constitutional magnitude and the record is adequate for review of the claim. To prevail under *Golding*, the defendant also must demonstrate that his or her constitutional rights were violated and the state cannot prove that the violation was harmless beyond a reasonable doubt. Id., 240. As the majority acknowledges, this court repeatedly has recognized that the *Golding* doctrine also applies in civil cases. *Chatterjee* v. *Commissioner of Revenue Services*, 277 Conn. 681, 694 n.15, 894 A.2d 919 (2006); see, e.g., *Bennett* v. *New Milford Hospital, Inc.*, 300 Conn. 1, 32, 12 A.3d 865 (2011); *Perricone* v. *Perricone*, 292 Conn. 187, 212 n.24, 972 A.2d 666 (2009). Because I need not do so for purposes of the present case, however, I do not address the issue of whether the plaintiff's failure to bring her state constitutional claim under § 31-51q may be considered a waiver of the claim on the theory that competent counsel are presumed to have known of the

is inapplicable to unpreserved claims under § 31-51q, (2) an appellant ordinarily is not entitled to review of an unpreserved alternative ground for affirmance even if the appellee will not be prejudiced by such review, and (3) the possibility that the appellee might have settled the case prior to trial if it had known of the appellant's alternative ground for affirmance constitutes prejudice for purposes of determining whether the appellant should be granted appellate review of that alternative ground. I nevertheless concur in the result that the majority reaches in part I A because I agree with the defendants that the plaintiff has failed to establish that the defendants would not be prejudiced by review of the plaintiff's unpreserved claim.

I

The majority concludes that the plaintiff's unpreserved alternative ground for affirmance under § 31-51q may not be brought under *Golding* because the plaintiff "has not raised a claim that the defendants violated her constitutional rights" but, instead, "has raised a claim implicating her statutory rights under § 31-51q."[2] Footnote 23 of the majority opinion. The majority's conclusion represents a classic example of elevation of form over substance. As this court has

claim but intentionally decided not to pursue it. Cf. *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011) (defendant deemed to have implicitly waived right to raise constitutional challenge to jury instructions when defense counsel fails to object to instructions after having been provided with copy of proposed jury instructions, allowed meaningful opportunity to review and comment on them, and counsel affirmatively accepts instructions proposed or given).

[2] As the majority notes, the plaintiff, in her brief to this court, did not seek *Golding* review of her state constitutional free speech claim under § 31-51q. It is apparent that she did not do so, however, because she viewed the claim as preserved. In any event, the majority's decision not to review her claim is predicated on what it characterizes as a problem more fundamental than her failure to seek *Golding* review, namely, her failure to raise a claim of constitutional magnitude. It is this latter conclusion with which I take issue.

observed, the rationale for the *Golding* doctrine is that, when the trial record is adequate for appellate review, a party should be able to raise an unpreserved constitutional claim because such claims "implicate fundamental rights . . . ." *State* v. *Brunetti*, 279 Conn. 39, 55, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007). In light of this rationale, there simply is no justification for denying *Golding* review to an unpreserved claim under § 31-51q, a statute that provides a remedy for violations of constitutional rights.

General Statutes § 31-51q provides in relevant part that "[a]ny employer . . . who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution[3] or section 3,[4] 4[5] or 14[6] of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such

[3] The first amendment to the United States constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[4] Article first, § 3, of the constitution of Connecticut provides: "The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in the state; provided, that the right hereby declared and established, shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state."

[5] Article first, § 4, of the constitution of Connecticut provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

[6] Article first, § 14, of the constitution of Connecticut provides: "The citizens have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance."

employee for damages caused by such discipline or discharge . . . .'' It is apparent, therefore, that ''[§] 31-51q creates a cause of action for damages to protect employees from retaliatory action illegally grounded in the employees' exercise of enumerated constitutionally protected rights.'' *D'Angelo* v. *McGoldrick*, 239 Conn. 356, 360, 685 A.2d 319 (1996). In other words, ''[t]he statute plainly was intended to protect the first amendment and related state constitutional rights of working men and women.'' *Cotto* v. *United Technologies Corp.*, 251 Conn. 1, 8, 738 A.2d 623 (1999). The purpose of § 31-51q, therefore, is to provide a mechanism pursuant to which an employee may vindicate certain of his or her federal and state constitutional rights. Because the rights protected by § 31-51q are all constitutional in nature, for present purposes, there is no appreciable difference between a claim under § 31-51q and a claim raised directly under the federal or state constitution. See, e.g., *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (recognizing private cause of action under United States constitution for alleged violation of fourth amendment's prohibition against unreasonable searches and seizures); *Binette* v. *Sabo*, 244 Conn. 23, 41, 710 A.2d 688 (1998) (recognizing private cause of action under Connecticut constitution, article first, §§ 7 and 9, for alleged violation of prohibition against unreasonable searches and seizures). Section 31-51q is similar to 42 U.S.C. § 1983, which provides a remedy for, inter alia, ''the deprivation of any rights, privileges, or immunities secured by the Constitution . . . .'' I see no reason why an unpreserved claim under 42 U.S.C. § 1983 should not warrant *Golding* review. Under the majority's formalistic analysis, however, no such review would be permitted because, even though 42 U.S.C. § 1983 protects constitutional rights, it is a statutory provision, not a constitutional one.

II

I also disagree with the majority's conclusion concerning the proper standard for determining the reviewability of an unpreserved alternative ground for affirmance. The majority declines to address the plaintiff's alternative ground for affirmance under § 31-51q in large part because the plaintiff did not raise the claim in the trial court and there are no "exceptional circumstances" warranting this court's review of the claim. Unlike the majority, I would conclude that an appellate court ordinarily should consider an unpreserved alternative ground for affirmance if the record is adequate for review and the appellee can establish that the appellant will not be prejudiced by such review.[7] Under such circumstances, considering an appellee's alternative ground for affirmance would preserve the finality of judgments and promote judicial economy without perpetrating a wrong on the appellant or on the trial court.

In reaching a stricter conclusion, the majority hews to an approach that this court adopted without any real analysis and to which this court has not consistently adhered. The majority notes that "[t]his court previously has held that [o]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . This rule applies equally to alternate grounds for affirmance. . . . *New Haven* v. *Bonner*, 272 Conn. 489, 498, 863 A.2d 680 (2005); see also *Thomas* v. *West Haven*, 249 Conn. 385, 390 n.11, 734 A.2d 535 (1999) ([t]he appellee's right to

[7] I agree with the majority that the burden is on the appellee to demonstrate that the appellant will not be prejudiced by review of the appellee's unpreserved alternative ground for affirmance. I add, however, that the appellant first should be required to advance a colorable claim of prejudice so that the appellee will know the nature of the alleged prejudice that it must disprove.

file a [Practice Book] § 63-4 [a] [1][8] statement has not eliminated the duty to have raised the issue in the trial court . . .), cert. denied, 528 U.S. 1187, 120 S. Ct. 1239, 146 L. Ed. 2d 99 (2000); *Peck* v. *Jacquemin*, 196 Conn. 53, 62 n.13, 491 A.2d 1043 (1985) (compliance with [Practice Book § 63-4 (a) (1)] is not to be considered in a vacuum; particularly to be considered is its linkage with [Practice Book § 60-5] which provides in part that this court shall not be bound to consider a claim unless it was distinctly raised at trial or arose subsequent to trial). Such exceptional circumstances may occur where a new and unforeseen constitutional right has arisen between the time of trial and appeal or where the record supports a claim that a litigant has been deprived of a fundamental constitutional right and a fair trial. . . . An exception may also be made where consideration of the question is in the interest of public welfare or of justice between the parties. . . . *Lopiano* v. *Lopiano*, 247 Conn. 356, 373, 752 A.2d 1000 (1998)." (Internal quotation marks omitted.) Finding no such exceptional circumstances in the present case, the majority concludes that the plaintiff is not entitled to review of her claim.[9]

[8] Practice Book § 63-4 provides in relevant part: "(a) At the time the appellant sends a copy of the endorsed appeal form and the docket sheet to the appellate clerk, the appellant shall also send the appellate clerk an original and one copy of the following:

"(1) A preliminary statement of the issues intended for presentation on appeal. If any appellee wishes to (A) present for review alternate grounds upon which the judgment may be affirmed . . . that appellee shall file a preliminary statement of issues within twenty days from the filing of the appellant's preliminary statement of the issues. . . ."

[9] The majority also states that, "even if we were to assume that a lack of prejudice to an appellant would justify review of an alternate ground for affirmance that was not raised in the trial court, even in the absence of other exceptional circumstances, the plaintiff in the present case has not established that the defendants would not be prejudiced if we were to review this claim." Text accompanying footnote 25 of the majority opinion. Thereafter, the majority explains that the defendants would be prejudiced by review of the plaintiff's alternative ground for affirmance. Because I believe that the better, more efficacious policy would be to permit review of unpreserved alternative grounds for affirmance whenever the appellant would not be prejudiced by such review, I would not "assume" that that is the appropriate policy approach for purposes of the present case only.

I do not dispute that the cases that the majority cites—*Bonner*, *Thomas* and *Peck*—say what the majority says they do. I nevertheless believe that these cases should not drive this court's policy concerning appellate review of unpreserved alternative grounds for affirmance, first, because the strict approach endorsed by these cases is not the most efficacious one and was adopted without any real analysis, and, second, because we have not consistently adhered to that strict approach.

As we observed in *Bonner*, *Thomas* and *Peck*, under our rules, this court is never required to address unpreserved claims. See *New Haven* v. *Bonner*, supra, 272 Conn. 498; *Thomas* v. *West Haven*, supra, 249 Conn. 390 n.11; *Peck* v. *Jacquemin*, supra, 196 Conn. 61–62 n.13. Practice Book § 60-5 expressly provides that the reviewing court "shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial." By its broad terms, Practice Book § 60-5 applies to *all* unpreserved claims, whether the claim has been raised for the first time on appeal by the appellant seeking *reversal* of the judgment or has been raised for the first time on appeal by the appellee seeking *affirmance* of the judgment, as in *Bonner*, *Thomas* and *Peck*. See *New Haven* v. *Bonner*, supra, 498; *Thomas* v. *West Haven*, supra, 390 n.11; *Peck* v. *Jacquemin*, supra, 61–62 n.13. In none of those cases, however, did this court engage in any analysis or discussion as to why a reviewing court should treat all unpreserved claims alike irrespective of whether the claim was raised by the appellee or the appellant. In fact, there is sound reason to treat the former more liberally than the latter.

The general rule disfavoring review of claims raised by the appellant for the first time on appeal stems from the concern that any other rule would be unfair to the trial court and to the opposing party. "[I]t is the

appellant's responsibility to present . . . a claim clearly to the trial court so that the trial court may consider it and, if it is meritorious, take appropriate action. That is the basis for the requirement that ordinarily [the appellant] must raise in the trial court the issues that he intends to raise on appeal. . . . For us [t]o review [a] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambuscade of the trial judge. . . . We have repeatedly indicated our disfavor with the failure, whether because of a mistake of law, inattention or design, to object to errors occurring in the course of a trial until it is too late for them to be corrected, and thereafter, if the outcome of the trial proves unsatisfactory, with the assignment of such errors as grounds of appeal." (Internal quotation marks omitted.) *Ravetto* v. *Triton Thalassic Technologies, Inc.*, 285 Conn. 716, 730, 941 A.2d 309 (2008).

Consequently, as this court has recognized, it is prudent to permit appellate review of an appellant's unpreserved claims only in exceptional circumstances. Claims that satisfy that stringent standard include claims of constitutional magnitude; see, e.g., *State* v. *Golding*, 213 Conn. 233, 239, 567 A.2d 823 (1989); claims involving the commission of plain error; see, e.g., *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 204–205, 982 A.2d 620 (2009); and claims implicating the court's subject matter jurisdiction. See, e.g., *Gordon* v. *H.N.S. Management Co.*, 272 Conn. 81, 101, 861 A.2d 1160 (2004).

When an appellee, rather than an appellant, raises a claim for the first time on appeal, the claim, if successful, would preserve the judgment, not upset it. In such a circumstance, there is no possibility of an ambuscade of the trial court because the claim represents a separate and independent alternative ground on which the

trial court's judgment may be affirmed. In the event that the appellant will not be prejudiced by review of the appellee's unpreserved claim, there is no persuasive reason to deny such review, and good reason to afford it. After all, a trial is a search for the truth conducted for the sake of resolving the parties' dispute. See, e.g., *Nix* v. *Whiteside*, 475 U.S. 157, 166, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986) ("the very nature of a trial [is] a search for truth"); *Miller* v. *Drouin*, 183 Conn. 189, 191, 438 A.2d 863 (1981) ("[a] trial is a search for truth"). Once a trial has been held and judgment rendered, granting review of an unpreserved alternative ground for affirmance furthers the public interest in preserving a legally correct judgment, an interest that is founded on two important and closely related principles, namely, the finality of judgments and judicial economy.[10] See, e.g., *Sawicki* v. *New Britain General Hospital*, 302 Conn. 514, 522, 29 A.3d 453 (2011) ("[t]he [courts have] a strong interest in the finality of judgments" [internal quotation marks omitted]); *Sikorsky Aircraft Corp.* v. *Commissioner of Revenue Services*, 297 Conn. 540, 544–45, 1 A.3d 1033 (2010) (recognizing "judicial policy in favor of judicial economy" [internal quotation marks omitted]); see also *LaSalla* v. *Doctor's Associates, Inc.*, 278 Conn. 578, 587, 898 A.2d 803 (2006) (recognizing "closely related" interests of judicial economy and finality of judgments). Appellate review should be denied only if the record is inadequate for review of the unpreserved claim or the appellant would be prejudiced by consideration of the claim because he did not have the opportunity to address the claim in the trial court, in

[10] The latter of these two considerations, namely, judicial economy, is especially important when the judgment would have to be reversed *and a new trial ordered* in the event that the reviewing court rejected an otherwise meritorious alternative ground for affirmance merely because it had not been raised in the trial court.

which case, the validity of the judgment itself would be in doubt.[11]

Consistent with the foregoing considerations, "when the trial court reaches a correct decision but on mistaken grounds, this court has repeatedly sustained the trial court's action if proper grounds exist to support it." (Internal quotation marks omitted.) *State* v. *Colon*, 272 Conn. 106, 187–88, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005); accord *Kelley* v. *Bonney*, 221 Conn. 549, 592, 606 A.2d 693 (1992); *Morris* v. *Costa*, 174 Conn. 592, 597–98, 392 A.2d 468 (1978). Indeed, we sometimes have addressed such alternative grounds even though they were not raised in the trial court and no exceptional circumstances existed to justify appellate review; see, e.g., *State* v. *Jacobson*, 283 Conn. 618, 629 n.13, 930 A.2d 628 (2007); and we often have considered an appellee's alternative claim in support of affirming the judgment without reference to whether the claim first had been raised in the trial court. See, e.g., *Hopkins* v. *O'Connor*, 282 Conn. 821, 827, 925 A.2d 1030 (2007); *State* v. *Colon*, supra, 187–88; *State* v. *Perkins*, 271 Conn. 218, 256, 856 A.2d 917 (2004); *Lombardo's Ravioli Kitchen, Inc.* v. *Ryan*, 268 Conn. 222, 238 n.12, 842 A.2d 1089 (2004); *Levandoski* v. *Cone*, 267 Conn. 651, 658 n.5, 841 A.2d 208 (2004); *Kelley* v. *Bonney*, supra, 592; *State* v. *Ruffin*, 206 Conn. 678, 683, 539 A.2d 144 (1988); *Herrmann* v. *Summer Plaza Corp.*, 201 Conn. 263, 273–74, 513 A.2d 1211 (1986); *Morris* v. *Costa*, supra, 597–98. This court's failure even to mention the preservation issue in those cases suggests that the issue frequently has been a

[11] I also note the general rule that, "[i]f the alternate issue was not ruled on by the trial court, the issue must be one that the trial court would have been forced to rule in favor of the appellee. Any other test would usurp the trial court's discretion." (Internal quotation marks omitted.) *Zahringer* v. *Zahringer*, 262 Conn. 360, 371, 815 A.2d 75 (2003), quoting W. Horton & S. Cormier, Rules of Appellate Procedure (2003) § 63-4 (a) (1), author's comments, p. 138.

matter of some indifference to this court and that the critical factors for determining the propriety of appellate review are the adequacy of the record and whether the appellant would be prejudiced by consideration of the claim. As we stated nearly sixty years ago, "[t]hat the [trial] court relied [on] a wrong theory does not render the judgment erroneous. A judgment responsive to the issues and supported by the facts should stand, even if the court's method of reaching its decision might be questionable. . . . *To remand the case for a new trial is unnecessary. It is only prejudicial error which requires that course.*"[12] (Citations omitted; emphasis added.) *Malone* v. *Steinberg*, 138 Conn. 718, 723, 89 A.2d 213 (1952).

I also note that, when an appellee *has* raised a claim in the trial court, a reviewing court will consider the claim as an alternative ground for affirmance, if the trial court did not address the claim, provided the record is adequate for review. See, e.g., *King* v. *Sultar*, 253 Conn. 429, 448–50, 754 A.2d 782 (2000). In such cases, the trial court record is incomplete, but the record nevertheless is sufficient for review. In cases in which the appellee has raised the alternative ground for affirmance for the first time on appeal, the record also is incomplete, but, if the record is adequate for review and consideration of the claim will not prejudice the appellant, the only reason to deny review is to sanction the appellee for his failure to raise the claim in the trial court. Although it is always preferable for parties to raise all of their claims in the trial court, I believe that the public and institutional interest in promoting judicial economy and

[12] In this regard, it bears noting that, in *Peck*, this court, without further explanation, "decided to address certain [of the] claims made by the [appellee] although he did not make them in the trial court"; *Peck* v. *Jacquemin*, supra, 196 Conn. 61–62 n.13; and, in *Bonner*, we declined to review the appellee's unpreserved alternative ground for affirmance because the record was inadequate for review. See *New Haven* v. *Bonner*, supra, 272 Conn. 497–500.

the finality of judgments substantially outweighs any possible benefit that may be achieved by declining to review an alternative ground for affirmance solely as punishment for the appellee's failure to have raised the claim in the trial court.[13]

Finally, Practice Book § 63-4 (a) (1) provides in relevant part: "If any appellee wishes to (A) present for review alternate grounds upon which the judgment may be affirmed . . . that appellee shall file a preliminary statement of issues within twenty days from the filing of the appellant's preliminary statement of the issues. . . ." Although Practice Book § 63-4 (a) (1) speaks in mandatory terms, this court has "refused to consider an issue not contained in a preliminary statement of issues *only in cases in which the opposing party would be prejudiced by consideration of the issue*." (Emphasis added; internal quotation marks omitted.) *State* v. *Cruz*, 269 Conn. 97, 99 n.2, 848 A.2d 445 (2004); see also *Pelletier* v. *Sordoni/Skanska Construction Co.*, 286 Conn. 563, 588 n.35, 945 A.2d 388 (2008). I see no reason why we should not adopt the same policy in cases involving an alternative ground for affirmance that was not raised in the trial court. The reviewing court should address the appellee's unpreserved claim upon a showing by the appellee both that the record is adequate for review and that the appellant will not be prejudiced by consideration of the unpreserved claim.

III

In concluding that the defendants would be prejudiced by our review of the plaintiff's unpreserved alternative ground for affirmance, the majority asserts that "affirming the . . . award [of damages] for the plain-

[13] To the limited extent that the denial of appellate review of unpreserved alternative grounds for affirmance may serve to deter parties from failing to raise claims in the trial court, I do not believe that that consideration trumps the significant interests favoring review of the claim.

tiff's [state constitutional] claim pursuant to § 31-51q would prejudice the defendants because the plaintiff's failure to raise [that claim] in [the trial court] . . . deprived them of the opportunity to evaluate and possibly to settle the claim before the jury returned its verdict." Text accompanying footnote 27 of the majority opinion. Unlike the majority, I believe that considerations pertaining to the counterfactual settlement of a case have no bearing on the issue of whether an appellant would be prejudiced by appellate review of an appellee's unpreserved claim.

The decision whether to settle a case ordinarily is influenced by many diverse factors. Undoubtedly, one such factor is the strength of the opposing party's case. The more that a party knows about the other party's case, the better the former can evaluate the advantages and disadvantages of settlement. But no matter how straightforward a case might seem, almost any such evaluation is complicated and multifaceted. Consequently, there is no reason why this court should presume that, in any given case, the likelihood of settlement would have increased if only the appellee had not failed to raise its alternative ground for affirmance in the trial court. There simply is no way to determine whether the appellee would have had any interest in settling, let alone an interest in settling on terms agreeable to the appellant. In light of the multitude of factors in the settlement equation, it is mere speculation for the majority to conclude that an appellant likely will be prejudiced in its opportunity to settle the case merely because the appellee did not raise its alternative ground for affirmance in the trial court. We should not deprive the appellee of an opportunity to raise an alternative ground for affirmance on the basis of such conjecture. Moreover, because it always can be said that an appellee's failure to raise its alternative ground for affirmance in the trial court conceivably might have affected the

appellant's willingness to attempt to settle the case, the majority effectively bars appellate review of unpreserved alternative grounds for affirmance in all future cases. There is no legitimate reason to create such a bad policy.

In addition, this court ordered the parties to file supplemental briefs on the following question: "Under the facts of this case, are the defendants prejudiced if this court considers the unpreserved issue of whether the plaintiff's speech was protected under the state constitution?" The defendants responded in the affirmative and identified several ways in which they would be prejudiced by this court's review of the plaintiff's unpreserved state constitutional claim. Not surprisingly, the defendants themselves did not contend that they were prejudiced because the plaintiff's failure to raise that claim in the trial court deprived them of a meaningful opportunity to settle the case. For these reasons, I cannot agree with the majority's refusal to review the plaintiff's unpreserved claim on the wholly speculative ground that the defendants were prejudiced because their "opportunity to evaluate and possibly to settle the claim before the jury returned its verdict" might have been impaired.

I do agree with the defendants, however, that the plaintiff cannot establish that the defendants would not be prejudiced by this court's review of the plaintiff's unpreserved claim. In particular, I agree with the defendants' contention that, because they had an airtight defense to the plaintiff's federal constitutional claim—as the plaintiff now concedes, under *Garcetti* v. *Ceballos*, supra, 547 U.S. 410, she was required but failed to prove that her allegedly protected speech, namely, her reports of abuse to the state department of children and families (department), was not made in her official capacity—they had no reason to adduce any evidence of the plaintiff's motivation in making those reports.

Even if it is assumed, arguendo, that the plaintiff's free speech rights are broader under the state constitution than under the federal constitution, § 31-51q "applies only to expressions regarding public concerns that are motivated by an employee's desire to speak out as a citizen." *Cotto* v. *United Technologies Corp.*, supra, 251 Conn. 17. The defendants, however, had no occasion to present evidence that the plaintiff's speech was motivated not by a desire to speak out as a private citizen but, rather, by a desire merely to comply with her legal duty as a mandated reporter.[14] The defendants surely would have introduced evidence tending to prove the latter if the plaintiff had raised a constitutional claim that was not otherwise barred by *Garcetti*. In such circumstances, the plaintiff cannot meet her burden of demonstrating that the defendants were not prejudiced by her failure to raise her state constitutional claim in the trial court.

Accordingly, I concur in the result that the majority reaches in part I A of its opinion. I otherwise join the majority opinion.

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[14] Indeed, in her complaint, the plaintiff expressly alleged that she had reported the abuse to the department "in the course of her employment-related obligations" and in the discharge of "her legal obligations as a mandated reporter pursuant to [s]tate . . . statutory law." Moreover, there is nothing in the plaintiff's trial testimony to indicate that her reports of abuse were motivated by any other concerns or considerations, and the record is devoid of any other allegedly protected speech. Under the circumstances, therefore, it is difficult to see how the plaintiff's mandated reports to the department could be found to implicate the free speech rights that § 31-51q was intended to protect. Even if the defendants would not have been entitled to judgment as a matter of law on the plaintiff's unpreserved state constitutional claim, however, as I have explained, they were prejudiced by the plaintiff's failure to raise the claim in the trial court.

REGINA CANTY, ADMINISTRATRIX (ESTATE OF SHAMAIA SMITH) *v.* KATHLEEN J. OTTO (SC 18610)

Rogers, C. J., and Norcott, Palmer, McLachlan, Eveleigh and Harper, Js.

Syllabus

Following a police investigation of O in connection with the disappearance and death of S, with whom O had been involved, the defendant, O's wife, transferred $8000 from a bank account held jointly with O into an account in her name alone. Subsequently, the defendant and O transferred title in certain residential property and in a jointly held vehicle to the defendant for no consideration. Thereafter, the defendant filed an action for the dissolution of the parties' marriage. Subsequently, the plaintiff, the administratrix of the estate of S, commenced a civil wrongful death action against O, and the state instituted a criminal action charging him with S's murder. The plaintiff then obtained a prejudgment remedy order against O in the wrongful death action, and following a hearing, the trial court found probable cause to believe that the defendant intended to conspire with O to obtain a judgment of dissolution in order to shield O's assets from the plaintiff. Subsequently, the trial court in the dissolution action rendered judgment dissolving the marriage and divided the marital property. Pursuant to that judgment, the defendant received all of the real property, and O received, inter alia, an automobile and certain shares of stock. Thereafter, in the criminal proceedings, O was convicted of S's murder. Subsequently, the plaintiff filed an action against the defendant pursuant to the Uniform Fraudulent Transfer Act (§ 52-552a et seq.), along with an application for a prejudgment remedy. The trial court denied the defendant's motion to dismiss the action and heard argument on the application for a prejudgment remedy. That court concluded, inter alia, that there was probable cause to believe that the assets had been fraudulently transferred from O to the defendant through the dissolution judgment and that the dissolution judgment was subject to a claim under the act. Accordingly, that court granted the plaintiff's application for a prejudgment remedy, and the defendant appealed. *Held*:

1. The plaintiff could not prevail on her claim that this court lacked jurisdiction to consider the defendant's claim that the trial court improperly denied her motion to dismiss the complaint in the case brought under the act because that decision was not a final appealable judgment; the trial court's grant of the application for a prejudgment remedy was a final judgment, and any adverse interlocutory ruling, including the denial of the defendant's motion to dismiss, was reviewable by this court, that

decision having necessarily been encompassed in the issues presented in the application for the prejudgment remedy.

2. The defendant could not prevail on her claims that the trial court lacked subject matter jurisdiction over the plaintiff's claims because the plaintiff lacked standing to bring a claim under the act, and that the trial court's determination that the plaintiff had standing because the dissolution action was undertaken with actual intent to hinder, delay or defraud S's estate was clearly erroneous: this court's review of the plain language of the act and its relationship to other relevant statutes supported the conclusion that the distribution of property in a dissolution decree constitutes a transfer under the act; furthermore, there was sufficient evidence in the record here to support the probable cause finding that O, through the dissolution action, intended to fraudulently transfer his assets to the defendant, an examination of the statutory (§ 52-552e [b]) factors for determining actual intent to commit fraud, including a property transfer to an insider, the fact that O continued to retain control of the assets after the transfer, and the fact that the dissolution proceedings were instituted shortly after the police began to investigate O in connection with S's murder, having supported the probable cause finding that O commenced the dissolution action with actual intent to hinder, delay or defraud the plaintiff.

3. The defendant could not prevail on her claim that the trial court lacked jurisdiction over the plaintiff's claims under the act because the court could not disturb the property distribution in the dissolution decree and, therefore, could not afford the plaintiff practical relief; the plaintiff was not a party to the dissolution action and was therefore not bound by that judgment, the plaintiff was seeking to attach certain assets that were transferred to the defendant and was not attempting to set aside the dissolution decree, and the trial court properly determined that this action under the act did not constitute an impermissible collateral attack on the judgment of the trial court dissolving the marriage, and the matter, therefore, was justiciable.

Argued January 13—officially released May 1, 2012

Procedural History

Action to recover damages for the allegedly fraudulent transfer of assets to the defendant, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Domnarski*, *J.*, denied the defendant's motion to dismiss; thereafter, the court, *Prescott*, *J.*, granted the plaintiff's application for a prejudgment remedy and ordered, inter alia, the attachment of certain of the defendant's real and personal property, and the defendant appealed; subse-

quently, the court, *Prescott*, *J.*, granted in part the defendant's supplemental motion for reconsideration and modified its prior order of attachment, and the plaintiff appealed and the defendant filed an amended appeal; thereafter, the court, *Prescott*, *J.*, denied the defendant's motion to dissolve, modify or vacate the order of attachment, and the defendant filed a second amended appeal; subsequently, the plaintiff withdrew her appeal. *Affirmed.*

Proloy K. Das, with whom was *Glenn E. Coe*, for the appellant (defendant).

Stephen F. McEleney, for the appellee (plaintiff).

Campbell D. Barrett, *Arnold H. Rutkin* and *Jon T. Kukucka* filed a brief for the American Academy of Matrimonial Lawyers, Connecticut Chapter, as amicus curiae.

Opinion

EVELEIGH, J. The defendant, Kathleen J. Otto, appeals[1] from the judgment of the trial court granting the application of the plaintiff, Regina Canty, administratrix of the estate of Shamaia Smith, for a prejudgment remedy. On appeal, the defendant contends that the plaintiff, who is a creditor of her debtor spouse, Kenneth Otto, Sr. (Otto), cannot collect the debt from the defendant, a nondebtor spouse, by bringing a claim under the Uniform Fraudulent Transfer Act (act), General Statutes § 52-552a et seq. Specifically, the defendant claims that: (1) the plaintiff lacks standing to bring a claim under the act because the distribution of marital assets in a dissolution decree is not a transfer under the act; (2) the trial court's determination that the plaintiff had standing under the act because the dissolution

[1] 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 § 65-1.

was undertaken with actual intent to hinder, delay or defraud the estate of Smith was clearly erroneous; and (3) the trial court lacked subject matter jurisdiction over the plaintiff's claim under the act because it could not disturb the property distribution in the dissolution decree. The plaintiff responds that she does have standing to bring a claim under the act, that the trial court's determination that the dissolution action was undertaken with actual intent to hinder, delay or defraud Smith's estate was proper, and that the trial court did have jurisdiction over her claim because it could grant practical relief under the act.[2] We agree with the plaintiff and, accordingly, affirm the judgment of the trial court.

The following facts, found by the trial court,[3] and procedural history, are relevant to our resolution of the issues on appeal. In early 2007, the East Hartford police department and state police began to investigate Otto in connection with the disappearance of Smith. The defendant, who was the wife of Otto, first learned of the police investigation "several weeks prior to April 7, 2007." At that time, the defendant learned from the police that Smith was an exotic dancer and a prostitute with whom Otto had been sexually involved. On April 13, 2007, the defendant transferred $8000 from a bank account held jointly with Otto to an account in her name alone, because she feared that the money might be "attached by someone." Subsequently, on April 16,

[2] The plaintiff also asserts that the portion of the defendant's appeal challenging the trial court's denial of her motion to dismiss should be dismissed for lack of a final judgment. As we explain in part I of this opinion, we disagree.

[3] We note that the appeal involves the decisions of two trial courts. The trial court, *Domnarski*, *J.*, ruled on the motion to dismiss. The trial court, *Prescott*, *J.*, ruled on the prejudgment remedy. As discussed later in this opinion, however, in view of the fact that the trial court, *Prescott*, *J.*, expressly considered and approved of the earlier decision of the court, *Domnarski*, *J.*, we refer herein to the trial court ruling in the singular, referring to the decision of the trial court, *Prescott*, *J.*, for the sake of clarity.

2007, pursuant to a search warrant, the police commenced searching a property located in Stafford (Stafford property), which was co-owned by Otto and his son, for evidence in connection with Smith's disappearance. Otto was present when the search commenced. Within one or two days of that search, Smith's remains were found buried on the Stafford property. Thereafter, on April 17, 2007, Otto and the defendant traveled together to the department of motor vehicles to transfer title in a jointly owned vehicle to the defendant. The couple then continued to Tewksbury, Massachusetts, where Otto transferred his title to certain residential property to the defendant. No consideration was paid by the defendant to Otto for these transfers. On either April 20 or April 23, the defendant telephoned a local attorney concerning the filing of a dissolution action. Thereafter, she contacted attorney Bruce S. Beck for an appointment on that day. Otto drove the defendant to Beck's office. A dissolution proceeding was then initiated on that day by service upon Otto as he waited in the reception area of Beck's office. Pursuant to the dissolution action, the next day a notice of lis pendens was filed against Otto's interest in property he owned in Ellington, as well as the Stafford property. The dissolution action was formally filed on April 27, 2007 (dissolution action). On May 9, 2007, the estate of Smith commenced a civil action against Otto, alleging that he had caused Smith's death (wrongful death action). On May 14, 2007, the state arrested Otto and charged him with one count of murder in violation of General Statutes § 53a-54a, and two counts of tampering with physical evidence in violation of General Statutes § 53a-155 (criminal case). The defendant continued living with Otto until he was incarcerated.

Thereafter, on June 4, 2007, after a full hearing in the wrongful death action, the plaintiff obtained a prejudgment remedy order against Otto in the amount of $4.5

million. The plaintiff then moved to intervene in the dissolution action. This motion was denied on November 27, 2007. The plaintiff appealed from the denial of her motion to intervene to the Appellate Court, which dismissed her appeal.

Subsequently, on June 3, 2008, after a trial, the court in the dissolution action, *Schuman*, *J.*, rendered a judgment of dissolution, which included a division of the marital property. In the dissolution decree, the defendant received all of the real property, and Otto received an automobile, some shares of stock and a relatively small remaining balance of his retirement funds. The plaintiff again appealed to the Appellate Court from the decision of the trial court denying her motion to intervene. The Appellate Court again dismissed her appeal for lack of a final judgment. On November 5, 2008, Otto was convicted of Smith's murder.

During the hearing in the wrongful death action, the trial court found probable cause to believe that the defendant did not truly want the dissolution from Otto that she was seeking. The defendant had testified that she wanted Otto released from jail so that he could come home and live with her. She admitted at the probable cause hearing that she still loved Otto and that she visited him in jail before and after he was convicted of murdering Smith. The court further found that the defendant did not truly intend to divorce Otto, but rather to conspire with him to obtain a judgment of dissolution in order to shield Otto's assets from Smith's estate. The court also found that Smith's estate is a creditor of the debtor, Otto, as defined under the act, and that Otto transferred assets shortly before commencement of the dissolution action with the specific intent to defraud his creditors, including the estate. The court further found that, knowing he would likely be arrested and prosecuted for Smith's murder, Otto made

transfers in a hurried fashion. Additionally, the court found that there was not a "scintilla" of evidence suggesting that Otto's intent in transferring assets to his wife was nonfraudulent. The court also found that Otto had encouraged and facilitated the defendant's institution of a dissolution action against him and did not seriously contest those proceedings in order to ensure that most or all of his assets could not be reached by the plaintiff in the wrongful death action.

Thereafter, the plaintiff filed the present action against the defendant pursuant to the act,[4] along with an application for a prejudgment remedy.[5] On May 8, 2009, the defendant filed a motion to dismiss the action on the ground that a dissolution judgment could not be collaterally attacked through a claim under the act. Thereafter, on August 28, 2009, the trial court, *Domnarski, J.*, denied that motion. Subsequently, on September 3 and September 16, the trial court, *Prescott, J.*, heard evidence on the plaintiff's application for a prejudgment remedy. On February 2, 2010, that court concluded that there was probable cause to show that the assets transferred from Otto to the defendant through the dissolution action were fraudulent transfers. In doing so, that court adopted the prior decision of Judge Domnarski, concluded that a dissolution judgment could be subject to a claim under the act, and awarded a prejudgment remedy in the amount of $670,000. Thereafter, the defendant appealed.

[4] General Statutes § 52-552e provides in relevant part: "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made or the obligation was incurred and if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder, delay or defraud any creditor of the debtor . . . ."

[5] The plaintiff in the wrongful death action was identified as the "estate of Shamaia L. Smith," while the plaintiff in the present action is "Regina Canty, administratrix of the estate of Shamaia L. Smith." For clarity, references to the plaintiff in this opinion refer to both the estate of Smith and Canty in her capacity as administratrix of that estate.

On February 11, 2010, the defendant filed a motion for reconsideration in which she claimed, inter alia, that the amount of the prejudgment remedy was higher than the amount alleged to have been transferred. On February 22, 2010, the plaintiff filed a motion for reconsideration seeking a higher prejudgment remedy award. On April 9, 2010, after previously denying most of the other claims, the trial court issued a memorandum of decision in which it agreed with the defendant that her one-half interest in the marital property could not be the subject of a fraudulent transfer and, accordingly, reduced the amount of the prejudgment remedy to $552,000. On April 16, 2010, the defendant filed an amended appeal. Additional facts will be set forth as necessary.

I

We first address the plaintiff's claim that this court lacks jurisdiction to consider the defendant's claim that the trial court improperly denied her motion to dismiss. Specifically, the plaintiff asserts that this court cannot consider issues related to the denial of the defendant's motion to dismiss because it is not a final judgment, and this court only has jurisdiction under General Statutes § 52-278*l*[6] to consider the decision of the trial court

[6] General Statutes § 52-278*l* provides: "(a) An order (1) granting or denying a prejudgment remedy following a hearing under section 52-278d or (2) granting or denying a motion to dissolve or modify a prejudgment remedy under section 52-278e or (3) granting or denying a motion to preserve an existing prejudgment remedy under section 52-278g shall be deemed a final judgment for purposes of appeal.

"(b) No such appeal shall be taken except within seven days of the rendering of the order from which the appeal is to be taken.

"(c) No such order shall be stayed by the taking of an appeal except upon the order of the judge who made such order, and any such stay shall be granted only if the party taking the appeal posts a bond, with surety, in a sum determined by such judge to be sufficient to indemnify the adverse party for any damages which may accrue as a result of such stay.

"(d) If a motion to discharge such prejudgment remedy is brought by the defendant, the property affected by such remedy may be restored to the use of the defendant, if the defendant posts a bond with surety in an amount

granting a prejudgment remedy. The defendant responds that, because the granting of a prejudgment remedy is a final judgment under § 52-278*l*, the court on appeal may also review the denial of her motion to dismiss because this subsidiary decision is necessarily encompassed by review of the appeal. The defendant supports this argument with case law holding that, in an appeal from a final judgment, any adverse interlocutory ruling may be challenged.[7] We agree with the defendant.

As a preliminary matter, we set forth the standard of review. "The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law . . . [and, therefore] our review is plenary." (Internal quotation marks omitted.) *Sweeney* v. *Sweeney*, 271 Conn. 193, 207, 856 A.2d 997 (2004).

"The jurisdiction of the appellate courts is restricted to appeals from judgments that are final. General Statutes §§ 51-197a and 52-263; Practice Book § [61-1] . . . . The policy concerns underlying the final judgment rule are to discourage piecemeal appeals and to facilitate the speedy and orderly disposition of cases at the trial court level. . . . The appellate courts have

determined by such judge to be sufficient to indemnify the plaintiff for any damages which may accrue by the defendant's continued use of such property, until such time as such motion is decided."

[7] The defendant relies on *State* v. *Assuntino*, 180 Conn. 345, 349, 429 A.2d 900 (1980), which stands for the proposition that, in an appeal taken from a final judgment that disposes of the entire action, the appellant may challenge any adverse interlocutory ruling that led to judgment being rendered against him. See also *Blue Cross/Blue Shield of Connecticut, Inc.* v. *Gurski*, 49 Conn. App. 731, 733–34, 715 A.2d 819, cert. denied, 247 Conn. 920, 722 A.2d 809 (1998). We reject this argument because *Assuntino* does not have any applicability to a situation, such as the situation in the present case, wherein an appeal is taken from an interlocutory order—here, an order granting a prejudgment remedy—that is final because a statute mandates the finality of the order.

a duty to dismiss, even on [their] own initiative, any appeal that [they lack] jurisdiction to hear. . . . In some instances, however, it is unclear whether an order is an appealable final judgment. In the gray area between judgments which are undoubtedly final and others that are clearly interlocutory . . . this court has adopted the following test, applicable to both criminal and civil proceedings: An otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them. *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983)." (Citations omitted; internal quotation marks omitted.) *Solomon* v. *Keiser*, 212 Conn. 741, 745–46, 562 A.2d 524 (1989).

We agree with both parties that the motion to dismiss in this case was directed to the complaint as opposed to the prejudgment remedy. Section 52-278*l* (a) (1) provides in relevant part that "granting or denying a prejudgment remedy following a hearing . . . shall be deemed a final judgment for purposes of appeal." In the present case, in granting the application for a prejudgment remedy, the court, *Prescott*, *J.*, necessarily had to consider the issue raised in the motion to dismiss, namely, the plaintiff's standing to bring a claim under the act. In fact, in granting the prejudgment remedy, that court explicitly agreed with and adopted the prior decision of the court, *Domnarski*, *J.*, denying the motion to dismiss. Accordingly, we conclude that we can review the defendant's claim related to the motion to dismiss because it is necessarily encompassed in the issues presented by the prejudgment remedy.[8] See

[8] The court, *Prescott*, *J.*, distinguished between assets that were transferred before the institution of the divorce action, and those that were transferred as the result of the dissolution judgment. It appears that Judge Prescott believed that the standing claims raised by the defendant related to only the transfer of assets that took place as the result of the dissolution judgment. In light of that fact, it is questionable whether the defendant

Marlin Broadcasting, LLC v. *Law Office of Kent Avery, LLC*, 101 Conn. App. 638, 641–45, 922 A.2d 1131 (2007) (addressing defendant's claim that plaintiff lacked standing to bring action in appeal brought pursuant to § 52-278*l*); see also *Collins* v. *Anthem Health Plans, Inc.*, 266 Conn. 12, 28–30, 836 A.2d 1124 (2003) (considering interlocutory orders on claims that were "inextricably intertwined" with issues that were considered final judgments by virtue of statute).

II

We now turn to the defendant's claims that the trial court lacked jurisdiction over the plaintiff's claims because the plaintiff lacked standing. Specifically, the defendant claims that the trial court lacked subject matter jurisdiction over the plaintiff's claims because: (1) the plaintiff lacks standing to bring a claim under the act because the distribution of marital assets in a dissolution decree is not a transfer under the act; and (2) the trial court's determination that the plaintiff had standing under the act because the dissolution was undertaken with "actual intent to hinder, delay or defraud Smith's estate," was clearly erroneous. We disagree.

"[S]tanding is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 286 Conn. 264, 272 n.9, 943 A.2d 420 (2008). "Two broad yet distinct categories of aggrievement exist, classical

would be entitled to a dismissal of the entire case even if she prevailed on her standing claims.

and statutory. . . . Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the decision, as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the [party's] decision has specially and injuriously affected that specific personal or legal interest. . . . Aggrievement does not demand certainty, only the possibility of an adverse effect on a legally protected interest. . . . Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) *Burton* v. *Commissioner of Environmental Protection*, 291 Conn. 789, 803, 970 A.2d 640 (2009). "Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause." (Internal quotation marks omitted.) *Monroe* v. *Horwitch*, 215 Conn. 469, 473, 576 A.2d 1280 (1990). "We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *State* v. *Tabone*, 301 Conn. 708, 713–14, 23 A.3d 689 (2011). Whether General Statutes § 52-552e grants statutory aggrievement is a question of statutory interpretation over which our review is plenary. See *C. R. Klewin Northeast, LLC* v. *State*, 299 Conn. 167, 175, 9 A.3d 326 (2010).

"The process of statutory interpretation involves a reasoned search for the intention of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . ." (Internal quotation marks omitted.) *Wasko* v. *Manella*, 269 Conn.

527, 534–35, 849 A.2d 777 (2004). "When construing a statute, we first look to its text, as directed by General Statutes § 1-2z, which provides: The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Genesky* v. *East Lyme*, 275 Conn. 246, 253–54, 881 A.2d 114 (2005). In the present case, we conclude, following an examination of the language of the act and its relationship to other statutes, that the plaintiff had standing to bring a claim under the act.

First, we examine whether the distribution of property in a dissolution decree is a transfer under the act. Section 52-552e provides in relevant part: "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made or the obligation was incurred and if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder, delay or defraud any creditor of the debtor . . . ." The term " '[t]ransfer' " is defined by General Statutes § 52-552b (12) to mean "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease and creation of a lien or other encumbrance." The use of the phrases "every mode" and "voluntary or involuntary" supports the conclusion that the term transfer is defined very broadly under the act. Therefore, the plain language of the act supports the conclusion that distribution of property in a dissolution decree is a transfer under the act.

Furthermore, the language of related statutes also supports the conclusion that distribution of property

in a dissolution decree is a transfer under the act. Specifically, General Statutes § 46b-81, which governs the assignment of property and conveyance of title in dissolution actions, provides in relevant part: "(a) At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the Superior Court may assign to either the husband or wife all or any part of the estate of the other. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either the husband or the wife, when in the judgment of the court it is the proper mode to carry the decree into effect.

"(b) A conveyance made pursuant to the decree shall vest title in the purchaser, and shall bind all persons entitled to life estates and remainder interests in the same manner as a sale ordered by the court pursuant to the provisions of section 52-500. When the decree is recorded on the land records in the town where the real property is situated, it shall effect the transfer of the title of such real property as if it were a deed of the party or parties. . . ." The use of the terms "assign," "pass title," "conveyance" and "vest title" in § 46b-81 supports the conclusion that the distribution of property in a dissolution decree would fit within the broad definition of transfer under the act.

We are further persuaded by the fact that many states that have considered this question have determined that a dissolution judgment may constitute a transfer of assets under the act. *In re Hoyt*, 97 B.R. 730 (Bankr. D. Conn. 1989) (treating contested dissolution judgment as fraudulent transfer for purpose of resolving whether constructive fraud allegation was foreclosed by collateral estoppel in motion for summary judgment); *Estes* v. *Titus*, 481 Mich. 573, 580–81, 751 N.W.2d 493 (2008) (concluding that property settlement agreement incor-

porated into dissolution judgment is transfer for purposes of act); *Dowell* v. *Dennis*, 998 P.2d 206, 212–13 (Okla. Civ. App.) (2000) (concluding that property distribution in dissolution decree can be challenged in claim under act); *Greeninger* v. *Cromwell*, 140 Or. App. 241, 246, 915 P.2d 479 (same), cert. denied, 323 Or. 690, 920 P.2d 549 (1996); see also A. Barkey, "The Application of Constructive Fraud to Divorce Property Settlements: What's Fraud Got to Do with It," 52 Wayne L. Rev. 221 (2006).

In addition, our conclusion that a distribution of marital assets in a dissolution decree is a transfer for purposes of the act is bolstered by the fact that courts consider such a distribution to be a "transfer" for purposes of the federal Bankruptcy Code. The definition of "transfer" in the Bankruptcy Code is similar to that in the act. Specifically, 11 U.S.C. § 101 (54) (D) (2006) defines transfer as "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with–(i) property; or (ii) an interest in property." In 1999, the Bankruptcy Court for the District of Columbia recognized that "it is now well settled that a transfer of property pursuant to a collusive divorce decree or property settlement intended to hinder, delay or defraud creditors (or pursuant to a divorce decree or property settlement for inadequate consideration, leaving the debtor insolvent) constitutes a 'transfer' as defined under § 101 (54) of the Bankruptcy Code." *In re Hope*, 231 B.R. 403, 415 (Bankr. D.D.C. 1999); see also *Britt* v. *Damson*, 334 F.2d 896, 901–902 (9th Cir. 1964) (deciding challenge to dissolution decree under bankruptcy act), cert. denied, 379 U.S. 966, 85 S. Ct. 661, 13 L. Ed. 2d 560 (1965); *In re Clausen*, 44 B.R. 41 (Bankr. D. Minn. 1984) (same).

The conclusion that distribution of marital property in a dissolution decree should be subject to attack in a claim under the act is also supported by 49 C.J.S. 546,

Judgments § 452 (2009), which allows for the collateral attack of a judgment by a creditor whose rights will be affected by the enforcement of that judgment on the ground that the judgment is fraudulent as to the creditor. In order to collaterally attack the judgment, § 452 requires the creditor to prove both that there was fraud designed to injure the creditor, and that the creditor's rights must have accrued before the judgment was entered. In the present case, the plaintiff had a "claim" against Otto prior to the transfer of assets from Otto to the defendant. Pursuant to the act, a " '[c]laim' means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." General Statutes § 52-552b (3). The "legislature chose to adopt a very broad definition of the term 'claim' . . . [and therefore] a plaintiff's claim [arises] on the date of the injury in the underlying action." *Davenport* v. *Quinn*, 53 Conn. App. 282, 304, 730 A.2d 1184 (1999). Thus, we agree with the trial court that "the plaintiff's . . . claim [under the act] arose on the date Smith was murdered, which was prior to both Otto transferring his land in Massachusetts and to the defendant filing for divorce against Otto." See 50 C.J.S. 65, Judgments § 511 (2006) ("[a creditor], whose rights or claims would be injuriously affected by enforcement of a judgment against [his] debtor, [may] impeach its validity on the ground that it is fraudulent"). Accordingly, 49 C.J.S., supra, p. 546, also supports our conclusion that the plaintiff has standing to bring her claim under the act.

The defendant claims that distributions of marital property as part of a dissolution judgment are not "transfers" subject to the act, but rather are equitable determinations as to which portion of the marital estate each party is entitled. "[T]he purpose of property division is to unscramble the ownership of property giving

to each spouse what is equitably his." (Internal quotation marks omitted.) *Werblood* v. *Birnbach*, 41 Conn. App. 728, 735, 678 A.2d 1 (1996). On the basis of this reasoning, the defendant claims that the plaintiff should not be allowed to bring her claim under the act because it would disturb the distribution that was carefully crafted by the trial court in the dissolution action and would create further complications for distributing marital property. The California Supreme Court rejected this concern in *Mejia* v. *Reed*, 31 Cal. 4th 657, 669, 74 P.3d 166, 3 Cal. Rptr. 3d 390 (2003), recognizing that "the parties' debts, and how to pay them, are matters that should be considered in marital settlement negotiations even if, like pension plans and income tax consequences, they make the process of reaching an agreement more complex." Furthermore, in concluding that the distribution of marital assets is a transfer under the act, the California Supreme Court also relied on the fact that, "[i]n view of this overall policy of protecting creditors, it is unlikely that the [l]egislature intended to grant married couples a one-time-only opportunity to defraud creditors by including the fraudulent transfer in [a marital separation agreement]." Id., 668. We agree with the reasoning of the California Supreme Court and conclude that policy considerations support our conclusion that the distribution of assets in a dissolution decree is a transfer under the act.

The defendant further asserts that the distribution of marital property can only be considered a transfer for purposes of the act when it arose from a settlement agreement as opposed to a contested hearing. The rationale for the defendant's position is, undoubtedly, that there is more opportunity for fraud or collusion in the event of a settlement agreement as compared to a case that is fully tried on the merits. Even in the case of a settlement agreement, however, a court must approve the agreement and incorporate the agreement into the

judgment. Further, the defendant's position does not consider the fact that the likelihood for abuse exists both in the parties' agreement regarding a disposal of assets, and in a trial when one party intentionally does not fully contest the claims of the other. We note that in the dissolution action in the present case, the defendant's attorney submitted a set of "proposed orders" to the trial court. Namely, the defendant proposed the transfer of all of Otto's assets to her, and suggested that she retain all assets in her name. The trial court granted all of the defendant's requests, except a proposal for $12,500 of the retirement funds to be paid to Otto's attorney. Therefore, we see no reason to preclude the plaintiff from bringing a claim under the act in the present case merely because the division of marital assets happened after a trial, rather than as a result of an agreement between the parties.

We next address the defendant's claim that the plaintiff did not have standing because the trial court's finding that the dissolution action was undertaken with "actual intent to hinder, delay or defraud" the plaintiff was clearly erroneous. Specifically, the defendant argues that there was no evidence in the record to support the trial court's finding that the dissolution action was undertaken with the intent to defraud the plaintiff. The defendant contends that both in denying the motion to dismiss and in granting the prejudgment remedy, the trial courts, *Domnarski* and *Prescott*, *Js.*, improperly relied on testimony given by the defendant at the dissolution trial that she was aware that she may still need to litigate an action brought by the plaintiff under the act before she could own the assets distributed to her through the dissolution action. The defendant argues that this reliance was misplaced and undermines the trial court's finding that the dissolution action was commenced with actual intent to hinder, delay or defraud. The plaintiff claims that there was

ample evidence in light of the numerous factors set forth in § 52- 552e (b),[9] which the court may consider in determining "actual intent" to fraudulently transfer.[10] We agree with the plaintiff.

As we previously have indicated, the standard of review "of the granting of a prejudgment remedy is very

[9] General Statutes § 52-552e (b) provides: "In determining actual intent under subdivision (1) of subsection (a) of this section, consideration may be given, among other factors, to whether: (1) The transfer or obligation was to an insider, (2) the debtor retained possession or control of the property transferred after the transfer, (3) the transfer or obligation was disclosed or concealed, (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with a suit, (5) the transfer was of substantially all the debtor's assets, (6) the debtor absconded, (7) the debtor removed or concealed assets, (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred, (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred, (10) the transfer occurred shortly before or shortly after a substantial debt was incurred, and (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor."

[10] To the extent that the defendant asserts that the court, *Domnarski*, *J.*, improperly denied her motion to dismiss the plaintiff's claims because it improperly concluded that the complaint alleged sufficient facts to state a claim under the act for fraud, we disagree. In ruling on the motion to dismiss, the issue before the court was whether, taking all of the facts alleged in the complaint as true, they would support a conclusion "either: (1) that the conveyance was made without substantial consideration and rendered the transferor unable to meet his obligations or (2) that the conveyance was made with a fraudulent intent in which the grantee participated." (Internal quotation marks omitted.) *Certain Underwriters at Lloyd's, London* v. *Cooperman*, 289 Conn. 383, 394, 957 A.2d 836 (2008). In the present case, the plaintiff alleged both that Otto's initial conveyance of the Massachusetts property by quitclaim deed to the defendant and the Ottos' entire divorce proceeding was undertaken with the intent to shelter various assets from the plaintiff. The plaintiff further asserted that the timing of these transfers, occurring so quickly after Otto became a suspect in Smith's murder—and well before Otto was convicted of a crime—offers a reasonable inference of fraudulent intent. In ruling on the motion to dismiss, the court found that "the plaintiff has alleged both that Otto's initial conveyance of the Massachusetts property by quitclaim deed to the defendant and that the Ottos' entire divorce proceeding was undertaken with the intent to shelter various assets from the plaintiff. Moreover, the plaintiff asserts that the timing of these transfers, occurring so quickly after Otto became a suspect in Smith's murder and well before Otto was convicted of that crime, offers

circumscribed. . . . In its determination of probable cause, the trial court is vested with broad discretion which is not to be overruled in the absence of clear error." (Citation omitted; internal quotation marks omitted.) *TES Franchising, LLC* v. *Feldman*, 286 Conn. 132, 137, 943 A.2d 406 (2008). We are further cautioned by the fact that the trial court in a hearing on an application for a prejudgment remedy need only make a finding of probable cause, as opposed to a more heightened standard that may prevail during the trial of the cause of action. It is with this probable cause standard in mind that we evaluate the court's finding of probable cause in the present case.

"The legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. . . . Probable cause is a flexible common sense standard. It does not demand that a belief be correct or more likely true than false. . . . The hearing in probable cause for the issuance of a prejudgment remedy is not contemplated to be a full scale trial on the merits of the plaintiff's claim. The plaintiff does not have to establish that he will prevail, only that there is probable cause to sustain the validity of the claim. . . . The court's role in such a hearing is to determine probable success by weighing probabili-

a reasonable inference of fraudulent intent. Taken together, these facts support a claim of actual fraud because they support a conclusion that Otto and the defendant acted with 'actual intent to hinder, delay or defraud' the plaintiff, to whom Otto is a debtor." As we previously have indicated, the trial court was entitled to accept all allegations in the complaint as true. We agree that the facts alleged in the complaint support a claim of actual fraud because they support a conclusion that Otto and the defendant acted with "actual intent to hinder, delay or defraud" the plaintiff, to whom Otto is the debtor. General Statutes § 52-552e (a) (1). Accordingly, we conclude that the trial court properly determined that the plaintiff had alleged sufficient facts to support a claim of fraudulent transfer and, therefore, properly denied the defendant's motion to dismiss.

ties. . . . In this process the trial court is vested with broad discretion which is not to be overruled in the absence of clear error." (Citations omitted; internal quotation marks omitted.) *Three S. Development Co.* v. *Santore*, 193 Conn. 174, 175–76, 474 A.2d 795 (1984). The intent to defraud almost always is proven by circumstantial evidence. A person's intent is to be inferred from his conduct under the surrounding circumstances, and is an issue for the trier of fact to decide. *State* v. *Nosik*, 245 Conn. 196, 208, 715 A.2d 673, cert. denied, 525 U.S. 1026, 119 S. Ct. 547, 142 L. Ed. 2d 455 (1998).

In its memorandum of decision on the application for prejudgment relief, the court, *Prescott, J.*, focused on Otto's intent in entering into the dissolution. In making its decision, the court reasoned that, "[a]lthough the transfer of the Ellington and Stafford real property, as well as cash and other personal property, have been ordered by Judge Schuman, [this] court concludes that the appropriate inquiry regarding intent must center upon Otto's actions with respect to the overall divorce proceeding. In other words, although [the defendant], at least in theory, had ample and even compelling justifications to seek a divorce from Otto, it is Otto's intent with respect to the divorce that is ultimately dispositive." That court further found that, "[b]ased upon the factual findings set forth [in this memorandum of decision], there is probable cause to believe that [Otto] encouraged and facilitated [the defendant] to institute a divorce action against him, and then did not seriously contest the case in order to ensure that most or all of his assets could not be reached by the estate of [Smith] in the wrongful death action." We conclude that the trial court's finding of probable cause was not an abuse of its discretion.

Section 52-552e (b) provides: "In determining actual intent under subdivision (1) of subsection (a) of this section, consideration may be given, among other fac-

tors, to whether: (1) The transfer or obligation was to an insider, (2) the debtor retained possession or control of the property transferred after the transfer, (3) the transfer or obligation was disclosed or concealed, (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with a suit, (5) the transfer was of substantially all the debtor's assets, (6) the debtor absconded, (7) the debtor removed or concealed assets, (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred, (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred, (10) the transfer occurred shortly before or shortly after a substantial debt was incurred, and (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor."

Relying on the factors in § 52-552e (b), we conclude that there is sufficient evidence in the record to support a probable cause finding that Otto commenced the dissolution action with actual intent to fraudulently transfer his assets to the defendant. First, the transfer of his property to the defendant—his former wife with whom he continued to reside—constituted transfers to an insider. Second, Otto continued to retain control of the assets after the transfer. Specifically, Otto continued to enjoy the use of the Ellington Road property and other assets until his incarceration. Third, the transfers left Otto totally without assets. The $12,500 awarded to him was for the purpose of paying his attorney. Otto did not receive any consideration for any of the transfers, and became insolvent shortly after the transfers. Fourth, the dissolution proceedings were instituted shortly after the police began investigating Otto in connection with Smith's murder and shortly after they searched his property as part of that investigation. The

transfers occurred shortly after Smith's body was found on his property. As the foregoing demonstrates, the evidence in the record supported a finding of probable cause that many of the factors set forth in § 52-552e (b) had been met. Accordingly, we conclude that the trial court properly determined that probable cause existed that Otto commenced the dissolution action with actual intent to hinder, delay or defraud the plaintiff.

III

Finally, we address the defendant's claim that the trial court lacked jurisdiction over this case because it cannot afford the plaintiff practical relief. Specifically, the defendant asserts that the plaintiff's claim under the act is an improper collateral attack on the trial court's judgment in the dissolution action. The defendant also claims that the property distributions of the trial court in that action cannot be disturbed because of this court's understanding of financial orders in a dissolution case "as resembling a mosaic, in which all the various financial components are carefully interwoven with one another . . . ." (Internal quotation marks omitted.) The defendant also asserts that the plaintiff is improperly attempting to obtain modification of a property distribution, which is forbidden by General Statutes §§ 46b-81 and 46b-86.[11] In response, the plaintiff asserts that her claim under the act is a challenge to the transfer of assets, not a collateral attack on the dissolution decree. The plaintiff also asserts that

[11] Although the defendant cites General Statutes § 46b-1 in her brief, we understand her claim to be a claim that the plaintiff's action is barred under §§ 46b-81 and 46b-86. We have held that, "[b]y its terms [§ 46b-81] deprives the Superior Court of continuing jurisdiction over that portion of a dissolution judgment providing for the assignment of property of one party to the other party under . . . § 46b-81." *Bunche* v. *Bunche*, 180 Conn. 285, 289, 429 A.2d 874 (1980). We also note that § 46b-86 does preclude a trial court in a dissolution proceeding from modifying assignments of assets transferred under § 46b-81.

the mosaic rule does not apply to a third party creditor. Finally, the plaintiff claims that the prohibition against modification of marital property distribution set forth in §§ 46b-81 and 46b-86 does not apply to her claim under the act. We agree with the plaintiff.

"Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant." (Internal quotation marks omitted.) *State* v. *McElveen*, 261 Conn. 198, 217, 802 A.2d 74 (2002).

First, as we explained in part I of this opinion, we have long recognized an exception to the rule against collateral attacks for the benefit of strangers to a judgment who did not have an opportunity to litigate their claim in the previous action. 50 C.J.S., supra, p. 65 ("[a creditor], whose rights or claims would be injuriously affected by the enforcement of a judgment against [his] debtor, may impeach its validity on the ground that it is fraudulent"). In the present case, the plaintiff attempted to intervene in the dissolution proceeding, but was denied intervention, from which she appealed to the Appellate Court. The Appellate Court dismissed the appeals for the lack of a final judgment.[12] Therefore, the plaintiff was not a party to the dissolution action and, accordingly, was unable to litigate her claim under the act in the context of the dissolution proceeding. Thus, the plaintiff was a stranger to the previous litiga-

[12] The defendant suggests that the plaintiff should have filed a writ of error, however, this court previously has held that the proper method for an aggrieved nonparty to challenge the denial of a motion to intervene is by filing an appeal, not a writ of error. *Hennessey* v. *Bristol Hospital*, 225 Conn. 700, 626 A.2d 702 (1993); *In re Baby Girl B.*, 224 Conn. 263, 618 A.2d 1 (1992).

tion. Further, we note that the plaintiff is not seeking to set aside the dissolution decree. Rather, the plaintiff is seeking to attach certain assets that were transferred to the defendant as the result of that decree. We agree with the trial court that providing the plaintiff relief under the act "would not require the court here to set aside the judgment dissolving the Ottos' marriage, but instead would only bring to fruition a result that [the defendant] was made aware of during the divorce proceeding, i.e., that she may not ultimately retain some of these assets that were to be distributed to her as part of the divorce." Therefore, in view of the fact that the plaintiff did not have the opportunity to litigate this issue in the context of the dissolution action, and is not attempting to set aside the dissolution judgment, we conclude that the trial court properly determined that this action does not constitute an impermissible collateral attack on the judgment of the trial court.

Second, the defendant asserts that the manner in which this court views financial orders in dissolution cases bars the plaintiff's claim under the act. This court has previously stated that "[t]he power to act equitably is the keystone to the court's ability to fashion relief in the infinite variety of circumstances which arise out of the dissolution of marriage." (Internal quotation marks omitted.) *Loughlin* v. *Loughlin*, 280 Conn. 632, 641, 910 A.2d 963 (2006). "[I]ssues involving financial orders are entirely interwoven. The rendering of a judgment in a complicated dissolution case is a carefully crafted mosaic, each element of which may be dependent on the other." (Internal quotation marks omitted.) *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 378, 999 A.2d 721 (2010). Recently, this court has stated, however, that "[a] financial order is severable when it is not in any way interdependent with other orders and is not improperly based on a factor that is linked to other factors. . . . In other words, an order is severable if

its impropriety does not place the correctness of the other orders in question." (Citation omitted; internal quotation marks omitted.) *Maturo* v. *Maturo*, 296 Conn. 80, 124–25, 995 A.2d 1 (2010). Accordingly, we conclude that the general principle that financial orders in dissolution cases are interwoven does not bar the plaintiff from bringing her claim under the act.

Furthermore, because the plaintiff was not a party to the dissolution action, she cannot be bound by that judgment and the provisions of §§ 46b-81 and 46b-86 do not apply to her. Those statutory provisions clearly only apply to parties to a dissolution proceeding. Additionally, the matter is clearly justiciable. The practical relief sought is the retransfer of alleged fraudulently transferred assets, or the monetary equivalent of those assets at the time of the fraudulent transfer. We can see no reason to bar the plaintiff from availing herself of the remedies available under the act, particularly where, as here, there is probable cause to believe that Otto invoked the trial court's jurisdiction in an effort to hinder, delay or defraud the plaintiff. Accordingly, we conclude that the trial court properly granted the plaintiff's application for a prejudgment remedy.

The judgment is affirmed.

In this opinion the other justices concurred.

JOHN A. CARTER *v.* TOWN OF CLINTON
(SC 18200)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.

Syllabus

Pursuant to statute (§ 31-294c), no proceedings on a claim for benefits pursuant to the Workers' Compensation Act (§ 31-275 et seq.) shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident, except if, within the

applicable period, the employee has been furnished with medical or surgical care "for the injury with respect to which compensation is claimed . . . ."

The plaintiff, a police officer of the defendant town of Clinton, sustained an injury to his right shoulder in February, 1996, that required surgery. Thereafter, in October, 1996, while attempting to lift a person in the line of duty, the plaintiff suffered a labral tear in his right shoulder requiring scapular reduction surgery, which was authorized by the defendant. Subsequently, a cervical spine magnetic resonance imaging showed two herniated discs and degenerative changes, and the plaintiff underwent fusion surgery in April, 1998. The plaintiff then retired from the police force because of his injuries. The plaintiff underwent two electrocardiograms, one in September, 1998, and one in March, 2000, both of which were described as normal. Thereafter, in April, 2000, the plaintiff suffered an acute myocardial infarction and underwent an angioplasty and coronary artery bypass surgery. Subsequently, the plaintiff filed notice of a claim for heart and hypertension benefits pursuant to the statute (§ 7-433c) authorizing the award of such benefits to regular members of paid municipal police departments if, inter alia, they suffer a condition of health caused by hypertension or heart disease resulting in their temporary or permanent disability. The plaintiff claimed that his right shoulder condition was misdiagnosed and that his October, 1996 symptoms had been caused by a cardiac problem. The defendant contested the claim, and the workers' compensation commissioner for the third district dismissed the claim for lack of subject matter jurisdiction. The commissioner concluded that the plaintiff had failed to produce sufficient evidence to show that his myocardial infarction was causally related to the October, 1996 lifting incident, that the one year limitations period in § 31-294c was not tolled under the medical care exception by his allegation that his heart condition was misdiagnosed following the October, 1996 incident, and that the plaintiff's June, 2001 notice of claim, therefore, was untimely. The compensation review board affirmed the commissioner's decision, and the plaintiff appealed. *Held* that the board properly concluded that the plaintiff failed to establish that the medical care exception applied to toll the statute of limitations with respect to the plaintiff's claim for heart and hypertension benefits: this court concluded that deference should be accorded to the board's time-tested, reasonable and consistent interpretation of the phrase "for the injury with respect to which compensation is claimed," which is contained in § 31-294c (c), to mean that a plaintiff can satisfy the medical care exception by proving either that his employer previously furnished medical care for the specific condition at issue in the late claim, or that a late claimed condition was causally related to a timely reported incident for which the employer furnished medical care; accordingly, because the plaintiff here failed to demonstrate that he fell under either method of proving the medical care exception by failing to demonstrate that the

defendant had furnished medical care for heart disease following the October, 1996 incident, and by failing to present sufficient evidence to support his allegation that the 2000 myocardial infarction was causally related to the October, 1996 lifting injury, the board properly affirmed the commissioner's decision.

Argued February 1—officially released May 1, 2012

Procedural History

Appeal from the decision of the workers' compensation commissioner for the third district dismissing the plaintiff's claim for benefits under the Heart and Hypertension Act, brought to the compensation review board, which affirmed the commissioner's decision, and the plaintiff appealed. *Affirmed.*

Jill Morrissey, with whom was *David J. Morrissey*, for the appellant (plaintiff).

Henry J. Zaccardi, with whom was *Sheila A. Huddleston*, for the appellee (defendant).

Opinion

McLACHLAN, J. This appeal requires us to consider the application of the medical care exception to the one year statute of limitations set forth in General Statutes § 31-294c.[1] The plaintiff, John A. Carter, appeals[2] from the decision of the compensation review board

[1] General Statutes § 31-294c provides in relevant part: "(a) No proceedings for compensation under the provisions of this chapter shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident or within three years from the first manifestation of a symptom of the occupational disease, as the case may be, which caused the personal injury . . . .

"(c) Failure to provide a notice of claim under subsection (a) of this section shall not bar maintenance of the proceedings if . . . within the applicable period an employee has been furnished, for the injury with respect to which compensation is claimed, with medical or surgical care as provided in section 31-294d. . . ."

[2] The plaintiff appealed from the decision of the compensation review board to the Appellate Court, and this court transferred the appeal to itself pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

(board), affirming the decision of the workers' compensation commissioner for the third district (commissioner) dismissing his claim seeking heart and hypertension benefits pursuant to General Statutes § 7-433c[3] for lack of subject matter jurisdiction on the basis that the notice of claim was untimely filed. The plaintiff argues that the board improperly rejected his argument that the statute of limitations was tolled by the medical care exception set forth in § 31-294c (c). Because we conclude that the board properly concluded that the plaintiff had failed to establish that the medical care

[3] General Statutes § 7-433c (a) provides: "Notwithstanding any provision of chapter 568 or any other general statute, charter, special act or ordinance to the contrary, in the event a uniformed member of a paid municipal fire department or a regular member of a paid municipal police department who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he or his dependents, as the case may be, shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under chapter 568 if such death or disability was caused by a personal injury which arose out of and in the course of his employment and was suffered in the line of duty and within the scope of his employment, and from the municipal or state retirement system under which he is covered, he or his dependents, as the case may be, shall receive the same retirement or survivor benefits which would be paid under said system if such death or disability was caused by a personal injury which arose out of and in the course of his employment, and was suffered in the line of duty and within the scope of his employment. If successful passage of such a physical examination was, at the time of his employment, required as a condition for such employment, no proof or record of such examination shall be required as evidence in the maintenance of a claim under this section or under such municipal or state retirement systems. The benefits provided by this section shall be in lieu of any other benefits which such policeman or fireman or his dependents may be entitled to receive from his municipal employer under the provisions of chapter 568 or the municipal or state retirement system under which he is covered, except as provided by this section, as a result of any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability. As used in this section, the term 'municipal employer' shall have the same meaning and shall be defined as said term is defined in section 7-467."

exception applied to toll the statute of limitations, we affirm the decision of the board.

The board's decision sets forth the following relevant facts and procedural history. "The [plaintiff] worked for the [defendant, the] town of Clinton as a police officer from 1972 through 1998. He sustained a right shoulder injury on February 20, 1996, that required surgery, and returned to regular duty in July, 1996. On October 2, 1996, [in] the line of duty, he was attempting to lift a heavy person when he felt a pop and sharp pain in his right shoulder that traversed his upper back. He also reported a sense of going into shock, with dizziness, shortness of breath, lightheadedness, and a crushing pain in the front and back. He completed an injury report for [the defendant], and went to the hospital for treatment, reporting increasing pain and discomfort in his shoulder.

"The attending physician at the hospital opined that he had a labral tear. A [computed tomography scan] of his scapula showed no abnormalities, and the [plaintiff] was referred to [John Daigneault, an orthopedic surgeon] for an orthopedic evaluation. After the [plaintiff] reported pain, clinking and grinding in the scapular area, [Daigneault] performed scapular reduction surgery in 1997, which was authorized by the [defendant]. In 1998, pain continued, beginning to radiate into the neck and jaw. A cervical spine [magnetic resonance imaging] showed two herniated discs and degenerative changes, leading to fusion surgery in April, 1998. The [plaintiff] then retired from the police force because of his injuries. [Daigneault] identified a 20 [percent] permanent partial impairment of the right shoulder from the October, 1996 injury, and a 10 [percent] impairment from the February, 1996 injury. [Myron E. Shafer, an orthopedic surgeon] rated the [plaintiff] with a 25 [percent] permanent impairment of the right arm on

January 7, 1998, noting a great deal of pain, discomfort and sensitivity.

"At the request of the [plaintiff's] primary physician, [Bernard Sheehan], the [plaintiff] underwent an [electrocardiogram] in September, 1998, that showed no acute changes. According to the [plaintiff], [Sheehan] had thought a stress test unnecessary despite the [plaintiff's] spoken fear that something was wrong with his heart. In March, 2000, another [electrocardiogram] was described as normal by [Sheehan]. The [plaintiff] was given pills to provide relief from presumed acid buildup. [Sheehan] prescribed a stronger antacid on April 3, 2000, noting the continuation of severe shoulder pain. On April 5, 2000, the [plaintiff] suffered an acute myocardial infarction, and was transported to the hospital where he had an angioplasty, followed by four-vessel coronary artery bypass surgery on April 7, 2000.

"The [plaintiff] filed a form 30C[4] on June 20, 2001, claiming that the right shoulder condition was misdiagnosed and that his October 2, 1996 symptoms were caused by a cardiac problem. The [defendant] contested this claim both on the basis of a lack of direct causal relation between the lifting incident and the myocardial infarction, and because the 2001 form 30C was untimely for a 1996 injury." On January 5, 2007, the commissioner dismissed the claim due to lack of subject matter jurisdiction, finding that the plaintiff had not produced sufficient evidence to show that his April 5, 2000 myocardial infarction was causally related to the October 2, 1996 incident. The commissioner also found that the statute of limitations was not tolled by the plaintiff's allegation that his heart condition was misdiagnosed following the October 2, 1996 incident, and that his June 20, 2001

[4] "A form 30C is the form prescribed by the workers' compensation commission . . . for use in filing a notice of claim under the [Workers' Compensation Act] . . . ." (Internal quotation marks omitted.) *Del Toro* v. *Stamford*, 270 Conn. 532, 536 n.4, 853 A.2d 95 (2004).

notice of claim was untimely. The commissioner denied the plaintiff's motions to correct and for reconsideration. The board subsequently affirmed the decision of the commissioner, and this appeal followed.

The sole issue in this appeal is whether the board correctly concluded that the medical care exception in § 31-294c did not apply to toll the statute of limitations for the plaintiff's claim for benefits pursuant to § 7-433c. The plaintiff contends that, because he claims that the October 2, 1996 incident caused him to experience symptoms of angina, his claim for benefits pursuant to § 7-433c falls under the medical care exception in § 31-294c (c), regardless of the commissioner's factual finding of no causal connection between the October 2, 1996 incident and his heart disease. In response, the defendant argues that, under the board's time-tested interpretation of § 31-294c (c), in order for a claimant to fall under the medical care exception, he must prove either: (1) that his employer previously furnished medical care for the specific condition at issue in the late claim; or (2) that a late claimed condition was causally related to a timely reported incident for which the employer furnished medical care. Because the plaintiff has not satisfied either of these showings, the defendant argues, the board correctly affirmed the decision of the commissioner dismissing the claim for lack of subject matter jurisdiction. We agree with the defendant.

"The principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board. . . . [W]e do not afford

deference to an agency's interpretation of a statute when . . . the construction of a statute previously has not been subjected to judicial scrutiny or to a governmental agency's time-tested interpretation . . . ." (Citation omitted; internal quotation marks omitted.) *Jones* v. *Redding*, 296 Conn. 352, 362–63, 995 A.2d 51 (2010).

Pursuant to § 7-433c (a), a firefighter or police officer[5] who has passed a preemployment physical examination that did not reveal any evidence of hypertension or heart disease, and who subsequently develops "any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he or his dependents, as the case may be, shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under chapter 568 . . . ." General Statutes § 7-433c (a). "It is well settled that the special compensation, or the outright bonus, of § 7-433c is that the claimant is not required to prove that the heart disease is causally connected to [his or her] employment, which he [or she] would ordinarily have to establish in order to receive benefits pursuant to the Workers' Compensation Act. . . . The benefits provided under § 7-433c are, however, payable and administered under the Workers' Compensation Act . . . and the type and amount of benefits available pursuant to § 7-433c are the same as those under the Workers' Compensation Act . . . ." (Internal quotation marks omitted.) *Ciarlelli* v. *Hamden*, 299 Conn. 265, 276–77, 8 A.3d 1093 (2010).

Although a claimant need not prove that his heart disease is causally connected to his employment in

[5] The board observed that, "[t]he question of timely notice aside, claims for § 7-433c benefits are not recognized unless the condition of hypertension or heart disease and the death or disability resulting from such condition are suffered while the claimant is a regular member of the police or fire department." See General Statutes § 7-433c (a).

order to qualify for benefits pursuant to § 7-433c, he must prove that he satisfies the jurisdictional threshold set forth in § 31-294c (a), which requires that a claimant provide his employer a "written notice of claim for compensation . . . within one year from the date of the accident . . . which caused the personal injury . . . ." See, e.g., *Malchik* v. *Division of Criminal Justice*, 266 Conn. 728, 739, 835 A.2d 940 (2003) ("[c]ompliance with [§ 31-294c] is essential to maintaining a claim for compensation under chapter 568 and therefore under . . . § 7-433c . . . because timely notice is a jurisdictional requirement that cannot be waived" [internal quotation marks omitted]). We recently have explained that "the one year limitation period for claims under § 7-433c begins to run only when an employee is informed by a medical professional that he or she has been diagnosed with hypertension [or heart disease]."[6] *Ciarlelli* v. *Hamden*, supra, 299 Conn. 300.

Section 31-294c (c) excuses a claimant from compliance with § 31-294c (a) "if within the applicable period an employee has been furnished, *for the injury with respect to which compensation is claimed*, with medical or surgical care as provided in section 31-294d. . . ." (Emphasis added.) The claimant bears the burden to show that the medical care exception applies. We have observed that the "purpose of the notice [requirement of § 31-294c (a)] is to inform the employer that an injury has been suffered upon which a claim for compensation will or may be founded. . . . The exception [in § 31-294c (c)] is, no doubt, based upon the fact that if the employer furnishes medical treatment he must know that an injury has been suffered which at least may be

[6] The plaintiff does not claim to establish jurisdiction under § 31-294c (a), and indeed would be unable to do so. The commissioner included in his findings that the plaintiff was diagnosed with acute myocardial infarction on April 5, 2000. The commissioner also found that the plaintiff filed a form 30C, notice of claim on June 20, 2001, more than one year after he was diagnosed with heart disease.

the basis of such a claim." (Citation omitted.) *Gesmundo* v. *Bush*, 133 Conn. 607, 612, 53 A.2d 392 (1947). Any interpretation of the scope of § 31-294c (c), accordingly, must be consistent with the principle that the employer's provision of medical care demonstrates that it was on notice that the claimant had suffered a compensable injury. In *Gesmundo*, we indicated that in order to find the medical care exception applicable, there must be some connection between the initial "injury" and the later claimed condition, but we did not have occasion in that case to explore in detail the nature of the required relation. Id., 612–13. During the course of his employment, on the evening of December 31, 1943, the plaintiff in *Gesmundo* was driving a truck that had no heater and a drafty cab area due to broken floorboards. Id., 609. It was a cold night, and his feet were frostbitten as a result of the ride. Id. He filed no notice of claim, but he reported his injury to his supervisor, who referred him to a physician for treatment. Id. Over the course of the next two years, the plaintiff consulted with various physicians, ultimately receiving a diagnosis of a "vasomotor disturbance of the causalgic type, probably related to his frostbite." Id., 610. In concluding that the commissioner correctly had concluded that the medical care exception applied, we specifically noted that the plaintiff had "suffered continuously since [the incident] and *no other intervening cause* of his condition has been proved." (Emphasis added.) Id., 613.

Although *Gesmundo* is somewhat helpful in guiding our analysis, that case did not directly present the question of whether the medical care exception applies when a claimant receives treatment for an injury sustained in connection with an incident and later seeks coverage for a different injury or condition that has arisen from the same incident. The board, however, has had occasion to address this issue, and has interpreted

the phrase in § 31-294c (c), "for the injury with respect to which compensation is claimed," to mean that a claimant can satisfy the medical care exception by proving either: (1) that his employer previously furnished medical care for the specific condition at issue in the late claim; or (2) that a late claimed condition was causally related to a timely reported incident for which the employer furnished medical care. The first method of proof is consistent with *Gesmundo*, in which the plaintiff's later condition of vasomotor disturbance developed from the initial condition of frostbite. *Gesmundo* v. *Bush*, supra, 133 Conn. 610; see also *Cessario* v. *Meriden*, No. 5467, CRB-6-09-5 (May 21, 2010) (later claimed myocardial infarction "sequelae of a previous compensable injury," hypertension).

The second method of proof to which the medical care exception applies is a bit more complex, because the nexus between the late claimed condition and the initial incident is not the original condition for which the employer provided medical treatment, but the incident itself. The board's decision in *Landrette* v. *Bristol*, 11 Conn. Workers' Comp. Rev. Op. 149 (1993), illustrates this manner of proof. In *Landrette*, the claimant police officer injured his ankle during an altercation with a suspect and gave notice of claim to his employer on the same day. Id., 150. The claimant alleged that he had provided oral notice of claim with respect to a mouth injury he received during the altercation, and the employer disputed that notice of claim had been provided or that any treatment had been furnished by the employer within the one year period. Id. Without referring to or relying on any resolution of these factual disputes between the parties by the commissioner, the board concluded that, regardless of whether the claimant had provided notice or the employer had provided treatment within the one year limit for the mouth injury, it was compensable because it was causally related

to the incident for which the employer had furnished medical care. Id., 151–52. In so concluding, the board relied on one of its earlier decisions, *Hebert* v. *New Departure Hyatt Bearings*, 4 Conn. Workers' Comp. Rev. Op. 94 (1987), in which it had allowed benefits for a late claimed injury, a herniated disc at the L1-2 level of his spine, because the employer had furnished medical treatment for a timely noticed injury, a herniated disc at the C5-6 level of his spine, because both injuries were causally related to the original incident. Id., 95. The board subsequently relied on *Landrette* in *Scott* v. *Bridgeport*, No. 4637, CRB-4-03-2 (February 24, 2004), which involved a dispute between the claimant and his employer regarding the compensability of a late claimed brain injury, where the claimant had alleged that the brain injury arose from the same work-related fall that had caused a timely noticed leg injury. Consistent with *Landrette* and *Hebert*, the board remanded the case to the commissioner to allow the claimant "the opportunity to demonstrate the causal link between a compensable accident and the head/traumatic brain injury." Id. The board's decision in the present case is consistent with its precedent spanning almost twenty years, as well as the principles we set forth in *Gesmundo* v. *Bush*, supra, 133 Conn. 607. We conclude, therefore, that the interpretation is both time-tested and reasonable and should be accorded deference. See, e.g., *Hartford* v. *Hartford Municipal Employees Assn.*, 259 Conn. 251, 270, 788 A.2d 60 (2002) (deference given to administrative board's reasonable "time-tested interpretation" of statutory terms).

Applying the rule to the present case, we conclude that the plaintiff has failed to demonstrate that he falls under the medical care exception. As to the first method of proof, the plaintiff did not attempt to demonstrate that the defendant had furnished medical care for his heart disease following the October 2, 1996 incident.

In fact, his argument is inconsistent with that theory, since his starting point is his claim that he was misdiagnosed at the time. The plaintiff instead relied on the second method of proof, attempting to demonstrate a link between his April 6, 2000 myocardial infarction and the October 2, 1996 incident. The commissioner's findings, however, are fatal to the plaintiff's argument. First, the commissioner found that there was "insufficient evidence to support the [plaintiff's] allegation that his myocardial infarction on April 6, 2000, was causally related to his lifting incident on October 2, 1996." As the board observed, the commissioner's denial of the plaintiff's motion to correct the findings clarified that the commissioner found no connection between the lifting incident and the plaintiff's heart disease. Specifically, the commissioner rejected the plaintiff's motion to correct the findings to state that the plaintiff had "reported symptoms of heart disease on October 2, 1996, which were misdiagnosed as solely orthopedic problems but because the [defendant] provided medical care for the symptoms . . . the claim is timely brought . . . ." The commissioner, therefore, did not find that there had been a misdiagnosis or that the defendant had provided treatment to the plaintiff for symptoms of heart disease. Additionally, the plaintiff had requested that the findings be corrected to state: "The [plaintiff] suffered pain on October 2, 1996, which was reported to his employer and for which medical treatment was provided. It was discovered that this pain was both orthopedic and anginal in nature on April 6, 2000." The commissioner's denial of these requested corrections demonstrates that he found no connection whatsoever between the October 2, 1996 incident and the plaintiff's heart disease. Given these findings, which the plaintiff has not successfully challenged, the board properly affirmed the decision of the commissioner.

The plaintiff's arguments to the contrary are unpersuasive. First, he claims that he is not required to dem-

onstrate that the October 2, 1996 incident caused his heart disease, because § 7-433c does not require a claimant to prove a causal connection to employment. *Ciarlelli* v. *Hamden*, supra, 299 Conn. 276. The plaintiff misses the point of the medical care exception—although he would not need to show a causal connection to his employment to qualify for benefits pursuant to § 7-433c, he still must meet the requirements of § 31-294c, which, because he seeks to benefit from the medical care exception provision, require that he prove either: (1) that his employer previously furnished medical care for the specific condition at issue in the late claim; or (2) that a late claimed condition was causally related to a timely reported incident for which the employer furnished medical care. The plaintiff argued that his heart disease was related to the October 2, 1996 incident, so he was required to show that the incident caused his late claimed condition, the heart disease.

The plaintiff also contends that, in order to toll the statute of limitations, he merely needed to demonstrate that he reported symptoms that were consistent with angina, and was not required to prove that the lifting incident caused his heart disease. As we already have explained, however, the commissioner's findings do not support the conclusion that the plaintiff reported symptoms that were consistent with angina. Finally, even if we agreed with the plaintiff's additional contention that the defendant at one point conceded the existence of coronary artery disease, which we do not, that argument would be unavailing. The commissioner's factual finding that the plaintiff failed to prove a connection between the October 2, 1996 incident and his heart disease is dispositive of the appeal.

The decision of the compensation review board is affirmed.

In this opinion the other justices concurred.

G. BERRY SCHUMANN *v.* DIANON SYSTEMS, INC.
(SC 18655)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Harper and Vertefeuille, Js.

Syllabus

The plaintiff employee of the defendant medical testing laboratory brought an action against the defendant following his termination from employment, alleging both common-law wrongful termination and statutory (§ 31-51q) wrongful discharge for the exercise of his right to freedom of speech. In 1993, the defendant hired the plaintiff as director of cytology and cytotechnology pertaining to the study of the anatomy, pathology and chemistry of cells. Prior to his employment with the defendant, the plaintiff had developed a specialized test to discover the presence of blood in urine and to help detect bladder cancer, which he licensed to the defendant under the trade name Microcyte when he began to work for the defendant. In 2001, the plaintiff resigned his position as director of the urocytopathology laboratory, but still continued with his research and development responsibilities as a senior staff pathologist. The defendant then merged with another laboratory located in Oklahoma, and subsequently was purchased by a different company. As a result of these changes, A, who as executive medical director and laboratory director was the defendant's superior, was charged with standardizing the terminology used in the cytology programs at the Oklahoma and Connecticut locations. Accordingly, a new testing service, MicrocytePlus, was created, and A proposed a new set of diagnostic terms to be used in connection with MicrocytePlus. In January, 2005, the plaintiff discussed with A the new MicrocytePlus product and the diagnostic terms and expressed his disapproval of that product. Specifically, the plaintiff took issue with the lack of clinical research supporting its reasoning and methodology. Additionally, the plaintiff voiced his objections to others employed by the defendant. Thereafter, A removed the plaintiff from his present role in which he would have used that service, explaining that the plaintiff could not provide the MicrocytePlus service unless he did so the way the defendant wanted. After the plaintiff had failed to attend a business meeting of which he claimed to be unaware, and had instead taken a personal day, A terminated the plaintiff's employment, citing the plaintiff's unexcused absence and his decision not to use the new diagnostic terms. Following a jury trial, the jury returned a verdict in favor of the plaintiff. Thereafter, the trial court denied, inter alia, the defendant's motion for judgment notwithstanding the verdict and rendered judgment for the plaintiff, from which the defendant appealed. *Held*:

1. The trial court improperly denied the defendant's motion for a judgment notwithstanding the verdict when it improperly failed to apply the rule set forth in *Garcetti* v. *Ceballos* (547 U.S. 410) to the plaintiff's first amendment claim under § 31-51q: this court determined that the rule set forth in *Garcetti*, which held that public employees who make statements pursuant to their official duties are not speaking as citizens for first amendment purposes and are not insulated by the federal constitution from employer discipline, applies to claims brought against private employers under § 31-51q that are grounded in the first amendment, and requires that courts first determine whether an employee is speaking pursuant to his official duties before considering the first amendment balancing test analysis; furthermore, because § 31-51q requires as a prerequisite that the speech at issue must be constitutionally protected, and because it was clear that the dispute here arose from the plaintiff's statements to A concerning the safety of the new MicrocytePlus test and A's proposal of a new set of diagnostic reporting terms, as well as the plaintiff's refusal to use such terms in connection with the tests that he performed, the plaintiff's speech was made pursuant to his official employment duties and, therefore, was not protected under *Garcetti*.
2. The plaintiff could not prevail on his claim, raised as an alternative ground for affirming the trial court's judgment, that article first, § 4, of the Connecticut constitution afforded broader free speech rights than the federal constitution, and therefore precluded application of the rule set forth in *Garcetti*; this court declined to reach the state constitutional issue because the plaintiff's speech in the present case would not have been protected under the balancing test for evaluating employee speech that existed prior to *Garcetti*, it having been readily apparent that the plaintiff's speech in its entirety was extraordinarily disruptive to his employment, took place in the work environment, greatly interfered with his job performance, placed considerable strain on his relationship with A as his supervisor, created division within the defendant's workforce, and was insubordinate in nature.

(*Two justices concurring separately in two opinions*)

Argued May 18, 2011—officially released May 1, 2012

Procedural History

Action to recover damages arising from, inter alia, the defendant's alleged wrongful termination of the plaintiff's employment, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hiller*, *J.*, denied the defendant's motion for summary judgment; thereafter, the matter was tried to a jury before *Frankel*, *J.*; verdict for the plaintiff awarding past and future economic damages and punitive damages;

subsequently, the court granted the motion by Jennifer Schumann et al. to be substituted as plaintiff; thereafter, the court denied the defendant's motions to set aside the verdict, for judgment notwithstanding the verdict, for a new trial and for remittitur, rendered judgment for the plaintiff, and awarded attorney's fees and offer of judgment interest to the plaintiff; subsequently, the defendant appealed to the Appellate Court, which granted in part the defendant's motion for review of the trial court's denial of its motion for articulation, and the case was transferred to this court. *Reversed*; *judgment directed*; *new trial.*

Gregory A. Castanias, pro hac vice, with whom were *Leon F. DeJulius, Jr.*, pro hac vice, *Daniel A. Schwartz* and, on the brief, *Cara Ceraso*, for the appellant (defendant).

Stephen J. Fitzgerald, with whom were *Joseph D. Garrison* and, on the brief, *Alinor C. Sterling* for the appellee (plaintiff).

Gregg D. Adler, *Nicole M. Rothgeb* and *Marc P. Mercier* filed a brief for the Connecticut Employment Lawyers Association as amicus curiae.

Opinion

NORCOTT, J. In *Garcetti* v. *Ceballos*, 547 U.S. 410, 421, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006), the United States Supreme Court concluded "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for [f]irst [a]mendment[1] purposes, and the [c]onstitution does not insulate their communications from employer discipline." The principal issue in this appeal requires us to determine whether the rule in *Garcetti* is applica-

[1] The first amendment to the United States constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

ble in an action brought against a private employer pursuant to General Statutes § 31-51q,[2] claiming that adverse employment actions taken in response to speech made during the course of an employee's job duties amounted to retaliation for the exercise of rights guaranteed by the first amendment to the United States constitution. The plaintiff, G. Berry Schumann,[3] a twelve year employee of the defendant, Dianon Systems, Inc., brought a two count complaint against the defendant, alleging a violation of § 31-51q and common-law wrongful termination of employment, following the defendant's termination of the plaintiff's employment as a senior pathologist. The defendant appeals[4] from the judgment of the trial court, rendered after a jury trial, awarding the plaintiff $10,136,015. On appeal, the defendant claims, inter alia, that the trial court improperly disregarded controlling principles under the first amendment by declining to apply the rule in *Garcetti* in instructing the jury and in denying the defendant's posttrial motions for a new trial, to set aside the verdict and for judgment notwithstanding the verdict. We con-

[2] General Statutes § 31-51q provides: "Any employer, including the state and any instrumentality or political subdivision thereof, who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages. If the court determines that such action for damages was brought without substantial justification, the court may award costs and reasonable attorney's fees to the employer."

[3] The plaintiff died on June 27, 2008. Thereafter, the coadministrators of the plaintiff's estate, Jennifer Schumann and Aaron Schumann, were substituted as plaintiffs in this case. For convenience, we will refer to G. Berry Schumann as the plaintiff.

[4] 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 § 65-1.

clude that the trial court improperly failed to grant judgment in the defendant's favor on the count of the complaint under § 31-51q because the plaintiff's speech was in the course of his employment duties for the defendant and, therefore, was not entitled to first amendment protection under *Garcetti*. We further decline to reach the plaintiff's proffered alternative ground for affirmance, namely, that *Garcetti* is not applicable under article first, § 4, of the constitution of Connecticut, because even if it is properly before us, the plaintiff's speech would not have been protected under the pre-*Garcetti* standards that he would have us apply.[5] Accordingly, we reverse the judgment of the trial court.

The record reveals the following facts that the jury reasonably could have found, and procedural history. The defendant is a medical testing laboratory located in Stratford, which performs diagnostic tests of biological samples, including tissue and bodily fluid specimens. Among the tests performed is urine cytology, which examines cells found in urine in order to detect various forms of cancer and other abnormalities. The defendant performs tests as ordered by the requesting physicians and, upon completion of the test, generates a report that contains the test results and diagnosis. Once the reports are approved by one of the defendant's staff pathologists, they are sent to the requesting physician.

In December, 1992, the defendant extended an offer of employment to the plaintiff, an experienced cytopathologist.[6] The plaintiff accepted the offer and began to work for the defendant as its director of cytology[7] and

[5] Article first, § 4, of the constitution of Connecticut provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

[6] Cytopathology is the "study of disease changes within individual cells or cell types." Stedman's Medical Dictionary (28th Ed. 2006) p. 490.

[7] Cytology is the "study of the anatomy, physiology, pathology, and chemistry of the cell." Stedman's Medical Dictionary (28th Ed. 2006) p. 489.

cytotechnology[8] in January, 1993, reporting to James Amberson, the then vice president of pathology services and laboratory director.[9]

Before beginning his employment with the defendant, the plaintiff had developed a specialized urine test, called cytodiagnostic urinalysis, which examined hematuria, or "the presence of blood in urine." The plaintiff provided this test to other physicians before he began to work for the defendant. When he joined the defendant in 1993, the plaintiff licensed this test to the defendant under the trade name Microcyte. Although prior to its implementation of Microcyte the defendant had offered other urine diagnostic tests, Microcyte represented an advancement over the defendant's earlier offerings that examined only cells from the bladder or lower urinary tract; Microcyte examined cells above, including the kidney. Because of this distinguishing feature, Microcyte provided a noninvasive alternative to kidney biopsies. Microcyte also had an increased sensitivity for detecting bladder cancer and other abnormalities. In addition, Microcyte offered the benefit of integrating two separate analyses, a cellular analysis and a chemical analysis, into one reporting format. The chemical component focused on chemical analyses of analytes and substances in the urine sample, whereas the cellular component involved the examination of the cells in the urine sample.

Microcyte proved to be a successful diagnostic service for the defendant, and, in 1996, the defendant launched Microcyte II, which modified the original test

[8] Cytotechnology refers to the methodology of testing cells.

[9] Amberson had joined the defendant in 1989 and had helped institute its urine cytology program. From 1994 to 2001, Amberson was the defendant's chief medical officer and laboratory director, and, in 2001, was promoted to executive medical director of anatomic pathology, maintaining his role as laboratory director, as well. At that time, the plaintiff continued to report to Amberson.

by integrating DNA analysis as an adjunctive component. This DNA test provided results that included an analysis of the chromosomes within a cell, which indicated, inter alia, if there were an abnormal number of chromosomes. The Microcyte tests continued to be successful from the date of their inception through 2004, and outpaced the defendant's original urine cytology test, Urocyte.

Shortly after Amberson's promotion in 2001 to executive medical director; see footnote 9 of this opinion; the plaintiff, citing personal reasons, resigned as director of the urocytopathology laboratory, a position he had assumed in 1996. The plaintiff continued, however, with his diagnostic and research and development responsibilities as a senior staff pathologist. In that capacity, the plaintiff worked on Microcyte and prostate biopsy samples. At that time, the plaintiff also retained control of his independently owned corporations, which included Schumann Diagnostics, Inc., and Schumann Cytology Laboratories, Inc., and maintained business relationships with other organizations, which included Orion Laboratories, Inc., Diagnostic Oncology CRO, Inc., and the University of Connecticut School of Allied Health Professionals.

In November, 2001, the defendant merged with another laboratory testing company, UroCor, which was located in Oklahoma City, Oklahoma. Thereafter, in early 2003, another company, Laboratory Corporation of America (LabCorp), purchased the defendant. At that time, the testing sites in Oklahoma City and Stratford were both owned by LabCorp. As part of the subsequent standardization process between the two sites, Amberson, who at that time was executive medical director and laboratory director of the Stratford site, was charged with, inter alia, standardizing the terminology used in the urine cytology programs at the two sites.

The standardization process resulted in the creation of a new urine testing service called MicrocytePlus. MicrocytePlus included an additional analytical test, Urovysion, which was a molecular genetics test that utilized fluorescent in situ hybridization technology, a method of examining not just the number of chromosomes in a given cell, but also the quality of those chromosomes. It provided medical professionals with an additional method of monitoring patient health. Urovysion was, therefore, a more sensitive test that could detect and assess the risk of developing or recurring bladder cancer with greater accuracy than could the defendant's standard urine tests. The combination of traditional cytology with Urovysion was the hallmark of MicrocytePlus, and was the genesis of the plaintiff's eventual dispute with the defendant.

Amberson also proposed a new set of diagnostic terms to be used in the reports generated by the new MicrocytePlus testing process. Before MicrocytePlus was offered, standard Microcyte reports, which informed the requesting physician of the test results and the diagnostic impressions made by the interpreting pathologist, used specific diagnostic language that included six diagnostic categories, two of the most obvious being "negative" and "cancer." Amberson's newly proposed terms included five diagnostic categories and was his attempt to resolve the ongoing conflict between the two labs about how many diagnostic categories to use, as well as which ones.

In late January, 2005, Amberson called a meeting of the staff pathologists, which included the plaintiff, and officially presented the new MicrocytePlus product, as well as the new diagnostic terms. Although the plaintiff remained silent throughout the meeting, he was shocked to learn that the MicrocytePlus product was so close to launch in the absence of any clinical research supporting Amberson's proposal to integrate Urovysion

into the Microcyte testing profile and roll out a new set of diagnostic terminology. During the presentation, Mary Lachman, another staff pathologist, voiced her concerns that, because Urovysion was a molecular genetics test performed by technicians over whom she had no control, she was not comfortable signing out, or approving, the new MicrocytePlus reports. Amberson did not address Lachman's concerns at the meeting and, shortly thereafter, he removed her from the urine service.

Sometime after the meeting, the plaintiff spoke with Amberson directly to express his disapproval of MicrocytePlus. He specifically told Amberson that he took issue with the lack of clinical research supporting the reasoning and methodology behind the integrated test, and the lack of any validation studies showing that the defendant could accurately perform and replicate the test inside its own facilities. The plaintiff also told Amberson that the proposed diagnostic language, which adopted the diagnostic terms from a different classification system, was inappropriate for urine cytology results, could confuse the requesting physicians and, ultimately, harm patients. The plaintiff explained to Amberson that these changes posed a safety issue and that it was Amberson's responsibility to ensure that patient safety was being maintained.

The plaintiff also voiced his objections to others, relaying his concerns to Lachman, telling Joan Parise, a senior cytotechnologist on the Microcyte service, that he "didn't understand how Microcyte worked" and that this new service went against what they had built, and telling Joanne Miller, the laboratory manager, that he could not "sign out a reporting or testing where [he] didn't understand where the information came from, how it was developed" or "sign out language which nobody had explained to [him] what it means . . . ."

The defendant officially launched MicrocytePlus on or about February 1, 2005. The plaintiff, upon his return from a vacation in March, met with Amberson and Miller, at which time Amberson removed the plaintiff from urine services and explained to him that he could not "go into the room that's providing that service unless you do the MicrocytePlus the way we want to do [it]." The plaintiff continued to work on the prostate biopsy service and to sign out a limited number of urine cases. The plaintiff also tried to resolve the conflict he had with the use of MicrocytePlus, to no avail.

Finally, on Monday, April 4, 2005, Amberson and Pat Noland, the defendant's business leader, met with the plaintiff upon his arrival at work. Amberson and Noland explained to the plaintiff that there had been a meeting scheduled the previous Friday, April 1, which the plaintiff had missed because he had spent that day in Galesburg, Illinois. Although the plaintiff was unaware of this meeting and had taken a personal day, notifying the defendant on the morning of April 1 that he would not be present that day, Amberson and Noland nevertheless proceeded to terminate the plaintiff's employment at that time, citing his unexcused absence and his decision not to use the new diagnostic terms.[10]

The plaintiff, following his termination, was unsuccessful at securing full-time employment. His only income came from two online courses that he offered, a small consulting contract with Diagnostic Oncology CRO, Inc., and unemployment insurance. In addition, in

[10] The plaintiff had a history of disciplinary issues related to unexcused and unapproved absences. In September, 2001, Amberson instructed the plaintiff that there were to be no more unexcused absences and described the procedure for taking time off. The following month, Amberson reprimanded the plaintiff for a more recent unexcused absence. One month later, the plaintiff was placed on a six month probationary period for an unexcused absence. In June, 2004, Amberson again addressed the plaintiff's unexcused absences, which at times had delayed completion of the plaintiff's daily work.

late 2007, the plaintiff sustained out-of-pocket hospital expenses of $192,534.16, which he incurred because he was not covered by employer provided health insurance.

Thereafter, the plaintiff brought this action against the defendant, alleging wrongful termination in violation of § 31-51q and the common law. After the trial court denied the defendant's motion for summary judgment, the case proceeded to a jury trial. The jury returned a verdict in favor of the plaintiff on the count under § 31-51q,[11] awarding him economic damages in the amount of $4,240,211.[12] According to the interrogatories, the jury specifically found that the plaintiff proved, by a preponderance of the evidence, that: (1) "he spoke out on matters of public concern, and that he was motivated to do so as a public citizen rather than for his own private interests"; (2) "his speech was a substantial and motivating factor in [the defendant's] decision to terminate his employment"; and (3) "his speech did not substantially or materially interfere with his bona fide job performance or his working relationship with [the defendant]." The defendant filed motions for remittitur, judgment notwithstanding the verdict, a new trial, and to set aside the verdict (posttrial motions), which the trial court denied.[13] The trial court

[11] Pursuant to the jury charge, the jury did not reach the common-law wrongful termination count after finding in favor of the plaintiff on the count under § 31-51q.

[12] The jury awarded the plaintiff $1,369,633 in past economic losses, $2,609,404 in future economic losses, $225,425 in loss of life's enjoyment, past and future, and $35,749 in interest.

[13] The plaintiff died from cancer on June 27, 2008. Following his death, the defendant filed a motion for discovery of the plaintiff's medical records, contending that the plaintiff misled the jury regarding his medical condition. The trial court granted the defendant's motion, and after conducting posttrial discovery, the defendant filed supplemental posttrial motions. In its memorandum of decision on the defendant's supplemental posttrial motions, the trial court summarized the defendant's arguments as follows: "(1) that the plaintiff failed to comply with requests for discovery regarding the nature of his health; (2) that the plaintiff committed fraud; (3) that the plaintiff committed perjury by making a false statement; and (4) that there is newly

subsequently granted the plaintiff's motion for attorney's fees, punitive damages[14] and offer of judgment interest, and rendered judgment for the plaintiff in the amount of $10,136,015. This appeal followed.

On appeal, the defendant claims that the trial court improperly disregarded relevant first amendment principles in instructing the jury and in deciding the posttrial motions: (1) by declining to apply *Garcetti* v. *Ceballos*, supra, 547 U.S. 410, thus subjugating the defendant's own free speech rights in favor of the plaintiff's; and (2) because the plaintiff's speech was not constitutionally protected under, inter alia, *Connick* v. *Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), since it (a) was not related to a matter of public concern, (b) qualified as insubordinate conduct, and (c) materially and substantially interfered with his job performance and working relationships.[15] In response, the plaintiff

discovered evidence." After a hearing to determine whether the plaintiff had committed perjury or fraud, the trial court denied the defendant's supplemental posttrial motions.

[14] The jury had determined that the plaintiff had "proved by a preponderance of the evidence that in terminating the plaintiff, the defendant acted with an intentional design to injure his rights to speak out on issues of public concern or with reckless indifference to whether it would injure these rights."

[15] The defendant also claims that the trial court improperly: (1) failed to set aside the jury's award of future damages as based on conjecture and speculation; (2) denied his motion for remittitur; (3) upheld the award of punitive damages in the absence of evidence of bad intent; and (4) instructed the jury with respect to the award of punitive damages and the standard governing common-law wrongful discharge. Because of our conclusion with respect to the issues posed by this appeal related to *Garcetti*, we need not reach these other claims.

We note that all of the defendant's claims are properly preserved for appellate review. The defendant, in accordance with Practice Book § 16-37, moved for a directed verdict at the close of the plaintiff's case-in-chief, arguing, inter alia, that the plaintiff failed to prove that his speech was constitutionally protected or that his speech did not materially and substantially interfere with his job performance. The trial court, however, reserved judgment on the defendant's motion until the completion of trial. The defendant renewed these arguments in its posttrial motions.

contends otherwise, and also posits, as an alternative ground for affirmance, that article first, § 4, of the Connecticut constitution provides him with greater protection than does the federal constitution, and thus precludes the application of *Garcetti*.[16] Additional facts will be set forth as necessary.

I

We begin with the defendant's claim that the trial court improperly denied its posttrial motions because, pursuant to *Garcetti* v. *Ceballos*, supra, 547 U.S. 410, the plaintiff's speech, which was made in the course of his job duties as a pathologist, did not constitute constitutionally protected speech actionable under § 31-51q. Specifically, the defendant argues that, under *Daley* v. *Aetna Life & Casualty Co.*, 249 Conn. 766, 734 A.2d 112 (1999), the trial court was bound to apply *Garcetti* in deciding the federal constitutional claims brought against it under § 31-51q because that statute "merely applies the first amendment in the private employment context," rendering United States Supreme Court "precedent as the controlling authority in determining the scope of workplace speech." Thus, the defendant contends that the trial court improperly failed to consider the effect of *Garcetti* on Supreme Court case law previously recognized as controlling, such as *Connick* v. *Myers*, supra, 461 U.S. 138. In response, the plaintiff contends that the rule set forth in *Garcetti* is incompatible with § 31-51q, because *Garcetti* establishes a broad class of employees—those speaking pursuant to their official duties—whose speech would be precluded categorically from first amendment protection, while § 31-51q avoids such a broad classification and instead requires proof of actual

[16] We note that the Connecticut Employment Lawyers Association filed an amicus curiae brief arguing that the rule set forth in *Garcetti* v. *Ceballos*, supra, 547 U.S. 410, is contrary to § 31-51q, the Connecticut constitution and the decisions of the Connecticut courts.

interference with the employee's job performance or working relationships before excluding employee speech from protection. Citing numerous lower court decisions on point, including a decision from the United States District Court for the District of Connecticut, *Trusz* v. *UBS Realty Investors, LLC*, United States District Court, Docket No. 3:09cv268 (JBA) (D. Conn. March 30, 2010), the plaintiff also argues that *Garcetti*, which involved a public employer-employee relationship, should not be applied to the private workplace. Finally, the plaintiff contends that the trial court's failure to apply *Garcetti* was harmless error not requiring reversal because the plaintiff's speech was not made pursuant to his "official duties." We agree with the defendant and conclude that the trial court improperly failed to apply *Garcetti* to the plaintiff's first amendment claims brought against a private employer pursuant to § 31-51q.

We first note that "[o]ur review of a trial court's refusal to direct a verdict or to render judgment notwithstanding the verdict takes place within carefully defined parameters. We must consider the evidence, including reasonable inferences which may be drawn therefrom, in the light most favorable to the parties who were successful at trial . . . [and] giving particular weight to the concurrence of the judgments of the judge and the jury, who saw the witnesses and heard the testimony . . . . The verdict will be set aside and judgment directed only if we find that the jury could not reasonably and legally have reached their conclusion." (Internal quotation marks omitted.) *Label Systems Corp.* v. *Aghamohammadi*, 270 Conn. 291, 301, 852 A.2d 703 (2004).

We also note that the defendant's claim with respect to whether *Garcetti* v. *Ceballos*, supra, 547 U.S. 410, applies to private employers for purposes of maintaining an action under § 31-51q, presents issues of con-

stitutional law and statutory interpretation over which we exercise plenary review. See, e.g., *HVT, Inc.* v. *Law*, 300 Conn. 623, 629, 16 A.3d 686 (2011) (statutory interpretation under General Statutes § 1-2z); *State* v. *Kirby*, 280 Conn. 361, 378, 908 A.2d 506 (2006) (constitutional issues). Moreover, should we determine that *Garcetti* applies, application of that rule to the facts of this case to determine whether the speech is constitutionally protected thereunder further presents a question of law over which our review is plenary. See, e.g., *Jackler* v. *Byrne*, 658 F.3d 225, 238 (2d Cir. 2011); accord *DiMartino* v. *Richens*, 263 Conn. 639, 661–62, 822 A.2d 205 (2003), citing *Connick* v. *Myers*, supra, 461 U.S. 148 n.7; see also *DiMartino* v. *Richens*, supra, 663–64 (reviewing court conducts "independent review" of factual record and findings as to protected status of speech).

A

We begin with a review of the background legal principles that govern an action brought under § 31-51q, which "creates a statutory cause of action for damages against '[a]ny employer' for 'any employee' who has been subjected 'to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States [c]onstitution or section 3, 4 or 14 of article first of the [c]onstitution of the state . . . .' On its face, the statute extends the protection of federal and state constitutional rights in two respects. It provides coverage for private employees as well as for governmental employees, and it imposes liability on private employers as well as governmental employers." *Cotto* v. *United Technologies Corp.*, 251 Conn. 1, 6, 738 A.2d 623 (1999). In *Cotto*, we concluded that the protections of § 31-51q were not limited to speech on public property but, rather, extended to employee speech in the private workplace as well. Id., 16.

A clear prerequisite to the application of § 31-51q, however, is that the speech at issue must be constitutionally protected; only the "exercise . . . of rights guaranteed by the first amendment to the United States [c]onstitution or section 3, 4 or 14 of article first of the [c]onstitution of the state" falls within the ambit of the statute. General Statutes § 31-51q; see *Daley* v. *Aetna Life & Casualty Co.*, supra, 249 Conn. 777 ("[§] 31-51q applies to constitutionally protected speech"); see also *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 498, 43 A.3d 69 (2012) (rejecting argument that violation of whistle-blowing statute, General Statutes § 31-51m, "can form the basis of a claim pursuant to § 31-51q, even if the employee was not exercising constitutional speech rights").

As a background matter, we note that the case law concerning the first amendment rights of employees by and large addresses claims against governmental employers, for the very elementary reason that there can be no first amendment violation without state action. See, e.g., *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 668, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991); see also *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982) (action may be brought against private actor under 42 U.S.C. § 1983 if "conduct allegedly causing the deprivation of a federal right be fairly attributable to the [s]tate," namely [1] "caused by the exercise of some right or privilege created by the [s]tate or by a rule of conduct imposed by the [s]tate or by a person for whom the [s]tate is responsible" and [2] "the party charged with the deprivation must be a person who may fairly be said to be a state actor"). Thus, federal case law concerning the speech rights of government employees is informative insofar as § 31-51q creates a statutory cause of action that serves to vitiate the state action requirement with respect to private sector employers. See *Tiernan* v.

Charleston Area Medical Center, 203 W. Va. 135, 147–48, 506 S.E.2d 578 (1998) (describing relationship of § 31-51q to first amendment state action requirement).

Thus, we next turn to the applicable constitutional principles governing the protected status of employee speech under the federal constitution as interpreted by the United States Supreme Court, wherein it is "well established that a . . . government may not compel individuals to relinquish their first amendment rights as a condition to obtaining government employment." *DiMartino* v. *Richens*, supra, 263 Conn. 665. In "*Pickering* v. *Board of Education*, [391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)] . . . the court . . . recognized that a government has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The court then set forth a general principle governing the constitutionality of government restrictions on the speech of its employees: in evaluating the constitutionality of government restrictions on an employee's speech, a court must arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [s]tate, as an employer, in promoting the efficiency of the public services it performs . . . . Id.

"In *Connick* v. *Myers*, supra, 461 U.S. 150, the court added a modification to the general balancing test promulgated in *Pickering*. Under *Connick*, if a government employee's speech cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary . . . to scrutinize the reasons for [his or] her discharge. . . . The court reasoned that if an employee's speech addresses matters of exclusively private concern, the government interest in latitude [to manage] their offices, without intrusive oversight by the judiciary . . . would outweigh the first amendment

interests in the speech, absent the most unusual circumstances . . . .

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of [the speech], as revealed by the whole record. . . . An employee's speech addresses a matter of public concern when the speech can be fairly considered as relating to any matter of political, social, or other concern to the community . . . ." (Citations omitted; internal quotation marks omitted.) *DiMartino* v. *Richens*, supra, 263 Conn. 666–67.

In *Garcetti* v. *Ceballos*, supra, 547 U.S. 413, which was decided subsequent to our decision in *DiMartino* articulating the tests in *Pickering* and *Connick*, the Supreme Court considered "whether the [f]irst [a]mendment protects a government employee from discipline based on speech made pursuant to the employee's official duties." *Garcetti* arose from retaliatory actions taken against a prosecutor who had antagonized colleagues and superiors when he criticized, both orally and in writing, the accuracy of a sheriff's affidavit in support of a search warrant—at one point recommending the dismissal of the criminal case. See id., 414–15. After noting the practical difficulties of applying the principles articulated in *Pickering* and *Connick*; see id., 418–19; the court then observed that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. . . . Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions." (Citation omitted; internal quotation marks omitted.) Id., 418–19; see also id., 422 (The court discussed "precedents . . . affording government employers sufficient

discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity."). The court emphasized that "[u]nderlying [its] cases has been the premise that while the [f]irst [a]mendment invests public employees with certain rights,[17] it does not empower them to 'constitutionalize the employee grievance.' " Id., 420, quoting *Connick* v. *Myers*, supra, 461 U.S. 154. Thus, the court concluded that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for [f]irst [a]mendment purposes, and the [c]onstitution does not insulate their communications from employer discipline."[18] *Garcetti* v. *Ceballos*, supra, 421; see also id., 421–22 (the court noted that "[r]estricting speech that owes its existence to a public employee's profes-

[17] The Supreme Court further noted that its "employee-speech jurisprudence protects, of course, the constitutional rights of public employees. Yet the [f]irst [a]mendment interests at stake extend beyond the individual speaker. The [c]ourt has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion." *Garcetti* v. *Ceballos*, supra, 547 U.S. 419.

[18] The court then noted that, with respect to the specific case before it, whether the prosecutor had "expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive [f]irst [a]mendment protection for expressions made at work." *Garcetti* v. *Ceballos*, supra, 547 U.S. 420. The court also noted that the fact that "[t]he memo concerned the subject matter of [the prosecutor's] employment . . . [is] too . . . nondispositive. The [f]irst [a]mendment protects some expressions related to the speaker's job." Id., 421. Rather, the court concluded that the "controlling factor . . . is that [the prosecutor's] expressions were made pursuant to his duties as a calendar deputy. . . . That consideration—the fact that [the prosecutor] spoke . . . fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes [his] case from those in which the [f]irst [a]mendment provides protection against discipline." (Citation omitted.) Id., 422; see also id., 421–22 (comparing prosecutor to plaintiff in *Pickering*, "whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day"). For further discussion of the case law exploring the scope of employees' duties for purposes of *Garcetti*, a matter that the Supreme Court did not need to address in detail in that decision, see *Garcetti* v. *Ceballos*, supra, 424–25, and part I C of this opinion.

sional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen," and that first amendment "does not invest [government employees] with a right to perform their jobs however they see fit . . . [but] simply reflects the exercise of employer control over what the employer itself has commissioned or created").

Consistent with our decision in the companion case also decided today; see *Perez-Dickson* v. *Bridgeport*, supra, 304 Conn. 483; we agree with the federal circuit courts of appeal that have considered the issue and unanimously have concluded that *Garcetti* adds a threshold layer of analysis, requiring courts to first determine whether an employee is speaking pursuant to his official duties before turning to the remainder of the first amendment analysis set forth in *Pickering* and *Connick*. See, e.g., *Leverington* v. *Colorado Springs*, 643 F.3d 719, 724 (10th Cir. 2011); *Evans-Marshall* v. *Board of Education*, 624 F.3d 332, 343 (6th Cir. 2010), cert. denied, U.S. , 131 S. Ct. 3068, 180 L. Ed. 2d 889 (2011); *Sousa* v. *Roque*, 578 F.3d 164, 170 (2d Cir. 2009); *Huppert* v. *Pittsburg*, 574 F.3d 696, 703 (9th Cir. 2009); *Winder* v. *Erste*, 566 F.3d 209, 214 (D.C. Cir. 2009); *Chaklos* v. *Stevens*, 560 F.3d 705, 712 (7th Cir. 2009); *Curran* v. *Cousins*, 509 F.3d 36, 44–45 (1st Cir. 2007); *Foraker* v. *Chaffinch*, 501 F.3d 231, 243 (3d Cir. 2007), abrogated on other grounds by *Duryea* v. *Guarnieri*, U.S. , 131 S. Ct. 2488, 180 L. Ed. 2d 408 (2011); *Davison* v. *Minneapolis*, 490 F.3d 648, 655 (8th Cir. 2007); *Vila* v. *Padron*, 484 F.3d 1334, 1339 (11th Cir. 2007); *Williams* v. *Dallas Independent School District*, 480 F.3d 689, 692 (5th Cir. 2007); see also *Andrew* v. *Clark*, 561 F.3d 261, 268 (4th Cir. 2009). But see *Brammer-Hoelter* v. *Twin Peaks Charter Academy*, 492 F.3d 1192, 1202 n.4 (10th Cir. 2007) (noting that *Garcetti* added new "first step" but that "[d]istrict courts remain free, however, to skip the *Garcetti* analysis and dismiss

or grant summary judgment on the basis of the traditional *Pickering* analysis when a claim clearly fails because the matters discussed are not matters of public concern"). Thus, we now turn to the principal issue in this appeal, namely, whether the rule in *Garcetti* applies to private employers as well as public employers, which is an appellate issue of first impression.

B

The defendant contends that precluding the application of *Garcetti* to private employers in an action brought pursuant to § 31-51q would render the statute "an absurdity" as applied to the health care industry because "[v]irtually every workplace dispute involving a health care worker would become a free speech case . . . with every employee serving as a roving ombudsman free to overrule her employer," thus creating a "lose/lose situation, no matter what the company does [wherein] someone will be unhappy with the result and could claim a free speech right to refuse to accept the employer's decision." In considering the merit of this argument, we begin with a review of the few cases that have considered this issue, beginning with a Connecticut federal district court decision, *Trusz* v. *UBS Realty Investors, LLC*, supra, United States District Court, Docket No. 3:09cv268 (JBA), wherein Judge Arterton concluded that the retaliation claim brought under § 31-51q by a real estate appraiser who had criticized his employer's improper property valuation practices was not subject to *Garcetti*. In so concluding, the court determined that "*Garcetti* . . . was expressly limited only to employees who work in the public sector; the [c]ourt [in *Garcetti*] explained that when the respondent in that case . . . 'went to work and performed the tasks he was paid to perform, [he] acted as a government employee,' and held that '[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the

employee might have enjoyed as a private citizen.' . . . The Supreme Court in *Garcetti* did not address any limitations on the exercise of free speech by private employees. Moreover, *Garcetti* has not been applied to [§] 31-51q." (Citation omitted.) Id., n.8. The court further rejected the defendants' attempt to extend the logic of *Garcetti* into the private sector under an argument that "[§] 31-51q and [42 U.S.C. §] 1983 are analogous, and thus, the parameters of their speech protections should be the same." Id. Following the Appellate Court's decision in *Cotto* v. *United Technologies Corp.*, 48 Conn. App. 618, 629, 711 A.2d 1180, aff'd, 251 Conn. 1, 738 A.2d 623 (1999), the District Court determined that the "obvious difference" between the statutes "is in the context of private employment, because [§] 31-51q covers private employers while [§] 1983 does not. . . . The Connecticut legislature intended to 'provide coverage for the exercise of constitutional rights at a private as well as at a public workplace.' . . . Although [f]irst [a]mendment protections extend to private employees in Connecticut, it does not follow that the rationale for public workplace limitations delineated in *Garcetti* should also apply to private workplaces. As a remedial statute, [§] 31-51q 'deserves a generous construction that implements its purpose' . . . and the *Garcetti* [c]ourt explicitly directed its holding only to public employees." (Citations omitted.) *Trusz* v. *UBS Realty Investors, LLC*, supra, n.8;[19] see also *Shand* v. *Martin*,

[19] We note that Connecticut Superior Court decisions on this point generally are consistent with the local federal District Court's decision in *Trusz* v. *UBS Realty Investors, LLC*, supra, United States District Court, Docket No. 3:09cv268 (JBA). See *Lehmann* v. *Connecticut Legal Rights Project, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-05-4018378-S (September 19, 2008) ("[a]t this time, the court is aware of no decision which extends *Garcetti* to private sector employees such as [the plaintiff, an attorney], and therefore believes that the decision does not apply to this situation"); *Dubowsky* v. *New Britain General Hospital*, Superior Court, judicial district of New Britain, Docket No. CV-04-4001320-S (August 18, 2006) (holding *Garcetti* inapplicable to case brought by maintenance technician against hospital because "speech at issue in the present case was not

United States District Court, Docket No. 2:07-cv-13100 (E.D. Mich. May 23, 2008) (declining to apply *Garcetti* to sports talk radio host employed by private radio station because Supreme Court "limited its express holding to the [f]irst [a]mendment rights of public employees" and "there was nothing about [the plaintiff's] commentary [criticizing the University of Michigan athletic director and the athletic department] that was central to his employment as a radio show host"); cf. *McClain* v. *Pfizer, Inc.*, United States District Court, Docket No. 3:06-cv-1795 (D. Conn. March 7, 2008) (denying employer's motion for summary judgment on claim under § 31-51q arising from scientist's continued complaints about way that employer handled waste created during stem cell research, but not citing or considering *Garcetti*).

We disagree with those cases holding *Garcetti* inapplicable in the private sector because of their incongruous effect of giving private sector employees greater workplace free speech rights than those afforded to their public sector counterparts—a result plainly not envisioned in the Supreme Court's decision, which recognized that "[g]overnment employers, *like private employers*, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." (Emphasis added.) *Garcetti* v. *Ceballos*, supra, 547 U.S. 418. Rather, we agree with the reasoning of another federal district court decision revealed by our independent research, namely, *German* v. *Fox*, United States District Court, Docket No. 5:06CV00119 (W.D. Va. April 26, 2007), aff'd, 267 Fed.

made by a public employee, such as the prosecutor/plaintiff in *Garcetti*, whose speech occurred in the course of the fulfillment of his official duties"). But see *St. Fleur* v. *R.C. Bigelow, Inc.*, Superior Court, judicial district of Fairfield, Docket No. CV-06-5004575-S (April 16, 2007) (assuming, without deciding, that *Garcetti* applies to actions brought against private employers pursuant to § 31-51q, and denying motion to strike).

Appx. 231 (4th Cir. 2008) (per curiam). In *German*, the plaintiff, who was director of public relations for a private, nonprofit organization that promotes travel in southwestern Virginia, claimed that his employment had been terminated in retaliation for numerous e-mails he had sent to various state officials and employees criticizing the location and facilities of a temporarily relocated welcome center. Id. Determining that state action requirements were satisfied under 42 U.S.C. § 1983 because the plaintiff had alleged that his termination had been coerced by a state official, the court nevertheless concluded that the plaintiff's statements were not protected by the first amendment. Id. The court rejected as "unpersuasive" the plaintiff's claim that "*Garcetti* is inapplicable to the present case, because it did not involve the termination of a private employee," stating that, "'[w]hile *Garcetti* specifically held that a public employee has no [f]irst [a]mendment protection for job-related 'official' speech . . . the case did not alter the general rule that private employees are generally entitled to less [f]irst [a]mendment protection than public employees. . . . To the contrary, in reaching its decision, the Supreme Court emphasized that '[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions.' . . . Thus, the court agrees with the defendants that *Garcetti* essentially affirms the right of every employer to control its employees' official job-related speech." (Citations omitted.) Id.; see also *Kentner* v. *Timothy R. Downey Ins., Inc.*, United States District Court, Docket No. 1:03-cv-435-RLY-WTL (S.D. Ind. September 18, 2006) (even if state action requirements were met, first amendment retaliation claims brought against insurance company that was third party administrator for public employee benefit plan failed under *Garcetti* because speech was made in plaintiff's capacity as defendant's corporate

counsel); *Logan* v. *Dept. of Corrections*, United States District Court, Docket No. 1:04-cv-0797-SEB-JPG (S.D. Ind. June 26, 2006) (even if state action requirements were met based on conspiracy between defendant private prison health care provider, and state department of correction officials, *Garcetti* barred claims arising from statements made by health care administrator in course of her employment by defendant).

Moreover, as the defendant notes, applying the rule in *Garcetti* to retaliation claims brought by employees against private employers under § 31-51q mitigates the potential constitutional risks highlighted by Justice Borden in his separate concurring and dissenting opinion in *Cotto* v. *United Technologies Corp.*, supra, 251 Conn. 20. Although the majority in *Cotto* declined to consider this point on the ground that the employer in that case did not argue it on appeal; see id., 7 n.5; Justice Borden observed that "interpreting the statute to apply to private workplace conduct could . . . bring two competing sets of expressive rights into conflict, and therefore places the state, in the form of the courts, on one side of that contest. Such a construction raises serious constitutional issues. It is well established that we construe statutes to avoid, rather than to confront, such issues. *Castagno* v. *Wholean*, 239 Conn. 336, 344, 684 A.2d 1181 (1996)."[20] *Cotto* v. *United Technologies Corp.*, supra,

[20] In so concluding, Justice Borden relied on *Redgrave* v. *Boston Symphony Orchestra*, 855 F.2d 888, 904 (1st Cir. 1988), cert. denied, 448 U.S. 1043, 109 S. Ct. 869, 102 L. Ed. 2d 993 (1989), wherein the United States Court of Appeals for the First Circuit, in applying the Massachusetts civil rights statute to a claim arising from the defendant's cancellation of the plaintiff's performance based on her expressed support for the Palestine Liberation Organization, stated: "[W]here the issue is the plaintiff's right to free speech, the analogy [to the federal statute prohibiting private racial discrimination] is strained. Such a right traditionally has content only in relation to state action—the state must be neutral as to all expression, and must not unreasonably restrain speech or expression. The right is to be free of state regulation, so that all private speech is formally on equal footing as a legal matter. In the traditional context, this means that various private actors can, without state interference, battle it out in the marketplace of ideas.

30; but see also id., 21 (*Borden*, *J.*, concurring and dissenting) (concluding that § 31-51q "does not reach expressive activity . . . that takes place on a private employer's property and involves only restrictive activity by his private, nongovernmental employer"). Applying *Garcetti* to federal constitutional claims brought under § 31-51q keeps courts from the constitutionally untenable task of, in essence, having to choose sides in a work-related viewpoint dispute between two private actors.[21] Thus, we conclude that the rule in *Gar-*

"In the present case, this application of the statute is made doubly unusual because, unlike in the typical discrimination case, there are free speech interests on the defendant's side of the balance as well. The plaintiff's statutory free speech right against the defendant is to be measured against the defendant's constitutional right against the state. If it were to enforce the statute, the state would be entering the marketplace of ideas in order to restrict speech that may have the effect of coercing other speech.

"We have grave concerns about the implication of such a conflict. If constitutional protections are effectively to protect private expression, they must do so, to some extent, even when the expression (or lack thereof) of one private person threatens to interfere with the expression of another. . . . The courts, noting that free speech guarantees protect citizens against governmental restraints upon expression, have hesitated to permit governments to referee disputes between speakers lest such mediation, even when it flies the banner of protecting speech, interfere with the very type of interest it seeks to protect." (Internal quotation marks omitted.) *Cotto* v. *United Technologies Corp.*, supra, 251 Conn. 31–32 (*Borden*, *J.*, concurring and dissenting).

[21] The plaintiff, supported by the amici curiae, contends that applying *Garcetti* is contrary to the language and purpose of § 31-51q, as expressed in its legislative history, which is described comprehensively in *Cotto* v. *United Technologies Corp.*, supra, 251 Conn. 9–13. Specifically, the plaintiff describes as "particularly relevant" the remedial purpose of § 31-51q, and the statement of Senator Howard T. Owens to the effect that § 31-51q was intended to protect "internal whistle-blowers," arguing that *Garcetti* "chills" such speech. See *Cotto* v. *United Technologies Corp.*, supra, 9–10, citing 26 S. Proc., Pt. 11, 1983 Sess., pp. 3597–3600. The plaintiff's reliance on this debate is, however, misplaced, given that § 31-51q, by its plain language, applies only "to constitutionally protected speech"; *Daley* v. *Aetna Life & Casualty Co.*, supra, 249 Conn. 777; and the legislative debate about the statute's enactment took place twenty-three years prior to the Supreme Court's decision in *Garcetti* v. *Ceballos*, supra, 547 U.S. 410; see also *Tiernan* v. *Charleston Area Medical Center*, supra, 203 W. Va. 147–48 (The court described § 31-51q as "the only legislative effort in the nation to extend

cetti v. *Ceballos*, supra, 547 U.S. 410, applies to claims under § 31-51q grounded in the first amendment that are brought against private employers, and must be considered as a threshold matter prior to undertaking the *Pickering/Connick* balancing test articulated in *DiMartino* v. *Richens*, supra, 263 Conn. 665.

C

The plaintiff claims, however, that the trial court's failure to instruct the jury on *Garcetti* or to apply that rule in the context of the defendant's posttrial motions was harmless error not requiring reversal because the statements at issue were not made in the course of his

the full gamut of constitutional principles to private employers," and as a response to the fact that, in the absence of statutory enactment, no "state court . . . has so applied state constitutional free speech principles to private employers. Likewise, we have discovered no federal court which applies the [f]irst [a]mendment [f]ree [s]peech [c]lause to private employers.").

Further, the text of § 31-51q does not by itself provide whistle-blower protections beyond those afforded by the first amendment, and our opinion in this case does not affect the whistle-blower protections afforded statutorily by General Statutes § 31-51m, which are not at issue in this case. See *Tiernan* v. *Charleston Area Medical Center*, supra, 203 W. Va. 148 and n.19 (The court emphasized that the conclusion that an "employee does not have a cause of action against a private sector employer who terminates the employee because of the exercise of the employee's state constitutional right of free speech" "does not invalidate nor impact upon the state's whistle-blower laws. . . . The whistle-blower laws present an independent statutory basis for liability should an employer retaliate against an employee for reporting wrongdoing or waste, as those terms are defined by statute." [Citation omitted.]); see also *Garcetti* v. *Ceballos*, supra, 547 U.S. 425–26 ("The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing. . . . Cases involving government attorneys implicate additional safeguards in the form of, for example, rules of conduct and constitutional obligations apart from the [f]irst [a]mendment. . . . These imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions." [Citations omitted.]); *Cotto* v. *United Technologies Corp.*, supra, 251 Conn. 13–15 (summarizing various statutes that "safeguard an employee from discharge for expressions of opinion at a private workplace").

duties as a pathologist for the defendant. Specifically, the plaintiff argues that the statements are not subject to *Garcetti* because "the protected speech in issue is not a mere refusal to perform the new test—it is statements regarding patient safety. Making these statements was not part of [the plaintiff's job]. His job was to sign out tests. . . . The limited additional work he did involving standardization of bladder cancer terminology is not to be confused with work on MicrocytePlus. . . . The development and launch of MicrocytePlus were never [the plaintiff's] responsibilities." Relying on, inter alia, *Green* v. *Board of County Commissioners*, 472 F.3d 794 (10th Cir. 2007), and *Weintraub* v. *Board of Education*, 593 F.3d 196 (2d Cir.), cert. denied, 562 U.S. 995, 131 S. Ct. 444, 178 L. Ed. 2d 344 (2010), the defendant argues, however, that this speech was directly related to, and therefore "part and parcel" of, the plaintiff's duties as a pathologist, and therefore was not constitutionally protected under *Garcetti*. The defendant emphasizes that the plaintiff's speech was simply a professional disagreement with his supervisors about the best way to process the reports, and therefore was not subject to constitutional protection. We agree with the defendant and conclude that the trial court should have granted the defendant's motion for judgment notwithstanding the verdict on the claim under § 31-51q.

In *Garcetti* v. *Ceballos*, supra, 547 U.S. 424, the Supreme Court noted that, because it was undisputed that the prosecutor in that case had written the memorandum at issue pursuant to "his employment duties," the court did not need "to articulate [therein] a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." In dicta, the court "[r]eject[ed], however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. . . . The proper inquiry is a practical one. Formal job

descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for [f]irst [a]mendment purposes." (Citation omitted.) Id., 424–25.

Subsequent circuit court decisions have, following this dicta, articulated tests for determining whether a statement is made pursuant to an employee's duties for purposes of *Garcetti*. In *Weintraub* v. *Board of Education*, supra, 593 F.3d 198, 201–202, the Second Circuit rejected a schoolteacher's claim that his filing of a union grievance against administrators who had failed to discipline students was protected under the first amendment and not subject to *Garcetti*, disagreeing with his contention that only conduct "required" by his employment duties or employer's policies was subject to *Garcetti*. Rather, the court noted that, under *Garcetti* v. *Ceballos*, supra, 547 U.S. 424, "[t]he objective inquiry into whether a public employee spoke 'pursuant to' his or her official duties is 'a practical one,' " and followed the decisions of "other circuit courts[22] [that] have con-

[22] The Second Circuit cited decisions from the United States Courts of Appeal for the Fifth, Seventh, Ninth, Tenth and Eleventh Circuits. See *Weintraub* v. *Board of Education*, supra, 593 F.3d 202–203, citing, e.g., *Renken* v. *Gregory*, 541 F.3d 769, 773 (7th Cir. 2008) (professor's complaints to university officials about difficulty in administering grant); *Brammer-Hoelter* v. *Twin Peaks Charter Academy*, supra, 492 F.3d 1204 (teachers' discussions about academy's expectations with respect to student behavior, curriculum and pedagogy); *Williams* v. *Dallas Independent School District*, supra, 480 F.3d 694 (athletic director's memoranda seeking information about disposition of funds collected at events); *Freitag* v. *Ayers*, 468 F.3d 528, 546 (9th Cir. 2006) (prison guard's internal complaints about supervisors' failure to respond to inmates' sexual harassment of her), cert. denied, 549 U.S. 1323, 127 S. Ct. 1918, 167 L. Ed. 2d 567 (2007); *Battle* v. *Board of Regents*, 468 F.3d 755, 761 (11th Cir. 2006) (university employee's report alleging improprieties in supervisor's handling and management of federal financial aid funds).

cluded that speech that government employers have not expressly required may still be 'pursuant to official duties,' so long as the speech is in furtherance of such duties." *Weintraub* v. *Board of Education*, supra, 202, quoting *Williams* v. *Dallas Independent School District*, supra, 480 F.3d 694. The speech need not be contemplated by the employee's formal job description; see *Weintraub* v. *Board of Education*, supra, 203; as the practical determination requires consideration of "the employee's level of responsibility and the context in which the statements were made." *Abcarian* v. *McDonald*, 617 F.3d 931, 937 (7th Cir. 2010), cert. denied, 562 U.S. 1288, 131 S. Ct. 1685, 179 L. Ed. 2d 617 (2011); cf. *Chaklos* v. *Stevens*, 560 F.3d 705, 712 (7th Cir. 2009) (*Garcetti* was not applicable to comments made by moonlighting public employee scientists who "signed their letter as employees of . . . an outside company. They did not complain to their own supervisors about matters relating to their jobs."). The key inquiry is "whether the speech activity stemmed from and [was of] the type . . . that [the employee] was paid to do," and "the ultimate question in determining whether speech falls within an employee's official duties is whether the employee speaks as a citizen or instead as a government employee." (Internal quotation marks omitted.) *Rohrbough* v. *University of Colorado*, 596 F.3d 741, 746 (10th Cir. 2010); see also *Jackler* v. *Byrne*, supra, 658 F.3d 237 ("[a]s a rule of thumb, activities required of the employee as part of his employment duties are not performed 'as a citizen' if they are not 'the kind of activity engaged in by citizens who do not work for the government' "). Put simply, on-the-job speech generally is "pursuant to" an employee's duties when it is "part-and-parcel of his concerns about his ability to properly execute his duties." (Internal quotation marks omitted.) *Weintraub* v. *Board of Education*, supra, 203.

It is clear that the dispute in the present case arose from the plaintiff's statements to Amberson about the safety of the Urovysion component of the new MicrocytePlus test and Amberson's proposal of a new set of diagnostic reporting terms, given the apparent lack of clinical research to support those proposals. The plaintiff also criticized the utility and clarity of Amberson's diagnostic language as applied to urine testing results, both to Amberson and other members of the defendant's staff, and refused to use it in connection with the tests that he did perform.[23] Thus, the plaintiff's con-

[23] We first note that during the period of time before the defendant terminated the plaintiff, he was a senior staff pathologist responsible for working on prostate biopsy cases in the morning and Microcyte cases in the afternoon. The plaintiff testified that, at that time, he worked on between 40 and 175 urine cases per day. After the launch of MicrocytePlus in February, 2005, the plaintiff was still responsible for and was expected to sign out urine cases using the new terminology.

After the launch of MicrocytePlus, however, the plaintiff stopped signing out certain urine tests, conceding that he "declined to perform the MicrocytePlus test . . . ." The plaintiff told Miller, the laboratory manager, that he could not use the diagnostic language because he "didn't understand where the information came from, how it was developed," and because "nobody [had] explained to [him] what it means, the codes, the terms, the new terms that [they] were using and [he] certainly couldn't sign out because it's approved by the [World Health Organization], their classification system." Following the plaintiff's express refusal to sign out a urine report, the plaintiff met with Amberson and Miller to discuss his objections to this new test. The plaintiff agreed to try and understand Amberson's position, but he continued to decline to use the new codes and, sometime thereafter, was removed from the urine services.

The job related nature of the speech was made clear at trial, when the plaintiff explained that he opposed the new diagnostic language because it "was not consistent with what's in the literature. I was opposed strongly because it—I had no research or foundation. I'm very opposed to changing laboratory results or data because it's going to confuse the patient—the physician. These are physician requested testing. So if I confuse the physician, the medical doctor, he's not going to get what he wants. He's not going to do what he should be doing and that—that's a safety issue. If then—which is even more problematic—he's or she's confused is to—ultimately . . . going to confuse that patient. Did I get the right tests or not. I got hematuria, but they worked me up for bladder cancer. . . . So number one, it can't confuse [the] physician with existing tests I'm trying to distribute. You can't do that." The plaintiff went on to explain that he expressed these

tention that making statements about patient safety is not part of his job description as a pathologist, and was not requested by the defendant, is inconsistent with the rule of *Weintraub* v. *Board of Education*, supra, 593 F.3d 203, under which speech is "pursuant to" an employee's duties when it is "part-and-parcel of his concerns about his ability to properly execute his duties." (Internal quotation marks omitted.) See also *Abcarian* v. *McDonald*, supra, 617 F.3d 937–38 (physician's complaints about risk management, fees and surgeons' abuse of prescription medications were "within the scope" of his responsibilities as chief of surgery at university hospitals); *Rohrbough* v. *University of Colorado*, supra, 596 F.3d 748, 751 (nurse transplant coordinator's communications about "alleged staffing crisis," substandard patient care and heart transplant misallocation were not protected speech under *Garcetti* because they occurred during work hours and were directed within chain of command); *Green* v. *Board of County Commissioners*, supra, 472 F.3d 800–801 (drug test lab technician's statements criticizing lack of confirmation testing and making arrangements for confirmation testing without consulting her supervisors "stemmed from and were the type of activities that she was paid to do" and therefore were not protected under *Garcetti*). Moreover, the contentious nature of the plaintiff's dispute with Amberson did not render his speech constitutionally protected under *Garcetti*, because when an employee has spoken in furtherance of his duties, "the fact that he persists in such speech after a supervisor has told him to stop does not, without

concerns to Amberson and "reminded him of our medical responsibilities. I reminded him that he is ultimately responsible for the patient safety. And public awareness is another thing. That he's responsible that what we do is safe and accurate."

more, transform his speech into protected speech."[24] *Anemone* v. *Metropolitan Transportation Authority*, 629 F.3d 97, 116 (2d Cir. 2011); id., 99, 116–17 (security director's statements outside chain of command to district attorney about corruption within transportation authority not protected by first amendment), citing *Thompson* v. *District of Columbia*, 530 F.3d 914, 918 (D.C. Cir. 2008) ("it would be incongruous to interpret *Garcetti*, a case concerned with allowing the government to control its employees within their jobs, as giving broader protections to disobedient employees who decide they know better than their bosses how to perform their duties"). Accordingly, we conclude that the plaintiff's federal constitutional claims were barred by *Garcetti*, and the trial court should have granted the

[24] Given our conclusion with respect to *Garcetti*, we need not address in detail the defendant's claims that, as a matter of law, the plaintiff's insubordinate and disruptive speech was not entitled to first amendment protection, other than to note that it is well established that "the [f]irst [a]mendment's shield does not extend to speech and conduct closely connected with insubordination that impedes an employee's performance of his duties or that interferes with the proper functioning of the workplace." (Internal quotation marks omitted.) *Hankard* v. *Avon*, 126 F.3d 418, 422 (2d Cir. 1997); see also, e.g., *Connick* v. *Myers*, supra, 461 U.S. 154 (termination prompted by insubordination that can fairly be predicted to "disrupt the office, undermine [supervisory] authority, and destroy close working relationships . . . [does] not offend the [f]irst [a]mendment"); *Domiano* v. *River Grove*, 904 F.2d 1142, 1143, 1146 (7th Cir. 1990) (fire chief's refusal to follow town ordinance "was insubordination justifying dismissal"). Indeed, an actual act of insubordination is not constitutionally required, as the United States Supreme Court does "not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick* v. *Myers*, supra, 152; see also *Domiano* v. *River Grove*, supra, 1146 (performing balancing test under *Pickering* v. *Board of Education*, supra, 391 U.S. 568, and determining that insubordinate actions following otherwise protected commentary were not protected speech). Thus, to the extent that the plaintiff's speech was simply a manifestation of his refusal to do his job in the manner desired by his employer; see footnote 23 of this opinion; it was unprotected under both the first amendment and the language of § 31-51q; see also part II of this opinion for further discussion of the plaintiff's first amendment claims under *Connick* and *Pickering*.

defendant's motion for judgment notwithstanding the verdict on the § 31-51q claim.[25]

II

Supported by the amicus curiae, the plaintiff argues, as an alternative ground for affirming the judgment of the trial court, that article first, § 4, of the Connecticut constitution[26] affords broader free speech rights than does the federal constitution and, as such, precludes the application of *Garcetti*. In support of this claim, both the plaintiff and the amicus provide comprehensive independent state constitutional analyses briefed in accordance with *State* v. *Geisler*, 222 Conn. 672, 610 A.2d 1225 (1992). The defendant contends, however, that we should not review this claim because, although it was mentioned in the plaintiff's statement of issues raised in the appeal pursuant to Practice Book § 63-4

[25] Citing *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 952 A.2d 1 (2008), the plaintiff also claims that the general verdict rule requires us to sustain the jury's verdict in this case because the defendant has not negated its basis on his separate claim of a state constitutional violation. The plaintiff contends that the general verdict on the constitutional claims under § 31-51q must be left undisturbed because the defendant failed to brief, in accordance with *State* v. *Geisler*, 222 Conn. 672, 610 A.2d 1225 (1992), a separate and independent claim that the state constitution does *not* provide greater protection than does the first amendment, thus rendering "a proper composition of the verdict . . . conceivable . . . ." *Chapman Lumber, Inc.* v. *Tager*, supra, 115 n.47. We disagree. Inasmuch as it is undisputed that the state constitutional issue was not litigated before the trial court, and the plaintiff's claim of entitlement to greater rights under our state constitution is being raised for the first time in this case as an alternative ground for affirmance pursuant to Practice Book § 63-4 (a), the plaintiff's general verdict argument is inconsistent with our long-standing approach to constitutional interpretation, namely, that in the absence of a specific claim of entitlement to greater protection under the state constitution, the court and the opposing parties are entitled to presume coextensive protections under both the federal and state constitutions. See *Perez-Dickson* v. *Bridgeport*, supra, 304 Conn. 498, citing *State* v. *Gore*, 288 Conn. 770, 776 n.7, 955 A.2d 1 (2008).

[26] See footnote 5 of this opinion. The amicus curiae also claim the applicability of article first, § 5, of the Connecticut constitution, which provides: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press."

(a), it was not raised before the trial court, wherein the plaintiff's complaint cited only the first amendment as a resource of relevant speech protection and the plaintiff had filed memoranda referring to the state and federal free speech rights protected by § 31-51q as "equivalent." We decline to reach the state constitutional issue raised in the plaintiff's alternative ground for affirmance because, even if it is properly before us notwithstanding our decision in the companion case, *Perez-Dickson* v. *Bridgeport*, supra, 304 Conn. 483,[27]

[27] In the companion case, *Perez-Dickson* v. *Bridgeport*, supra, 304 Conn. 486, 496–98, we concluded that the rule set forth in *Garcetti* v. *Ceballos*, supra, 547 U.S. 410, applied to bar an action under § 31-51q brought by the plaintiff, a public school principal who had claimed, inter alia, that her first amendment rights were violated when the defendants, school district administrators, retaliated against her for reporting to the department of children and families that teachers had physically abused two students. After reversing the trial court's decision to the contrary, we then declined to review the plaintiff's alternative ground for affirmance, which had claimed that *Garcetti* is not applicable under the state constitution. *Perez-Dickson* v. *Bridgeport*, supra, 498. Noting that the alternative ground for affirmance had not been raised before the trial court, we emphasized that both the trial court and the defendants were entitled to assume that the plaintiff's free speech rights under the state and federal constitutions were "coextensive . . . ." Id., citing *State* v. *Gore*, 288 Conn. 770, 776 n.7, 955 A.2d 1 (2008). Observing that the plaintiff had failed to file a statement of alternative grounds for affirmance under Practice Book § 63-4 (a) (1), we cited case law, including *New Haven* v. *Bonner*, 272 Conn. 489, 498, 863 A.2d 680 (2005), pursuant to which "[o]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . This rule applies equally to alternate grounds for affirmance." (Internal quotation marks omitted.) *Perez-Dickson* v. *Bridgeport*, supra, 498–99. "Such exceptional circumstances may occur where a new and unforeseen constitutional right has arisen between the time of trial and appeal or where the record supports a claim that a litigant has been deprived of a fundamental constitutional right and a fair trial. . . . An exception may also be made where consideration of the question is in the interest of public welfare or of justice between the parties." (Internal quotation marks omitted.) Id., 499–500. Finally, the court will not consider the alternative ground for affirmance unless the appellee establishes that doing so will not prejudice the appellant. Id., 500 n.23, 501.

Applying this standard in *Perez-Dickson*, we declined to review the proffered alternative ground for affirmance because: (1) the claim was not of constitutional magnitude because claims under § 31-51q concern statutory,

the plaintiff's speech would not have been protected under the pre-*Garcetti* standards that he would have us apply.

"Established wisdom counsels us to exercise self-restraint so as to eschew unnecessary determinations of constitutional questions." (Internal quotation marks omitted.) *State* v. *Fernandes*, 300 Conn. 104, 111–12, 12 A.3d 925, cert. denied, 563 U.S. 990, 131 S. Ct. 2469, 179 L. Ed. 2d 1213 (2011). This is particularly so given the state constitutional issue presented in this appeal, namely, whether *Garcetti* applies as a matter of state constitutional law[28]—a question of particular importance to governmental employers, none of whose interests are represented in this appeal, which involves only private actors. Thus, we review the record to determine first whether it is necessary to engage in adjudication under our state constitution.

With respect to the state constitutional issues presented, we begin by noting that neither the plaintiff nor

rather than constitutional rights, including when the defendant is a public employer; (2) there was no intervening change in the law and the plaintiff had received a fair trial; and (3) doing so conceivably could prejudice the defendants because they did not have the opportunity to consider the possibility of state constitutional claims in appraising the case for settlement purposes, and a conclusion determining a standard different than that established in *Garcetti* could potentially lead to the expense of a retrial, rather than a directed judgment. Id., 501.

We note that the alternative ground for affirmance raised in the present case is founded on a record similar to that of *Perez-Dickson*. First, the complaint in the present case did not raise the specter of a state constitutional claim in seeking relief under § 31-51q, a matter that conceivably could have influenced tactical determinations, including settlement valuation, at the trial level. Second, the present case, like *Perez-Dickson*, presents a purely statutory question under § 31-51q, especially insofar as it involves only private sector actors.

[28] We note that the plaintiff does not claim that our state constitution lacks a state action requirement for purposes of free speech infringement by employers—a claim that has met near universal rejection. See, e.g., *Edmondson* v. *Shearer Lumber Products*, 139 Idaho 172, 177, 75 P.3d 733 (2003), cert. denied, 540 U.S. 1184, 124 S. Ct. 1426, 158 L. Ed. 2d 88 (2004); *Tiernan* v. *Charleston Area Medical Center*, supra, 203 W. Va. 146–48.

the amicus; see footnote 16 of this opinion; argues for a state constitutional standard different from the state of the law pre-*Garcetti*, which required us to apply only the *Pickering/Connick* balancing test; see *DiMartino* v. *Richens*, supra, 263 Conn. 665; under which this case was tried.[29] Even assuming without deciding, however, that *Garcetti* does not apply and the *Pickering/Connick* balancing test remains the sole state constitutional standard for determining whether public employee speech is constitutionally protected, we conclude that the plaintiff's speech and actions in this case were not constitutionally protected under that rule. Accordingly, it is unnecessary for us to decide the question of whether *Garcetti* applies under the state constitution.

Specifically, we begin by noting that, although "[t]he *Pickering* analysis requires particularized balancing based on the unique facts presented in each case"; *Voigt* v. *Savell*, 70 F.3d 1552, 1560–61 (9th Cir. 1995), cert. denied, 517 U.S. 1209, 116 S. Ct. 1826, 134 L. Ed. 2d 931 (1996); whether the plaintiff's speech was constitutionally protected is a question of law subject to "independent" de novo review. See, e.g., *DiMartino* v. *Richens*, supra, 263 Conn. 664. Only if the evidence, when viewed in the light most favorable to the plaintiff, supported

[29] We note that, after the parties had completed their closing arguments at trial, the trial court instructed the jury on the elements of the plaintiff's claim under § 31-51q and provided the jury with a verdict form containing the following three interrogatories: "[1] Did [the plaintiff] prove, by a preponderance of the evidence, that he spoke out on matters of public concern, and that he was motivated to do so as a public citizen rather than for his own private interests? . . . If your answer to this question . . . is [y]es, proceed to the next question. [2] Did [the plaintiff] prove, by a preponderance of the evidence, that his speech was a substantial and motivating factor in [the defendant's] decision to terminate his employment? . . . If your answer to this question is . . . [y]es, proceed to the next question. [3] Did [the plaintiff] prove, by a preponderance of the evidence, that his speech did not substantially or materially interfere with his bona fide job performance or his working relationship with [the defendant]?" The jury subsequently answered all three questions in the affirmative.

the conclusion that the plaintiff's speech was entitled to such protection should the jury then have been permitted to resolve disputed factual issues, with findings subject to review only for clear error, under the other elements of § 31-51q, such as motivation, causation and whether his speech "substantially or materially interfere[d] with [his] bona fide job performance or the working relationship between the employee and [his] employer . . . ."[30] General Statutes § 31-51q; see, e.g., *Beckwith* v. *Daytona Beach Shores*, 58 F.3d 1554, 1560 (11th Cir. 1995).

As discussed previously, in "*Pickering* v. *Board of Education*, supra, 391 U.S. 568 . . . the court . . . recognized that a government has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The court then set forth a general principle governing the constitutionality of government restrictions on the speech of its employees: in evaluating the constitutionality of government restrictions on an employee's speech, a court must arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [s]tate, as an employer, in promoting the efficiency of the public services it performs . . . .

[30] "For an employee to prevail he or she must also demonstrate that the speech was the motivating factor causing the public employer to take adverse action. . . . Even when the government cannot show a compelling justification under *Pickering* for infringing on its employee's rights, the government still may succeed if it can demonstrate that it would have undertaken the same adverse employment action even absent the protected speech. . . . By the same token, when the government prevails in the balancing test, the employee may still carry the day if he can show that the employer's motivation for the discipline was retaliation for the speech itself, rather than for any resulting disruption." (Citations omitted.) *Melzer* v. *Board of Education*, 336 F.3d 185, 193 (2d Cir. 2003), cert. denied, 540 U.S. 1183, 124 S. Ct. 1424, 158 L. Ed. 2d 87 (2004).

"In *Connick* v. *Myers*, supra, 461 U.S. 150, the court added a modification to the general balancing test promulgated in *Pickering*. Under *Connick*, if a government employee's speech cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary . . . to scrutinize the reasons for [his or] her discharge. . . . The court reasoned that if an employee's speech addresses matters of exclusively private concern, the government interest in latitude [to manage] their offices, without intrusive oversight by the judiciary . . . would outweigh the first amendment interests in the speech, absent the most unusual circumstances . . . .

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of [the speech], as revealed by the whole record. . . . An employee's speech addresses a matter of public concern when the speech can be fairly considered as relating to any matter of political, social, or other concern to the community . . . ." (Citations omitted; internal quotation marks omitted.) *DiMartino* v. *Richens*, supra, 263 Conn. 666–67.

Although the plaintiff's speech concerning MicrocytePlus related to the patient safety implications of the new testing procedure, which is topically a matter of "public concern"; see, e.g., *Springer* v. *Henry*, 435 F.3d 268, 275 (3d Cir. 2006); we nevertheless perform the *Pickering* balancing test to determine "whether the employee's right to speak is outweighed by the . . . employer's interest in the effective operation of the workplace." *Dangler* v. *New York City Off Track Betting Corp.*, 193 F.3d 130, 139 (2d Cir. 1999). "In the *Pickering* balancing test, several factors are relevant, including: 'the extent of the disruption caused by the employee's speech on [1] workplace discipline, [2] harmony among co-workers, [3] working relationships, [4] the employee's job performance, [5] the responsibilities

of the employee within the agency and [6] whether the speech is made publicly or privately . . . .' " (Citations omitted.) Id. Further, "[i]n balancing protected [f]irst [a]mendment activity against governmental disruption we take into account the 'manner, time, and place' in which [the] speech or activity occurred . . . keeping in mind that the government is more likely to meet its burden when an employee's disruptive activity occurs in the workplace than when the equivalent activity occurs on an employee's own time, away from work." (Citation omitted.) *Melzer* v. *Board of Education*, 336 F.3d 185, 197 (2d Cir. 2003). "In each case, the ultimate question is whether the employee's right to speak is outweighed by the public employer's interest in the effective operation of the workplace." (Internal quotation marks omitted.) *Dangler* v. *New York City Off Track Betting Corp.*, supra, 140. Put differently, "[w]hen considering [the plaintiff's] remarks in the *Pickering* calculus, we are obliged to look at the ordinary or foreseeable effect of the conduct in controversy and to determine whether it would be reasonably calculated to create division or to have impaired discipline." (Internal quotation marks omitted.) *Domiano* v. *River Grove*, 904 F.2d 1142, 1145 (7th Cir. 1990).

Applying these principles to the facts of the present case, it is readily apparent that the plaintiff's speech in its entirety was extraordinarily disruptive to his employment with the defendant and, therefore, not constitutionally protected under the *Pickering* balancing test—regardless of whether *Garcetti* applies. First, all of the speech at issue took place in the work environment, rather than on the plaintiff's own time. Second, the speech greatly interfered with the plaintiff's job performance, as he acknowledges that, although he had been directed to sign out urine cases using the new diagnostic language, he refused to do so because of his concerns regarding the safety and reliability of the new test, per-

forming only prostate biopsy tests and those few urine tests that could be done without the new language. That the plaintiff stopped performing nearly 50 percent of his job responsibilities renders self-evident the disruption caused by his speech on the defendant's efficient office operation.

With respect to the effect of the plaintiff's speech on his relationships with superiors and coworkers, it also is undisputed that the plaintiff's objections to the new test and his refusal to sign out cases using the new diagnostic codes placed considerable strain on his relationship with Amberson, who was not only the plaintiff's supervisor, but also the individual responsible for developing and launching the new diagnostic codes. When Amberson told the plaintiff that he would be removed from the urine service if he persisted in his stance against using the new codes, the plaintiff chose to leave the urine service rather than use the codes. From that time until his termination, the plaintiff worked only half a day on prostate cases, but continued to receive his full salary, a fact that further exacerbated tensions between the plaintiff and Amberson. Finally, the plaintiff's actions stoked division within the defendant's workforce, as the plaintiff, a senior cytopathologist who previously had held high level executive positions with the defendant, was not reticent in expressing his concerns about MicrocytePlus to lower level employees such as Parise, a cytotechnologist, and Miller, a laboratory manager. See footnote 23 of this opinion.

Finally, because the plaintiff's speech in opposition to the defendant's new diagnostic codes was accompanied by his refusal to use those codes, it was insubordinate in nature, removing it from the ambit of

constitutional protection.[31] "[T]he [f]irst [a]mendment's shield does not extend to speech and conduct closely connected with insubordination that impedes an employee's performance of his duties or that interferes with the proper functioning of the workplace."[32] (Internal quotation marks omitted.) *Hankard* v. *Avon*, 126 F.3d 418, 422 (2d Cir. 1997); see also, e.g., *Connick* v. *Myers*, supra, 461 U.S. 154 (termination prompted by insubordination that can fairly be predicted to "disrupt the office, undermine [supervisory] authority, and destroy close working relationships . . . [does] not offend the [f]irst [a]mendment"); *Moran* v. *Washington*, 147 F.3d 839, 850 (9th Cir. 1998) ("[t]he [f]irst [a]mend-

[31] Notably, the plaintiff's sole response to the evidence adduced by the defendant that the plaintiff's refusal to sign out cases using the new diagnostic terminology substantially interfered with his job performance is that his refusal did not interfere with his employment because, as Amberson testified, the plaintiff was willing to sign out cases using *the old diagnostic terminology*. The plaintiff's position appears to be that the defendant was obligated to countenance his insubordination so long as he was willing to perform his job on terms that were agreeable to him alone, despite the defendant's "long-standing policy that all pathologists would use the same diagnostic terminology." Not surprisingly, the plaintiff can cite no authority for this proposition.

[32] A comparison of the present case with *Domiano* v. *River Grove*, supra, 904 F.2d 1142, is illustrative of the constitutionally unprotected nature of the plaintiff's speech. In *Domiano*, the plaintiff, a local fire chief, was removed from his job by the city after he made public statements expressing his intention to disobey a recently enacted ordinance relating to his department's ambulance transportation of patients. Id., 1144. The plaintiff believed that the new law was unsafe and expressed this view to his colleagues and the media. Id. Applying the *Pickering* test, the Court of Appeals for the Seventh Circuit concluded that, although the plaintiff's "concern for the safe transport of patients was commendable and his disagreement with the ordinance was certainly protected speech; his adamant refusal to follow the ordinance . . . was insubordination justifying dismissal." Id., 1146. In contrast to the present case, where the plaintiff stopped performing certain tests, there was no evidence in *Domiano* that the plaintiff's work had actually been impeded by his disagreement with the new ordinance, that is, that he had actually failed to transport patients in accordance with that ordinance. The court concluded nevertheless that the plaintiff's actions had "undermined department discipline and harmony and ignored [a lawful] directive of [the plaintiff's employer], thereby justifying his dismissal." Id.

ment simply does not constitutionalize insubordination"). Because application of the *Pickering* test, even without the *Garcetti* threshold analysis applicable under the first amendment to the United States constitution; see part I A of this opinion; reveals that the plaintiff's speech was not constitutionally protected and, therefore, not covered by § 31-51q, we simply need not, and do not, decide the issue of whether *Garcetti* applies under the state constitution.

The judgment is reversed and the case is remanded with direction to render judgment for the defendant on the claim under § 31-51q and for a new trial limited to the plaintiff's common-law wrongful termination claim.

In this opinion ROGERS, C. J., and ZARELLA, McLACHLAN, HARPER and VERTEFEUILLE, Js., concurred.

PALMER, J., concurring. Although I agree with the majority opinion generally, I wish to note my view that, for the reasons set forth in my concurring opinion in *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 531, 43 A.3d 69 (2012) (*Palmer, J.*, concurring), I do not believe that the considerations identified in footnote 27 of the majority opinion would be a sufficient basis for declining to review the claim of the plaintiff, G. Berry Schumann, under the state constitution.

ZARELLA, J., concurring. I agree with the majority opinion in all respects. I write separately because I find General Statutes § 31-51q inapplicable to any speech[1] made by a private sector employee in a private workplace, contrary to the reasoning in *Cotto* v. *United Tech-*

[1] In this concurring opinion, I refer to protected "speech" for conciseness, although I recognize that § 31-51q, and its related jurisprudence, is not limited to speech but, rather, extends to any protected activity under the first amendment to the United States constitution and article first, §§ 3, 4 and 14, of the constitution of Connecticut.

nologies Corp., 251 Conn. 1, 738 A.2d 623 (1999). Because the parties in the present case have not asked us to reconsider this precedent, however, I express my view with the hope that this court will have the opportunity to reconsider the precedent established by *Cotto* when it is presented in a future case.

In *Cotto*, a majority of the court held that § 31-51q extends to protect speech made in the workplace by private sector employees.[2] See id., 16; id., 41 (*Katz*, *J.*,

[2] *Cotto* comprises four separate opinions. The opinion announcing the judgment was authored by Justice Peters and joined by Justice Palmer. That opinion, referred to in this concurring opinion and relied on as precedent by the majority in the present case, held that § 31-51q extended its protections to the private sector workplace but upheld the dismissal of the plaintiff's complaint for failing to allege adequately that the plaintiff's speech was otherwise protected speech under the United States constitution or the Connecticut constitution. *Cotto* v. *United Technologies Corp.*, supra, 251 Conn. 16, 20. Three justices, in two separate opinions, concurred in the result that the majority reached but disagreed with the majority's conclusion that § 31-51q extended to the private workplace. Id., 20–21 (*Borden*, *J.*, with whom *Callahan*, *C. J.*, joined, concurring and dissenting); id., 53 (*McDonald*, *J.*, concurring). Lastly, in a concurring and dissenting opinion, Justice Katz, joined by Justice Berdon, agreed with Justice Peters that § 31-51q extended to the private workplace but reasoned instead that the plaintiff's complaint should survive a motion to strike. Id., 41 (*Katz*, *J.*, concurring and dissenting in part).

Thus, four members of the court—Justices Peters, Palmer, Katz and Berdon—concluded that § 31-51q provided a new right that protected employee speech in the private workplace. Id., 16; id., 41 (*Katz*, *J.*, concurring and dissenting in part). Three members of the court—Chief Justice Callahan and Justices Borden and McDonald—reasoned that § 31-51q only provided to private employees a cause of action against their employers if the employee engaged in what would otherwise be considered a constitutionally protected activity, and not that the statute extended to employee speech in the private workplace. Id., 21 (*Borden*, *J.*, concurring and dissenting); id., 53–54 (*McDonald*, *J.*, conurring). The principal point of disagreement between the two sides concerned the meaning of the statutory language "on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state . . . ." General Statutes § 31-51q. Neither Justice Peters nor Justice Katz analyzed the meaning of this phrase, and, instead, they appear to have treated it as shorthand for the legislature's intent to extend into the private workplace what previously were only protections against government interference with speech. Justice Borden rejected this

concurring and dissenting in part). This holding suffers from several analytical weaknesses and leads to problematic results. First, it fails to track the plain meaning of the statutory language, namely, the scope of the protection afforded under the statute. Second, by extending the protections of § 31-51q to the private workplace, *Cotto* forces the private sector employer to comply with conflicting statutory requirements, subjecting the employer to unavoidable liability under certain circumstances. Third, *Cotto* creates constitutional concerns by placing the employee's statutorily created free speech right in potential conflict with the employer's constitutional free speech right. Fourth, *Cotto*, and our related § 31-51q jurisprudence, requires courts to apply United States Supreme Court first amendment precedent regarding public employee speech to the private workplace; see part I of the majority opinion; raising serious conceptual problems.

I begin, as always, with the text of the statute.[3] General Statutes § 31-51q provides in relevant part: "Any employer, including the state and any instrumentality or political subdivision thereof, who subjects any employee to discipline or discharge *on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state*, provided such activity does not substan-

reasoning and interpreted the plain meaning of the statute as it appeared from the statutory text. He concluded that private sector employers cannot interfere with an employee's right to be free from government interference with speech but may interfere with the employee's unprotected speech in the private workplace. Id., 26–28 (*Borden*, *J.*, concurring and dissenting).

[3] General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

tially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages. . . ." (Emphasis added.)

First, in simpler terms, § 31-51q imposes potential liability on any employer, public or private.[4] Second, the statute protects any employee who has been disciplined or discharged in violation of the statute, and allows the employee to recover damages in that circumstance. Third, the statute provides an exception to employer liability if the activity for which the employee was disciplined or discharged interfered with the employee's job performance or employer relationship. The core of § 31-51q, however, is in the meaning of the language "the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state . . . ." As the following analysis makes clear, although this language extends certain protections to private employees, it does not create a new right of free speech in the private workplace.

[4] This is clear from its plain language, as Justice Peters' opinion in *Cotto* accurately notes. "Read literally, the language employed by the legislature unconditionally includes private employers as well as public employers within the terms of the statute. The phraseology of expressly 'including' governmental employers is not readily transmuted into the manifestation of an intention of impliedly 'excluding' private employers. The use of the word 'any' at the outset of the statutory language reenforces its natural reading to encompass rights at a private workplace. Had the legislature meant to confine the statute to the conduct of governmental actors . . . the legislature presumably could have done so directly, by adding 'public' or 'governmental' before 'employer.' To read the statute as limited to governmental actors requires either the deletion of words that the statute contains or the addition of a word that it does not contain. That is not a preferred method of statutory analysis." *Cotto* v. *United Technologies Corp.*, supra, 251 Conn. 7.

"The first amendment of the United States constitution, stated generally, guarantees freedom of religion, freedom of speech, freedom of the press, and the rights of peaceable assembly and to petition the government for a redress of grievances. It is axiomatic that the first amendment, which applies to the states through the due process clause of the fourteenth amendment, guarantees those freedoms and rights only against governmental, and not private, action. *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 837–38, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982). Freedom of speech traditionally has content only in relation to state action—the state must be neutral as to all expression, and must not unreasonably restrain speech or expression. The right is to be free of state regulation . . . . *Redgrave* v. *Boston Symphony Orchestra, Inc.*, [855 F.2d 888, 904 (1st Cir. 1988), cert. denied, 448 U.S. 1043, 109 S. Ct. 869, 102 L. Ed. 2d 993 (1989)]. A necessary corollary of that fundamental constitutional principle is that the first amendment does not guarantee the conduct contemplated by those freedoms and rights where that conduct takes place on private property and is not restricted or coerced by state action in any way. *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 567, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972); *Cologne* v. *Westfarms Associates*, 192 Conn. 48, 56–57, 469 A.2d 1201 (1984). It is also well established that §§ 3, 4 and 14, of article first of the state constitution, which, stated generally, guarantee freedom of religion, speech and the press, and the rights of peaceful assembly and to petition the government for redress of grievances, guarantee those freedoms and rights only against governmental, and not private, action. *Cologne* v. *Westfarms Associates*, supra, 61–63.

"Thus, when the legislature referred in § 31-51q to the exercise by the employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution

of the state, that language strongly suggests that it was intended to have the same meaning in the statute that it has in its well established constitutional jurisprudence. That meaning plainly is limited to restriction by governmental action." (Internal quotation marks omitted.) *Cotto* v. *United Technologies Corp.*, supra, 251 Conn. 26–28 (*Borden*, *J.*, concurring and dissenting).

In more concrete terms, § 31-51q protects only private employee speech to the extent that that speech is otherwise constitutionally protected. If a private sector employee were "engaged in expressive activity on public property, such as participating in a peaceful demonstration on a town green against the war with Iraq, or [if] he refused to comply with a *governmental* demand that he display the American flag, whether on public or his own private property . . . his employer could not, consistent with § 31-51q . . . [discipline] or [discharge] him based on that activity, because he would [be] exercising rights guaranteed to him by the first amendment and article first." (Citation omitted; emphasis in original.) Id., 26 n.3 (*Borden*, *J.*, concurring and dissenting). Thus, the plain meaning of the statute merely serves to protect private sector employees from job-related repercussions for the otherwise lawful exercise of their constitutional rights. Indeed, if the legislature had intended to create a new right of free speech in the private workplace, it is unlikely that it would have referred to those rights already "guaranteed" by the United States constitution and the Connecticut constitution.

This conclusion finds additional support in an examination of problematic consequences that follow from the contrary reasoning in *Cotto*. To begin, construing the statute in accordance with *Cotto* places a private sector employer in a bind. An employer that fails to remedy discriminatory harassment against an employee will be liable to that employee, but an employer that

disciplines an employee because of his speech may be liable to that employee under § 31-51q. The following two scenarios better illustrate this problem.

In the first scenario, a newly hired employee at a private company works alongside several coworkers who speak derogatory names and slurs based on sexual orientation. Although the speech is not targeted directly at the individual, it occurs in the employee's presence, behind his back while he is working. Immediately, the employee becomes frustrated, angered and humiliated by this harassment, but, because of his nonconfrontational nature, he does not initially approach his harassers or discuss it with his supervisors. After several years of enduring this, the employee complains to his supervisor, who tries to resolve the issue by arranging a meeting with the employee and his coworkers. The situation improves only temporarily. With the harassment continuing to escalate, the employee retains counsel, elevates his complaints to senior company management, and files a formal complaint with the commission on human rights and opportunities (commission). Responding to commission hearings, the company's management investigates the employee's complaints. Although the company fails to determine if harassment is occurring, it holds a workplace harassment seminar to settle the complaint. Yet the harassment persists. After several additional complaints, the employee brings an action against the company, alleging a hostile work environment because of the harassment on the basis of the individual's sexual orientation and the company's concomitant failure to remedy the environment after learning of it.

Under the relevant antidiscrimination statutes, General Statutes §§ 46a-60 and 46a-81c, and the foregoing facts, the employee might have a cognizable and compensable cause of action against the employer, provided that the employee could prove that a hostile work envi-

ronment existed and that the employer knew of this environment and failed to take reasonable steps to remediate it. Under these circumstances, the employee's claim, if proven, aligns with one of the purposes of the antidiscrimination statutes, namely, to reduce discrimination by holding employers liable for their failure to take reasonable steps to prevent harassment among coworkers.

Now, consider the second scenario, in which the same company from the preceding scenario hires another employee. Again, the new employee is the target of the same discriminatory harassment by coworkers, and, again, although the harassment does not affect the employee's job performance, he suffers emotionally. This time, however, when the employee complains to his supervisor, the company acts swiftly to remedy the situation, knowing that to do otherwise would subject it to potential liability. The company reasonably determines that the most appropriate remedy is a limited suspension without pay for the harassing coworkers. In response, the suspended coworkers bring an action against the company, alleging that their speech was protected speech under § 31-51q. The coworkers may indeed have a cognizable and compensable claim under *Cotto*. In these circumstances, the speech would not fall within the statute's exception. It did not interfere with the coworkers' job performance because they continued to perform their duties satisfactorily. Similarly, it did not affect the relationship between the coworkers and their employer because the harassment was not targeted at the employer, and the employer did not itself find the harassment offensive. If the coworkers adequately allege that their speech implicated a matter of public concern,[5] their claim would proceed to trial.

[5] As the majority aptly notes, "[a]n employee's speech addresses a matter of public concern when the speech can be fairly considered as relating to any matter of political, social, or other concern to the community . . . ." (Internal quotation marks omitted.) In the scenarios presented in this concurring opinion, then, the coworkers' speech might be considered a matter of

If the coworkers succeed in proving all elements of their claim, their employer would be liable for all damages, including punitive damages, caused by their suspension, as well as fees and costs. At a minimum, an employer in this situation would be unable to know how to act to avoid liability under the antidiscrimination statutes while also avoiding liability under § 31-51q.

In addition to placing the employer in an untenable position in situations arising between employees, the interpretation of § 31-51q in *Cotto* is constitutionally questionable. The creation of a statutory free speech right in the workplace puts the employee's speech in potential conflict with the employer's constitutional free speech right. "Both the United States Supreme Court and this court have held that a private property owner may exclude the public from entering the premises and expressing its views without the owner's consent. . . . If property owners may control the expression that occurs on their own land, it follows that they have the right, protected by the first amendment of the United States constitution, to express their own views on their property, free of government interference." (Citations omitted.) *Cotto* v. *United Technologies Corp.*, supra, 251 Conn. 53–54 (*McDonald*, *J.*, concurring); see also *Citizens United* v. *Federal Election Commission*, 558 U.S. 310, 342, 130 S. Ct. 876, 175 L. Ed.

public concern if it were grounded in a larger, ongoing discussion of the appropriateness of legalizing same sex marriage. See *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 174–227, 957 A.2d 407 (2008) (noting history and significance of society's acceptance of gay persons). Indeed, even if the coworkers' speech was not in the form of slurs at all, such a discussion might nevertheless create a hostile work environment for a gay employee.

More to the point, the determination of what constitutes a matter of public concern is one made by a trial judge and subject to de novo review on appeal. See *DiMartino* v. *Richens*, 263 Conn. 639, 661–63, 822 A.2d 205 (2003). This standard is too nebulous for a private sector employer to know whether, under the interpretation of § 31-51q in *Cotto*, an employee's workplace speech is protected.

2d 753 (2010) ("[t]he [United States Supreme] Court has recognized that [f]irst [a]mendment protection extends to corporations"). Thus, "interpreting the statute to apply to private workplace conduct could . . . bring two competing sets of expressive rights into conflict, and therefore places the state, in the form of the courts, on one side of that contest. Such a construction raises serious constitutional issues. It is well established that we construe statutes to avoid, rather than to confront, such issues."[6] *Cotto* v. *United Technologies Corp.*, supra, 30 (*Borden, J.*, concurring and dissenting); see also *Citizens United* v. *Federal Election Commission*, supra, 899 ("[T]he [g]overnment may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the [g]overnment deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The [g]overnment may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.").

[6] Justice Borden provides an example of this potential conflict: "Assume that a private employee, whose workstation is an isolated cubicle, displays in his cubicle in such a way that only he can see it, a swastika, or perhaps a bumper sticker favoring a Ku Klux Klan candidate for public office. Assume further that it does not interfere with his job performance, and that for all practical purposes he works alone, so that there is no viable claim that the display will interfere with his relationship with his employer. Nonetheless, his employer demands that he remove it, solely because the employer does not want that kind of expression anywhere on his property, and when the employee refuses, the employer discharges him. Applying the statute . . . [to the private workplace] could require us to force the employer to have his property bear an expression that he does not want, thereby favoring the employee's right of expression over that of the employer. At the least, this would raise serious constitutional concerns, and at the most, it would be a clear violation of the employer's right of expression." *Cotto* v. *United Technologies Corp.*, supra, 251 Conn. 32–33 n.6 (*Borden, J.*, concurring and dissenting).

Finally, serious conceptual complications arise by applying to the private workplace United States Supreme Court first amendment case law, which concerns solely public sector employees. In resolving first amendment issues between a public employer and its employee, the court balances the government's role as an employer with the first amendment prohibition on government interference with speech. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. . . . At the same time, the [c]ourt has recognized that a citizen who works for the government is nonetheless a citizen. The [f]irst [a]mendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." (Citation omitted.) *Garcetti* v. *Ceballos*, 547 U.S. 410, 418–19, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). This balancing involves additional considerations as well. "[T]he [f]irst [a]mendment interests at stake extend beyond the individual speaker. The [c]ourt has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion. . . . The [c]ourt's approach [has] acknowledged the necessity for informed, vibrant dialogue in a democratic society. It suggested, in addition, that widespread costs may arise when dialogue is repressed." (Citations omitted.) Id., 419.

Significantly, none of these considerations carries over in equal force, if at all, to a private sector employee's speech in the workplace. A nongovernmental employee does not have, under the United States constitution or the constitution of this state, a freestanding right to speak in the workplace. In other words, the

interpretation of § 31-51q in *Cotto* applies United States Supreme Court first amendment precedent to speech in the private workplace, even though this precedent is based on considerations inapplicable to private sector employers and employees.[7]

The foregoing illuminates the critical weaknesses in our § 31-51q jurisprudence that result from the holding in *Cotto*. Reexamining the statutory language reveals that *Cotto* extends § 31-51q beyond its intended purpose and scope. Accordingly, when presented with the appropriate case, I would overrule *Cotto* and instead follow Justice Borden's concurrence and dissent in *Cotto*. A proper reading of § 31-51q extends protections to private sector employees only from discipline or discharge as a result of the exercise of their constitutionally guaranteed free speech rights outside of the workplace. It does not protect a private sector employee's speech in the private workplace, regardless of whether that speech was a matter of public concern or made pursuant to his or her job duties.[8]

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[7] To the extent that a private sector employee's *workplace* speech may be relevant to matters of public concern—for example, internal corporate practices dangerous to community safety or the environment—this speech is already adequately protected by various statutes. See *Cotto* v. *United Technologies Corp.*, supra, 251 Conn. 13–15 (listing statutes). Moreover, under the interpretation of § 31-51q advanced by Justice Borden in his concurrence and dissent in *Cotto*, an employee also would be protected under that statute if, for example, he lobbied the legislature to adopt laws targeted at preventing dangerous corporate practices.

[8] If this reasoning were applied to the present case, I would conclude that the claims by the plaintiff, G. Berry Schumann, under § 31-51q must fail because his speech occurred at a private sector employer's workplace. Thus, his speech was not protected under our free speech jurisprudence and, therefore, was not within the scope of § 31-51q.

CITY OF NEW BRITAIN *v.* AFSCME, COUNCIL 4, LOCAL 1186
(SC 18671)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan and Harper, Js.

Syllabus

The plaintiff city appealed to the Appellate Court from the judgment of the trial court denying its application to vacate an arbitration award in favor of the defendant union. The plaintiff claimed that it had not agreed to arbitrate a dispute regarding pay upgrades for city employees classified as foremen that the union claimed were necessary as a result of certain pay raises that had been given to subordinate city employees supervised by the foremen. In 2003, the parties had negotiated a collective bargaining agreement that provided that the collective bargaining process would be the sole means for submitting requests for upgrades and that arbitration would be used to redress all upgrades that were not resolved in negotiations. In January, 2006, following the pay upgrades of the subordinate employees, the parties signed a memorandum of understanding memorializing the upgrades in which they agreed that arbitration would not be used to redress upgrades that were not resolved in negotiations. After it was discovered that as a result of the upgrades, the foremen were paid at a rate less than 5 percent above the rate paid to the subordinate employees in violation of the city's civil service rules, the foremen, as a class, filed an unfair labor practice complaint. The defendant thereafter entered into a settlement agreement with the plaintiff in which the parties agreed that the defendant could file a grievance regarding the foremen's pay issue, that the grievance could be filed directly to arbitration, and that either party could raise any claim or defense including the issue of arbitrability in exchange for the defendant's withdrawal of the unfair labor practice action. The matter was then submitted to the state board of mediation and arbitration, which issued an award concluding that the matter was arbitrable and determining that the civil service rule that required supervisors to be paid at least 5 percent more than the employees they supervised was applicable in this case because the parties had intended to incorporate the language of those rules into their collective bargaining agreement. The trial court then denied the plaintiff's application to vacate the arbitration award, concluding that it was not empowered to overturn the arbitrators' decisions, even if their interpretation of the parties' agreements was wrong. On the plaintiff's appeal, the Appellate Court concluded, pursuant to the test enunciated in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.* (363 U.S. 574), that it could not say with positive assurance, that the parties intended to exclude the issue of the foremen's upgrade from arbitration, and, accordingly, that court affirmed the trial court's judg-

ment. Following the granting of certification, the plaintiff appealed to this court, claiming that it never agreed to arbitrate the foremen's dispute. *Held* that the Appellate Court improperly affirmed the trial court's denial of the plaintiff's application to vacate the arbitration award, the plaintiff never having agreed to arbitrate the foremen's dispute: a review of the relevant documents revealed that the parties did not clearly and unmistakably indicate an intention to waive judicial review of the question of arbitrability and, therefore, the trial court had the primary authority to determine whether the foremen's pay differential dispute was arbitrable, as the collective bargaining agreement did not contain an agreement by the parties to submit the issue of arbitrability to the arbitrators' sole authority but, rather, gave the arbitrators the authority to resolve disputes regarding pay upgrades, the memorandum of understanding further restricted the scope of the arbitrators and did not indicate that the parties intended to submit the issue of arbitrability to the arbitrators for final determination, and the settlement agreement explicitly indicated only that the defendant could file a grievance in order to arbitrate the underlying question of the civil service rule violation; furthermore, this court's conclusion that the plaintiff never waived its right to judicial review by agreeing to have the issue of arbitrability decided solely by the arbitrators was supported by the plain language of the memorandum of understanding, which evidenced the parties' intention to avoid arbitration as to any disputes that were not the subject of negotiations memorialized in that agreement, and the settlement agreement, which clearly preserved the plaintiff's right to raise the defense of nonarbitrability.

(*Two justices dissenting in one opinion*)

Argued December 6, 2011—officially released May 1, 2012

Procedural History

Application to vacate an arbitration award, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Pittman*, *J.*; judgment denying the application, from which the plaintiff appealed to the Appellate Court, *Lavine*, *Beach* and *Alvord*, *Js.*, which affirmed the judgment of the trial court; thereafter, the plaintiff, on the granting of certification, appealed to this court. *Reversed; judgment directed.*

Mary C. Pokorski, associate city attorney, for the appellant (plaintiff).

J. William Gagne, Jr., with whom, on the brief, was *Kimberly A. Cuneo*, for the appellee (defendant).

Opinion

ROGERS, C. J. The issue in this certified appeal[1] is whether the plaintiff, the city of New Britain, agreed to arbitrate a dispute with certain city employees, classified as foremen, regarding an alleged violation of the city's civil service rules. The plaintiff appeals from the judgment of the Appellate Court affirming the trial court's denial of its application to vacate the arbitration award in favor of the defendant, AFSCME, Council 4, Local 1186.[2] *New Britain* v. *AFSCME, Council 4, Local 1186*, 121 Conn. App. 564, 570, 997 A.2d 560 (2010). The plaintiff claims that the Appellate Court improperly concluded that it agreed to arbitrate the foremen's dispute in a settlement agreement between the parties. Id. We agree with the plaintiff that it never agreed to arbitrate the matter and, accordingly, we reverse the judgment of the Appellate Court.

The following facts are undisputed. The plaintiff and the defendant negotiated a collective bargaining agreement, effective July 1, 2003 to June 30, 2008. Article XIV, § 11.5, of the collective bargaining agreement provides: "The collective bargaining process will be the sole means for submitting requests for upgrading and/or title changes." Article XIV, § 14.9 (F), of the collective bargaining agreement provides: "Effective [July 1, 2005] the parties agree that arbitration shall be used to redress all upgrades that have not been resolved in negotiations."

[1] We granted the plaintiff's petition for certification to appeal limited to the following issue: "Did the Appellate Court properly determine that the issue of the foremen's pay differential was arbitrable?" *New Britain* v. *AFSCME, Council 4, Local 1186*, 298 Conn. 903, 3 A.3d 69 (2010).

[2] The defendant appears in this case on behalf of the foremen whose pay is at issue.

In January, 2006, the plaintiff and the defendant negotiated a number of upgrades that increased the pay of certain city employees. *New Britain* v. *AFSCME, Council 4, Local 1186*, supra, 121 Conn. App. 566. The foremen did not receive upgrades during these negotiations, but the subordinate employees whom they supervise did.[3] To memorialize their agreement, the parties signed a memorandum of understanding, which provided in relevant part: "The parties hereby mutually agree that the list of proposed upgrades on the attached pages (dated [January 18, 2006]) would go into effect retroactive to January 1, 2006. Any omissions, adjustments, corrections, etc. can only be made with the signature of both parties. The parties agree that arbitration shall NOT be used to redress all upgrades that have not been resolved in the negotiations." (Internal quotation marks omitted.) Id., 567.

Thereafter, it was discovered that, as a result of these upgrades, the foremen were paid at a rate less than 5 percent above the rate paid to the subordinates, in violation of the rules of the city's civil service commission. The civil service rule at issue provides that persons classified as foremen shall be paid at least 5 percent more than the employees whom they supervise. The foremen, as a class, filed an unfair labor practice complaint regarding the violation of the civil service rules. The defendant, on behalf of the foremen, then entered into a settlement agreement with the plaintiff on September 8, 2006. That settlement agreement provided: "[The plaintiff] hereby agrees that [the defendant] may

[3] The list of employees receiving upgrades was attached to the parties' memorandum of understanding and is thus contained in the record. At oral argument in this court, the plaintiff explained that the foremen were not discussed during the negotiations leading up to the memorandum of understanding. The defendant acknowledges this fact in its brief as well, as it provides, "[t]he memorandum [of understanding] does not apply to the foremen's pay issue *as they were not a part of the negotiations that resulted in the memorandum*." (Emphasis added.)

file a grievance regarding the issue of [f]oremen being paid less than 5 [percent] more than their subordinates. This grievance shall be filed directly to arbitration. [The plaintiff] and [the defendant] further agree that either party may raise any claim or defense they could otherwise have made had they filed at step [one], including the issue of arbitrability but not including timeliness. In consideration of the above, [the defendant] agrees to the withdrawal and closing of [the unfair labor practice action]."

The matter was thereafter submitted to arbitration in two phases. In the first submission to the state board of mediation and arbitration (board), the plaintiff argued that the matter was not arbitrable at all. *New Britain* v. *AFSCME, Council 4, Local 1186*, supra, 121 Conn. App. 566–67. In support of its claim, the plaintiff referred the arbitrators to the arbitration provision in the memorandum of understanding. Id. Specifically, the plaintiff claimed that it never agreed to arbitration because the memorandum of understanding specifically prohibited arbitration regarding upgrades not resolved therein, and the settlement agreement specifically reserved the plaintiff's right to raise the defense of arbitrability.

The board issued an award concluding that the matter was arbitrable. While recognizing that no foremen positions were at issue in the upgrades that had been negotiated for subordinates, the board concluded that it was "very questionable whether the prohibition against the use of arbitration [in the memorandum of understanding] was meant to concern the unforeseen consequences of an automatic upgrade to the foremen through reliance on the [c]ivil [s]ervice [r]ules." The board also concluded, in light of the settlement agreement, that it would be unreasonable to conclude that the matter was not arbitrable.

The parties then moved to the second phase of the arbitration. After hearing evidence, the board determined that the civil service rule mandating a 5 percent pay differential for supervisors applied in the present case. *New Britain* v. *AFSCME, Council 4, Local 1186*, supra, 121 Conn. App. 567–68. The board further determined that the civil service rule did not conflict with the provisions of the parties' collective bargaining agreement. Id., 568. The board thus concluded in the defendant's favor that the parties intended to incorporate the language of the civil service rules into their collective bargaining agreement, and that the two provisions should therefore be read and applied in concert. Id.

On February 29, 2008, the plaintiff filed an application to vacate the arbitration award pursuant to General Statutes § 52-418 (a) (4),[4] claiming that the arbitrators improperly concluded that the dispute was subject to arbitration and, on the merits, that the foremen were entitled to be paid a rate 5 percent above the employees they supervise. The trial court denied the application, concluding that it was not empowered to overturn the arbitrators' decisions, even if their interpretation of the parties' agreements was wrong.

The plaintiff appealed to the Appellate Court, which, applying the positive assurance test,[5] concluded that

[4] General Statutes § 52-418 (a) provides in relevant part: "Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides . . . shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

[5] As set forth in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960), judicial

"eight months after agreeing that arbitration should not be used to redress the upgrades, [the plaintiff] agreed to arbitrate the foremen's grievance as part of its settlement agreement with the defendant." Id., 570. Thus, because the Appellate Court concluded that it could not state "with positive assurance that the parties intended to exclude the issue from arbitration," it affirmed the judgment of the trial court. Id. This appeal followed.

The plaintiff claims that the Appellate Court improperly affirmed the trial court's denial of its motion to vacate. First, the plaintiff claims that collective bargaining negotiations were a condition precedent to arbitration under the collective bargaining agreement and the memorandum of understanding, and that the mandatory negotiations did not take place. Second, the plaintiff asserts that the memorandum of understanding clearly evidenced the parties' intent not to arbitrate this dispute and the settlement agreement merely allowed the defendant to file a grievance in arbitration while specifically reserving the plaintiff's right to raise nonarbitrability as a defense. The defendant, on the other hand, claims that the condition precedent was satisfied when the parties negotiated the upgrades set forth in the memorandum of understanding, and, regardless, the plaintiff subsequently agreed to arbitrate the pay differential dispute in the subsequent settlement agreement.[6] For the reasons we set forth in the following

review under the positive assurance test must be "strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

[6] Significantly, the defendant does not claim that it had no obligation to satisfy the condition precedent contained in the collective bargaining agreement. Indeed, it could not so claim, in light of the arbitrators' determination, during phase two, that the collective bargaining agreement and the civil service rules do not conflict and therefore both apply in the present

discussion, we agree with the plaintiff that the foremen's dispute was not arbitrable and, accordingly, reverse the judgment of the Appellate Court.

We first determine our standard of review. In doing so, we note that both parties assert in their briefs that our standard of review in this case is limited. Indeed, when reviewing a denial of a motion to vacate under § 52-418 (a) (4), we generally reverse a decision upholding the denial only if we conclude that the arbitrator acted in manifest disregard of the law.[7] Because, however, the plaintiff appeals from the arbitrators' determination that the dispute was arbitrable, rather than from the award itself, we must examine more closely the question of our standard of review.

"[A party] can be compelled to arbitrate a dispute only if, to the extent that, and in the manner which, [it] has agreed so to do. . . . Because arbitration is based on a contractual relationship, a party who has not consented cannot be forced to arbitrate a dispute." (Citation omitted; internal quotation marks omitted.) *MBNA America Bank, N.A.* v. *Boata*, 283 Conn. 381, 386, 926

case. Consistent with this conclusion, the defendant specifically indicated that, "[p]ursuant to the parties' *collective bargaining agreement*, [the alleged violation of the civil service rule] led to the filing of . . . a prohibited practice complaint [by the foremen]." (Emphasis added.) The defendant further explains that, in accordance with the settlement agreement, "[p]ursuant to [a]rticle XIV of the parties' *collective bargaining agreement*, a grievance [in arbitration] was filed." (Emphasis added.)

[7] Our standard of review of motions to vacate an arbitration award under § 52-418 (a) (4) is well established: "[A]n award that manifests an egregious or patently irrational application of the law is an award that should be set aside pursuant to § 52-418 (a) (4) because the arbitrator has exceeded [his] powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. We emphasize, however, that the manifest disregard of the law ground for vacating an arbitration award is narrow and should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles." (Internal quotation marks omitted.) *McCann* v. *Dept. of Environmental Protection*, 288 Conn. 203, 220, 952 A.2d 43 (2008).

A.2d 1035 (2007). We recently noted that three distinct issues arise in cases such as the present one: (1) whether the parties agreed to arbitrate the underlying merits of the case, i.e., whether the matter is arbitrable; (2) who has the primary authority to decide that question—the arbitrator or the court; and (3) if the court has the primary authority to decide that question, whether the parties engaged in conduct that precludes judicial review of the arbitrator's decision on that matter.[8] *Bacon Construction Co.* v. *Dept. of Public Works*, 294 Conn. 695, 709–10, 987 A.2d 348 (2010).

In accordance with these principles, in determining our standard of review, we first examine who had the primary authority to resolve the question of arbitrability in the present case: the court or the arbitrators. It is well established that, absent the parties' contrary intent, it is the court that has the primary authority to determine whether a particular dispute is arbitrable, not the arbitrators. Id., 714. Thus, courts generally review challenges to an arbitrator's determination of arbitrability de novo.[9] Id.; see also *White* v. *Kampner*, 229 Conn. 465, 472, 641 A.2d 1381 (1994).

Because, however, "[a]rbitration is a creature of contract"; (internal quotation marks omitted) *State* v. *Philip Morris, Inc.*, 289 Conn. 633, 642, 959 A.2d 997 (2008); parties may agree to arbitrate the question of

[8] Although these three inquiries are inextricably linked, we note that most cases like the present one require appellate courts to examine them out of order. Appellate courts must first examine the second and third inquiries in order to determine whether they should review the question of arbitrability de novo. Only after determining the appropriate standard of review should an appellate court turn to the first question of whether the parties intended to arbitrate the particular dispute at issue.

[9] Unlike the question of whether the foremen's dispute is arbitrable, this preliminary inquiry into whether the parties submitted that question for the arbitrator's sole determination is one we review de novo. In reviewing this question, we note that our preliminary inquiry into the standard of review is not dictated by the positive assurance test. See footnote 5 of this opinion.

arbitrability. *White* v. *Kampner*, supra, 229 Conn. 472. "It is well established . . . that parties may agree to have questions concerning the arbitrability of their disputes decided by a separate arbitrator. . . . In apportioning, between the court and the arbitrators, the responsibility for determining which disputes are arbitrable, the language of the contract controls . . . ." *Wallingford* v. *Wallingford Police Union Local 1570, Council 15, AFSCME*, 45 Conn. App. 432, 436, 696 A.2d 1030 (1997). When deciding whether a party has agreed that an arbitrator should have the sole authority to decide arbitrability, we must "not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). "In this manner the law treats silence or ambiguity about the question who (primarily) should decide arbitrability differently from the way it treats silence or ambiguity about the question whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement . . . ." (Emphasis in original; internal quotation marks omitted.) Id., 944–45. In this state, the intention to have arbitrability solely determined by an arbitrator "can be manifested by an express provision or through the use of broad terms to describe the scope of arbitration, such as all questions in dispute and all claims arising out of the contract or any dispute that cannot be adjudicated." (Internal quotation marks omitted.) *White* v. *Kampner*, supra, 229 Conn. 472.

We review the documents at issue in the present case in chronological order. First, the arbitration provision in the collective bargaining agreement clearly did not contain an agreement by the parties to submit the issue of arbitrability to the arbitrator's sole authority. Likewise, that provision did not contain broad terms from which we may infer such intent. Rather, by providing

in article XIV, § 14.9 (F), of the collective bargaining agreement that "arbitration shall be used to redress all *upgrades* that have not been resolved in negotiations"; (emphasis added); the arbitration provision limits the submission to the arbitrator to the merits of the dispute. According to this provision, the arbitrator is given the authority to resolve disputes regarding pay upgrades, but not the overall question of arbitrability. The memorandum of understanding further restricted the scope of the arbitrator and indicated in no way that the parties intended to submit the question of arbitrability to the arbitrator for final determination. Finally, the settlement agreement explicitly indicated only that the defendant could file a grievance in order to arbitrate the underlying question of the civil service rule violation.[10] For all of these reasons, we conclude that the trial court had the primary authority in the present case to determine whether the foremen's pay differential dispute was arbitrable.[11]

[10] The dissent places much significance upon two statements in the settlement agreement, namely, that the "grievance shall be filed directly [in] arbitration," and that "either party may raise any claim or defense . . . including the issue of arbitrability . . . ." We disagree that these statements clearly and unmistakably demonstrate an intent by the parties to submit the question of arbitrability to the arbitrator's sole determination. The former evidences the parties' intent to submit the underlying dispute regarding the foremen's pay differential to the arbitrator solely in the event that the dispute is deemed arbitrable in the first place. The latter, meanwhile, does not in any way indicate who has the authority to decide the question of arbitrability, but merely preserves the parties' ability to raise that issue as a defense.

[11] In response to the dissent's statement that "the majority determines that the parties did not authorize the arbitration panel to decide whether the dispute was arbitrable," we clarify that, although arbitrability was one of the two issues that the parties submitted to the arbitrators, that submission did not give the arbitrators the authority to decide that issue conclusively without judicial review of its determination on appeal. "We have long recognized two procedural routes by which a party may preserve the issue of the arbitrability of a particular dispute for judicial determination. . . . A party initially may refuse to submit to an arbitration and instead compel a judicial determination of the issue of arbitrability. . . . Alternatively, the issue of arbitrability may properly be left to an arbitrator or arbitration panel for a determination . . . . In the latter situation, a court may properly

This conclusion does not end the inquiry into our appellate standard of review. Having determined that the parties did not clearly and unmistakably indicate in any of the three documents an intention to waive judicial review of the question of arbitrability, we next turn to the third inquiry set forth in *Bacon Construction Co.*, which consists of two parts: preservation and waiver. *Bacon Construction Co.* v. *Dept. of Public Works*, supra, 294 Conn. 710. A party preserves its right to judicial review of an arbitrator's conclusion regarding arbitrability by raising that issue before the arbitrator. Id. "A party who [makes] such a challenge nonetheless may waive its right to judicial review by agreeing to vest the arbitrator with authority to decide" whether the matter is arbitrable. Id. In order to obtain judicial review of the arbitrator's arbitrability determination, therefore, a party must both preserve its claim and refrain from activities that would, in essence, estop that party from asserting its claim at a later time.

entertain a challenge to an award alleging disregard of the limits of the parties' agreement with respect to arbitration." (Citations omitted; internal quotation marks omitted.) *MBNA America Bank, N.A.* v. *Boata*, supra, 283 Conn. 392. In other words, a claim that a dispute is not subject to arbitration may be submitted to the arbitrator without waiving the claim that the court has the primary authority to determine arbitrability. We thus conclude that the parties' submission of the question of arbitrability to the arbitrators is not dispositive in the present case.

Finally, the dissent contends that the plaintiff never claimed that the board was not authorized to decide finally the question of arbitrability and, indeed, that the plaintiff has made judicial admissions that the board had such authority. With respect to the plaintiff's purported admissions, as we have indicated, submission of the question of arbitrability to the arbitrator in the first instance does not constitute an admission that the arbitrator has the authority to decide that issue finally, without de novo review by the court. With respect to the dissent's contention that the plaintiff has *never* raised the claim that the issue of arbitrability was to be decided by the trial court rather than the arbitrator, we note that, as the dissent recognizes, the plaintiff did claim on appeal that this court should apply the positive assurance test, which is applicable only when the court has the primary authority to decide arbitrability. Accordingly, we conclude that the claim is fairly before us.

The plaintiff asserts two theories in support of its appeal. First, it claims that the collective bargaining agreement and the memorandum of understanding require negotiations as a condition precedent to arbitration. Second, it claims that the memorandum of understanding evidences the parties' intent not to arbitrate the foremen's dispute, and that the settlement agreement did not evidence a contrary intent. Because the record reveals that the plaintiff did not raise its first claim before the arbitrators, we conclude that the plaintiff did not preserve this claim. With respect to its second claim, however, the plaintiff argued before the arbitrators that the memorandum of understanding clearly evidenced the parties' intent not to arbitrate. Having preserved one of its claims that it never agreed to arbitrate, the plaintiff is therefore entitled to de novo judicial review of that claim so long as it did not engage in behavior precluding such review.

As we have indicated, the plaintiff never waived its right to judicial review by agreeing to have the issue of arbitrability decided solely by the arbitrators. In *Bacon Construction Co.* v. *Dept. of Public Works*, supra, 294 Conn. 710, we concluded that the defendant waived its right to judicial review by agreeing that the arbitrator would be the final authority on the question of arbitrability. Specifically, in its answering statement to the arbitrator, the defendant in that case had stated: "The actual issues in this proceeding are [the plaintiff's] delay and disruption claims, and [the defendant's] special defenses that: [the plaintiff's] claims are barred by the doctrine of sovereign immunity [and thus are not arbitrable] . . . . *Those issues may be heard and fully and finally determined by this arbitration.*" (Emphasis in original; internal quotation marks omitted.) Id., 711. This unequivocal declaration by the defendant that the arbitrator would determine arbitrability " 'fully and finally,' " demonstrated that "the defendant intended to

be bound by the arbitrator's decision and constitute[d] a waiver of judicial review of the issue of arbitrability." Id. Contrastingly, as we noted previously, the settlement agreement in the present case did not evidence any intention by the parties to submit the question of arbitrability to the arbitrators for their full and final decision on the matter. Finding no indication that the parties intended to contract out of judicial review in the present case, we review the plaintiff's claim de novo in accordance with the principle that courts have plenary review over the question of arbitrability absent a showing of the parties' contrary intent.

Turning to the merits of the appeal, the plaintiff claims that it never agreed to arbitrate the foremen's dispute. Specifically, the plaintiff contends that the memorandum of understanding evidenced its intention to avoid arbitration, and that the settlement agreement preserved its right to raise the defense of nonarbitrability. The defendant responds that, regardless of the memorandum of understanding, the settlement agreement contains the plaintiff's agreement to arbitrate the foremen's dispute. We agree with the plaintiff.

"[A] person can be compelled to arbitrate a dispute only if, to the extent that, and in the manner which, he has agreed so to do. . . . Because arbitration is based on a contractual relationship, a party who has not consented cannot be forced to arbitrate a dispute." (Citation omitted; internal quotation marks omitted.) *MBNA America Bank, N.A.* v. *Boata*, supra, 283 Conn. 386. Nevertheless, "[b]ecause we favor arbitration, we will defer to this alternative method of dispute resolution if the contractual arbitration provisions fall within the grey area of arbitrability, employing the positive assurance test as set out in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960). Under this test, judicial inquiry . . . must be strictly confined to the

question whether the reluctant party did agree to arbitrate the grievance . . . . An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." (Internal quotation marks omitted.) *Board of Education* v. *Wallingford Education Assn.*, 271 Conn. 634, 639, 858 A.2d 762 (2004).

In analyzing the plaintiff's claims, the Appellate Court concluded that, "[a]lthough the parties originally stated that arbitration would not be used to redress the issue of upgrades, they later signed . . . [the] settlement agreement . . . ." *New Britain* v. *AFSCME, Council 4, Local 1186*, supra, 121 Conn. App. 570. On the basis of its reading of the settlement agreement, the Appellate Court concluded that, "eight months after agreeing that arbitration should not be used to redress the upgrades, [the plaintiff] agreed to arbitrate the foremen's grievance . . . ." Id. The Appellate Court thus concluded that it could not say "with positive assurance that the parties intended to exclude the issue from arbitration." Id. Upon review of the contested documents, we agree that the parties agreed initially in the memorandum of understanding not to arbitrate the foremen's dispute, but we disagree that the settlement agreement prevents us from concluding with positive assurance that the plaintiff never agreed to arbitration.

Specifically, we note that the memorandum of understanding contained an agreement between the parties that "arbitration [would] NOT be used to redress all upgrades that ha[d] not been resolved in the negotiations." The parties thus explicitly agreed not to arbitrate any disputes involving upgrades that were not the subject of the negotiations memorialized in the memorandum of understanding. Because the foremen were not upgraded in these negotiations, their pay differential

dispute falls within the class of disputes that the parties specifically agreed not to arbitrate.

Subsequently, in the settlement agreement the parties agreed that "the defendant may file a grievance regarding the issue of [f]oremen being paid less than 5 [percent] more than their subordinates." The agreement further provides that the grievance could be filed directly at arbitration, and that "either party may raise any claim or defense they could have made had they filed at step [one], including the issue of arbitrability but not including timeliness." Although the first clause in this settlement agreement indicated that the parties agreed that the defendant could file a grievance directly in arbitration, it clearly provides that the plaintiff did not concede the issue of arbitrability. Furthermore, reading the settlement agreement in its entirety, the second clause actually indicates that the plaintiff intended to preserve the defense of nonarbitrability, presumably because it planned to continue asserting that claim. We thus conclude that the settlement agreement, by its plain language, did not alter the parties' agreement to avoid arbitration that was contained in the memorandum of understanding, but, rather, preserved the plaintiff's right to assert its defense of nonarbitrability. Because the plaintiff did not agree to arbitrate the foremen's dispute, it could not be compelled to submit to arbitration.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to the trial court with direction to grant the plaintiff's application to vacate the arbitration award.

In this opinion NORCOTT, ZARELLA and McLACHLAN, Js., concurred.

HARPER, J., with whom, PALMER, J., joins, dissenting. In considering whether the plaintiff, the city of New Britain, was entitled to have the arbitration award in favor of the defendant, AFSCME, Council 4, Local 1186, vacated on the ground that the issue of foremen pay upgrades was not arbitrable, the majority applies de novo review, notwithstanding the fact that the parties unmistakably agreed to empower the arbitration panel (arbitrators) to resolve their disagreement as to whether the defendant's grievance is arbitrable. The parties signed a document clearly and unmistakably manifesting this intention, and the plaintiff has never suggested thereafter that the arbitrators were not authorized to resolve their dispute over arbitrability. Instead of construing these essential facts in light of their self-evident meaning, the majority determines that the parties did not authorize the arbitrators to decide whether the dispute was arbitrable because the document does not contain certain talismanic language of authorization. Reviewing the arbitration question de novo, the majority then concludes that the Appellate Court improperly determined that the issue of foremen pay upgrades is arbitrable, thereby failing to give legal effect to the parties' conduct or to afford the arbitrators' decision the level of judicial deference required by our case law and General Statutes § 52-418.[1] Because, under

[1] General Statutes § 52-418 (a) provides: "Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the

the proper standard of review, it cannot be said that the arbitrators "exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made"; General Statutes § 52-418 (a) (4); I must respectfully dissent.

I

The plaintiff seeks to vacate the arbitration award in favor of the defendant on the ground that the dispute between the parties, namely, whether the plaintiff violated the collective bargaining agreement by failing to upgrade the position of foremen to conform with civil service rules requiring foremen to be paid at least 5 percent more than their subordinates, is not arbitrable.[2] I agree with the majority regarding the basic legal principles that are implicated when such a dispute arises. Where the majority and I depart is in the application of those principles to the clear facts in the present case. I briefly summarize those principles and then turn to the relevant facts.

A determination of whether an issue is arbitrable can implicate three related questions: "(1) whether the matter is arbitrable; (2) who has primary authority to decide that question—the arbitrator or the court; and (3) if the matter is one over which the court would have primary authority, did the parties engage in, or fail to engage in, conduct that precludes judicial review

subject matter submitted was not made." The plaintiff seeks to vacate the award on the basis of § 52-418 (a) (4).

[2] The issues identified by the arbitrators in their interim award and award as those submitted to it, respectively, were: (1) "Is [c]ase [number] 2007-A-0214 [assigned to the grievance] arbitrable?"; and (2) "Did the [plaintiff] violate [§§] 11.0 and or 2.0 of the collective bargaining agreement by not upgrading the position of [f]oreperson? If so, what shall the remedy be?" As the plaintiff has never contended that the arbitrators exceeded the scope of the submission, I presume that the issues stated in the awards accurately reflect those submitted for the arbitrators' consideration.

of the arbitrator's decision on that matter."[3] *Bacon Construction Co.* v. *Dept. of Public Works*, 294 Conn. 695, 709–10, 987 A.2d 348 (2010). With respect to the question of who has primary authority to determine arbitrability, it is a well settled principle that "[w]hether a particular dispute is arbitrable is a question for the court, *unless*, *by appropriate language*, *the parties have agreed to arbitrate that question*, *also*." (Emphasis in original; internal quotation marks omitted.) Id., 714; see also *Connecticut Union of Telephone Workers*, *Inc.* v. *Southern New England Telephone Co.*, 148 Conn. 192, 197, 169 A.2d 646 (1961) ("[w]hether the parties have agreed to submit to arbitration not only the merits of the dispute but the very question of arbitrability, as well, depends upon the intention manifested in the agreement they have made"). Elaborating on the proper method for determining whether the parties have chosen to empower the arbitrator to determine arbitrability, this court has held that "[t]he intention to have arbitrability determined by an arbitrator can be manifested by an express provision or through the use of broad terms to describe the scope of arbitration, such as all questions in dispute and all claims arising out of the contract or any dispute that cannot be adjudicated."

[3] Because I conclude that the parties have contractually agreed that the arbitrators will decide the issue of arbitrability, thus satisfying prong two, I do not reach the further question of whether the plaintiff has waived judicial review of this issue. The question of waiver can arise only when the dispute being arbitrated is otherwise a matter for the court to decide; *Bacon Construction Co.* v. *Dept. of Public Works*, 294 Conn. 695, 709, 987 A.2d 348 (2010); a condition that is not met in the present case because the parties have agreed to empower the arbitrators to resolve the issue of arbitrability. I note, however, that, even if the settlement agreement plausibly could be deemed to fall short of the clear language necessary to contractually vest the arbitrators with authority to decide arbitrability, a dubious supposition, that agreement and the plaintiff's subsequent conduct undoubtedly would qualify as clear evidence that the plaintiff "agree[d] to vest the arbitrator with authority to decide that issue"; id., 710; thereby waiving de novo judicial review of the question of arbitrability.

(Internal quotation marks omitted.) *White* v. *Kampner*, 229 Conn. 465, 472, 641 A.2d 1381 (1994).

This specific principle proceeds from a general recognition that "[a]rbitration is a creature of contract between the parties and its autonomy requires a minimum of judicial intrusion. . . . The parties themselves, by the agreement of the submission, define the powers of the arbitrator." (Internal quotation marks omitted.) *Office of Labor Relations* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, 288 Conn. 223, 228–29, 951 A.2d 1249 (2008).

Therefore, we must consider whether, in the present case, the parties contractually agreed to submit to the arbitrators their dispute as to whether the foremen pay upgrades is arbitrable. Because the parties executed several agreements, I briefly outline the course of the parties' dealings as revealed by the following undisputed facts in the record. First, the parties entered into a collective bargaining agreement, which provides for a multistep internal grievance procedure and for arbitration of grievances on which satisfactory resolution has not been reached; both procedures must be initiated within specified time limits. Article XIV, § 14.8, of the collective bargaining agreement provides: "The grievance procedure shall be the sole method of processing claims concerning rights and/or privileges provided herein or concerning interpretation or application of provisions of this [a]greement." The collective bargaining agreement further provides in article XIV, § 14.9 (F), that, effective upon a specified date, "the parties agree that arbitration shall be used to redress all upgrades that have not been resolved in negotiations." Several years after that collective bargaining agreement went into effect, the parties entered into negotiations that ultimately led to pay upgrades for certain positions. After these negotiations, the parties signed a memorandum of understanding setting forth those upgrades and

further providing: "The parties agree that arbitration shall NOT be used to redress all upgrades that have not been resolved in negotiations."

Thereafter, the defendant filed an unfair labor practice complaint with the state board of labor relations, claiming that the plaintiff had failed to bargain in good faith by violating the collective bargaining agreement because the recent pay upgrades had resulted in a violation of the city's civil service rules, which the defendant contended had been incorporated into the collective bargaining agreement, requiring that foremen (whose pay had not been the subject of negotiation and had not been upgraded) be paid at least 5 percent more than subordinates. Weeks later, while that complaint was pending, the parties entered into a settlement agreement, which provides as follows: "The [plaintiff] hereby agrees that [the defendant] may file a grievance regarding the issue of [f]oremen being paid less than 5 [percent] more than their subordinates. *This* [*g*]*rievance shall be filed directly to arbitration.*

"The [plaintiff] and [the defendant] further agree that either party may raise any claim or defense they could otherwise have made had they filed at step [one], including the issue of arbitrability but not including timeliness.[4]

"In consideration of the above, the [defendant] agrees to the withdrawal and closing of [the unfair labor practice complaint]." (Emphasis added.)

[4] Article XIV, § 14.1, of the collective bargaining agreement provides with respect to commencement of the internal grievance process: "No grievance may be filed after fifteen (15) working days of the event giving rise to it." That article further provides in § 14.3 that the defendant must receive written notice of an intention to submit the grievance to arbitration within twenty days after an adverse decision or the expiration of the time limits for a decision on the grievance to be rendered. The memorandum of understanding that resulted in the violation of the civil service rule regarding pay differential was executed on January 19, 2006. The only grievance in the record before this court is one filed with the plaintiff's personnel director received on September 29, 2006.

It is clear that neither the collective bargaining agreement nor the memorandum of understanding vests the arbitrators with authority to decide a dispute as to arbitrability.[5] The text of the settlement agreement, however, cannot be mistaken for anything other than a declaration by the parties that the issue of arbitrability should be resolved by the arbitrators. As the parties agreed, the defendant "may file a grievance . . . [that] shall be filed directly to arbitration." To state the obvious, this language establishes that the parties agreed to present some issue to the arbitrators. Dispelling any uncertainty regarding the scope of the submission to the arbitrators, the settlement agreement sets forth the specific dispute and further provides, immediately after

[5] Although the collective bargaining agreement provided for arbitration of any grievance, a term defined as "a claim by an employee or the [u]nion that rights under the specific language of this [a]greement have been violated, or that there has been a misinterpretation or misapplication of the specific provisions of this [a]greement," courts have held that authority linked to interpretation of the contract is not clear and unmistakable evidence of intent to vest the arbitrator with authority to decide whether a matter is arbitrable. See, e.g., *Peabody Holding Co., LLC* v. *United Mine Workers of America*, 665 F.3d 96, 102 (4th Cir. 2012) ("an arbitration clause committ[ing] all interpretive disputes relating to or arising out of the agreement does not satisfy the clear and unmistakable test" [internal quotation marks omitted]); *Spahr* v. *Secco*, 330 F.3d 1266, 1270 (10th Cir. 2003) ("broad provisions to arbitrate all disputes arising out of or relating to the overall contract, like the one at issue here, do not provide the requisite clear and unmistakable evidence within the four corners of the . . . [a]greement that the parties intended to submit the question of whether an agreement to arbitrate exists to an arbitrator" [internal quotation marks omitted]); *McLaughlin Gormley King Co.* v. *Terminix International Co., L.P.*, 105 F.3d 1192, 1194 (8th Cir. 1997) (arbitration clause did not clearly and unmistakably evidence parties' intent to give arbitrator power to determine arbitrability where clause did not mention "controversy over arbitrability" [internal quotation marks omitted]); cf. *PaineWebber, Inc.* v. *Bybyk*, 81 F.3d 1193, 1199–1200 (2d Cir. 1996) (provision requiring arbitration of "[a]ny and all controversies" indicates parties' intent to submit to arbitration question of arbitrability [internal quotation marks omitted]); *White* v. *Kampner*, supra, 229 Conn. 472 (authority vested in arbitrator when contract uses language "such as all questions in dispute and all claims arising out of the contract or any dispute that cannot be adjudicated" [internal quotation marks omitted]).

providing for the matter to be filed directly to arbitration, that either party may raise otherwise available defenses "*including the issue of arbitrability* . . . ." (Emphasis added.) This latter provision of the settlement agreement highlights the fact that the plaintiff did not believe that the *merits* of the defendant's grievance properly could be arbitrated, but it also makes abundantly clear that the defense of nonarbitrability was intended to be raised and decided, in the first instance, by the arbitrators.

The unusual specificity and concreteness of the settlement agreement sets this case apart in an important respect from the usual arbitration clause. The majority has cited *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995), for the principle that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."[6] I highlight that case not only because I believe this principle to be sound but also because it is useful to understand the policy concerns behind the principle. Per *First Options of Chicago, Inc.*, a heightened clarity requirement is appropriate because, unlike the question of what types of disputes should be arbitrated, "[a] party often might not focus upon [who (primarily) should decide arbitrability] or upon the significance of having arbitrators decide the scope of their own

[6] The Supreme Court has explained: "In this manner the law treats silence or ambiguity about the question 'who (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question 'whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement'—for in respect to this latter question the law reverses the presumption." *First Options of Chicago, Inc.* v. *Kaplan*, supra, 514 U.S. 944–45; see also *PaineWebber, Inc.* v. *Bybyk*, 81 F.3d 1193, 1198 (2d Cir. 1996) ("where the arbitration agreement contains an ambiguity as to who determines eligibility, the [Federal Arbitration Act's] presumption favoring arbitration is reversed so that the court will ordinarily decide the question").

powers." Id., 945. In the present case, however, the settlement agreement is both perfectly clear and unusually attentive not only to the narrow issue in dispute but also to the question of who should decide the arbitrability of that dispute; the agreement's sole function was to submit to the arbitrators a limited set of disputes, one of which is arbitrability. Thus, there can be no question that the concern underlying the heightened clarity requirement enunciated in *First Options of Chicago, Inc.*, has been satisfied in the present case.

Reinforcing the clear significance of the text of the settlement agreement, the course of the parties' dealings in this case forecloses any conclusion other than that the parties intended to submit to the arbitrators the issue of arbitrability. The settlement agreement brought to a close formal proceedings initiated by the defendant and moved the dispute to a new forum—arbitration—for resolution. To infer from this course of events that the parties intentionally transferred their dispute from a forum that was able to resolve the defendant's grievance to a forum that they knew was incapable of resolving even the threshold issue in that matter is to foist on the parties an intent that they could not possibly, in good faith, have held.[7]

[7] Thus, the plaintiff's role in directing the grievance to arbitration renders its position substantively different than a party that plays no role in the commencement of arbitration proceedings, manifests a clear intention to resist arbitration, and appears in the arbitral forum for the sole purpose of asserting its defense of nonarbitrability. See *Opals on Ice Lingerie* v. *Body Lines, Inc.*, 320 F.3d 362, 369 (2d Cir. 2003) ("The Supreme Court has held that 'merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue.' *First Options of Chicago* [*Inc.*] v. *Kaplan*, [supra, 514 U.S. 946]. To the contrary, the [c]ourt noted in [that case], the fact that a party 'forcefully object[s]' to having an arbitrator decide a dispute—as [the defendant] clearly did—suggests an unwillingness to submit to arbitration. Id. See also *Textile Unlimited* v. *A..BMH & Co.*, 240 F.3d 781, 788 [9th Cir. 2001] [holding that party did not waive right to object to arbitration by participating in arbitration proceedings where the party 'only participated in the arbitration to contest the arbitration itself']; *Coady* v. *Ashcraft & Gerel*, 223 F.3d 1, 9 n.10 [1st Cir. 2000] [holding that party's objection to scope of arbitration was not waived by its participation in

Finally, I draw attention to the course of litigation in the present case. Not only has the plaintiff consistently framed its contentions in a manner that unequivocally demonstrates that it does not challenge the arbitrators' authority to decide the question of arbitrability, the plaintiff also has made judicial admissions attesting to this grant of authority. Specifically, in its application to vacate the arbitration award submitted to the trial court, the plaintiff stated: "[O]n August 3, 2007, the parties *submitted the issue of arbitrability to the arbitrator*[*s*]." (Emphasis added.) In that application to vacate, the plaintiff further contended that, because the grievance was not arbitrable under the memorandum of understanding, "[t]he [arbitrators], *by retaining jurisdiction* of the award, did not issue a final and definite award as required by [§ 52-418]." (Emphasis added.) The plaintiff's latter assertion clearly presupposes that the arbitrators possessed initial "jurisdiction"[8] to determine the threshold question of whether the merits of the plaintiff's grievance could be arbitrated. These express admissions, moreover, accord with the manner in which the plaintiff has presented its claims throughout the litigation process. At no point—not before the arbitrators, not before the trial court, not before the Appellate Court, not before this court—has the plaintiff ever contended that the arbitrators lacked contractual authority to resolve the issue of arbitrability.[9]

hearings because the party 'consistently and vigorously maintained its objection to the scope of arbitration'].").

[8] As this court clarified in *MBNA America Bank, N.A.* v. *Boata*, 283 Conn. 381, 388–92, 926 A.2d 1035 (2007), arbitrators do not possess subject matter jurisdiction, a term that has a specific significance in court proceedings, but, rather, authority derived from the consent of the parties.

[9] In its brief to this court, the plaintiff does rely on certain appellate cases, and an examination of those cases reveals that the courts had applied the positive assurance test. As I explain in part II of this dissenting opinion, that test applies only when the court has primary authority to decide whether the dispute is arbitrable. For the reasons I previously have set forth, the parties clearly vested the arbitrators with primary authority to decide that

I recognize that the settlement agreement lacks some of the linguistic hallmarks of agreements that have been found to clearly and unmistakably vest the arbitrator with authority to arbitrate arbitrability. The settlement agreement does not vest the arbitrator with authority to resolve "any and all" disputes; see footnote 5 of this dissenting opinion; or provide that the grievance shall be "decided," "resolved" or "adjudicated" by the arbitrators or "committed to" the panel.[10] Nor does the settlement agreement contain an express provision that the arbitrator has authority to decide its own "jurisdiction."[11] See footnote 7 of this dissenting opinion. Such agreements, however, have not been drafted by parties considering the specific question of whether a narrow issue in dispute should be arbitrated. A contextual and common sense reading of the settlement agreement, as well as the plaintiff's judicial admissions as to the arbitrators' authority, compels a conclusion that the parties clearly and unmistakably committed the question of arbitrability to the arbitrators. To conclude oth-

question. Even if I were to interpret the plaintiff's reliance on these cases as a vague belated claim on appeal that it did not agree to arbitrate the issue of arbitrability, the plaintiff's role in directing the grievance to arbitration would preclude it from successfully advancing such a claim. Cf. *PowerAgent, Inc.* v. *Electronic Data Systems Corp.*, 358 F.3d 1187, 1192 (9th Cir. 2004) ("PowerAgent [Inc.] was the plaintiff in arbitration and affirmatively sought to submit the issue of arbitrability to the arbitration panel, arguing in favor of the arbitrators' authority to decide the issue. . . . Having affirmatively urged the arbitrators to decide arbitrability and asserted their authority to do so, PowerAgent [Inc.] cannot await the outcome and, after an unfavorable decision, challenge the authority of the arbitrators to act on that very issue.").

[10] See, e.g., *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 130 S. Ct. 2772, 2779, 177 L. Ed. 2d 403 (2010); *Carson* v. *Giant Food, Inc.*, 175 F.3d 325, 331–32 (4th Cir. 1999); *Telectronics Pacing Systems* v. *Guidant Corp.*, 143 F.3d 428, 431 (8th Cir. 1998); *Bacon Construction Co.* v. *Dept. of Public Works*, supra, 294 Conn. 711.

[11] See *Qualcomm, Inc.* v. *Nokia Corp.*, 466 F.3d 1366, 1372–73 (Fed. Cir. 2006) (parties' agreement incorporated American Arbitration Association rules that expressly provided arbitration panel had power to rule on own jurisdiction).

erwise, as has the majority, would not only elevate form over substance but also would assume and reward the plaintiff's bad faith in inducing the defendant to withdraw the matter from a competent forum to one wholly lacking authority.

II

Having concluded that the arbitrators were contractually authorized to determine whether the defendant's grievance was arbitrable, I turn to the plaintiff's claim that the Appellate Court improperly affirmed the trial court's judgment denying the plaintiff's motion to vacate the award on the ground that the dispute at issue was not arbitrable. Specifically, the plaintiff contends: (1) in light of the memorandum of understanding expressly stating that "arbitration shall NOT be used to redress all upgrades that have not been resolved in negotiations," the Appellate Court should have concluded that the arbitrators exceeded their authority in violation of § 52-418 (a) (4) by determining that the dispute was arbitrable; and (2) in reaching a contrary conclusion on the basis of the settlement agreement, the Appellate Court disregarded the plaintiff's reservation of its right to assert the defense of nonarbitrability. I agree with the plaintiff's secondary contention, but disagree with its primary claim. Although the Appellate Court properly recognized the obvious—that the settlement agreement vested the arbitrators with authority—in so concluding, it appears to have conflated the distinct inquiries into the arbitrators' authority to decide the merits of the dispute and its authority to decide whether the dispute is arbitrable and, in so doing, applied an improper standard of review. Nonetheless, I agree with the Appellate Court's conclusion that the plaintiff is not entitled to have the award vacated, though I reach that conclusion by a different route.

The Appellate Court, like the majority in this certified appeal, applied the positive assurance test in reaching

its conclusion. Under that test, "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." (Internal quotation marks omitted.) *White* v. *Kampner*, supra, 229 Conn. 473, quoting *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960). The positive assurance test is applied, however, when courts determine, *in the first instance*, whether a dispute is arbitrable. See, e.g., *Board of Education* v. *Nonnewaug Teachers' Assn.*, 273 Conn. 28, 30–32, 866 A.2d 1252 (2005) (action for declaratory judgment that dispute is not arbitrable); *White* v. *Kampner*, supra, 472–73 (motion to vacate award where court determined that arbitrator lacked authority to determine arbitrability); *Welch Group, Inc.* v. *Creative Drywall, Inc.*, 215 Conn. 464, 467, 576 A.2d 153 (1990) (plaintiff's application for injunction restraining defendant from proceeding with arbitration); *John A. Errichetti Associates* v. *Boutin*, 183 Conn. 481, 488–89, 439 A.2d 416 (1981) (plaintiff's application for order directing defendant to proceed with arbitration); *Board of Education* v. *Frey*, 174 Conn. 578, 581–82, 392 A.2d 466 (1978) (action for injunction staying arbitration). That test is inapplicable when the threshold question of arbitrability has been committed to the arbitrator. See *Bridgeport* v. *Bridgeport Police Local 1159, AFSCME, Council 15*, 183 Conn. 102, 106, 438 A.2d 1171 (1981) ("[o]nce the trial court has determined that arbitrability is to be decided by the arbitrators, there is no need for it to apply the 'positive assurance' test").

When the parties have agreed to vest the arbitrator with primary authority to decide whether the dispute is arbitrable, as in the present case, we generally defer to the arbitrator's determinations of fact and law, vacat-

ing the award only on narrow grounds.[12] As the United States Supreme Court explained in *First Options of Chicago, Inc.* v. *Kaplan*, supra, 514 U.S. 942: "[The parties] disagree about who should have the primary power to decide [whether the dispute is arbitrable]. Does that power belong primarily to the arbitrators (because the court reviews their arbitrability decision deferentially) or to the court (because the court makes up its mind about arbitrability independently)? . . . Although the question is a narrow one, it has a certain practical importance. That is because a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has

[12] In the present case, the trial court properly recognized that a more deferential standard of review was required, also apparently recognizing that the settlement agreement conferred authority on the arbitrators. In particular, the court noted: "In *Costello Construction* [*Corp.*] v. *Teamsters Local 559*, 167 Conn. 315, 318, 355 A.2d 279 (1974), the court held that where the parties have *submitted the issue of arbitrability to the arbitrator for determination*, the court is bound by the arbitrator's determination unless that determination clearly falls within the proscriptions of [§ 52-418], or procedurally violates the parties' agreement." (Emphasis added.) Because the trial court viewed the plaintiff's claims as essentially charging the arbitrators with making "erroneous legal interpretation[s]," it concluded that such a claim was not a proper basis to vacate the award under § 52-418 (a) (4). I note that this court has "overrule[d] the statement in *Costello* [*Construction Corp.*] implying that the review of the procedural determination of an arbitrator is not restricted by the criteria established by § 52-418." *East Hartford* v. *East Hartford Municipal Employees Union, Inc.*, 206 Conn. 643, 650, 539 A.2d 125 (1988).

The Appellate Court did not explain why it had applied a different standard of review than the trial court and did not state a conclusion as to whether the question of arbitrability itself had been committed to the arbitrators, although it quoted case law stating that such authority may be committed to the arbitrators. The fact that the Appellate Court failed to give any legal effect to the settlement agreement's express reservation of the plaintiff's right to assert the defense of nonarbitrability suggests that the court may have conflated the question of whether the arbitrators were empowered to decide arbitrability, under which the defendant's reservation of that defense would not bar the exercise of authority, and the merits of the arbitrability question, under which such a fact could be dispositive.

relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. See, e.g., 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko* v. *Swan*, 346 U.S. 427, [436–37, 74 S. Ct. 182, 98 L. Ed. 168] (1953) (parties bound by arbitrator's decision not in 'manifest disregard' of the law), overruled on other grounds, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 [109 S. Ct. 1917, 104 L. Ed. 2d 526] (1989). Hence, who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration." See also *AFSCME, Council 4, Local 1565* v. *Dept. of Correction*, 298 Conn. 824, 835, 6 A.3d 1142 (2010) (citing "three recognized grounds for vacating an award: [1] the award rules on the constitutionality of a statute . . . [2] the award violates clear public policy . . . or [3] the award contravenes one or more of the statutory proscriptions of § 52-418 [a]" [internal quotation marks omitted]).

The plaintiff cites § 52-418 (a) (4) as the basis for its application to vacate, under which "the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." The plaintiff's central complaint is that the arbitrators exceeded their power by forcing the parties to arbitrate the issue of foremen's pay when the parties had signed a memorandum of understanding, following a round of wage negotiations, agreeing "that arbitration shall NOT be used to redress all upgrades that have not been resolved in negotiations."[13] The plaintiff points to an Appellate Court case

[13] I agree with the majority that the plaintiff waived any claim regarding the existence of a condition precedent to arbitration that had not been met—negotiation—by failing to assert this claim prior to its appeal to this court, and I therefore also do not consider its merits.

in which that court had stated the principle that "an arbitrator cannot find a dispute arbitrable if language in the contract indicates that it is not"; *Wallingford* v. *Wallingford Police Union, Local 1570*, 45 Conn. App. 432, 437, 696 A.2d 1030 (1997); and concluded that the collective bargaining agreement could not reasonably have been given any other interpretation than to exclude the issue on which the defendant had sought arbitration. Id. The plaintiff cannot prevail on this claim.

The plaintiff's claim suffers from several fatal defects. First, "[w]e have explained that, [i]n our construction of § 52-418 (a) (4), we have, as a general matter, looked to a comparison of the award with the submission to determine whether the arbitrators have exceeded their powers." (Internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 84, 881 A.2d 139 (2005); see also *Board of Education* v. *AFSCME, Council 4, Local 287*, 195 Conn. 266, 271, 487 A.2d 553 (1985) ("[t]he memorandum of decision may . . . be examined to determine if an arbitrator has exceeded his or her authority by making an award beyond the scope of the submission"). The plaintiff does not contend, however, that the award fails to conform to the submission, and there appears to be no basis to make such an assertion. See footnote 2 of this dissenting opinion. Ordinarily, if an issue is submitted to an arbitrator, this court will not second-guess the reasoning behind the arbitrator's resolution of that issue. *Garrity* v. *McCaskey*, 223 Conn. 1, 12, 612 A.2d 742 (1992) ("[a]n award conforming to an unrestricted submission should generally be confirmed by the court").[14]

[14] The court in *Garrity* v. *McCaskey*, supra, 223 Conn. 5, further explained that "[t]he authority of an arbitrator to adjudicate the controversy is limited only if the agreement contains express language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review. In the absence of any such qualifications, an agreement is unrestricted." In the present case, the submission provides for certain defenses to be available at arbitration, but it reserves no explicit rights from the submission, and it makes no mention of court review. The submission is therefore plainly unrestricted, and neither party has suggested otherwise.

Second, the *Wallingford* case and the others cited by the plaintiff in its brief to this court are inapposite. In those cases, the court had applied the positive assurance test to determine whether the dispute was arbitrable. See, e.g., *Wallingford* v. *Wallingford Police Union, Local 1570*, supra, 45 Conn. App. 437. For the reasons I previously have set forth, that test is not applicable in the present case.

Third, it is clear that in reaching its decision, the arbitrators attempted to ascertain the parties' intent in drafting the memorandum of understanding. The arbitrators found as follows: "A reading of the January 19, 2006 [m]emorandum of [u]nderstanding providing the upgrades clearly shows that no [f]oremen positions were at issue in the upgrades. Nor is there testimony that at anytime the parties discussed the upgrading of [f]oremen during the upgrade negotiations. It is very questionable whether the prohibition against the use of arbitration was meant to concern the *unforeseen* consequences of an *automatic* upgrade to the [f]oremen through reliance on the [c]ivil [s]ervice [r]ules."[15] (Emphasis added.) Thus, it plainly appears that the arbitrators concluded, as a matter of contract interpretation, that the memorandum of understanding was inapplicable to an upgrade that is mandated, rather than subject to negotiation. This court has explained: "[A]n arbitrator is confined to interpretation and application

[15] In addition to the arbitrators' reasoning, I note that, although it is unmistakable from the text of the memorandum of understanding that the parties intended to impose an unconditional ban on arbitration, its reference to "all upgrades that have not been resolved in negotiation" creates an ambiguity with respect to the scope of that ban. Specifically, it is not clear whether the memorandum of understanding applies only to a limited set of upgrades that were the subject of previous, unresolved, negotiations or whether it applies to all possible upgrades, even those that were not addressed in the negotiations leading to the settlement agreement. For both that reason and the one articulated by the arbitrators, even if I were to agree with the majority that the positive assurance test applies, I would be compelled to conclude that the presumption in favor of arbitration has not been overcome.

of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." (Internal quotation marks omitted.) *Board of Education* v. *AFSCME, Council 4, Local 287*, supra, 195 Conn. 273; accord *Major League Baseball Players Assn.* v. *Garvey*, 532 U.S. 504, 509, 121 S. Ct. 1724, 149 L. Ed. 2d 740 (2001) (explaining that "[i]t is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable"). Review of the arbitration decision reveals no such blatant disregard for the contract and reliance on the arbitrators' own view of public policy, but, rather, a different construction of the document on which the plaintiff relies. "With respect to contract interpretation, this standard essentially bars review of whether an arbitrator misconstrued a contract." *T.Co Metals, LLC* v. *Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010). Thus, whether the arbitrators' decision is well reasoned or correct is not for me, or for this court, to decide. Accordingly, the Appellate Court properly affirmed the trial court's judgment denying the plaintiff's motion to vacate the award.

I respectfully dissent.

COUNCIL 4, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO *v.* STATE ETHICS COMMISSION ET AL.
(SC 18896)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.

Argued March 21—officially released May 8, 2012

Procedural History

Appeal from an advisory opinion issued by the defendant citizen's ethics advisory board, brought to the Superior Court in the judicial district of New Britain, and tried to the court, *Cohn*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed. *Affirmed.*

J. William Gagne, *Jr.*, with whom was *Kimberly A. Cuneo*, for the appellant (plaintiff).

Cynthia Isales, assistant general counsel, with whom was *Barbara E. Housen*, general counsel, for the appellees (defendants).

Opinion

PER CURIAM. The defendant citizen's ethics advisory board (board), a division of the office of state ethics,[1] issued an advisory opinion in 2009 concluding that hearing reporters for the workers' compensation commission (commission) are not permitted under General Statutes § 1-84 (c)[2] to prepare transcripts for

[1] The office of state ethics is the successor agency to the state ethics commission. See General Statutes § 1-80. Both entities were named as defendants in the petition in this administrative appeal, in addition to Carol Carson, the executive director of the board, and Robert N. Worgaftik, chairperson of the board, at the time of the 2009 proceedings.

[2] General Statutes § 1-84 (c) provides: "No public official or state employee shall wilfully and knowingly disclose, for financial gain, to any other person, confidential information acquired by him in the course of and by reason of the official duties or employment and no public official or state employee shall use his public office or position or any confidential information received through his holding such public office or position to obtain financial gain for himself, his spouse, child, child's spouse, parent, brother or sister or a business with which he is associated."

private sale during the hours that they work for the state. The plaintiff, Council 4, American Federation of State, County and Municipal Employees, AFL-CIO, appealed to the trial court on behalf of the hearing reporters. The trial court dismissed the appeal. The plaintiff then filed this appeal.[3] The plaintiff claims, inter alia, that: (1) the trial court improperly concluded that the board properly treated the hearing reporters differently than Superior Court reporters, whom the board previously had determined are allowed to prepare transcripts for private sale on state time; (2) the trial court's decision is in conflict with General Statutes § 51-63 (e);[4] and (3) the trial court's decision is in conflict with a stipulated agreement between the plaintiff and the commission that allowed the hearing reporters to produce transcripts for private parties while they were working on state time.

After examining the record and the briefs and considering the arguments of the parties, we are persuaded that the judgment rendered by the trial court should be affirmed. The issues raised by the plaintiff were resolved properly in the thoughtful and comprehensive memorandum of decision filed by the trial court. *Council 4, AFSCME, AFL-CIO* v. *State Ethics Commission*, 52 Conn. Sup. 304, 44 A.3d 225 (2010). Because that memorandum of decision fully addresses the arguments raised in the present appeal, we adopt the trial court's well reasoned decision as a statement of the facts and the applicable law on those issues. It would serve no useful purpose for us to repeat that discussion here.

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

[4] General Statutes § 51-63 (e) provides: "Official and assistant stenographers in the offices of the workers' compensation commissioners shall be entitled, in addition to the compensation otherwise provided for, to the same fees for preparing transcripts as are provided for reporters in the Superior Court."

See, e.g., *Socha* v. *Bordeau*, 289 Conn. 358, 362, 956 A.2d 1174 (2008); *Lord Family of Windsor, LLC* v. *Inland Wetlands & Watercourses Commission*, 288 Conn. 669, 673, 954 A.2d 133 (2008).

The judgment is affirmed.

ERIK M. PIN ET AL. *v.* DAVID L. KRAMER ET AL.
(SC 18572)

Norcott, Palmer, Zarella, McLachlan, Eveleigh and Vertefeuille, Js.

Syllabus

The plaintiffs, C and E, brought an action for medical malpractice alleging that the defendants, an orthopedic surgeon who treated E, and the group for whom that surgeon worked, were negligent in connection with the removal of a tumor from E. At trial, the defendants' medical expert testified as to the increased health care costs caused by defensive medical practice and increased malpractice premiums arising from the proliferation of medical malpractice claims, and that he therefore would have performed more radiology tests on E. The plaintiffs then requested a mistrial or a curative instruction to the jury relating to the insurance issues, which the trial court denied. Thereafter, the jury returned a verdict for the defendants, from which the plaintiffs appealed to the Appellate Court. That court reversed the trial court's judgment and remanded the case for a new trial, and the defendants, on the granting of certification, appealed to this court. *Held* that, the Appellate Court having properly concluded that the trial court's failure to issue a curative instruction following the expert witness' inflammatory and prejudicial testimony was an abuse of discretion because those statements introduced a highly controversial and legally improper issue into the case and that the plaintiffs were deprived of their right to a fair trial, this court adopted the Appellate Court's opinion as a proper statement of the issue and the applicable law concerning the issue raised in this appeal.

Argued March 20—officially released May 8, 2012

Procedural History

Action to recover damages for the defendants' alleged medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Danbury and transferred to the judicial district of Stamford-Norwalk,

Complex Litigation Docket, and tried to the jury before *Shay*, *J.*; verdict for the defendants; subsequently, the court denied the plaintiffs' motion to set aside the verdict and rendered judgment in accordance with the verdict, and the plaintiffs appealed to the Appellate Court, *Bishop*, *Lavine* and *Schaller*, *Js.*, which reversed the judgment of the trial court and remanded the matter for a new trial, from which the defendants, on the granting of certification, appealed to this court. *Affirmed.*

Robert C. E. Laney, with whom were *Daniel E. Ryan III* and, on the brief, *Lauren E. Abbate*, for the appellants (defendants).

Lawrence F. Reilly, for the appellees (plaintiffs).

Brenden P. Leydon filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

Opinion

PER CURIAM. The defendants, David L. Kramer, an orthopedic surgeon, and Danbury Orthopedic Associates, P.C., appeal, upon our grant of their petition for certification,[1] from the judgment of the Appellate Court, reversing the judgment of the trial court in their favor, rendered after a jury trial in this medical malpractice action brought by the plaintiffs, Erik M. Pin and Carrie L. Pin.[2] *Pin* v. *Kramer*, 119 Conn. App. 33, 46, 986 A.2d 1101 (2010). On appeal, the defendants contend that the Appellate Court improperly concluded that a new

[1] We granted the defendants' petition for certification to appeal limited to the following issue: "Did the Appellate Court properly determine that the trial court incorrectly failed to give a curative instruction and, if so, was such failure harmful?" *Pin* v. *Kramer*, 295 Conn. 911, 989 A.2d 1074 (2010).

[2] "Carrie L. Pin brought this action as a parent and next friend of her minor son. She also brought the action on her own behalf for damages arising from her son's injuries.

"Erik M. Pin is referred to in this opinion individually as the plaintiff, and Erik M. Pin and his mother, Carrie L. Pin, are referred to collectively in this opinion as the plaintiffs." *Pin* v. *Kramer*, 119 Conn. App. 33, 35 n.1, 986 A.2d 1101 (2010).

trial was required because the trial court had failed to grant the plaintiffs' request for a curative instruction following remarks by the defendants' expert witness, during his direct examination testimony, concerning increased health care costs caused by defensive medicine practices and increased malpractice insurance premiums arising from the proliferation of medical malpractice claims in Connecticut. Id., 43, 45–46. We disagree and affirm the judgment of the Appellate Court.

Briefly, we note the following relevant facts and procedural history as revealed by the record and the Appellate Court opinion. The plaintiffs brought this medical malpractice action against the defendants seeking, inter alia, compensatory damages for Kramer's negligence in his surgical treatment of a spinal tumor suffered by the plaintiff. The plaintiffs contended specifically that, because of Kramer's negligence, the plaintiff was required to undergo two additional spinal surgeries, causing him to suffer from unnecessary pain, emotional distress and increased physical limitations and risk of future back problems, and Carrie L. Pin, his mother, to incur additional medical bills and expenses on his behalf. At trial, one significant factual issue was whether the standard of care required Kramer to order additional radiological tests, such as X rays, computerized tomography (CT) scans or magnetic resonance imaging (MRI) scans, prior to performing the first surgery on the plaintiff on December 28, 2001, in order to determine whether the tumor had grown or otherwise changed since it was first detected in April, 2001, and also after the surgery in order to monitor the plaintiff's recovery. See id., 36–38.

On the eighth day of trial, the defendants' medical expert, Todd Albert, an orthopedic surgeon, testified that "the standard of care did not require additional radiology tests," but then "explained why he would have ordered such tests had he been the treating physician.

When asked why he would have ordered the radiology tests, Albert explained:

" 'Well, a few reasons. One, I am with residents, fellows, and medical students all the time. So, we are ordering a lot of tests on everything so they have the opportunity to read them. And you could say, oh, that's wasteful, but that is part of being at a teaching institution. One. It is for teaching purposes as much as anything, for they have one more chance to look at just one more—they have another dot in their exposure.

" 'The second reason is much different than in this part of the country and this state. I live in the worst malpractice community in the world. And . . . we practice a lot of defensive medicine. It's true. It's unfortunate, but it's true. And so we order way more tests. You hear about the cost of medicine going up. We are the epicenter of it because we have more doctors leaving because they can't get insurance and things like that. So, we order way more tests than are necessary to protect ourselves. And that's just a fact. And so we get acclimated to practicing like that. So, there's lots of reasons.' " Id., 40. At that point, the "plaintiffs requested a mistrial, or in the alternative, an instruction to Albert not to refer to 'things like that again,' as well as a curative instruction to the jury." Id., 41. The trial court denied the plaintiffs' requests, determining that the mention of insurance was more prejudicial to the defendants and that "there was no prejudice toward the plaintiffs, and, considering the length and expense of the trial, it would be unjust to grant the motion for a mistrial." Id., 41–42. Subsequently, the jury returned a verdict in favor of the defendants, and the trial court denied the plaintiffs' motion to set aside the verdict. See id., 39.

The plaintiffs then appealed from the judgment of the trial court to the Appellate Court, claiming, inter

alia, that the trial court had abused its discretion in denying their request for a curative instruction and motion for a mistrial.[3] The Appellate Court concluded that the trial court's "failure to issue a curative instruction in the face of Albert's inflammatory and prejudicial testimony was an abuse of discretion that likely influenced the jury's deliberations. Although the improper statements by Albert were not pervasive, they introduced a highly controversial and legally improper issue into the case. We conclude that based on the likelihood of prejudice, due to the nature of Albert's comments, and the court's refusal to provide the jury with an appropriate curative instruction, the plaintiffs were harmed. Accordingly, the plaintiffs were deprived of their right to a fair trial." Id., 45–46. Accordingly, the Appellate Court reversed the judgment of the trial court and remanded the case for a new trial. Id., 46. This certified appeal followed. See footnote 1 of this opinion.

Our examination of the record and briefs and our consideration of the arguments of the parties persuade us that the judgment of the Appellate Court should be affirmed on the certified issue. *Pin* v. *Kramer*, supra, 119 Conn. App. 43–46. That issue was resolved properly in the Appellate Court's concise and well reasoned opinion. Because that opinion fully addresses all arguments

[3] The plaintiffs also claimed that the trial court "improperly (1) restricted their questioning of potential jurors during voir dire, (2) assumed the role of an advocate and interfered with the presentation of their case, examination of witnesses and cross-examination of the defendants' expert witness, (3) refused to admit Kramer's deposition testimony into evidence, (4) prevented them from offering rebuttal testimony regarding the defendants' learned treatises, as well as interfered with their cross-examination by improperly finding that they lacked foundation for questions regarding the learned treatises, (5) applied the learned treatise doctrine to admit inadmissible hearsay and (6) denied their motion for a mistrial or for a curative instruction after hearing improper and harmful testimony from the defendants' medical expert." *Pin* v. *Kramer*, supra, 119 Conn. App. 35. The Appellate Court did not address these issues, concluding that "they are issues that are not likely to arise again in a retrial of this case." Id., 35 n.2.

raised in this appeal, we adopt it as a proper statement of the issue and the applicable law concerning that issue. It would serve no useful purpose for us to repeat the discussion contained therein. See, e.g., *Clinch* v. *Generali-U.S. Branch*, 293 Conn. 774, 777–78, 980 A.2d 313 (2009).

The judgment of the Appellate Court is affirmed.

LUIS PATINO *v.* BIRKEN MANUFACTURING COMPANY
(SC 18441)

Rogers, C. J., and Norcott, Zarella, McLachlan, Eveleigh and Harper, Js.*

Syllabus

The plaintiff sought to recover damages from the defendant, his former employer, for allegedly creating or failing to alleviate a hostile work environment in violation of the statute (§ 46a-81c [1]) governing sexual orientation discrimination. Specifically, the plaintiff claimed that the defendant failed to take reasonable steps to prevent the plaintiff's coworkers from harassing him on the basis of his sexual orientation. During the course of the plaintiff's twenty-seven years of employment with the defendant, he was subjected to derogatory and homophobic slurs by certain of his coworkers. The plaintiff recorded the incidents of harassment in his diaries and thereafter complained of the harassment to his supervisor. Following a meeting attended by the plaintiff and his harassing coworkers, the harassment briefly stopped but then recommenced a few weeks later. Subsequently, the plaintiff retained an attorney, who filed a series of five complaints with the commission on human rights and opportunities, and exchanged various letters with the defendant's then vice president and general counsel describing various incidents of the plaintiff's harassment. The defendant then completed an investigation that concluded that none of the plaintiff's coworkers were aware of the alleged occurrences. The defendant, in response to the various complaints, held a workplace harassment workshop and discussed the matter with the plaintiff's coworkers, but ultimately the plaintiff obtained no relief from the harassment, which eventually

* This case was scheduled to be argued before a panel of this court consisting of Chief Justice Rogers and Justices Norcott, Zarella, McLachlan, Eveleigh and Harper. Although Chief Justice Rogers was not present when the case was argued before the court, she read the record and briefs and listened to oral argument prior to participating in this decision.

resulted in the complaint alleging the hostile work environment claim in violation of § 46a-81c (1). Following a jury trial, the jury returned a verdict in favor of the plaintiff and awarded him $94,500 in noneconomic damages. The defendant then filed a motion to set aside the verdict and a motion for remittitur, both of which were denied by the trial court. The court found, inter alia, that although § 46a-81c (1) did not contain explicit language creating a hostile work environment claim, the statute prohibited discrimination "in terms, conditions or privileges of employment," which concept authorized such hostile work environment claims. The trial court thereafter rendered judgment for the plaintiff in accordance with the verdict, from which the defendant appealed. On appeal, the defendant claimed that § 46a-81c (1) did not provide for hostile work environment claims, that the evidence was insufficient to support such a finding, and that the $94,500 damages award was excessive. *Held*:

1. The defendant could not prevail on its claim that, because § 46a-81c (1) does not contain the words "hostile workplace" or "hostile environment," the statute plainly and unambiguously indicated that there was no such cause of action, and, therefore, the trial court improperly denied its motion to set aside the verdict by concluding that the statute created a cause of action for hostile work environment claims; a review of state and federal statutes and case law demonstrated that the phrase "terms, conditions or privileges of employment" in § 46a-81c (1) is a well settled term of art in antidiscrimination law that clearly encompassed a hostile or offensive work environment, and the legislature's use of that phrase evidenced its intent to permit hostile work environment claims where employees, like the plaintiff here, are subjected to sexual orientation discrimination.
2. The trial court did not abuse its discretion by concluding that the jury reasonably could have determined that the plaintiff had been subjected to a hostile work environment, the evidence having supported the jury's determination that a hostile work environment clearly existed: derogatory comments were made in the plaintiff's presence numerous times per day or week over a prolonged period of employment despite the plaintiff's complaints to his supervisors, the plaintiff presented evidence of the recorded incidents in his diaries, the derogatory comments were directed at the plaintiff, and the plaintiff's testimony indicated the detrimental effect of the harassment; furthermore, notwithstanding the defendant's claim that the plaintiff must not have found the work environment hostile because he chose to work on certain vacation days, the defendant did not provide any authority for the proposition that an employee must take every opportunity offered to him to avoid his workplace in order to assert a hostile work environment claim.
3. The trial court did not abuse its discretion in denying the defendant's motions to set aside the verdict and for remittitur, that court having determined that the plaintiff presented sufficient evidence to support the damages award and that the award was not excessive or shocking

when compared to verdicts awarded under similar circumstances, given the sustained nature of the discrimination described by the plaintiff, the severity of the hostility he experienced, and the continued failure of the defendant to remedy the situation.

Argued January 31—officially released May 15, 2012

Procedural History

Amended action to recover damages for employment discrimination for the defendant's alleged creation of, or failure to alleviate, a hostile work environment, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Prescott, J.*; verdict for the plaintiff; thereafter, the court denied the defendant's motion to set aside the verdict and its motion for remittitur, and rendered judgment for the plaintiff in accordance with the verdict, from which the defendant appealed; subsequently, the trial court awarded the plaintiff attorney's fees, and the defendant filed an amended appeal. *Affirmed.*

Peter D. Vodola, with whom were *Elizabeth F. Ahlstrand* and, on the brief, *Mark B. Seiger*, for the appellant (defendant).

Jon L. Schoenhorn, with whom, on the brief, was *Sara J. Packman*, for the appellee (plaintiff).

Thomas W. Ude, Jr., filed a brief for the Lambda Legal Defense and Education Fund, Inc., et al., as amici curiae.

Nina T. Pirrotti and *Bennett H. Klein*, pro hac vice, filed a brief for the Connecticut Employment Lawyers Association et al. as amici curiae.

Charles Krich, principal attorney, and *Derek Borchardt*, law student intern, filed a brief for the commission on human rights and opportunities as amicus curiae.

ROGERS, C. J. The central issue presented by this appeal[1] is whether General Statutes § 46a-81c (1)[2] imposes liability on employers for failing to take reasonable steps to prevent their employees from being subjected to hostile work environments based on their sexual orientation. The plaintiff, Luis Patino, commenced this action against the defendant, his former employer, Birken Manufacturing Company, claiming that it engaged in a discriminatory employment practice when it permitted his coworkers to harass him based on his sexual orientation over a period of many years.[3]

[1] 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 § 65-1.

[2] General Statutes § 46a-81c provides in relevant part: "It shall be a discriminatory practice in violation of this section: (1) For an employer, by himself or his agent . . . to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against him in compensation or in terms, conditions or privileges of employment because of the individual's sexual orientation or civil union status . . . ."

We note that technical changes not relevant to this appeal were made to § 46a-81c subsequent to the incidents that occurred in this case. See Public Acts 2007, No. 07-245, § 3. For purposes of convenience, we refer to the current revision of the statute.

[3] The record reveals that the harassment began in the 1990s, and lasted until the plaintiff's termination in 2004. Without citing any authority, the defendant argues that this court may consider only the harassment that took place between June 26, 2002 and November 8, 2004, the time period subject to the plaintiff's fifth complaint filed with the commission. The United States Supreme Court has explained, however, that because hostile work environment claims, by their very nature, "cannot be said to occur on any particular day"; *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101, 115, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002); "consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period." Id., 105; see also *McGullam* v. *Cedar Graphics, Inc.*, 609 F.3d 70, 75 (2d Cir. 2010). Because it is undisputed that some of the acts complained of in the present case fell within the statutory time period; see General Statutes (Rev. to 2005) § 46a-82 (e) (requiring complaint to be filed within 180 days after discriminatory acts); we conclude that it is appropriate for us to consider the entire scope of the hostile work environment.

Following a jury trial, the jury returned a verdict in favor of the plaintiff. The defendant then filed a motion to set aside the verdict and a motion for remittitur, both of which the trial court denied. The trial court thereafter rendered judgment in accordance with the verdict, from which the defendant appeals, claiming that: (1) § 46a-81c (1) does not provide for hostile work environment claims; (2) even if we were to assume that such claims can be brought under § 46a-81c (1), the plaintiff presented insufficient evidence to support the jury's finding of a hostile work environment; and (3) the award of damages was unsupported by the evidence and excessive. For the reasons that follow, we reject each of the defendant's claims. Accordingly, we affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The plaintiff was employed by the defendant as a machinist from 1977 until his termination on November 8, 2004.[4] Beginning in 1991, the plaintiff became the subject of name-calling on the shop floor of the defendant's industrial plant. The name-calling consisted of derogatory slurs for homosexuals in Spanish, such as "pato" and "maricon," and in Italian and English, such as "pira," "faggot," and "homo." The slurs were used in a variety of contexts, including "faggot go home" and "faggot get out of here." The plaintiff heard such words "very often," sometimes even "two or three times a day." The derogatory words were not spoken to the plaintiff's face, but were made in his presence, such as directly behind his back while he was operating machinery. The plaintiff was devastated and "overwhelmed by anger and by frustration and the humiliation" resulting from the harassment. He testified that

[4] The plaintiff does not allege that he was terminated on the basis of his sexual orientation. Rather, in a separate proceeding before a federal agency, he claimed that he was fired for engaging in certain whistle-blowing activities.

the demeaning treatment made him so upset that his body would shake, his work product suffered, and it became difficult for him to sleep.

Initially, in an effort to avoid confrontation, the plaintiff simply recorded the incidents in a series of diaries[5] and did not complain to the defendant about the harassment. After a period of five to six years, however, the plaintiff eventually complained to his supervisor, George Kemzura, who responded by holding a meeting with the plaintiff, the employees engaging in the harassment, and the company's owner. At the meeting, the owner indicated that " 'bad words' " were being said, and that they were " 'going to stop.' " After a few weeks of relief, the harassment recommenced, and the plaintiff again complained to Kemzura, who then transferred one of the offenders to a different facility. The transfer did not solve the problem, however, and soon other coworkers had " 'join[ed] in the brouhaha,' " and began yelling more slurs in the plaintiff's presence.

In 1995, the plaintiff retained an attorney, who sent a letter to the defendant complaining about the harassment. Gary Greenberg, the defendant's then vice president and general counsel, responded in a letter dated April 20, 1995. In that letter, Greenberg recommended that the plaintiff be evaluated by a psychologist because the plaintiff's job required him to work with precision instruments and he thus posed a safety risk to others when his mental facilities were compromised. Meanwhile, the plaintiff continued to be subjected to harassment and to record the incidents in his diaries.

The plaintiff filed a total of five complaints with the commission on human rights and opportunities (commission), the first of which was filed on September 30, 1996. Following a hearing with the commission, the

[5] The plaintiff's first entry in his diary describing the harassment dates back to 1991, and his last entry is dated November 5, 2004.

plaintiff wrote a second letter to the defendant describing the harassment he had experienced up to that point. On September 9, 1997, Greenberg again responded with a letter stating that the defendant had completed an investigation of the plaintiff's complaints and found that none of the plaintiff's coworkers knew anything about the alleged occurrences. On September 16, 1997,[6] the plaintiff sent the defendant another letter stating that he would not continue sending letters to the defendant describing the incidents because doing so would be " 'an exercise in futility.' "

The parties thereafter settled the plaintiff's first complaint with the commission by agreeing that the defendant would hold a workplace harassment seminar in November, 1997. At the seminar, employees were informed that they could lose their jobs, be suspended, or even be sued by the defendant if they made derogatory remarks. Few of the employees engaging in the harassment attended the seminar, however, and the harassment did not cease.

The plaintiff filed his second complaint with the commission in 1998, but summarily withdrew it in an attempt to "improv[e] the atmosphere of the shop." The plaintiff then wrote three more letters to the defendant describing yet more harassment and the detrimental effect that the harassment was having on the plaintiff's work product.[7] On October 7, 1999, after being informed that the defendant had discussed the matter with the plaintiff's coworkers but had ultimately ended the investigation, the plaintiff filed a third complaint with the

[6] The trial court mistakenly indicated in its memorandum of decision that the plaintiff sent this letter in 2007. The record reflects that it was actually sent in 1997.

[7] Specifically, the plaintiff explained in one of the letters that he was so overwhelmed by the behavior of Ben Joseph, one his coworkers, and Kemzura, his supervisor, that he had lost his concentration at work, causing him to "[scrap] two parts from Pratt and Whitney."

commission. The plaintiff then filed a fourth complaint with the commission on March 8, 2002, in which he described fifteen more incidents of harassment. Six months later, still having obtained no relief, the plaintiff wrote another letter to the defendant, dated August 25, 2003.[8]

In January, 2004, five months after sending his last letter to the defendant, the plaintiff filed a fifth complaint with the commission, which is the subject of the present action.[9] The complaint alleged that the defendant had violated § 46a-81c (1) "by creating a hostile work environment because of the plaintiff's sexual orientation, [and] failing to take adequate measures to alleviate the harassment or to remedy the hostile work environment . . . ." The defendant responded by filing a general denial of the plaintiff's allegations.

Following a jury trial, the jury found in favor of the plaintiff and awarded him $94,500 in noneconomic damages. The defendant filed two postjudgment motions: a motion to set aside the verdict and a motion for remittitur. The trial court denied the motions, concluding that: (1) although § 46a-81c (1) contains no provision explicitly creating hostile work environment claims, "the statute prohibits discrimination 'in terms, conditions or privileges of employment,' which . . . is an 'expansive concept' that authorizes [such claims]"; (2) the plaintiff presented sufficient evidence to support the finding that a hostile work environment existed and the award of damages; and (3) the damages award was not excessive and fell "within the necessarily uncertain limits of fair and just damages . . . and [was] proportional to compensatory damages awarded in [similar]

[8] In this letter, the plaintiff described an incident in which a coworker yelled "fag" directly at the plaintiff in the presence of Kemzura, who did nothing to stop the harassment.

[9] The plaintiff obtained a release of jurisdiction from the commission on May 23, 2005.

cases." (Citation omitted; internal quotation marks omitted.) This appeal followed.[10]

I

The defendant first claims that the trial court improperly denied its motion to set aside the verdict by concluding that § 46a-81c (1) creates a cause of action for hostile work environment claims. The defendant essentially contends that, because the statute does not contain the words "hostile workplace" or "hostile environment," the text of the statute plainly and unambiguously indicates that there is no such cause of action. The plaintiff responds that the "terms and conditions" language of § 46a-81c (1) has acquired a peculiar and appropriate definition in the context of antidiscrimination law that "leaves little room for doubt concerning its meaning." In the alternative, the plaintiff and certain of the amici curiae[11] assert that, even if ambiguous, extratextual evidence demonstrates that the legislature intended to create a hostile work environment cause of action under § 46a-81c (1). We agree with the plaintiff, and conclude that, because the phrase "terms, conditions or privileges of employment" is a well settled term of art in antidiscrimination law, hostile work environment claims fall within the purview of § 46a-81c (1).

As a preliminary matter, we set forth the applicable standard of review. Although we generally review a trial court's denial of a motion to set aside a verdict for an

[10] After the appeal was filed, the trial court awarded the plaintiff attorney's fees and the defendant amended its appeal. The defendant did not brief any issues relating to the award of attorney's fees and we do not consider that issue. See *Czarnecki* v. *Plastics Liquidating Co.*, 179 Conn. 261, 262 n.1, 425 A.2d 1289 (1979) ("claims of error not briefed are considered abandoned").

[11] Regarding the first issue on appeal, the following parties have submitted amicus curiae briefs in support of the plaintiff's position: Lambda Legal Defense and Education Fund, Inc., the Connecticut Legal Rights Project, and the Connecticut Women's Education and Legal Fund, collectively; as well as the commission on human rights and opportunities, individually.

abuse of discretion; *Hall* v. *Bergman*, 296 Conn. 169, 179, 994 A.2d 666 (2010); the question whether § 46a-81c (1) provides relief for hostile work environment claims is a question of statutory interpretation over which our review is plenary. See *In re Joseph W.*, 301 Conn. 245, 256, 21 A.3d 723 (2011).

The principles governing statutory construction are well established. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning . . . [General Statutes] § 1-2z[12] directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When 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.) *Francis* v. *Fonfara*, 303 Conn. 292, 297, 33 A.3d 185 (2012).

We begin by reviewing the text of § 46a-81c, which provides in relevant part: "It shall be a discriminatory

[12] General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

practice in violation of this section: (1) For an employer, by himself or his agent . . . to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against him in compensation or in terms, conditions or privileges of employment because of the individual's sexual orientation . . . ." In construing this statute, we must first determine whether the phrase "terms, conditions or privileges of employment" is plain and unambiguous and does not yield absurd or unworkable results.

Although § 46a-81c does not itself define the phrase, such silence does not necessarily equate to ambiguity. See *Mayfield* v. *Goshen Volunteer Fire Co.*, 301 Conn. 739, 745, 22 A.3d 1251 (2011). "The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Francis* v. *Fonfara*, supra, 303 Conn. 297. In the absence of express statutory guidance, we must inquire whether the phrase is a legal term of art that has "acquired a peculiar and appropriate meaning in the law" requiring it to "be construed and understood accordingly." General Statutes § 1-1 (a). "[L]egal terms . . . absent any legislative intent shown to the contrary, are to be presumed to be used in their legal sense. . . . Words with a fixed legal or judicially settled meaning must be presumed to have been used in that sense. . . . In ascertaining legislative intent [r]ather than using terms in their everyday sense, [t]he law uses familiar legal expressions in their familiar legal sense." (Internal quotation marks omitted.) *State* v. *Dupigney*, 295 Conn. 50, 59, 988 A.2d 851 (2010).

This court previously has determined that "Connecticut antidiscrimination statutes should be interpreted in accordance with federal antidiscrimination laws." *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 407, 944 A.2d 925 (2008); see also *Thames Talent, Ltd.* v.

Commission on Human Rights & Opportunities, 265 Conn. 127, 139, 827 A.2d 659 (2003). Thus, in defining the contours of an employer's duties under antidiscrimination laws such as § 46a-81c, we have looked for guidance to federal case law. See, e.g., *Brittell* v. *Dept. of Correction*, 247 Conn. 148, 164, 717 A.2d 1254 (1998) (concluding legislature intended to make General Statutes § 46a-60 [a] [1], which prohibits discrimination on basis of "race, color, religious creed, age, sex, marital status, national origin, ancestry . . . [and] disability," coextensive with Title VII of the Civil Rights Act of 1964).

Analogous federal law that long predates and contains nearly identical language to § 46a-81c (1),[13] makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, *terms*, *conditions*, *or privileges of employment*, because of such individual's race, color, religion, sex, or national origin . . . ." (Emphasis added.) Title VII of the Civil Rights Act of 1964, § 703 (a) (1), codified as 42 U. S. C. § 2000e-2 (a) (1) (Title VII).

In *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986), the United States Supreme Court examined the legislature's use of the phrase "terms, conditions, or privileges of employment" in Title VII, and declared that it evinced a congressional intent "to strike at the entire spectrum of disparate treatment of men and women in employment." (Internal quotation marks omitted.) The court concluded that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." Id., 66; *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (reaffirming standard set forth in *Vinson*); *Fitzgerald* v. *Henderson*, 251 F.3d 345, 358 (2d Cir.

[13] Section 46a-81c was enacted in 1991. See Public Acts 1991, No. 91-58, § 3.

2001) (employing standard); see also *Rogers* v. *Equal Employment Opportunity Commission*, 454 F.2d 234, 237–38 (5th Cir. 1971) (practice of racially segregating patients in physician's office was discrimination in " 'the terms, conditions, or privileges of employment' "), cert. denied, 406 U.S. 957, 92 S. Ct. 2058, 32 L. Ed. 2d 343 (1972).

Consistent with *Vinson* and its progeny, this court declared in *Brittell* v. *Department of Correction*, supra, 247 Conn. 166–67, that to support a hostile work environment claim, "the workplace [must be] permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive *to alter the conditions of the victim's employment* and create an abusive working environment . . . ." (Emphasis added; internal quotation marks omitted.) By definition, therefore, a hostile work environment is one that is so severe that it affects the terms and conditions of the workplace.

In examining the phrase hostile work environment, we also look to Connecticut case law analyzing § 46a-60 (a) (1),[14] this state's broader antidiscrimination statute, which employs the identical phrase "terms, conditions or privileges of employment" as § 46a-81c (1) and also predates that statute. Having concluded in previous cases that the legislature intended to create a cause of action for hostile work environment claims by prohibiting employers from discriminating "in terms, conditions or privileges of employment" under § 46a-60 (a) (1); see *Rodrigue* v. *Triumph Actuation Systems-Connecticut, LLC*, Superior Court, judicial district of Hart-

[14] General Statutes § 46a-60 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent . . . to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in *terms, conditions or privileges of employment* because of the individual's race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disability, mental retardation, learning disability or physical disability . . . ." (Emphasis added.)

ford, Docket No. CV-11-6020397S (January 20, 2012) (disability discrimination based on hearing loss); *Tosado* v. *State*, Superior Court, judicial district of Fairfield, Docket No. CV-03-0402149S (March 15, 2007) (race, national origin, and ancestry discrimination); *Bramwell* v. *State*, Superior Court, judicial district of New Britain, Docket No. CV-97-0481200S (March 28, 2002) (race discrimination); *Hartford* v. *Casati*, Superior Court, judicial district of Hartford, Docket No. CV-00-0599086S (October 25, 2001) (race discrimination); we now conclude that its use of the same phrase in § 46a-81c (1) evinces a similar intent with respect to sexual orientation discrimination. Cf. *Morales* v. *ATP Health & Beauty Care, Inc.*, United States District Court, Docket No. 3:06CV01430 (AWT) (D. Conn. August 18, 2008) 2008 WL 3845294 (plaintiff permitted to use evidence of harassment based on sexual orientation to support hostile work environment claim because, unlike Title VII, § 46a-81c prohibits sexual orientation discrimination); *Hartford* v. *Casati*, supra (employee's use of words "dyke" and "fag" contributed to racially and sexually derogatory hostile work environment under § 46a-60 [a] [1]).

This conclusion is consistent with the well established principle that, absent evidence to the contrary, "where the legislature uses the same phrase it intends the same meaning." (Internal quotation marks omitted.) *Schiano* v. *Bliss Exterminating Co.*, 260 Conn. 21, 41, 792 A.2d 835 (2002). Accordingly, as a term of art with a fixed legal meaning in both federal and Connecticut antidiscrimination law, the phrase "terms, conditions or privileges of employment" appears in § 46a-81c (1) for the specific legislative purpose of permitting hostile work environment claims under that statute.[15]

[15] Although the parties and amici curiae devoted portions of their briefs to the legislative history of § 46a-81c, our conclusion that the statute clearly and unambiguously provides for hostile work environment claims by employing a term of art prohibits us from analyzing these arguments even in support of our conclusion. See General Statutes § 1-2z.

Nevertheless, despite the fact that § 46a-60 (a) (1) employs language identical to § 46a-81c (1), the defendant in the present case urges us not to draw from our interpretation of § 46a-60 (a) (1) because "the legislature's different approach [in § 46a-81c] was [intended] to set this statute apart from other statutes that had a corresponding federal statute rooted in federal constitutional protections." The defendant contends that, "whereas Title VII codified a remedy for discrimination 'that amounts to a constitutional tort' under the United States [c]onstitution," § 46a-81c, by extending protection to a class of persons not protected under the federal constitution, did not codify such a remedy.

The defendant's contention disregards the fact that, although modeled after Title VII, § 46a-60 (a) (1) is itself undoubtedly more expansive than Title VII and thus, like § 46a-81c, was intended to extend broader protection than its federal counterpart. Title VII prohibits discrimination only on the basis of "race, color, religion, sex, or national origin"; see 42 U.S.C. § 2000e-2 (a) (1); while § 46a-60 (a) (1) broadly prohibits discrimination based on "race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disability, mental retardation, learning disability or physical disability . . . ." Hence, § 46a-60 (a) (1) protects additional classes of individuals who are not entitled to protection under Title VII, but whom the legislature has nevertheless deemed deserving of such protection under state law. Nothing in the language of the relevant statutes suggests that the legislature intended less extensive protections for victims of sexual orientation discrimination than for victims of other forms of discrimination.[16]

[16] We note that in *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 165–69, 957 A.2d 407 (2008), this court recognized that sexual orientation meets all of the requirements of a quasi-suspect classification under the Connecticut constitution and therefore sexual orientation is subject to the same heightened scrutiny as sex discrimination.

In further support of its argument that our interpretation of the identical phrase in § 46a-60 (a) (1) is inapplicable to § 46a-81c because it provides more extensive protection than § 46a-81c, the defendant asserted at oral argument that, in *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 206, 957 A.2d 407 (2008), this court acknowledged that Connecticut statutes prohibiting sexual orientation discrimination provide more limited protection than any other antidiscrimination statutes. Specifically, the defendant referred to our statement in *Kerrigan* regarding General Statutes §§ 46a-81a through 46a-81r, wherein we observed that, "the bill that did become [the gay rights] law provides more limited protection than the proposals that had preceded it, all of which would have added sexual orientation to the existing nondiscrimination laws and would have treated the classification in the same manner as other protected classes." Id. In *Kerrigan*, however, we focused on the legislation in its entirety, rather than § 46a-81c (1) specifically, which is the subsection at issue in the present case. Although other provisions concerning sexual orientation discrimination are or were limited by express provision; see, e.g., General Statutes (Rev. to 2009) § 46a-81r (law shall not be construed "to mean that the state of Connecticut condones homosexuality");[17] General Statutes § 46a-81p (exception for religious institutions); General Statutes § 46a-81q (exception for ROTC programs); § 46a-81c, the employment discrimination section, contains no such limitation. We therefore disagree with the defendant that the phrase "terms, conditions or privileges of employment" in § 46a-81c (1) should be more narrowly construed than § 46a-60 (a) (1). For the foregoing reasons, we conclude that it is proper for us to look to § 46a-60 (a) (1) when interpreting § 46a-81c (1).

[17] Section 46a-81r was repealed, effective April 23, 2009.

The defendant next directs our attention to § 46a-60 (a) (8) (C), which specifically employs the phrase "hostile or offensive working environment" in the context of sexual harassment claims. The defendant asserts that, "[b]ecause the Connecticut legislature chose to use the hostile work environment language in § 46a-60 [(a) (8)] . . . and did not do so in the statutory language of § 46a-81c . . . the trial court should not have read into the statute language that does not exist." In other words, the defendant essentially seeks to limit hostile work environment claims to those claims arising under statutes specifically employing the "hostile or offensive work environment" terminology. We disagree.

Section 46a-60 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . (8) For an employer, by the employer or the employer's agent . . . to harass any employee, person seeking employment or member on the basis of sex. 'Sexual harassment' shall, for the purposes of this section, be defined as any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when . . . (C) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, *hostile or offensive working environment* . . . ." (Emphasis added.)

Although § 46a-60 (a) (8) (C) contains the words "hostile or offensive working environment," we disagree with the defendant that the legislature must include such language in order to evince an intent to permit hostile work environment claims. First, we disagree because, according to the defendant's theory, under § 46a-60 (a) (1), which also does not contain the "hostile or offensive work environment" terminology; see footnote 14 of this opinion; the legislature intended not to permit hostile work environment claims arising out of discrimination on the basis of other classifications such

as race, religion, age, marital status and disability. To the contrary, however, as we previously have explained, hostile work environment claims may be brought under § 46a-60 (a) (1) pursuant to that provision's prohibition of discrimination in "terms, conditions or privileges of employment . . . ." See *Rodrigue* v. *Triumph Actuation Systems-Connecticut, LLC*, supra, Superior Court, Docket No. CV-11-6020397S (disability discrimination); *Tosado* v. *State*, supra, Superior Court, Docket No. CV-03-0402149S (race, national origin, and ancestry discrimination); *Bramwell* v. *State*, supra, Superior Court, Docket No. CV-97-0481200S (race discrimination); *Hartford* v. *Casati*, supra, Superior Court, Docket No. CV-00-0599086S (race discrimination); see also *Smith* v. *Cingular Wireless*, 579 F. Sup. 2d 231 (D. Conn. 2008) (Title VII hostile work environment claim based on store manager's refusal to accommodate plaintiff's back injury).

Indeed, because § 46a-60 (a) (8) (C) is Connecticut's only antidiscrimination statute containing the "hostile or offensive working environment" terminology, the defendant essentially claims that the legislature intended plaintiffs to obtain redress *only* in the sexual harassment context, apparently giving license to rampant workplace bigotry and thwarting the very purpose of antidiscrimination laws. As one amicus curiae points out, under such a system, so long as an employer took reasonable steps to prevent sexual harassment, it "could ignore an African-American employee's coworkers who repeatedly paper over her worksite with pictures of the Ku Klux Klan and burning crosses," and turn a blind eye when "a Jewish employee's coworkers . . . paper the walls of his worksite with Nazi swastikas." We cannot conclude that the legislature intended such an absurd result when it employed the phrase "terms, conditions and privileges of employment" in both §§ 46a-60 (a) (1) and 46a-81c (1).

Second, the timeline of events leading up to the enactment of § 46a-60 (a) (8) is consistent with the legislature's use of the "hostile or offensive working environment" terminology in that statute. Specifically, § 46a-60 (a) (8) was adopted in 1980, the same year that the federal Equal Employment Opportunity Commission announced its stance that sexual harassment violates Title VII.[18] Although it took six years for the United States Supreme Court to conclude, consistent with the Equal Employment Opportunity Commission's stance on the issue, that sexual harassment violates Title VII; see *Meritor Savings Bank* v. *Vinson*, supra, 477 U.S. 66; the Connecticut legislature enacted § 46a-60 (a) (8) immediately following that commission's declaration in order to clarify that, at least under Connecticut law, sexual harassment violates § 46a-60 (a). This principle was well established however by 1991, when the legislature enacted § 46a-81c. It is therefore reasonable to conclude that the legislature did not include the hostile or offensive work environment terminology in § 46a-81c because it was clearly encompassed in the phrase "terms, conditions or privileges of employment" by that time.

Accordingly, we conclude that the phrase "terms, conditions or privileges of employment" constitutes a term of art with a fixed legal meaning, and the legislature's use of that phrase in § 46a-81c (1) evidences its intent to permit hostile work environment claims where employees are subject to sexual orientation discrimination.

II

The defendant next claims that, even if § 46a-81c creates a cause of action for hostile work environment

[18] See Equal Employment Opportunity Commission Compliance Manual (CCH 2009) § 615, para. 3114 (4), p. 3225. The Equal Employment Opportunity Commission derives its authority to issue guidelines on employment discrimination, including sexual harassment, from 42 U.S.C. § 2000e-16 (b).

claims, the jury's determination that a hostile work environment existed in the present case is wholly unsupported by the evidence. Specifically, the defendant first asserts that the derogatory and homophobic slurs were never said directly to the plaintiff. Second, the defendant contends that the slurs were commonly made in languages not understood by the plaintiff, who is fluent only in Spanish and English, and that there is an alternative definition for at least one Spanish word that was used by the plaintiff's coworkers. Finally, the defendant asserts that the plaintiff voluntarily chose to work on paid vacation days, and "[i]t makes no sense that [the plaintiff] experienced what a reasonable person would describe as an objectively hostile work environment if, on a day when he was entitled to stay away from work and still get paid, he chose to show up at the shop." We reject each argument in turn.

The applicable standard of review is well settled. "The proper appellate standard of review when considering the action of a trial court in granting or denying a motion to set aside a verdict is the abuse of discretion standard. . . . In determining whether there has been an abuse of discretion, 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. . . . [T]he role of the trial court on a motion to set aside the jury's verdict is not to sit as [an added] juror . . . but, rather, to decide whether, viewing the evidence in the light most favorable to the prevailing party, the jury could reasonably have reached the verdict that it did. . . . In reviewing the action of the trial court in denying [or granting a motion] . . . to set aside the verdict, our primary concern is to determine whether the court abused its discretion. . . . The trial court's decision is significant because the trial judge has had the same opportunity as the jury to view

the witnesses, to assess their credibility and to determine the weight that should be given to [the] evidence. Moreover, the trial judge can gauge the tenor of the trial, as [this court], on the written record, cannot, and can detect those factors, if any, that could improperly have influenced the jury." (Citations omitted; internal quotation marks omitted.) *Hall* v. *Bergman*, supra, 296 Conn. 179.

As we have stated previously, to establish a hostile work environment claim, a plaintiff must produce evidence sufficient to show that the workplace is "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . . . [I]n order to be actionable . . . a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." (Citations omitted; internal quotation marks omitted.) *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 166–67; see also *Gorzynski* v. *JetBlue Airways Corp.*, 596 F.3d 93, 102 (2d Cir. 2010). Whether an environment is objectively hostile is determined by looking at the record as a whole and at all the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris* v. *Forklift Systems, Inc.*, supra, 510 U.S. 23. As the Court of Appeals for the Second Circuit explained with respect to offensive slurs in another context: "[T]here must be more than a few isolated incidents of racial enmity . . . meaning that [i]nstead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments . . . . Thus, whether racial slurs constitute a hostile work environment typi-

cally depends upon the quantity, frequency, and severity of those slurs . . . considered cumulatively in order to obtain a realistic view of the work environment . . . ." (Citations omitted; internal quotation marks omitted.) *Schwapp* v. *Avon*, 118 F.3d 106, 110–11 (2d Cir. 1997).

The evidence of a hostile work environment in the present case is that derogatory comments were made multiple times per week, sometimes several times a day, over a prolonged period of time, despite the plaintiff's repeated complaints to his supervisors. The plaintiff testified that his coworkers constantly yelled slurs in his presence as he worked on the shop floor. The plaintiff meticulously recorded each incident in his diaries, which were admitted into evidence for the jury to consider in reaching its verdict. On the basis of this evidence, we conclude that the trial court did not abuse its discretion when it concluded that the jury reasonably could have determined that the plaintiff was subjected to a hostile work environment.

Despite the plaintiff's testimony and diary entries, the defendant contends that the evidence was insufficient because the derogatory slurs were not "directed at" the plaintiff. In addressing this claim, we begin by noting that it is proper for us to consider conduct directed toward others in assessing the general work atmosphere; *Gorzynski* v. *JetBlue Airways Corp.*, supra, 596 F.3d 102–103; because discriminatory conduct need not be directed at a particular plaintiff in order to support a finding of a hostile work environment.[19] Even state-

[19] The defendant relies upon several federal District Court cases in support of its claim that derogatory comments must be directed at a plaintiff to be actionable, all of which we conclude are inapplicable in the present case. In *Bronner* v. *Catholic Charities of the Roman Catholic Diocese of Syracuse, Inc.*, United States District Court, Docket No. 3:08-CV-0015, 2010 WL 981959, *13 (N.D.N.Y. March 15, 2010), for example, the District Court dismissed the plaintiff's hostile work environment claim, explaining that the claim "rest[ed] upon allegations of a few isolated and unspecified incidents of comments thought to be racist, criticism thought to be racially motivated, and unspecified jokes by co-workers, *most of which were not directed at*

ments made to others not in an employee's presence are actionable when the employee is aware of the conduct taking place behind his back. See *Schwapp* v. *Avon*, supra, 118 F.3d 111 ("[j]ust as a racial epithet need not be directed at a plaintiff in order to contribute to a hostile work environment . . . the fact that a plaintiff learns second-hand of a racially derogatory comment or joke . . . also can impact the work environment" [citation omitted]); *Torres* v. *Pisano*, 116 F.3d 625, 633 (2d Cir. 1997) ("[a]n employee who knows that her boss is saying [sexually derogatory] things . . . behind her back may reasonably find her working environment hostile"); *Hartford* v. *Casati*, supra, Superior Court, Docket No. CV-00-0599086S ("[t[hat discriminatory terms and comments are not used in the presence of or directed at particular individuals has provided no defense to employers under employment discrimination laws"). Thus, the fact that the derogatory comments complained of in the present case were not always directed specifically at the plaintiff, and appeared to be the product of a "locker-room office culture," does

[*the plaintiff*] or identified with any precision." (Emphasis added.) Although the defendant places much significance upon the court's observation that the comments were "not directed at [the plaintiff]," the District Court in *Bronner* ultimately concluded that, "[c]ourt[s] *can consider the conduct directed toward others* in assessing the general work atmosphere . . . ." (Emphasis added.) Id. The dismissal of the plaintiff's claim in *Bronner* was thus based upon other factors, including the lack of severity and infrequency of the comments, rather than the fact that they were not directed at the plaintiff.

Similarly, the defendant claims that *Nurriddin* v. *Goldin*, 382 F. Sup. 2d 79, 108–109 (D.D.C. 2005), cert. denied, 552 U.S. 1243, 128 S. Ct. 1473, 170 L. Ed. 2d 296 (2008), established that statements directed at third parties are insufficient to demonstrate a hostile work environment. Although the District Court stated in *Nurriddin* that, "[w]hen racial statements are not made directly to a plaintiff, generally a hostile environment cannot be established"; id., 108; it reviewed multiple factors in rejecting the plaintiff's claims, including "the frequency, nature, severity and offensiveness of the alleged incidents . . . ." Id., 109. Accordingly, we conclude that the cases cited by the defendant do not support its broad claim that discriminatory remarks must always be directed at the plaintiff to be actionable.

not shield the defendant from liability. See *McGullam* v. *Cedar Graphics, Inc.*, 609 F.3d 70, 85 (2d Cir. 2010) (Calabresi, J., concurring).

Regardless, we further conclude that the plaintiff presented sufficient evidence upon which the jury could reasonably have concluded that the derogatory remarks were in fact directed at the plaintiff. The plaintiff testified that his coworkers uttered derogatory slurs near him in particular, such as when "they were passing [his] aisle [on the shop floor]." Additionally, the plaintiff's diary entries explain that his coworkers regularly yelled homosexual slurs upon seeing the plaintiff while working on the shop floor and sometimes even made eye contact with him while doing so.[20]

The defendant also contends that the evidence was insufficient because the derogatory slurs were spoken in languages in which the plaintiff admittedly is not fluent. In support of this claim, the defendant points out that the plaintiff speaks fluent Spanish and English, but "testified that he was called[21] derogatory names in Spanish, French, Indian, Laotian, Portugese, and Vietnamese . . . ." The defendant also asserts that one of the Spanish words used by the plaintiff's coworkers has a nonderogatory definition and that the plaintiff failed to prove that his coworkers intended its derogatory meaning when they used it. In particular, the defendant asserts that, in addition to being a homophobic slur, a "pato" is a male duck in Spanish. We emphatically disagree.

[20] A diary entry dated September 3, 2004, for example, provides: "At 12:30 [a coworker] blasted the word '[f]ag' from the door of the men's room as I was in my machine . . . I stared at him . . . he was staring at me." Another entry dated November 4, 2004, provides: "At 1:45 [another coworker] screamed the word '[p]ato' as I came into his view through the alley between [two machines] . . . ."

[21] We note that this statement by the defendant in its brief undercuts its prior argument that the evidence was insufficient to establish that the derogatory slurs were directed at the plaintiff.

To begin, we note that the defendant failed to raise this argument before the trial court, either at trial or in its posttrial motions. Putting aside the issue of preservation, the defendant's notion that one must be fluent in a language in order to know that a particular word has a derogatory meaning defies common sense. Certainly, one may learn the meaning of a particular word without mastering an entire language. Furthermore, most of the slurs that the plaintiff heard while working on the defendant's shop floor were in English or Spanish, which the plaintiff does speak fluently. Finally, with respect to the defendant's argument that "pato" means a male duck in Spanish, other courts have noted that English words like "fag" and "faggot" similarly have several uses in the English language: " 'Fag' can mean a tuft of grass, a cigarette, or toil. A faggot can be a bundle of sticks, or a spicy meatball." *King* v. *Burris*, 588 F. Sup. 1152, 1157 n.10 (D. Colo. 1984). Nevertheless, those courts have explained that, when one definition of a term predominates, courts may follow the interpretation most reasonable in context. Id. "To suggest otherwise serves only to further tax the gullibility of the credulous and require this court to espouse a naiveté unwarranted under the circumstances." *Moricoli* v. *Schwartz*, 46 Ill. App. 3d 481, 483, 361 N.E.2d 74 (1977). As there are presumably few occasions on which employees would discuss male ducks on the shop floor of an industrial plant such as the defendant's, the argument that the plaintiff's coworkers did not intend to use the word pato in a derogatory way lacks merit.

The defendant's final argument regarding its claim of insufficient evidence to support the jury's verdict is that the plaintiff must not have found the environment hostile, as evidenced by his having chosen to work rather than taking all of the paid vacation days available to him. We again note that the defendant failed to raise this argument at trial or in either of its posttrial motions.

Even if we were to assume that the defendant had properly preserved its argument, however, we wholly reject this claim. Although discrimination in the workplace may sometimes "discourage employees from remaining on the job, or keep them from advancing in their careers"; *Harris* v. *Forklift Systems, Inc.*, supra, 510 U.S. 22; the defendant cites, and we have found, no authority for the proposition that employees must take every opportunity offered to them to avoid their workplace in order to assert a hostile work environment claim. The plaintiff's decision to work rather than take paid vacation days could be attributable to a whole host of reasons, none of which bear on the question of whether the defendant's industrial plant was a hostile work environment. Indeed, by creating a cause of action for hostile work environment claims, the legislature acknowledged that constructive discharge claims offer insufficient redress for employees who, for a variety of reasons, must continue to work in hostile environments in spite of the harassment that they endure there. See generally id., 21 (claims under Title VII are not limited to "economic" or "tangible" discrimination); *Rogers* v. *Equal Employment Opportunity Commission*, supra, 454 F.2d 238 (employment discrimination is not limited to "isolated and distinguishable events" of "hiring, firing, and promoting"). Because "the victim of [workplace] harassment should not be punished for the conduct of the harasser"; (internal quotation marks omitted) *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 177; we strongly disagree with the defendant's suggestion that the plaintiff's claim is undercut by his strong work ethic or ability to withstand harassment on the job. Accordingly, in light of the plaintiff's testimony indicating the detrimental effect of the harassment, we conclude that the trial court did not abuse its discretion when it concluded that there was sufficient evidence to support the jury's verdict.

III

The defendant's final claim on appeal is that the trial court, in denying the motion to set aside the verdict and the motion for remittitur, abused its discretion by concluding that the $94,500 noneconomic damages award was supported by the evidence and was not excessive. Specifically, the defendant asserts that: (1) the plaintiff produced little, if any, evidence of emotional distress; (2) the $94,500 damages award is tantamount to punitive damages as it is excessive and shocks the court's sense of justice; and (3) the trial court improperly applied Connecticut law in reaching its decision on the motions. The plaintiff responds that his testimony provided sufficient evidence of his damages, the award is not excessive, and the trial court properly applied the law in denying the defendant's motions.[22] We agree with the plaintiff.

Our analysis of this claim is guided by certain governing principles, which are applicable when reviewing appeals regarding motions to set aside a verdict as well as motions for remittitur. Because an award of damages is a matter peculiarly within the province of the trier of facts, we have held consistently that "a court should exercise its authority to order a remittitur rarely—only in the most exceptional of circumstances." *Saleh* v. *Ribeiro Trucking, LLC*, 303 Conn. 276, 280, 32 A.3d 318 (2011). "In determining whether to order remittitur, the trial court is required to review the evidence in the light most favorable to sustaining the verdict. . . . Upon

[22] The following parties have submitted amicus curiae briefs in support of the plaintiff's position regarding the third issue on appeal: the Connecticut Employment Lawyers Association, African-American Affairs Commission, Center for Disability Rights, Connecticut Alliance for Business Opportunities, Connecticut Hispanic Bar Association, Connecticut Transadvocacy Coalition, Gay & Lesbian Advocates & Defenders, Permanent Commission on the Status of Women, and Triangle Community Center, collectively; as well as the commission on human rights and opportunities, individually.

completing that review, the court should not interfere with the jury's determination except when the verdict is plainly excessive or exorbitant. . . . The ultimate test which must be applied to the verdict by the trial court is whether the jury's award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, prejudice, mistake or corruption. . . . The court's broad power to order a remittitur should be exercised only when it is manifest that the jury [has] included items of damage which are contrary to law, not supported by proof, or contrary to the court's explicit and unchallenged instructions." (Citation omitted; internal quotation marks omitted.) Id., 281.

Furthermore, "[t]he decision whether to reduce a jury verdict because it is excessive as a matter of law . . . rests solely within the discretion of the trial court. . . . [Consequently], the proper standard of review of a trial court's decision to grant or deny a motion to set aside a verdict as excessive as a matter of law is that of abuse of discretion. . . . Accordingly, the ruling of the trial court on the motion to set aside the verdict as excessive is entitled to great weight and every reasonable presumption should be given in favor of its correctness." (Citations omitted; internal quotation marks omitted.) Id., 281–82.

In the present case, giving every reasonable presumption in favor of the verdict's correctness, we conclude that the trial court did not abuse its discretion when it determined that the plaintiff presented sufficient evidence to support the damages award.[23] The jury reason-

[23] Although the brief filed by amici curiae Connecticut Employment Lawyers Association, African-American Affairs Commission, Center for Disability Rights, Connecticut Alliance for Business Opportunities, Connecticut Hispanic Bar Association, Connecticut Transadvocacy Coalition, Gay & Lesbian Advocates & Defenders, Permanent Commission on the Status of

ably could have credited the plaintiff's testimony that the harassment he experienced over the period of more than two years at issue devastated and overwhelmed him, making him angry, sad, and humiliated, and feeling diminished.[24] The plaintiff further testified that he had difficulty sleeping, and, in at least one of his letters to Greenberg, he stated that the stress was so overwhelming that his body would shake and his work product suffered as a result.[25] See *Olsen* v. *Nassau*, 615 F. Sup. 2d 35, 46 (E.D.N.Y. 2009) ("[i]n garden variety emotional distress claims, the evidence of mental suffering is generally limited to the testimony of the plaintiff" [internal quotation marks omitted]).

Furthermore, given the sustained nature of the discrimination described by the plaintiff, the severity of

Women, and Triangle Community Center describes several studies examining in great detail the mental and physical harms associated with discrimination against minority groups, we may consider only the evidence contained in the record when reviewing the defendant's claim that the plaintiff presented insufficient evidence to support the award of damages in this case. Regarding the defendant's alternative claim, namely, that the motion for remittitur was improperly denied because the damages award was excessive, we need not address the question of whether we may properly consider the studies described by the amici curiae because we conclude that the evidence presented by the plaintiff, on its own, demonstrates that the damages award was appropriate.

[24] We note that the jury was instructed that the plaintiff's allegations pertained to the time period between June 26, 2002 and November 8, 2004. See footnote 3 of this opinion.

[25] The defendant asserts that the plaintiff failed to offer any medical or expert testimony to corroborate his "subjective testimony" about his emotional distress. The defendant essentially invites this court to conclude that a plaintiff's own testimony regarding the detrimental effect of derogatory and homophobic slurs is insufficient without corroboration. As the defendant itself acknowledged in its brief, however, Connecticut law requires no such evidence. *Schanzer* v. *United Technologies Corp.*, 120 F. Sup. 2d 200, 219 (D. Conn. 2000) (citing *Berry* v. *Loiseau*, 223 Conn. 786, 807, 614 A.2d 414 [1992]); see also *Meacham* v. *Knolls Atomic Power Laboratory*, 381 F.3d 56, 78 (2d Cir. 2004) (recognizing that awards of more than $100,000 are often upheld even "without discussion of protracted suffering, truly egregious conduct, or medical treatment"). We reject the defendant's invitation to change the current law.

the hostility he experienced, and the continued failure of the defendant to remedy the situation, the trial court did not abuse its discretion when it concluded that the award was not excessive or shocking when compared to verdicts awarded under similar circumstances.[26] See, e.g., *Gonzalez* v. *Bratton*, 147 F. Sup. 2d 180, 208–209 (S.D.N.Y. 2001) ($250,000 compensatory damages award for emotional distress claim under both federal and state law); *Oliver* v. *Cole Gift Centers, Inc.*, 85 F. Sup. 2d 109, 114–15 (D. Conn. 2000) ($100,000 compensatory damages award in Title VII and Connecticut Fair Employment Practices Act case); *Ikram* v. *Waterbury Board of Education*, United States District Court, Docket No. 3:95CV2478 (AHN), 1997 U.S. LEXIS 14619 (D. Conn. September 9, 1997) ($100,000 compensatory damages award in Title VII case); *Annis* v. *Westchester*, 939 F. Sup. 1115, 1121–22 (S.D.N.Y. 1996) ($100,000 compensatory damages award based on 42 U.S.C. § 1983 civil rights violation causing plaintiff's emotional suffering); *Rush* v. *Scott Specialty Gases, Inc.*, 930 F. Sup. 194, 199 (E.D. Pa. 1996) ($100,000 compensatory damages award based on Title VII claim for plaintiff's emotional distress and depression); see also *Olsen* v. *Nassau*, supra, 615 F. Sup. 2d 46 ("[g]arden variety emotional distress] claims generally merit $30,000 to $125,000 awards" [internal quotation marks omitted]).

Finally, we disagree with the defendant that the trial court misapplied Connecticut law regarding damages

[26] In support of its claim, the defendant relies primarily upon *Schanzer* v. *United Technologies Corp.*, 120 F. Sup. 2d 200 (D. Conn. 2000), and *McInnis* v. *Weston*, 458 F. Sup. 2d 7 (D. Conn. 2006). Although the District Court reduced the jury verdict in *Schanzer*, it specifically noted that the plaintiffs in that case had faced discrimination on only one occasion in the context of company-wide terminations, rather than on repeated occasions. *Schanzer* v. *United Technologies Corp.*, supra, 219. Furthermore, in *McInnis*, the District Court reduced the jury verdict from $960,000 to $150,000, which is still more than the damages award at issue in the present case. *McInnis* v. *Weston*, supra, 19.

when it denied the posttrial motions. Specifically, the defendant argues that the trial court improperly stated that, in *Delgado* v. *Cragganmore Associates Ltd. Partnership*, United States District Court, Docket No. 3:01CV1633 (JCH), 2001 WL 1913745 (D. Conn. October 31, 2001), the District Court "held that a prejudgment remedy of approximately $77,000 [per plaintiff] reflecting potential emotional distress damages was not unreasonable for very serious discrimination cases." (Internal quotation marks omitted.) In actuality, the defendant asserts, the District Court in *Delgado* held that $77,000 was excessive and therefore reduced the award to $52,042 per plaintiff.

Contrary to the defendant's claim, we conclude that *Delgado* actually offers additional support for the damages award in the present case. As the trial court noted in its memorandum of decision denying the defendant's motions, the District Court in *Delgado* reviewed the amount of damages awarded in analogous discrimination cases and ultimately concluded that serious discrimination cases may in fact warrant damages awards of $77,000, and sometimes even $100,000 or more. In light of the jury's determination in the present case that the plaintiff was subjected to discrimination, which was reinforced by the plaintiff's testimony regarding the frequency and severity of the harassment, we reject the defendant's assertion that the District Court's decision in *Delgado* supports a reduction in the damages award here.

For the foregoing reasons, we conclude that the trial court did not abuse its discretion when it denied the defendant's posttrial motions.

The judgment of the trial court is affirmed.

In this opinion the other justices concurred.

NICHOLAS RUSSO ET AL. *v.* CITY OF WATERBURY ET AL.
(SC 18392)
(SC 18588)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Harper and Vertefeuille, Js.

Syllabus

Pursuant to a provision (§ 2761) of the Waterbury city charter, "[n]o payments of retirement, disability or death benefits shall be allowed or paid under the provisions of this act or for such period as payments are being made to the [c]ity . . . under the provisions of the General Statutes relating to workers' compensation, except when such payments would exceed the payments made under the provisions of the Workers' Compensation Act. In such cases the pensioner shall receive, in addition to his payments under the Workers' Compensation Act the difference between that amount and the amount which he would receive under the provisions of this act."

In 2006, the defendant city of Waterbury reviewed the issue of offsetting pension payments by the amount of heart and hypertension benefits that certain retired city workers were receiving. The plaintiffs, all retired city employees whose employment had been governed by various collective bargaining agreements between the city and certain police and firefighters unions, were recipients of heart and hypertension benefits pursuant to statute (§ 7-433c), in addition to their city pensions. The plaintiffs received letters advising them that their pension payments would be offset by the amount of their heart and hypertension benefits, which had the effect for some of the plaintiffs of completely offsetting their pensions by the amount of heart and hypertension benefits they were receiving. Thereafter, the plaintiffs filed an action against the city and the defendant retirement board alleging that application of the offset constituted a breach of contract, that the failure to provide a meaningful opportunity to be heard prior to the application of the offset deprived the plaintiffs of their right to federal procedural due process, and that application of the offset was barred by the doctrine of equitable estoppel due to the defendants' historical practice of not applying the offset. The trial court found in favor of the plaintiffs on their breach of contract claims only. That court concluded, as to the plaintiffs A, C, L and S, that because the offset reduced the guaranteed minimum amounts set forth in their respective collective bargaining agreements, which contained no provision expressly allowing pensions to be offset, implementation of the offsets conflicted with those collective bargaining agreements. With respect to the plaintiff R, the trial court acknowledged that his collective bargaining agreement expressly allowed an offset if the

combined total pension and heart and hypertension benefits exceeded 76 percent of R's annual pay, but that court, without making any findings as to whether R's combined pension and heart and hypertension benefits exceeded the maximum pension amount payable pursuant to his collective bargaining agreement, concluded that the offset constituted a breach of the bargaining agreement. Subsequently, the defendants appealed, and A, C, L and R cross appealed. *Held*:

1. The trial court improperly concluded that the collective bargaining agreements of A, C, L and S conflicted with § 2761 of the city charter and therefore precluded the city from applying the charter's offset provision; there was no dispute that § 2761 of the city charter, which was in existence at the time the plaintiffs entered into each of the collective bargaining agreements and was incorporated expressly into each agreement, applied to heart and hypertension benefits and authorized a reduction in pension payments for whatever amount and during whatever period workers' compensation benefits were being paid, this court's review of the individual collective bargaining agreements pertaining to A, C, L and S revealed that the mandatory language in the applicable provisions guaranteed the application of the specific pension formula, but did not preclude the application of the pension offset, and the city, therefore, did not breach the applicable collective bargaining agreements by applying that provision of the city charter to the pensions provided in the collective bargaining agreements of A, C, L and S.

2. The trial court improperly assumed that the application of the pension offset reduced R's benefits below the cap of 76 percent of annual pay set forth in his collective bargaining agreement without determining whether R's combined benefits in fact exceeded that cap, thus precluding an offset; R's collective bargaining agreement acknowledged the city's power to implement an offset when the total combined pension and heart and hypertension benefits exceed a cap of 76 percent of annual pay, and because the trial court failed to make any finding regarding R's annual pay or whether his combined benefits of pension and heart and hypertension payments exceeded 76 percent of that amount, the trial court's judgment was reversed with respect to R and the case was remanded for a new trial on that issue.

3. On their cross appeal, A, C, L and R could not prevail on their claim that the trial court improperly dismissed R's equitable estoppel claim as moot; because none of those parties, including R, offered evidence at trial to establish that they had changed their position as a result of or had acted in detrimental reliance on the city's prior failure to implement the offset pursuant to the city charter, they failed to meet their burden to establish the elements of a claim for equitable estoppel.

Argued December 7, 2011—officially released May 15, 2012

Procedural History

Action to recover damages for, inter alia, breach of contract, to enjoin the defendant retirement board of the city of Waterbury from continuing to offset the pensions of the plaintiffs or their decedents, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the case was transferred to the Complex Litigation Docket; thereafter, the court, *Cremins*, *J.*, granted the defendants' motions to dismiss and to strike certain counts of the plaintiffs' complaint; subsequently, the plaintiff Jason Chicano withdrew his remaining claims against the defendants; thereafter, the case was tried to the court, *Cremins*, *J.*; judgment in part for the named plaintiff et al., from which the defendants appealed and the named plaintiff et al. cross appealed; subsequently, this court granted the defendants' motion to vacate the judgment as to the plaintiff Paul Salvatore; thereafter, the court, *Cremins*, *J.*, granted the motion filed by Terese Salvatore, administratrix of the estate of Paul Salvatore, to open the judgment and to be substituted as a plaintiff for Paul Salvatore, and rendered judgment for the substitute plaintiff, from which the defendants filed a separate appeal. *Reversed in part; judgment directed in part; new trial.*

Sheila A. Huddleston, with whom were *Gary S. Starr* and, on the brief, *Michelle L. Querijero* and *Brian Clemow*, for the appellants-appellees (defendants).

Richard O. LaBrecque, with whom was *Francis J. Grady*, for the appellees-appellants (named plaintiff et al.).

Jason M. Lipsky, for the appellee (substitute plaintiff Terese Salvatore).

Opinion

McLACHLAN, J. This appeal and cross appeal concern the authority of the named defendant, the city of

Waterbury (city), under its city charter to offset the pension benefits of the plaintiffs, Eugene Coyle, Cecile Lynch, Delores Acas, Paul Salvatore and Nicholas Russo,[1] by the heart and hypertension benefits they received pursuant to General Statutes § 7-433c. The defendants, the city and the city's retirement board (board), appeal, and Coyle, Lynch, Acas and Russo (cross appellants) cross appeal, from the judgment of the trial court rendered in favor of the plaintiffs on their breach of contract claims.[2] The substitute plaintiff, Terese Salvatore, administratrix of the estate of Paul Salvatore, is not a party to the cross appeal.[3] In their

[1] Jason Chicano, originally a plaintiff in this action, is not a party to this appeal. All of his claims have been either stricken, withdrawn or dismissed. Nicholas Russo died while his cross appeal was pending, and, thereafter, this court granted the motion to substitute Richard M. Russo, the executor of Nicholas Russo's estate, as a party plaintiff in the action. As we explain; see footnote 3 of this opinion; Paul Salvatore died before judgment was rendered in the trial court, and his substitute plaintiff is not participating in the other plaintiffs' cross appeal.

[2] The defendants appealed from the judgment of the trial court to the Appellate Court, and Russo, Coyle, Lynch and Acas cross appealed. We transferred the appeal and cross appeal, SC 18392, to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[3] Although the trial court rendered judgment in favor of Paul Salvatore, he had died before judgment was entered. Following the defendants' appeal, they filed a motion in this court to vacate the judgment as to Paul Salvatore, which this court granted without prejudice to the right of the executrix of his estate to reopen the judgment and to be substituted for the decedent. Terese Salvatore then so moved in the trial court, which granted the motion and rendered judgment in favor of Terese Salvatore as substitute plaintiff.

The defendants appealed from that judgment to the Appellate Court. We transferred that appeal to this court pursuant to Practice Book § 65-2 (SC 18588), and consolidated it, for the record and oral argument, with the initial appeal and cross appeal (SC 18392). Terese Salvatore did not file a cross appeal, but the plaintiffs' appellate brief asserts that she is "joining" the claims advanced in the cross appeal, and a letter from her counsel has advised this court that she is adopting the brief in SC 18392 as her appellee brief in SC 18588. The defendants argue that Terese Salvatore is precluded from challenging the judgment of the trial court because of her failure to file a cross appeal. Because the cross appellants have not prevailed on their claims in this appeal, the question of whether Terese Salvatore may join the cross appeal and adopt the arguments therein is rendered moot and we do not address it.

appeal, the defendants argue that: (1) the trial court improperly concluded, with respect to Coyle, Lynch, Acas and Paul Salvatore, that their respective collective bargaining agreements conflicted with § 2761 of the 1967 Waterbury city charter (city charter),[4] which allows the city to offset the plaintiffs' pension benefits based on their heart and hypertension benefits; and (2) although the trial court properly interpreted Russo's collective bargaining agreement to permit the city to offset his pension benefits by his heart and hypertension benefits, that court improperly failed to determine whether Russo's combined pension and heart and hypertension benefits exceeded the cap set forth in the agreement, thus permitting an offset.[5] The cross appellants claim, inter alia, that the trial court improperly dismissed as moot Russo's claim that the defendants are barred under the doctrine of equitable estoppel from offsetting their pension benefits because the defendants historically had not done so,[6] and that,

[4] Section 2761 of the city charter provides: "No payments of retirement, disability or death benefits shall be allowed or paid under the provisions of this act so long or for such period as payments are being made by the city of Waterbury under the provisions of the General Statutes relating to workers' compensation except when such payments would exceed the payments made under the provisions of the Workers' Compensation Act. In such cases the pensioner shall receive, in addition to his payments under the Workers' Compensation Act the difference between that amount and the amount which he would have received under the provisions of this act."

[5] The defendants also claim, as to Paul Salvatore, that, even under the trial court's improper construction of the bargaining agreement applicable to him, the offset was permissible because that offset did not reduce his pension payments below the minimum set forth in his bargaining agreement. Because we agree with the defendants that the trial court improperly concluded that the charter offset provision could not be applied, we do not address this claim.

[6] The cross appellants advance a number of claims that we do not address. We briefly summarize those claims and the reasons we do not reach them.

The cross appellants claim that, in light of the trial court's determination that they are entitled to their pension without any offset, that court improperly concluded that the defendants had not deprived them of a federally protected property interest in violation of their right to procedural due process when applying the offset on the ground that they did not have a

in the event that we reverse the judgment of the trial court as to the breach of contract count, the case must be remanded to the trial court for a determination of whether the cross appellants established their right to equitable estoppel. We agree with the defendants' claims, but disagree with the plaintiffs' and cross appellants' claims. Accordingly, we reverse the judgment of the trial court in part, direct judgment in favor of the defendants on all claims except Russo's claim for breach of contract, and remand the case for a new trial on that claim.

The trial court found the following undisputed facts. In August, 2006, the city hired Frank May, an attorney, to review the city's past practices, labor contracts and legal authority pertaining to the issue of offsetting pension payments by heart and hypertension benefits. May

constitutionally protected interest in their pension payments. The defendants respond, inter alia, that the plaintiffs' claim is based on a contractual right to receive a certain amount of benefits in excess of what would be allowed if § 2761 applied to the bargaining agreements and that a contract right does not give rise to a constitutionally protected property interest. Because we conclude that the city properly could apply § 2761 of the city charter to offset the plaintiffs' pensions, however, the question of whether the plaintiffs had a constitutionally protected property interest in the amount of their pension that was offset is moot.

The cross appellants also claim that the trial court's decision failed to protect from offset certain payments to which they are entitled in addition to the minimum amounts established by their bargaining agreements. Specifically, the cross appellants claim that the trial court's decision did not account for: the more favorable pension formula for disability pensions; cost of living increases; and other awards in excess of the contractual minimum. Because we conclude that the trial court improperly interpreted the bargaining agreements to establish a minimum guaranteed pension payment, we do not address these claims. For the same reason, it is unnecessary for us to address the cross appellants' claim that the trial court improperly failed to award them interest.

Finally, we decline to review either the cross appellants' claim that the trial court improperly dismissed the plaintiffs' administrative appeal from the retirement board's decision to apply the offset or their request for a remand to the trial court for findings of fact as to the meaning of the agreements in light of extrinsic evidence. Both claims are inadequately briefed.

presented his findings at the December 14, 2006 meeting of the board, stating that, pursuant to the city charter, the Waterbury code of ordinances, applicable collective bargaining agreements and the relevant provisions of the General Statutes, the board was obligated to impose certain pension offsets. At the same meeting, the retirement board adopted a resolution directing the city's pension and benefits manager, his successor and the city pension office to take any necessary actions to implement such pension offsets in accordance with the applicable documents and charter provisions. Shortly thereafter, the plaintiffs, all of whom had been receiving both pension and heart and hypertension benefits, received letters advising them that their pension payments would from that point on be offset by the amount of their heart and hypertension benefits.

Russo worked as a firefighter for the city. Pursuant to the July 1, 1983 to June 30, 1986 collective bargaining agreement between the city and Local 1339, International Association of Firefighters, AFL-CIO (firefighters union), he had been awarded a disability pension of $1908.61 per month and heart and hypertension benefits of $2409.14 per month. His pension has been completely offset by his heart and hypertension benefits since January, 2007.

Acas is the surviving spouse of a Waterbury police officer who was awarded a disability pension upon his retirement pursuant to the 1979 to 1982 collective bargaining agreement between the city and the Waterbury Police Union, Local 1237 and Council 15, American Federation of State, County and Municipal Employees, AFL-CIO (police union), and was also awarded heart and hypertension benefits pursuant to § 7-433c. When her spouse passed away, Acas was awarded a widow's pension of $759.07 per month, and $1993.17 per month in heart and hypertension benefits pursuant to § 7-433c.

Acas' pension has been completely offset by her heart and hypertension benefits since January, 2007.

Paul Salvatore, a retired Waterbury police officer, had been awarded a disability pension in the amount of $2236.48 per month pursuant to the 1984 to 1986 collective bargaining agreement between the city and the police union. He also was awarded heart and hypertension benefits in the amount of $452.71 per month. His pension was offset by the amount of his heart and hypertension benefits from January, 2007, until his death.

Coyle, a retired Waterbury police officer, was awarded a service pension pursuant to the July 1, 2000 to June 30, 2005 collective bargaining agreement between the city and police union in place at the time of his retirement. Effective June 30, 2003, he also was awarded heart and hypertension benefits of $589 per week for 171.6 weeks.[7] In July, 2007, he was awarded an additional twenty-six weeks of benefits, which he received until April, 2008. Coyle currently receives no heart and hypertension benefits. His service pension was offset from February, 2007, until approximately April 14, 2008.[8]

Lynch, the surviving spouse of a city firefighter, was awarded a widow's pension pursuant to the July 1, 1980 to June 30, 1983 collective bargaining agreement between the city and the firefighters union. She was awarded a pension in the amount of $886.57 per month and heart and hypertension benefits in the amount of

[7] Coyle originally received permanent partial heart and hypertension benefits. In June, 2005, he began receiving total temporary heart and hypertension benefits, and his award increased to $678 per week. In July, 2006, he resumed receiving permanent partial heart and hypertension benefits. The trial court made no finding as to the amount of his benefits upon the resumption of his permanent partial heart and hypertension benefits.

[8] The trial court did not make findings regarding either the amount that Coyle received in pension benefits or the amount of the offset.

$3432.54 per month. Her pension has been completely offset by her heart and hypertension benefits since January, 2007.

In 2007, the plaintiffs, as well as other recipients of pension and heart and hypertension benefits, filed various actions against the city, the board and other city personnel. In January, 2008, the plaintiffs filed this exemplar action against the defendants, alleging that application of the offset constituted a breach of contract, that the failure to provide a meaningful opportunity to be heard prior to application of the offset deprived the plaintiffs of their right to federal procedural due process in violation of 42 U.S.C. § 1983, and that application of the offset is barred by the doctrine of equitable estoppel due to the defendants' historic failure to apply it.[9] Following a trial to the court, the trial court found in favor of the plaintiffs on their breach of contract claims only. The court concluded that, as to Paul Salvatore, Acas, Coyle and Lynch, because the application of the offset reduced the "guaranteed minimum amounts" set forth in the plaintiffs' respective bargaining agreements—which agreements contained no provisions expressly allowing pensions to be offset—the implementation of the offsets conflicted with the bargaining agreements and thus constituted a breach of contract. As to Russo, the court recognized that the collective bargaining agreement applicable to him expressly allowed an offset if the combined total of pension and heart and hypertension benefits exceeded the maximum amount of the pension that could have been awarded to him pursuant to the bargaining agreement. Without making any finding as to whether the total of Russo's heart and hypertension and pension benefits exceeded the maximum pension amount payable pursuant to his bargaining agreement,

[9] Terese Salvatore also asserted a claim for infliction of emotional distress, which the trial court rejected.

the court concluded that the offset constituted a breach of the bargaining agreement. The court dismissed as moot Russo's equitable estoppel claim and determined that it need not reach the remaining plaintiffs' equitable estoppel claims in light of its conclusion in their favor on the breach of contract claims. Finally, the trial court rejected the plaintiffs' due process claim on the merits. This appeal and cross appeal followed.

I

We begin with the defendants' claim in their appeal that, with respect to Acas, Paul Salvatore, Coyle and Lynch, the trial court improperly concluded that those plaintiffs' respective collective bargaining agreements conflict with § 2761 of the Waterbury city charter and therefore preclude the city from applying the city charter's offset. The defendants claim that the trial court improperly interpreted the bargaining agreements as establishing a mandatory minimum payment of pension benefits, which may not be offset. Rather, the defendants argue, because the bargaining agreements do not indicate otherwise, § 2761 of the city charter should be read into the bargaining agreement, consistent with the established rule that bargaining agreements are interpreted to incorporate existing statutes, in the absence of an indication to the contrary. See *Hatcho Corp.* v. *Della Pietra*, 195 Conn. 18, 21, 485 A.2d 1285 (1985). The plaintiffs respond that the mandatory language of the pension formula provisions in each of the bargaining agreements unambiguously grants specific pension benefits, that the offset set forth in § 2761 conflicts with that unambiguous grant and, therefore, the offset cannot be applied. We agree with the defendants that there is no conflict between the bargaining agreements and § 2761 of the city charter. Accordingly, we conclude that the city did not breach these collective bargaining agreements by applying the city charter offset to the pensions provided in the bargaining agreements.

We first review the principles that guide our analysis of this issue, which requires interpretation of the pertinent bargaining agreements, the city charter and various statutory provisions. Principles of statutory construction, subject to plenary review, govern our interpretation of the city charter and the applicable sections of the General Statutes. See *Honulik* v. *Greenwich*, 293 Conn. 698, 710, 980 A.2d 880 (2009) ("[a]s with any issue of statutory construction, the interpretation of a charter or municipal ordinance presents a question of law, over which our review is plenary" [internal quotation marks omitted]); *Kelly* v. *New Haven*, 275 Conn. 580, 607, 881 A.2d 978 (2005) (same). "Principles of contract law guide our interpretation of collective bargaining agreements." *Honulik* v. *Greenwich*, supra, 710. When, as in the present case, the trial court based its interpretation solely on the language of the contract, our standard of review is plenary. See *Garcia* v. *Hartford*, 292 Conn. 334, 341–42, 972 A.2d 706 (2009). Similar rules of construction apply to each, under which we look to the text to determine whether a plain intention is manifested and to extratextual sources only when the text is ambiguous. See General Statutes § 1-2z (statutory construction); *Murtha* v. *Hartford*, 303 Conn. 1, 7, 35 A.3d 177 (2011) (contract construction).

Because the contracts must be interpreted within the context of the statutory framework, we begin by examining the relevant statutory provisions, starting with the sections in the Municipal Employee Relations Act, General Statutes § 7-460 et seq., that address the issue of conflicts between bargaining agreements and statutory provisions. General Statutes § 7-474 (f) provides in relevant part: "Where there is a conflict between any agreement reached by a municipal employer and an employee organization and approved in accordance with the provisions of sections 7-467 to 7-477, inclusive, on matters appropriate to collective

bargaining, as defined in said sections, and any charter, special act, ordinance, rules or regulations adopted by the municipal employer or its agents . . . the terms of such agreement shall prevail . . . ." Similarly, § 7-474 (e) provides in relevant part: "The procedure for the making of an agreement between the municipal employer and an employee organization provided by said sections shall be the exclusive method for making a valid agreement for municipal employees represented by an employee organization, and any provisions in any general statute, charter or special act *to the contrary* shall not apply to such an agreement." (Emphasis added.) Subsections (e) and (f) of § 7-474 must be understood in light of the rule of statutory construction to which we already have alluded, that is, in the absence of an indication to the contrary, bargaining agreements are interpreted in light of existing statutes. *Hatcho Corp.* v. *Della Pietra*, supra, 195 Conn. 21; see also *Greene* v. *Waterbury*, 126 Conn. App. 746, 751, 12 A.3d 623 (2011) ("Like any other contract, a collective bargaining agreement may incorporate by reference other documents, statutes or ordinances to be included within the terms of its provisions. . . . When a contract expressly incorporates a statutory enactment by reference, that enactment becomes part of a contract for the indicated purposes just as though the words of that enactment were set out in full in the contract." [Citation omitted; internal quotation marks omitted.]). Given the text of these statutes and the rule of construction together, we must determine whether there is a conflict between § 2761 of the city charter and the pertinent bargaining agreement provisions. If there is a conflict between § 2761 of the city charter and the pertinent bargaining agreement provisions, the terms of the bargaining agreements control and the city is precluded from applying the offset pursuant to the city charter. In the absence of such a conflict, the city charter's

offset provision "becomes a part of [the bargaining agreements] and must be read into [them] just as if an express provision to that effect were inserted therein." *Hatcho Corp.* v. *Della Pietra*, supra, 21.

The city implemented the offset of the plaintiffs' pensions pursuant to § 2761 of the city charter, which provides: "No payments of retirement, disability or death benefits shall be allowed or paid under the provisions of this act so long or for such period as payments are being made by the [c]ity of Waterbury under the provisions of the General Statutes relating to workers' compensation, except when such payments would exceed the payments made under the provisions of the Workers' Compensation Act. In such cases the pensioner shall receive, in addition to his payments under the Workers' Compensation Act the difference between that amount and the amount which he would receive under the provisions of this act." Put briefly, § 2761 authorizes a reduction in pension payments for whatever amount and during whatever period workers' compensation benefits are being paid. If the workers' compensation benefits exceed the pension benefits, § 2761 authorizes a complete offset of the pension benefits. It is undisputed that heart and hypertension benefits pursuant to § 7-433c are treated in the same manner as workers' compensation benefits. *O'Connor* v. *Waterbury*, 286 Conn. 732, 752–53, 945 A.2d 936 (2008). Accordingly, there also is no dispute that the charter's offset provision applies to heart and hypertension benefits, when applicable.

We turn next to the collective bargaining agreements. We begin with the 1979 to 1982 collective bargaining agreement between the city and the police union (1979 police union agreement), pursuant to which Acas is entitled to spousal pension benefits. Article XXIII of the 1979 police union agreement, which governs pension benefits, is replete with references to the city charter.

For example, article XXIII, § 1, provides that nothing in that agreement shall be interpreted to limit or derogate any rights that the employees have pursuant to the city charter. The agreement references the city charter as a source of some definitions; art. XXIII, § 2 (1), (3) and (4), of the 1979 police union agreement; and as a reference for computing years of service for purposes of eligibility to exceed the maximum pension benefit. Id., § 9. Even more significant is the reference to the city charter in article XXIII, § 13, of the 1979 police union agreement, which expressly identifies the extent to which a particular charter provision does not apply. Specifically, article XXIII, § 13, which sets forth pension benefits for surviving children, incorporates § 2745 of the Waterbury city charter, but then identifies two exceptions to the city charter provision's application.[10] The frequency of references to the city charter, particularly those references in which the parties clearly exhibit their awareness of their power to use the city charter precisely to the extent that fits their needs and no more, suggests that if the parties had intended to preclude application of the city charter, they would have done so expressly, as they did in § 13.

The operative provision entitling Acas to pension benefits, article XXIII, § 12, of the 1979 police union agreement, provides in relevant part: "A spouse of an employee *shall be entitled* to a '[s]pouse [p]ension' in the amount hereinafter set forth in this [§] 12, upon the death of the employee (or a former employee, who, at the time of death, was a retiree) which death occurred

[10] Article XXIII, § 13, of the 1979 police union agreement provides the following exceptions: "Except the dollar amount to be paid to the legally appointed guardian of any surviving child or children of any such deceased employee shall be determined by application of the formula in [§] 12 of this [a]rticle XXIII and except that the provision in [§] 2745 of the [c]harter concerning five . . . years of service with the [police] [d]epartment shall be reduced to a requirement of only two years of service with the [police] [d]epartment."

per the circumstances and per the formula of said [§] 2745 of the said [c]harter." (Emphasis added.) Article XXIII, § 12 (A) further provides that "the spouse of said deceased employee *shall be entitled* to receive a [s]pouse [p]ension in an amount equal to one-half . . . of the annual pay[11] which said deceased employee was entitled to receive at the time of his or her death; the spouse of a deceased retiree *shall be entitled* to receive a [s]pouse [p]ension in an amount equal to one-half . . . of the annual pay which such deceased retiree was entitled to receive as of the date of his or her application for a service or disability pension." (Emphasis added.) Other pension formula provisions in article XXIII use similar mandatory language in defining the applicable formulas pursuant to which the beneficiary is to receive a pension. See, e.g., id., § 7 (setting forth formula for service pension and stating that "an employee's pension . . . *shall* be based upon [2 percent] for each year of service" [emphasis added]); id., § 14 (setting forth formula for disability pension and stating that "[t]he [city] *guarantees* that *no* pension payable to a police participant employed by the [p]olice [d]epartment on account of total and permanent disability sustained during the performance of essential duties pertaining to employment by the [city] as provided herein, *shall be less than* one-half . . . the annual rate of regular compensation, plus longevity, received by the disabled employee at the time of disability"[12] [emphasis added]).

[11] Article XXIII, § 12, of the 1979 police union agreement defines " 'annual pay' " as "the employee's annual base salary as of the date of death (or as of date of application for a pension) . . . plus the longevity payment for the year in which the employee dies (or applies for pension) . . . ."

[12] In *O'Connor* v. *Waterbury*, supra, 286 Conn. 745–46, this court stated, when construing this "guarantee" provision and rejecting a claim that a disability retirement amount under this provision should exceed the amount provided for service retirement under another provision: "We conclude that the language in article twenty-three, § 12, of the agreement *clearly and unambiguously* provides that the board was prohibited only from awarding a disability pension *less than* 50 percent of an applicant's annual compensation. Thus, a pension award under § 12 may, but is not required to, *exceed*

The question is whether, as the plaintiffs contend, application of the city charter's offset conflicts with the mandatory language of the pension formula provisions because the offset's application necessarily reduces the guaranteed pension amount, or whether, as the defendants contend, there is no conflict because the two provisions serve different purposes. We agree with the defendants. First, as we have observed, the plaintiffs' position is belied by the frequency with which the drafters of the bargaining agreements referenced the city charter and excepted certain charter provisions from applying to the bargaining agreements. Second, and more significantly, the spousal pension formula provision in the city charter, which predated the 1979 bargaining agreement, clearly demonstrates that the offset and the pension provisions are intended to apply together.

Section 2745 of the city charter sets forth the pension benefits of surviving spouses and dependents. With respect to surviving spouses, the city charter uses mandatory language setting forth the pension formula provisions in the city charter that is virtually identical to the language in the bargaining agreements on which the plaintiffs rely.[13] Yet, § 2745 is part of the city charter,

50 percent of an applicant's annual compensation. In addition, while article twenty-three, § 4, of the agreement provides a clear formula that the board was required to utilize when determining the amount of a service pension, the provisions of § 12 do *not* contain such a formula. Accordingly, we conclude that § 12 of the agreement gave the board broad discretion in deciding the specific amount of a disability pension, so long as the pension constituted at least 50 percent of an applicant's annual compensation." (Emphasis altered.)

[13] Section 2745 of the city charter provides in relevant part: "The spouse or other dependent as hereinafter provided of any police or fire participant who has been in service in either department for at least five years and who dies from any cause *shall be entitled* to a pension in accordance with and subject to the provisions of this section. If it is shown to the satisfaction of the retirement board that such fire or police participant was either killed in the actual performance of duties in his department or has died from the proximate effects of any injury received or exposure experienced while in the active discharge of his duties, the spouse of such participant *shall receive*

along with the pension offset provision, § 2761. It is a basic tenet of statutory construction that "statutes should be construed, where possible, so as to create a rational, coherent and consistent body of law." (Internal quotation marks omitted.) *Aspetuck Valley Country Club, Inc.* v. *Weston*, 292 Conn. 817, 829, 975 A.2d 1241 (2009). Reading the two city charter provisions together as a coherent whole, the only reasonable interpretation of the mandatory language in § 2745 is that, although it mandates the particular pension formula set forth in that provision, it does not preclude an offset of the pension if the beneficiary is receiving benefits that trigger the application of § 2761.

A comparison of the pension formula provision in the bargaining agreement with the pension formula set forth in § 2745 of the city charter further demonstrates that there is no conflict between the bargaining agreement and the charter offset provision. Specifically, article XXIII, § 12, of the 1979 police union agreement provides a more generous pension formula than had been provided under the preexisting charter.[14] The new,

a pension in accordance with and subject to the provisions of this section until death or remarriage. Said pension *shall be equal to* one-half of the pension to which such deceased participant would have been entitled at the time of death or one-quarter of the annual pay of such deceased participant at the time of death, whichever is greater. Upon the death of any retired police or fire participant, the spouse of such member *shall receive a pension equal to* one-half of the pension received by such participant. . . ." (Emphasis added.)

[14] Section 2745 of the city charter entitles a spouse to "one-half of the pension to which such deceased participant would have been entitled at the time of death or one-quarter of the annual pay of such deceased participant at the time of death, whichever is greater." Article XXIII, § 12 (A), of the 1979 police union agreement, by comparison, entitles a spouse to "one-half . . . of the annual pay which said deceased employee was entitled to receive at the time of his or her death; the spouse of a deceased retiree shall be entitled to receive a [s]pouse [p]ension in an amount equal to one-half . . . of the annual pay which such deceased retiree was entitled to receive as of the date of his or her application for a service or disability pension." Article XXIII, § 12, defines " 'annual pay' " to include longevity, representing a more favorable formula for spouses.

more favorable formula thus directly conflicts with the charter provision. Because § 2745 of the charter conflicts with article XXIII, § 12, of the 1979 police union agreement, § 7-474 (e) and (f) require that the bargaining agreement controls the manner in which the pension must be calculated. There is, however, no conflict between article XXIII, § 12, of the 1979 police union agreement and § 2761 of the city charter. Just as the mandatory language in § 2745 of the charter is reconcilable with the charter offset provision, the mandatory language in article XXIII, § 12, of the 1979 police union agreement is also readily reconciled with § 2761. The bargaining agreement controls the amount of the pension, but the charter determines if that pension is subject to an offset.

The two subsequent agreements between the city and the police union, pursuant to which Paul Salvatore and Coyle were entitled to benefits, contain substantially similar language to that employed in the 1979 police union agreement and yield the same conclusion. See art. XXIII of 1984 to 1986 bargaining agreement between the city and the police union (1984 police union agreement); and art. XXIII of 2000 to 2005 bargaining agreement between the city and the police union (2000 police union agreement). Notably, both the 1984 police union agreement and the 2000 police union agreement contain the mandatory language relied upon by the plaintiffs, including the language in which the city guarantees that no disability pension payable shall be less than the amount specified in the contract. Art. XXIII, § 14, of the 1984 police union agreement; art. XXIII, § 12, of the 2000 police union agreement. Just as in the 1979 police union agreement, the preexisting charter contained this same "guarantee" language. Additionally, the particular provisions pursuant to which Paul Salvatore and Coyle were entitled to benefits, when compared to the corresponding provisions of the city

charter, demonstrate that the bargaining agreements substituted pension formulas that were more favorable to beneficiaries, conflicting with, and therefore superseding, the applicable charter provisions.[15] Just as we did with regard to the 1979 police union agreement, we read the mandatory language in the 1984 and 2000 police union agreements to guarantee the application of the particular pension formulas set forth in the applicable provisions, rather than to preclude the application of an offset.

Similar to the police union bargaining agreements, the 1980 to 1983 bargaining agreement between the firefighters union and the city (1980 firefighters union agreement), pursuant to which Lynch was entitled to a spousal pension, references the city charter frequently and also expressly indicates the circumstances in which specified provisions of the city charter do not govern. The 1980 firefighters union agreement contains mandatory language in its pension formula provisions similar

[15] Paul Salvatore, who was awarded a disability pension pursuant to article XXIII, § 14, of the 1984 police union agreement, was entitled under that section to receive a pension that was not less than "one-half . . . the annual rate of regular compensation, plus longevity, received by the disabled employee at the time of disability." Under the applicable provision of the city charter, § 2746, he would simply have been entitled to "one-half the annual rate of regular compensation received by the disabled employee at the time of disability." Again, the more favorable formula in the bargaining agreement, which includes longevity as part of annual pay, prevails. Similarly, Coyle, who was awarded a service pension pursuant to article XXIII, § 4, of the 2000 police union agreement, was entitled to receive a pension "in an amount equal to one-half of the amount of compensation . . . received by him, at the permanent rank or grade held by him at the time of his retirement, payable monthly." " 'Compensation' " is defined in article XXIII, § 2 (6), of the 2000 police union agreement to include annual pay plus longevity. For additional years of service after the date of eligibility for retirement, article XXIII, § 4, of the 2000 police union agreement adds "a sum equal to [2.5 percent] percent of his said compensation, for each additional year he continues in said service until the date of his permanent retirement." The formula for additional years of service is more generous than that set forth in the applicable charter provision, § 2742, which allows only 1.66 percent for each additional year of service.

to the language utilized in the 1979 police union agreement. Like the spousal benefits provision in the 1979 police union agreement, article XXXIII, § 6, of the 1980 firefighters union agreement modifies and supersedes § 2745 of the city charter, the provision governing spousal benefits, by incorporating longevity payments into the definition of " 'annual pay.' " Article XXXIII, § 6, of the 1980 firefighters union agreement expressly acknowledges the alteration, stating that the formula set forth in the bargaining agreement will apply regardless of "[a]nything in [§] 2745 of the [c]harter of the [city] to the contrary . . . ." Section 7 of article XXXIII of the 1980 firefighters union agreement, which governs the pension benefits of surviving children, includes similar language to that employed in the 1979 police agreement, namely, that the provisions of § 2745 of the city charter "shall remain in full force and effect except the dollar amount to be paid to the legally appointed guardian of any surviving child or children of any such deceased employee shall be determined by application of the formula in [§] 6 of this [a]rticle [XXXIII]."

The 1980 firefighters union agreement contains mandatory language in its pension formula provisions that is similar to the language in the 1979 police union agreement.[16] For the reasons we already have set forth in this opinion, we conclude that the mandatory language in the applicable provisions guarantees the application of the specific pension formula, but does not preclude the application of the pension offset.

[16] Article XXXIII, § 6, of the 1980 firefighters union agreement, the provision pursuant to which Lynch was entitled to benefits, provides that the spouse of a deceased retiree or employee "*shall be entitled* to receive a spouse pension in an amount equal to one-half of the annual pay" that the employee or retiree was entitled to receive at the time of death or at the date of application for a pension, respectively. (Emphasis added.) Section 9 of article XXXIII of the 1980 firefighters union agreement provides that the employee's pension "*shall be based* upon [2 percent] for each year of service . . . ." (Emphasis added.)

In summary, a comparison of the pension formula provisions in the bargaining agreements with those in the preexisting city charter reveals that the charter uses the same mandatory language to characterize the pension formulas, language that, when read consistently with § 2761 of the city charter, cannot reasonably be interpreted to preclude a pension offset. Instead, a comparison of these provisions reveals that the bargaining agreements simply superseded the city charter's pension formula provisions by providing more favorable formulas. Nothing in the language of the bargaining agreements precludes the application of the offset provision. Indeed, such a conclusion is consistent with the Appellate Court's recognition that "[t]he purpose of . . . § 7-433c is to protect against a wage loss, not to give some firemen and policemen a double recovery for the same wage loss." *Middletown* v. *Local Union No. 1073*, 1 Conn. App. 58, 63, 467 A.2d 1258 (1983), cert. dismissed, 192 Conn. 803, 471 A.2d 244 (1984).

The plaintiffs' arguments in support of the trial court's interpretation of the bargaining agreements are not persuasive. First, the plaintiffs rely on a provision in the firefighters union collective bargaining agreements, which expressly mentions an offset, to argue that the absence of similar, express language acknowledging the possibility of an offset in the other provisions of all five bargaining agreements demonstrates that no offset was allowed in those instances. We conclude that the provision on which the plaintiffs rely actually supports our conclusion.

Article XXXIII, § 12, of the 1980 firefighters union agreement, and article XXXIII, § 12, of the 1983 to 1986 collective bargaining agreement between the city and the firefighters union (1983 firefighters union agreement) both set a cap for disability pensions at 76 percent of annual pay. In light of that cap, § 12 in both agreements also provides that "the [c]ity may, if it so

elects and it is necessary to do so because of the 76 [percent] maximum prescribed herein, utilize as an offsetting credit, the amount of the appropriate reduction in the dollars prescribed by [§] 2746 of the [city] [c]harter as against any dollars required to be paid per the [workers' compensation or heart and hypertension statutes], (if [those] provisions . . . are applicable to the disability pension applications in question . . .). The parties agree that the provisions of this [s]ection shall not apply to, and shall not require a reduction of, any specific injury award, if applicable . . . ."

Contrary to the plaintiffs' construction, § 12 of the 1980 and 1983 firefighters union agreements does not *permit* an offset that otherwise is prohibited. Instead, that section *limits* the city's ability to offset a disability pension pursuant to § 2761 of the city charter. That is, the city's power to implement an offset pursuant to § 2761 is limited under § 12 to those instances in which the combined pension and heart and hypertension benefits exceed 76 percent of the disability pensioner's annual pay. Thus, if the retiree received heart and hypertension benefits that, taken together with the pension benefits, resulted in the retiree receiving combined benefits totaling 75 percent of his annual pay, under § 12 of the 1980 and 1983 firefighters union agreements, the city would not have authority to offset the retiree's pension by the amount of heart and hypertension benefits. In the absence of that provision, however, § 2761 of the city charter would have authorized an offset of the amount of the heart and hypertension benefits. The specific limitation set forth in § 12 of the two firefighters union agreements conflicts with the charter's absence of such a limit—in this instance, § 7-474 requires that the provision of the bargaining agreements must prevail. The fact that the parties opted in this instance to impose a limit on the city's power to implement the offset provides further evidence of their awareness that

the bargaining agreements were subject to the city charter provisions and that they had the power to modify the city charter provisions in the bargaining agreements if that was their intention.

The plaintiffs also contend that the city is precluded from applying § 2761 because the provision was repealed before the city attempted to implement the offset.[17] The plaintiffs' argument, however, overlooks the rule that a contract must be interpreted in light of the laws that existed at the time the parties entered into the agreement. *Hatcho Corp.* v. *Della Pietra*, supra, 195 Conn. 21. The 1967 city charter was in effect at the time that the parties entered into each of the bargaining agreements, and was incorporated expressly into each of the bargaining agreements. Any subsequent amendment to the charter, accordingly, is irrelevant to the issues in this appeal because the 1967 charter is applicable to the bargaining agreements.

Also unpersuasive is the plaintiffs' argument that the historical practice provisions of the bargaining agreements preclude the city from applying § 2761 of the city charter. Specifically, the plaintiffs rely on article XVIII, § 2, of the police union bargaining agreements and article XXXII, § 1, of the firefighters union bargaining agreements, each of which protects benefits and rights previously enjoyed. The plaintiffs contend that, because the city failed for years to offset the plaintiffs' pensions by their heart and hypertension benefits,

[17] The plaintiffs rely on an ordinance adopted by the city in 2003, which replaced the portions of the charter dealing with pension and retirement, including § 2761 of the city charter. The new provision, § 35.22 of the final amended ordinance regarding the pension and retirement system, has the same effect as § 2761, and provides: "To the extent that a pensioner is entitled to any pension benefits from the retirement system, while such benefits are payable to such pensioner they shall be reduced by any amounts attributable to workers' compensation and/or heart and hypertension benefits paid under any relevant state of Connecticut or local statutes or ordinances." All of the bargaining agreements, however, predate this change.

the historical practice provisions of the bargaining agreements preclude the city from doing so now.

Article XVIII, § 2, of the 1979 police union agreement provides in relevant part: "The signing of this [a]greement shall not abridge any employee rights or privileges to which he is entitled by . . . historical practice *unless such right or privilege is specifically covered by one or more terms of this* [a]greement." (Emphasis added.) The pertinent language in article XVIII, § 2, of the 1984 police union agreement and article XVIII, § 2, of the 2000 police union agreement is identical. Article XXXII, § 1, of the 1980 firefighters union agreement and article XXXII, § 11, of the 1983 firefighters union agreement both provide: "All privileges, benefits and rights heretofore enjoyed by employees in this bargaining unit *which are not specifically relinquished, provided for, or abridged in this* [a]greement are hereby protected by this [a]greement." (Emphasis added.) The emphasized language in each of the historical practice provisions illustrates the failure of the plaintiffs' argument. The historical practice provisions expressly do not apply rights or privileges that are addressed by the agreements. As we have explained, all five of the agreements, either directly or indirectly by incorporating the city charter, address the issue of pension offset. Accordingly, the historical practice provisions of the bargaining agreements are inapplicable.

In sum, we conclude that the city charter's offset does not conflict with the provisions in the collective bargaining agreements governing the pensions provided to Acas, Paul Salvatore, Coyle and Lynch. Therefore, the trial court improperly concluded that the defendants had breached those agreements.

II

We next consider the defendants' claim that, although the trial court properly interpreted the language in

Russo's bargaining agreement to permit an offset only to the extent that Russo's combined pension and heart and hypertension benefits exceed the cap set forth in the agreement, that court improperly found that the defendants had breached the agreement. Specifically, the defendants contend that the trial court improperly assumed that application of the offset reduced Russo's benefits below the cap without determining whether Russo's combined benefits in fact exceeded the cap set forth in the agreement, thus precluding an offset. We agree.

As we have explained in part I of this opinion, the 1983 firefighters union agreement, pursuant to which Russo was awarded a disability pension, specifically acknowledges the city's power to implement an offset, but limits that authority to circumstances in which the total combined pension and heart and hypertension benefits exceed the 76 percent cap set forth in the bargaining agreement. Art. XXXIII, § 12, of the 1983 firefighters union agreement. The trial court correctly concluded that "Russo's disability pension could only have been offset if his combined disability pension and heart and hypertension payments exceeded 76 percent of his 'annual pay.' " The court, however, made no finding regarding Russo's annual pay, and no finding regarding whether Russo's combined benefits of pension and heart and hypertension payments exceeded 76 percent of that amount. Therefore, we reverse the judgment of the trial court with regard to Russo and remand the case to that court for a new trial with regard to such findings.

III

Finally, we address the cross appellants' claim that the trial court improperly dismissed Russo's equitable estoppel claim as moot. Additionally, the cross appellants contend that, in the event that this court reverses the judgment of the trial court as to the plaintiffs' breach

of contract claims, the case should be remanded to the trial court for a new trial on their estoppel claim, which the trial court never addressed. We disagree. Because none of the cross appellants offered evidence at trial to establish that he or she had changed his or her position in reliance on the city's failure to apply the offset pursuant to § 2761 of the city charter, all of them failed to meet their burden to establish the elements of equitable estoppel. Accordingly, we conclude that a new trial is not warranted and affirm the judgment of the trial court with respect to Russo's equitable estoppel claim.

"There are two essential elements to an estoppel—the party must do or say something that is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief; and the other party, influenced thereby, must actually change his position or do some act to his injury which he otherwise would not have done. . . . [I]n order for a court to invoke municipal estoppel, the aggrieved party must establish that: (1) an authorized agent of the municipality had done or said something calculated or intended to induce the party to believe that certain facts existed and to act on that belief; (2) the party had exercised due diligence to ascertain the truth and not only lacked knowledge of the true state of things, but also had no convenient means of acquiring that knowledge; (3) the party had changed its position in reliance on those facts; and (4) the party would be subjected to a substantial loss if the municipality were permitted to negate the acts of its agents." (Citation omitted; internal quotation marks omitted.) *O'Connor* v. *Waterbury*, supra, 286 Conn. 757–58. "The party claiming estoppel . . . has the burden of proof." (Internal quotation marks omitted.) Id., 758.

Although the cross appellants testified as to the negative consequences they had suffered because of their reduced income as a result of the pension offset, none

of them testified that he or she had acted in detrimental reliance on the city's failure to implement the offset in the years prior to its decision to apply § 2761 of the city charter. For example, Russo testified that, subsequent to the pension offset, he had to change his budgeting decisions, forgoing a trip to Italy, sacrificing trips to the casino and making more economic choices about dining and entertainment. He also testified that he had experienced stress as a result of the difficulty of meeting expenses with the reduced income. He did not, however, testify that he would have behaved differently had he known from the beginning that his pension was subject to offset—that is, Russo did not testify that he would have retired later, or that he would have made different investment decisions, or did not offer any other testimony to demonstrate that he acted in detrimental reliance on the extra income that he was receiving or anticipated receiving during the time that the city failed to implement the offset to his pension. Similarly, the other cross appellants testified as to the negative effect they experienced due to their reduced income following the implementation of the offset, but did not offer any evidence that they had acted in detrimental reliance on the city's prior failure to implement the offset.[18]

[18] For example, far from testifying that her husband timed his retirement in reliance on the nonoffset income, Acas testified that her husband retired following a heart attack because his health forced him to do so. She testified that she calculated her monthly budget based on the amount of both her pension benefits and her heart and hypertension benefits, but did not state that she would have saved or invested money differently had she known that her widow's pension might be subject to offset. In support of her estoppel claim, she merely testified that she was unable to add a new deck to her home and make repairs on the home because of her reduced income following the implementation of the offset. Lynch also testified that her husband had retired at the time that he did for health reasons. She testified that she calculated her monthly budget on the basis of her combined income from pension and heart and hypertension benefits, but did not testify that she would have saved or invested more or differently had she known that her pension could be offset. She testified as to the effect of her reduced income, stating that she had decided to forgo some planned updates to her

The question of whether the cross appellants met their burden to establish the elements of estoppel is a question of fact. *Middlesex Mutual Assurance Co.* v. *Walsh*, 218 Conn. 681, 699, 590 A.2d 957 (1991). Under ordinary circumstances, a remand would be required. "There are times [however] . . . when the undisputed facts or uncontroverted evidence and testimony in the record make a factual conclusion inevitable so that a remand to the trial court for a determination would be unnecessary." (Internal quotation marks omitted.) *Allstate Ins. Co.* v. *Palumbo*, 296 Conn. 253, 268, 994 A.2d 174 (2010). In the present case, a remand would be pointless, because none of the cross appellants offered *any* evidence to demonstrate detrimental reliance on the city's failure to offset their pension benefits. In such a case, the trial court could reach only one conclusion: that the estoppel claims fail. Accordingly, a remand is not necessary, because the cross appellants have failed to sustain their burden of establishing a necessary element of equitable estoppel.

The judgment is reversed in part and the case is remanded to the trial court with direction to render judgment in favor of the defendants on all claims except for Russo's claim for breach of contract; the case is remanded for a new trial on that claim. The judgment is affirmed with respect to the claim of equitable estoppel.

In this opinion the other justices concurred.

home and was no longer contributing to the costs for the care of two of her grandchildren. She did not testify, however, that she or her husband had in any way acted in detrimental reliance on the city's failure to apply the offset. Similarly, Coyle did not testify that he relied to his detriment on the additional income and he was not asked how the reduced income following the implementation of the offset had affected him.

With respect to Terese Salvatore, we observe that, even if she were allowed to join the cross appeal; see footnote 3 of this opinion; she would not be entitled to a remand on the issue of estoppel. Paul Salvatore testified that he timed his retirement based on his health. He also testified as to the effect that the reduced income had on his standard of living, but did not testify that he acted in reliance on the nonoffset income to his detriment.

DAVID CARON CHRYSLER MOTORS, LLC, ET AL. *v.* GOODHALL'S, INC., ET AL. (SC 18694)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.

Syllabus

The plaintiffs, D and D Co., sought to recover damages from the defendants for, inter alia, breach of a lease of certain real property. The defendant G, who owned the property, originally had entered into a lease with the defendant G Co. as the tenant. The lease specified that no part of the lease could be assigned without the prior written consent of G, and that a transfer of a majority interest in the tenant would constitute an assignment of the lease. Thereafter, D purchased a majority interest in G Co. without obtaining G's prior written consent, and the name of G Co. was eventually changed to D Co. Subsequently, a dispute arose as to G's responsibility under the lease for remediating certain preexisting environmental conditions on the property and G's warranty of fitness and habitability of the premises. After a trial to the court, the court rendered judgment for the defendants, concluding that because G did not consent to the assignment of the lease, there was no contract between D Co. and G. The plaintiffs appealed to the Appellate Court, which concluded that because the trial court's memorandum of decision specifically stated that there was no contract between D and G, and because the memorandum of decision had referred to D individually, the trial court had made no finding regarding the existence of a lease between D Co. and G. The Appellate Court affirmed the trial court's judgment, and the plaintiffs, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court improperly determined that the trial court made no finding regarding the existence of a lease between D Co. and G; although the trial court had referred to D individually within the memorandum of decision, the trial court ultimately concluded that there was no contract between "the parties to this action," and the term parties included all of the parties to the action, namely, D, D Co. and G, which made it clear that the trial court had concluded that there was no enforceable lease between D Co. and G.
2. The trial court's determination that there was no enforceable lease between D Co. and G was clearly erroneous, the trial court having incorrectly found that because G did not consent to the assignment of the lease, there was no contract between D Co. and G; D's failure to obtain G's consent did not render the contract void but merely voidable, there was no evidence in the record that G exercised its option to void the lease upon D's breach of the assignment provision, and, therefore,

G remained subject to the binding rights and obligations contained in the lease, which passed to D Co. upon D's assignment of the lease.

Argued January 6—officially released May 15, 2012

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Hon. Lawrence C. Klaczak*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment for the defendants, from which the plaintiffs appealed to the Appellate Court, *Gruendel* and *Beach*, *Js.*, with *Dupont*, *J.*, dissenting, which affirmed the trial court's judgment, and the plaintiffs, on the granting of certification, appealed to this court. *Reversed; further proceedings.*

Walter A. Twachtman, Jr., for the appellants (plaintiffs).

Edward Muska, with whom was *F. Joseph Paradiso*, for the appellees (defendants).

Opinion

McLACHLAN, J. In this certified appeal, we must determine whether a tenant's assignment of a commercial lease in breach of a provision prohibiting such assignment without the landlord's consent is void or merely voidable. The plaintiffs, David Caron and David Caron Chrysler Motors, LLC, appeal, upon our grant of certification,[1] from the judgment of the Appellate Court affirming the trial court's judgment in favor of the defendants, Goodhall's, Inc., Goodhall's Garage, Inc., and

[1] We granted certification to appeal limited to the following questions: (1) "Did the Appellate Court improperly fail to reach the question of whether the trial court erred in finding that there was no lease between David Caron Chrysler Motors, LLC, and Goodhall's, Inc.?"; and (2) "If yes, was the trial court's decision that there was no lease between David Caron Chrysler Motors, LLC, and Goodhall's, Inc., clearly erroneous?" *David Caron Chrysler Motors, LLC* v. *Goodhall's, Inc.*, 298 Conn. 925, 925–26, 5 A.3d 486 (2010).

Lucille Goodhall, administratrix of the estate of Wallace Goodhall, Jr. *David Caron Chrysler Motors, LLC* v. *Goodhall's, Inc.*, 122 Conn. App. 149, 149–50, 997 A.2d 647 (2010). The plaintiffs claim that the Appellate Court improperly failed to consider their claim that the trial court had improperly concluded that no contract existed between David Caron Chrysler Motors, LLC, and Goodhall's, Inc. The plaintiffs further urge this court to conclude that the trial court improperly determined that there was no contract between David Caron Chrysler Motors, LLC, and Goodhall's, Inc. We agree with the plaintiffs, and, accordingly, reverse the judgment of the Appellate Court.

This breach of lease action concerns real property located at 2 Mashapaug Road, in the town of Union (property), which has been owned by Goodhall's, Inc. (Goodhall's), since 1961. Wallace Goodhall, Jr., operated a vehicle service station and Chrysler franchise on the property until 1996, when Jerry Yost, through a limited liability company known as Goodhall's Chrysler-Plymouth-Dodge-Jeep-Eagle, LLC, bought the business and leased the property from Goodhall's. The lease identified Goodhall's as the landlord, and Goodhall's Chrysler-Plymouth-Dodge-Jeep-Eagle, LLC, as the tenant. The lease stipulated that no part of the lease "shall, by operation of law or otherwise, be assigned . . . without the prior written consent of [the] [l]andlord, which consent shall not be unreasonably withheld" (antiassignment provision).[2] It further provided that a

[2] The antiassignment provision stated in full: "Except as expressly otherwise provided in this [a]rticle, neither this [l]ease nor any part hereof, nor the interest of [the] [t]enant in any sublease or the rentals thereunder, shall, by operation of law or otherwise, be assigned, mortgaged, pledged, encumbered or otherwise transferred by [the] [t]enant, [the] [t]enant's legal representatives or successors in interest, and neither the [d]emised [p]remises nor any part thereof shall be encumbered in any manner by reason of any act or omission on the part of [the] [t]enant, or anyone claiming under or through [the] [t]enant, or shall be sublet or be used, occupied or utilized for desk space, mailing privileges, or any other purpose for or by any other principles or entities other than [the] [t]enant, without the prior written

transfer of a majority interest in the tenant would constitute an assignment of the lease. Notwithstanding the antiassignment provision, in 1998, Caron purchased a majority membership interest in Goodhall's Chrysler-Plymouth-Dodge-Jeep-Eagle, LLC,[3] without having obtained the written consent of Goodhall's.

A dispute arose concerning the party responsible for remediating certain environmental conditions on the property. The plaintiffs commenced the present action for damages, claiming, inter alia, that the defendants had violated provisions in the lease regarding Goodhall's responsibility for preexisting environmental conditions and Goodhall's warranty of fitness and habitability.[4] The trial court rendered judgment in favor of the defendants. The court concluded that no contract existed between "the parties to this action" because the assignment of a majority interest in the tenant to Caron was invalid—Caron had not obtained Goodhall's prior written consent to the assignment and the plaintiffs had not established that Goodhall's consent had been unreasonably withheld.

The plaintiffs appealed from the trial court's decision to the Appellate Court, claiming that the trial court improperly had found that no enforceable lease existed

consent of [the] [l]andlord, which consent shall not be unreasonably withheld. If [the] [t]enant is other than an individual, a transfer in any single transaction or in a series of transactions of more than . . . [49] percent . . . in interest of [the] [t]enant (whether stock, [p]artnership interest or otherwise) by any party(ies) in interest shall be deemed an assignment of this [l]ease."

[3] In 1997, Goodhall's Chrysler-Plymouth-Dodge-Jeep-Eagle, LLC, was renamed Jerry Yost's Chrysler Motors, LLC, and Jerry Yost's Chrysler Motors, LLC, was later named David Caron Chrysler Motors, LLC.

[4] The lease provided that the tenant "shall not be responsible for any environmental condition, noncompliance with any environmental laws or any costs to remediate or cure the condition, problem or violation that existed prior to the commencement of [the] [l]ease." Additionally, the lease stated that the landlord "warrants and represents that the premises are fit for and habitable for occupancy and use" of the tenant.

between the plaintiffs and Goodhall's. *David Caron Chrysler Motors, LLC* v. *Goodhall's, Inc.*, supra, 122 Conn. App. 150. The Appellate Court affirmed the trial court's judgment. Id., 152. In reaching this decision, the Appellate Court first determined that the trial court had made no finding with respect to the contractual relationship between David Caron Chrysler Motors, LLC, and Goodhall's; id., 151; rather, it was unclear whether the trial court's statement that no contract existed between "the parties to this action" referred only to Caron, individually. Id., 151 n.3. The Appellate Court then reasoned that, because the plaintiffs did not seek an articulation from the trial court on this issue, it was required to read any ambiguity in the trial court's decision to support, rather than to undermine, the trial court's judgment.[5] Id., 152. This appeal followed. Additional facts will be set forth as necessary.

The plaintiffs argue that the Appellate Court improperly concluded that the trial court's decision contained no finding on whether a contract existed between David Caron Chrysler Motors, LLC, and Goodhall's. Rather, the plaintiffs assert that the trial court clearly found that a contract did *not* exist between David Caron Chrysler Motors, LLC, and Goodhall's. The plaintiffs further argue that this finding was clearly erroneous. The defendants respond that the Appellate Court's reading of the trial court's decision was correct and, therefore, that the Appellate Court properly affirmed the judgment of the trial court. They suggest that, even if the trial court had found that there was no lease between David Caron Chrysler Motors, LLC, and Goodhall's, there was sub-

[5] Judge Dupont dissented from the panel's decision to affirm the judgment of the trial court. *David Caron Chrysler Motors, LLC* v. *Goodhall's, Inc.*, supra, 122 Conn. App. 152. She would have found that the trial court determined that no contract existed between David Caron Chrysler Motors, LLC, and Goodhall's, and that this finding was clearly erroneous. Id., 153. As a result, she would have reversed the judgment in favor of the defendants and remanded the case to the trial court. Id.

stantial evidence in the record to support such a finding. We agree with the plaintiffs.

I

We first consider whether the Appellate Court properly determined that the trial court made no finding regarding the existence of a lease between David Caron Chrysler Motors, LLC, and Goodhall's. In its review of the trial court's decision, the Appellate Court focused on the fact that the trial court had defined "Caron" as Caron individually and had referred to Caron in his individual capacity at various points throughout the decision as "Caron." Id., 151. The Appellate Court concluded that the trial court's statement that there was no contract between " 'Caron and Goodhall['s]' " therefore referred to Caron individually and did not express any opinion on whether there was a contract between David Caron Chrysler Motors, LLC, and any of the defendants. Id.

Our review of the trial court's memorandum of decision, however, leads us to the opposite conclusion. In particular, the trial court stated: "The fact is there was never any contract between *the parties* to this action." (Emphasis added.) The ordinary meaning of the term "parties" encompasses all of the plaintiffs and defendants to an action. Therefore, a reference to the "parties" would include David Caron Chrysler Motors, LLC, and Goodhall's. Moreover, two sentences before this statement, the court expressly had defined the term "parties" to include Goodhall's, Caron and David Caron Chrysler Motors, LLC.[6] Thus, we understand the court's conclusion that there was no contract between "the parties to this action" to state unambiguously that the court determined that no contract existed between any

[6] Specifically, the trial court stated: "There were negotiations between the parties (Goodhall's, Inc., and David Caron/David Caron Chrysler Motors, LLC) . . . ."

of the parties, including between David Caron Chrysler Motors, LLC, and Goodhall's.

This interpretation of the trial court's memorandum of decision is consistent with the manner in which the case was presented to the trial court. It is well established that "the right of a plaintiff to recover is limited by the allegations of the complaint . . . and any judgment should conform to the pleadings, the issues and the prayers for relief." (Citation omitted; internal quotation marks omitted.) *Kawasaki Kisen Kaisha, Ltd.* v. *Indomar, Ltd.*, 173 Conn. 269, 272, 377 A.2d 316 (1977). In the plaintiffs' complaint, the only lease in question was the lease between Goodhall's and the entity originally known as Goodhall's Chrysler-Plymouth-Dodge-Jeep-Eagle, LLC, which was subsequently renamed David Caron Chrysler Motors, LLC. The plaintiffs did not allege that Caron, individually, had entered into a separate agreement with any of the defendants. Furthermore, a review of the record and the transcripts of the trial court proceedings reveals that the parties litigated the issue of Goodhall's continuing responsibility to remediate environmental conditions on the property under the lease entered into by Goodhall's Chrysler-Plymouth-Dodge-Jeep-Eagle, LLC, and Goodhall's. Therefore, we read the memorandum of decision to address the issue of whether the lease entered into by Goodhall's and Goodhall's Chrysler-Plymouth-Dodge-Jeep-Eagle, LLC, governed the relationship between the parties.[7]

Finally, we address any confusion created by the trial court's statement that there was no lease between "Caron and Goodhall's" by observing that the trial court

[7] The defendants point out that the only damages alleged in the plaintiffs' complaint and at trial were framed in terms of the losses suffered by Caron, individually. The question of the amount one can recover is distinct, however, from the question of one's right to recover on the basis of a breach of an enforceable lease.

consistently equated the tenant with its majority member. For instance, the trial court stated that Wallace Goodhall had leased the property "to Yost" as if Yost, individually, were the tenant under the lease. Similarly, the court stated: "The lease between *Yost* and Goodhall's . . . provided that there 'will be no assignment of the lease without the prior written consent of the landlord' and that a transfer of a majority interest in *the limited liability company* [*Yost*] would constitute an assignment of the [l]ease." (Emphasis added.) It is undisputed that Goodhall's Chrysler-Plymouth-Dodge-Jeep-Eagle, LLC, was the tenant and that Yost was merely the majority member of that tenant at the lease's inception. The fact that the trial court expressly found that the lease "ran from Goodhall's . . . to Goodhall's Chrysler-Plymouth-Dodge-Jeep-Eagle, LLC," further reveals that the trial court was not confused as to who the tenant was, but rather viewed the names of the tenant and its majority member as interchangeable. Likewise, when the trial court defined the parties as Goodhall's and "David Caron/David Caron Chrysler Motors, LLC," the use of a forward slash between "David Caron" and "David Caron Chrysler Motors, LLC," indicates that the court equated the two.

Thus, although the trial court used the name "Caron" to refer to Caron individually earlier in the memorandum of decision, we interpret the court's ultimate conclusion that "[t]here was no contract between Caron and Goodhall's, explicit or implied" to mean that the court found no evidence of a contract between Goodhall's and Caron, in his capacity as the majority member and representative of David Caron Chrysler Motors, LLC. Because the trial court's decision makes clear that it concluded that there was no enforceable lease between David Caron Chrysler Motors, LLC, and Goodhall's, the Appellate Court improperly determined that there was no finding on whether there was a contract

binding David Caron Chrysler Motors, LLC, and Goodhall's.

II

Having determined that the trial court concluded that there was no enforceable lease between David Caron Chrysler Motors, LLC, and Goodhall's, we turn to the merits of the plaintiffs' claim that this determination was clearly erroneous. The parties do not dispute the trial court's finding that Goodhall's entered into a lease with an entity known as Goodhall's Chrysler-Plymouth-Dodge-Jeep-Eagle, LLC, and that this entity's name was changed to Jerry Yost's Chrysler Motors, LLC, and later to David Caron Chrysler Motors, LLC.[8] Nor do the parties dispute that Caron's acquisition of a majority interest in the tenant constituted an assignment under the lease or that the tenant failed to obtain the required consent from Goodhall's. Rather, the parties disagree as to whether the trial court properly concluded that the failure to obtain Goodhall's consent to the assignment of the lease rendered it void as to the plaintiffs, and, therefore, that no contract existed between David Caron Chrysler Motors, LLC, and Goodhall's.

In their brief to this court, the plaintiffs claimed that Goodhall's impliedly waived the consent requirement contained in the antiassignment provision by neither accepting nor rejecting the assignment and by treating the plaintiffs as the tenant under the lease. At oral argument, the plaintiffs further argued that the assignment in default of their duties under the lease did not

[8] General Statutes § 34-121 stipulates that the articles of organization for a limited liability company must set forth, inter alia, the name of the company. Because General Statutes § 34-122 (b) provides that a limited liability company's articles of organization "may be amended in any and as many respects as may be desired," Goodhall's Chrysler-Plymouth-Dodge-Jeep-Eagle, LLC, could freely amend the name set forth in its articles of organization to Jerry Yost's Chrysler Motors, LLC, and later to David Caron Chrysler Motors, LLC, without dissolving or otherwise changing the legal entity itself.

automatically terminate the lease, but rather gave Goodhall's a right to terminate the lease for breach thereof.[9] In response, the defendants contended that their performance pursuant to the terms of the lease was excused once the antiassignment provision was breached. Thus, to determine whether the original lease of the property entered into by Goodhall's Chrysler-Plymouth-Dodge-Jeep-Eagle, LLC, and Goodhall's governed the relationship between David Caron Chrysler Motors, LLC, and Goodhall's despite the lack of consent to the assignment of a majority interest to Caron, we must consider whether a breach of the antiassignment provision renders the resulting assignment void or merely voidable. Because the trial court's determination that the assignment in breach of the antiassignment provision rendered the contract void was a legal determination governed by principles of contract law, our review is plenary. *Crews* v. *Crews*, 295 Conn. 153, 161, 989 A.2d 1060 (2010); see also *Bria* v. *St. Joseph's Hospital*, 153 Conn. 626, 632, 220 A.2d 29 (1966) (when surrounding circumstances were not in dispute, construction and legal effect of contract was question of law).

Although the plaintiffs rely on the theory that the defendants *waived* their right to terminate the lease by neither accepting nor rejecting the assignment, we decide the case on a slightly different, but closely related, theory. Specifically, we conclude that this court's decision in *Rumbin* v. *Utica Mutual Ins. Co.*, 254 Conn. 259, 757 A.2d 526 (2000), controls our resolution of this case. In *Rumbin*, we held that, unless an antiassignment clause expressly limits the *power*, as opposed to the *right*, to assign the contract or invali-

[9] The plaintiffs also claim that the assignment was valid because Goodhall's unreasonably withheld its consent, or, in the alternative, that it expressly waived any requirement of consent. Because we conclude that the assignment remained valid due to Goodhall's failure to take advantage of its right to invalidate the lease, we need not address these additional arguments.

dates the assignment, the assignment remains valid and enforceable; id., 269; but the assignor will be liable for any damages that result from such assignment.[10] Id., 274. In other words, without express contractual language providing otherwise, a provision restricting the assignment of a contract will be construed to be a covenant like any other contractual covenant—a breach thereof will render the breaching party liable in damages but will not make the contract a nullity. Id., 263. We concluded that this approach advanced our policy disfavoring restraints on alienation and provided full compensation when actual damages resulted from the breach. Id., 278.

The particular assignment at issue in *Rumbin* pertained to a structured settlement agreement; however, the principles of contract law that we announced therein were not limited to structured settlement agreements. Rather, we expressly stated that the law of contracts had changed considerably and that we were "reexamin[ing] the basic legal principles regarding contractual antiassignment provisions" to inform our analysis of the particular assignment at issue. Id., 267. In our consideration of the modern approach to restrictions on the alienability of contracts, the cases we exam-

[10] The plaintiffs point out that "[w]aiver does not have to be express, but may consist of *acts or conduct* from which waiver may be implied." (Emphasis added; internal quotation marks omitted.) *Novella* v. *Hartford Accident & Indemnity Co.*, 163 Conn. 552, 562, 316 A.2d 394 (1972). The trial court made no findings as to whether the defendants' conduct constituted a waiver in the present case. Even if the defendants' mere failure either to accept or reject the assignment of the lease did not constitute a *waiver*, however, they were required as a matter of law under *Rumbin* to take affirmative action to terminate the lease or to void the transfer after the unauthorized assignment. As we have indicated, although this is a slightly different theory than the waiver theory that the plaintiffs argued to the trial court and on appeal, it is very closely related. Accordingly, we conclude that the defendants had fair notice of the plaintiffs' claim that the assignment did not automatically terminate the lease, and that deciding the case under *Rumbin* will not prejudice them in any way.

ined and ultimately followed were not limited to cases in which structured settlement agreements were at issue. See id., 268–72. Accordingly, *Rumbin* pronounced a general rule of contract law.[11]

Although this court has not been confronted with the question of whether *Rumbin* applies specifically to provisions limiting the assignment of commercial lease agreements of real property, "[a] lease is a contract." *Cohn* v. *Fennelly*, 138 Conn. 474, 476, 86 A.2d 183 (1952). "As a contract, a lease is subject to the same rules of construction as other contracts." *Middlesex Mutual Assurance Co.* v. *Vaszil*, 279 Conn. 28, 35, 900 A.2d 513 (2006). Accordingly, we have applied general rules on the assignment of contracts to lease agreements. See, e.g., *Wesley* v. *Schaller Subaru, Inc.*, 277 Conn. 526, 539–40 n.15, 893 A.2d 389 (2006) (considering rights of assignee of motor vehicle lease); *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 225, 654 A.2d 342 (1995) (considering liability of first assignee under commercial lease after lease was reassigned to second assignee); *Warner* v. *Konover*, 210 Conn. 150, 154–55, 553 A.2d 1138 (1989) (landlord who retains discretion to withhold consent to tenant's assignment of commercial lease must act in good faith).

Furthermore, the majority of jurisdictions that have considered the issue have held that provisions requiring the consent of the landlord to the assignment of a lease

[11] We emphasize that *Rumbin* examined principles of contract law, and that the rules relating to assignments differ in other contexts. See, e.g., *Dodd* v. *Middlesex Mutual Assurance Co.*, 242 Conn. 375, 382–84, 698 A.2d 859 (1997) (assignment of personal injury claim not permitted absent statutory authority); see also *Stearns & Wheeler, LLC* v. *Kowalsky Bros., Inc.*, 289 Conn. 1, 9, 11, 955 A.2d 538 (2008) (characterizing Connecticut Unfair Trade Practices Act claim as neither tort nor contract claim, and prohibiting assignment thereof); *Gurski* v. *Rosenblum & Filan, LLC*, 276 Conn. 257, 259–60, 267, 885 A.2d 163 (2005) (characterizing legal malpractice claim as hybrid contract and tort action, and prohibiting assignment thereof to adversary in same litigation that gave rise to malpractice claim).

are for the sole benefit of the lessor. Annot., 148 A.L.R. 1362 (1944); see, e.g., *Routt County Mining Co.* v. *Stutheit*, 101 Colo. 254, 257, 72 P.2d 692 (1937); *Johnson* v. *Hotel Lawrence Corp.*, 337 Ill. 345, 349, 169 N.E. 240 (1929); *O'Neil* v. *A. F. Oys & Sons, Inc.*, 216 Minn. 391, 394, 13 N.W.2d 8 (1944); *Dieter* v. *Scott*, 110 Vt. 376, 385, 9 A.2d 95 (1939). As such, an assignment in violation of a covenant against assignment is valid subject to the option of the landlord to terminate the lease. See *People* v. *Klopstock*, 24 Cal. 2d 897, 901, 151 P.2d 641 (1944) ("[t]he assignment of the lease without the consent of the lessor did not of itself terminate the lease or render the assignment void but the making of such assignment merely gave to the lessor certain rights to be exercised in the manner provided by law" [internal quotation marks omitted]); *Johnson* v. *Hotel Lawrence Corp.*, supra, 349 (provision "does not render the assignment . . . absolutely void but voidable only, at the option of the lessor or his representative"); *Bemis* v. *Wilder*, 100 Mass. 446, 447 (1868) (stating that if lease containing condition prohibiting assignment with right of entry reserved were breached, "lease would have been valid until the lessor had exercised his option to terminate it"); *Holman* v. *DeLin*, 30 Or. 428, 438, 47 P. 708 (1897) (antiassignment covenants "were made for the benefit of the lessors, and it was incumbent upon them to re-enter in order to terminate the lease or revest the estate in them"); *Morrison* v. *Nelson*, 38 Wn. 2d 649, 659, 231 P.2d 335 (1951) ("assignment in violation of a restriction is not void, but voidable at the option of the lessor"). As stated by the Supreme Court of Tennessee, "[t]he prevailing rule in the United States can be clearly ascertained from even a casual perusal of the authorities. Said rule is that an assignment made in violation of a restrictive clause is not void, but merely voidable by the lessor. Thus, an estate for years vests in the assignee until effective legal action is taken by the lessor to avoid

the transfer." *First American National Bank* v. *Chicken System of America, Inc.*, 510 S.W.2d 906, 908 (Tenn. 1974).

In sum, we see no reason to distinguish our treatment of the assignment of a contract in the context of commercial leases, and we conclude that the principle articulated in *Rumbin* controls our review of the present case. We therefore agree with the plaintiffs that the failure to obtain the consent to the assignment was a default under the lease and did not render the contract void, but merely voidable.

In the present action, the lease provided in relevant part that no part of the lease "shall, by operation of law or otherwise, be assigned . . . without the prior written consent of [the] [l]andlord, which consent shall not be unreasonably withheld." This antiassignment provision does not contain the clear and unmistakable contractual language necessary to limit the power to assign the lease. Although it purports to limit the right to assign the lease, it does not state that an assignment in breach of the provision will be deemed void, invalid or otherwise ineffective automatically. On the contrary, the lease expressly provides a procedure to follow permitting the landlord to reenter and terminate the lease if the tenant breaches the lease.[12] Thus, the assignment

[12] In particular, the lease stated: "[I]f [the] [t]enant shall (i) do or permit anything to be done, whether by action or inaction contrary to any of [the] [t]enant's obligations hereunder, or (ii) default in the performance of any covenant or condition of this [l]ease . . . [the] [l]andlord may (in addition to any and all rights at law or in equity) re-enter and remove all persons and [the] [t]enants [p]roperty and/or other property from the [d]emised [p]remises and such [t]enants [p]roperty and other property may be removed and stored in a public warehouse or elsewhere at the cost of, and for the account of [the] [t]enant, all with service of notice and resort to legal process and without being deemed guilty of trespass, or becoming liable for any loss or damage which may be occasioned thereby." Additionally, the lease stated: "Should [the] [l]andlord elect to re-enter, as herein provided, or should he take possession pursuant to legal proceedings or pursuant to any notice provided for by law, [the] [l]andlord may terminate this [l]ease, and/or make such alterations and repairs as may be necessary in order to relet

of a majority interest in the tenant to Caron in contravention of the antiassignment provision was voidable, not void, upon Goodhall's election to terminate the lease pursuant to its terms. Unless and until Goodhall's exercised such option, the binding rights and obligations contained in the lease passed to David Caron Chrysler Motors, LLC.

There is no evidence in the record that Goodhall's exercised its option to void the lease upon the tenant's breach of the antiassignment provision. Neither party contends that Goodhall's followed the procedure to reenter the property pursuant to the lease's default provision. The only facts before us suggesting an intent to terminate the lease include: (1) a summary process action initiated by Goodhall's against Goodhall's Chrysler-Plymouth-Dodge-Jeep-Eagle, LLC, for nonpayment of rent; and (2) a stipulation entered into by David Caron Chrysler Motors, LLC, and Goodhall's. With respect to the summary process action, the trial court found that this action was settled by the transfer of a vehicle to Wallace Goodhall, Jr., and Lucille Goodhall. Thus, the summary process action did not terminate the lease.[13] With respect to the stipulation, the parties agree that the purpose of the stipulation was to establish that "the existing [l]ease between Goodhall's . . . as [l]andlord, and David [Caron] Chrysler Motors, LLC, as [t]enant, be terminated by mutual agreement of the parties to said [l]ease [a]greement . . . ." Even if this

the [d]emised [p]remises . . . . No such re-entry or taking possession of [the] [d]emised [p]remises by the [l]andlord shall be construed as an election on its part to terminate this [l]ease unless a written notice of such intention be given to [the] [t]enant or unless the termination thereof be decreed by a court of competent jurisdiction. Notwithstanding any such reletting without termination, [the] [l]andlord may at any time thereafter elect to terminate this [l]ease for such previous breach." Thus, by the terms of the lease, the lease does not automatically terminate upon a tenant's breach of a covenant or default in an obligation.

[13] Caron testified that Goodhall's commenced a second summary process action for nonpayment of rent naming David Caron Chrysler Motors, LLC, as the tenant, and that this eviction proceeding was settled by the stipulation.

stipulation constituted an action by Goodhall's voiding the assignment and terminating the lease, the stipulation was entered into in June, 2000, after the plaintiffs' cause of action allegedly accrued.[14] Absent evidence of any action terminating the assignment prior to the claimed cause of action,[15] Goodhall's failed to prove that it terminated the assignment, and, consequently, it remained subject to the rights and obligations set forth in the lease.

We therefore conclude that the trial court was incorrect in finding that, because Goodhall's did not consent to the assignment, there was no contract between David Caron Chrysler Motors, LLC, and Goodhall's. Because the trial court did not make any factual findings with respect to the plaintiffs' claim for breach of the lease, further proceedings to determine the rights and liabilities of the parties pursuant to the original lease are necessary.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to that court for further proceedings according to law.

In this opinion the other justices concurred.

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[14] In their complaint, the plaintiffs alleged that the environmental conditions existing on the property at the time the lease was originally entered into violated provisions in the lease regarding the landlord's responsibility for preexisting environmental conditions and the landlord's warranty of fitness and habitability.

[15] In fact, Goodhall's acceptance of rent after it was aware that Caron was occupying the premises weakens the claim that Goodhall's elected to terminate the lease.

CHARLES D. GIANETTI *v.* NORWALK HOSPITAL ET AL.
(SC 18549)
(SC 18550)

Norcott, Palmer, Zarella, McLachlan, Eveleigh, Harper and Vertefeuille, Js.

Syllabus

The plaintiff, a retired plastic surgeon, sought injunctive relief and damages from the defendant hospital after the hospital declined to renew his clinical privileges in 1983 and failed to hold a hearing on the renewal of such privileges in accordance with its bylaws. The plaintiff covered emergency room call at the hospital from the mid-1970s until 1983 and claimed that he was entitled to lost profits from lost business when his privileges at the hospital were not renewed. The plaintiff also covered emergency room call at three other area hospitals during those years and continued to cover call at those hospitals even after his privileges at the defendant hospital were not renewed. The trial court found that the defendant was liable but denied the plaintiff injunctive relief and awarded only nominal damages. The Appellate Court upheld the denial of injunctive relief but reversed the judgment as to the award of nominal damages, concluding that the lost volume seller theory of damages was applicable to the provision of personal services in addition to the sale of goods, and that the plaintiff was a lost volume seller of his medical services. The Appellate Court concluded, however, that the plaintiff was entitled to recover for lost profits in 1984 only. This court, on appeal, concluded that the record was inadequate to determine whether the plaintiff was a lost volume seller under the circumstances of the case and that the Appellate Court improperly determined that the plaintiff was entitled to lost profits in 1984 only. The case was remanded to the trial court for a determination of whether the plaintiff was a lost volume seller and the appropriate award of damages. On remand, the trial court found that the plaintiff was a lost volume seller and that he had proven lost profits for the years 1984 through 1988 with reasonable certainty, and awarded him lost profits for those years. The trial court, however, denied the plaintiff's request for prejudgment and postjudgment interest, and attorney's fees. The hospital and the plaintiff thereafter filed separate appeals. *Held*:

1. The trial court correctly determined that the plaintiff was a lost volume seller under the circumstances of the case; the evidence established that the plaintiff had the capacity to continue working for the defendant hospital while also handling an increased workload at the other area hospitals, that it would have been profitable for him to assume the increased workload and to continue working for the defendant hospital, and that he would have assumed the increased workload at the other

area hospitals even if his clinical privileges at the defendant hospital had been renewed.

2. Contrary to the hospital's claim, the record contained sufficient evidence to support the trial court's finding that the plaintiff had proven damages with reasonable certainty for the years 1984 through 1988; the trial court addressed any variables that might have affected the plaintiff's potential earnings at the hospital between 1984 and 1988 and concluded that their effect was reasonably similar during those years to their effect during the preceding years when the plaintiff was working at the hospital, and there was no merit to the hospital's claim that the trial court's calculation of lost profits was speculative because it was unlikely that the parties' contractual relationship would have continued for five additional years in light of their turbulent relationship leading up to the nonrenewal of the plaintiff's privileges.

3. The trial court did not abuse its discretion in excluding, on grounds of relevancy, certain evidence demonstrating that the hospital had sought to remove the plaintiff from its emergency room rotation, that the plaintiff routinely had missed emergency room calls, and that the plaintiff had failed to follow directions or hospital policies; that evidence, which related to conduct by the plaintiff and communications between the parties in 1983, was not relevant to the parties' intent and expectations when they entered into their contractual relationship in the 1970s.

4. The trial court properly followed the remand directive of this court in *Gianetti* v. *Norwalk Hospital* (266 Conn. 544) that required the trial court first to determine how long the parties reasonably could have expected their contractual relationship to have continued; the trial court made clear in its memorandum of decision and articulation that it had considered the parties' expectations, and the fact that the court had not addressed that matter until the end of its decision and in its articulation was immaterial because it could not have calculated damages in the manner that it did without considering those expectations.

5. Contrary to the plaintiff's claim, there was no inconsistency between the trial court's finding that the plaintiff was a lost volume seller and its finding that lost profits should have been awarded only for the years 1984 through 1988; the trial court properly considered both parties' reasonable expectations in determining whether the relationship could have been expected to continue beyond 1988 and properly found that the issue of the parties' intentions to continue their relationship beyond 1988 was moot as any finding regarding lost profits after 1988 would have been based on surmise and conjecture.

6. There was no merit to the plaintiff's claim that the trial court improperly concluded that lost profits could not be determined after 1988 in light of this court's prior determination that it would have been profitable for the plaintiff to continue working at the hospital after that year; the trial court had not ruled that lost profits could not be determined after 1988 but, rather, that the plaintiff had not sustained his burden of proving

lost profits after 1988, and, contrary to the plaintiff's claim, this court did not previously determine that it would have been profitable for the plaintiff to continue working at the hospital after 1988.

7. The trial court properly concluded that it could not calculate lost profits after 1988 because of certain variables affecting the plaintiff's projected income, including the increase in plastic surgeons sharing call at the hospital, the decrease in the overall amount of emergency room patients needing plastic surgery procedures, the decrease in emergency procedures being performed by plastic surgeons, as opposed to emergency room physicians, and a reduction in reimbursement rates for plastic surgery procedures; the evidence supported the trial court's conclusion that, because there was insufficient evidence as to the effect of these and other variables after 1988, it was unable to project lost profits with reasonable certainty after that year.

8. There was no merit to the plaintiff's claim that the trial court improperly concluded that it could not assess the plaintiff's lost profits after 1988 on the basis of that court's improper assumption that there was an increase in the number of plastic surgeons with privileges at the hospital after 1987 that resulted in a reduction of the number of cases available to each plastic surgeon, including the plaintiff; the increase in the amount of plastic surgeons was only one of many variables that the court considered in determining that any finding of lost profits after 1988 would have been based on surmise and conjecture.

9. The trial court properly relied on the average market approach, which called for the application of the same ratio of expenses to gross income to the plaintiff's projected income, to estimate the plaintiff's practice expenses for purposes of calculating his lost profits; there was sufficient evidence in the record to support the trial court's conclusion that the expected gross income from his lost business practice at the defendant hospital would have been reduced by the same percentage of expenses as the gross income from the business practice that he conducted at the other area hospitals.

10. The trial court did not abuse its discretion in declining to award the plaintiff prejudgment interest, pursuant to the statute (§ 37-3a) allowing for an award of such interest as damages for the detention of money after it becomes payable, from 1984 to 1987, and postjudgment interest from 1987 to the present; the hospital made good faith arguments as to liability and damages throughout the litigation, and the parties did not know if the plaintiff would be awarded damages until the trial court determined in 2009 that the plaintiff was a lost volume seller, which determination was the subject of this appeal.

11. The trial court properly declined to award the plaintiff attorney's fees; contrary to the plaintiff's claim, the hospital did not act in bad faith in choosing to continue the litigation instead of reinstating his privileges or providing him with a due process hearing on the nonrenewal of his privileges, and the hospital did not breach a fiduciary duty to the plaintiff

by failing to follow its bylaws when it did not provide him with such a hearing.

Lost volume seller theory of damages, explained.

Argued November 29, 2011—officially released May 15, 2012

Procedural History

Action to recover damages for, inter alia, breach of contract for the defendants' failure to renew the plaintiff's medical staff privileges at the defendant hospital and for failure to follow the hospital's bylaws in declining to renew those privileges, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Spear*, *J.*, rendered judgment in favor of the plaintiff on the issue of liability only; the matter then was tried to the court, *Gormley*, *J.*, on the issue of damages; judgment awarding the plaintiff nominal damages only, from which the plaintiff appealed to the Appellate Court, *Landau*, *Mihalakos* and *Dupont*, *Js.*, which reversed in part the trial court's judgment and remanded the case for further proceedings, and, on the granting of certification, the named defendant appealed and the plaintiff cross appealed to this court, which reversed in part the Appellate Court's judgment and remanded the case to the trial court for a new hearing in damages; on remand, the trial court, *Hon. Edward F. Stodolink*, judge trial referee, awarded the plaintiff damages but denied the plaintiff's request for attorney's fees, and prejudgment and postjudgment interest, and the named defendant and the plaintiff filed separate appeals. *Affirmed*.

Robert A. Lacobelle, for the appellant in Docket No. SC 18549 and the appellee in Docket No. SC 18550 (named defendant).

Alan Neigher, with whom was *Sheryle S. Levine*, for the appellee in Docket No. SC 18549 and the appellant in Docket No. SC 18550 (plaintiff).

ZARELLA, J. In this breach of contract action, which comes before the court for the third time in twenty-four years,[1] the named defendant, Norwalk Hospital,[2] appeals, and the plaintiff, Charles D. Gianetti, a retired plastic surgeon, appeals, from the judgment of the trial court rendered in favor of the plaintiff following a hearing in damages.[3] On appeal, the hospital claims that the trial court improperly (1) found that the plaintiff was a lost volume seller under the circumstances of this case, (2) concluded that there was sufficient evidence in the record to support a finding that the plaintiff proved damages with reasonable certainty for the years 1984 through 1988, and (3) precluded evidence relevant to the determination of damages regarding the parties' reasonable expectations as to the length of their contractual relationship. In his appeal, the plaintiff claims that the trial court improperly (1) calculated the damage award,[4] (2) declined to award prejudgment and post-

[1] We first considered the issues in this case in *Gianetti* v. *Norwalk Hospital*, 211 Conn. 51, 557 A.2d 1249 (1989)(*Gianetti I*), and, again, in *Gianetti* v. *Norwalk Hospital*, 266 Conn. 544, 833 A.2d 891 (2003) (*Gianetti II*).

[2] We hereinafter refer to the defendant, Norwalk Hospital, as either Norwalk Hospital or the hospital.

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

[4] The plaintiff specifically claims that the trial court improperly (1) failed to follow our directive in *Gianetti* v. *Norwalk Hospital*, 266 Conn. 544, 570, 833 A.2d 891 (2003) (*Gianetti II*), requiring the court *first* to determine how long the parties reasonably expected the contractual relationship to continue before calculating the amount of the damage award, (2) made inconsistent findings that the plaintiff was a lost volume seller and that the plaintiff had failed to prove lost profits after 1988, (3) concluded that lost profits could not be determined after 1988, even though this court affirmed in *Gianetti II* that it would have been profitable for the plaintiff to continue working at Norwalk Hospital after 1988; see id., 563–64 n.10; (4) concluded that the plaintiff had suffered no lost profits after 1988 because of certain variables, when the same variables had existed prior to 1988 and two other plastic surgeons with similar practices earned profits after 1988, (5) failed to specify the variables that prevented it from calculating lost profits after 1988, (6) concluded that the increase in the number of plastic surgeons at

judgment interest, and (3) declined to award attorney's fees.[5] We affirm the judgment of the trial court.

The following relevant facts and procedural history are set forth in *Gianetti* v. *Norwalk Hospital*, 266 Conn. 544, 833 A.2d 891 (2003) (*Gianetti II*). "The plaintiff is a physician who specializes in the field of plastic and reconstructive surgery. In 1974, the plaintiff was granted provisional clinical privileges as a member of the hospital's medical staff. In 1976, the plaintiff was granted full clinical privileges as an assistant attending staff physician. The plaintiff's privileges were renewed on an annual basis through 1983. During this time period, the plaintiff also had clinical privileges at [several] other area hospitals [Bridgeport hospitals].

"In 1983, the last year for which the plaintiff was granted privileges, there were four plastic surgeons, including the plaintiff, who worked in conjunction with the hospital's emergency department. Neither the plaintiff nor the other plastic surgeons were required to remain physically at the hospital while 'on call.' Rather, they were summoned to the hospital as their services were needed. Three of the plastic surgeons who covered call at the hospital also simultaneously covered call at other area hospitals. Each plastic surgeon was responsi-

Norwalk Hospital after 1988 necessarily would have translated to a reduced caseload for the plaintiff when there was no evidence presented to support that conclusion, and (7) failed to consider as expenses for the purpose of calculating the plaintiff's lost profits only those additional costs incurred by virtue of the plaintiff's service as an emergency room physician at Norwalk Hospital.

[5] The plaintiff also claims that the trial court failed to rule on the liability of the seven individual defendants, namely, Norman A. Brady, the former president of Norwalk Hospital, and physicians William F. Hughes, Horace A. Laffaye, the former chairman of the department of surgery, E.J. Tracey, the former chief of staff, Joel B. Singer, the former chief of the plastic and reconstructive surgery section, Carmine Calabrese, and Philip F. Corso. During oral argument, however, the plaintiff's appellate counsel stipulated that the action should be withdrawn as to all of the individual defendants.

ble for billing his patient or the patient's medical insurance carrier for any services performed.

"In 1983, the plaintiff applied for the renewal of privileges for 1984. On the basis of the recommendations of the hospital's department of surgery, section of plastic and reconstructive surgery and credentials committee, the medical staff of the hospital declined to renew the plaintiff's privileges for 1984. The hospital's board of trustees subsequently ratified the decision of the medical staff.

"In 1984, a year in which the plaintiff derived no income from services performed at the hospital owing to the nonrenewal of his privileges, the plaintiff's gross income was $225,815. In 1983, the plaintiff earned $43,687 in gross income from services performed at the hospital and $172,890 in gross income from all other services performed, including services performed at [the Bridgeport] hospitals, for a total gross income of $216,577.

"In response to the nonrenewal of privileges, the plaintiff brought the present action against the hospital [in January, 1984], seeking, inter alia, damages and injunctive relief. The case thereafter was referred to an attorney trial referee, who concluded in his report [dated May 7, 1987] that an enforceable contract existed between the hospital and the plaintiff and, furthermore, that the hospital, through its employees and agents, had breached that contract by failing to follow the procedural requirements of its bylaws in declining to renew the plaintiff's privileges.

"The trial court subsequently accepted the referee's report[6] [on June 18, 1993] and rendered [an interlocu-

[6] The trial court accepted the attorney trial referee's report only after this court determined, with respect to two questions of law that the parties had presented for appellate review by way of a joint motion for reservation, that (1) the hospital bylaws did not create a contract between the plaintiff and the hospital but that there was nonetheless a contractual relationship between them, and (2) the rights and duties arising out of the contractual

tory] judgment in favor of the plaintiff on the issue of liability. The trial court then conducted a hearing to determine the appropriate remedy, after which the court declined to grant the plaintiff injunctive relief [in a decision dated September 9, 1999] because he did not prove that he had suffered irreparable harm or that he was without an adequate remedy at law. In addition, the court awarded the plaintiff $1 as nominal damages, reasoning that the evidence adduced by the plaintiff did not provide a basis for finding any economic loss or damages arising out of the hospital's breach of contract. The court based its award of nominal damages on its determination that the plaintiff was not a lost volume seller inasmuch as he [had] provided personal services to the hospital and that, consequently, the doctrine of mitigation of damages applied. Thus, the court rendered judgment awarding the plaintiff nominal damages only.

"The plaintiff thereafter appealed to the Appellate Court. The Appellate Court affirmed the trial court's denial of injunctive relief but reversed that part of the judgment awarding nominal damages. *Gianetti* v. *Norwalk Hospital*, 64 Conn. App. 218, 233, 779 A.2d 847 (2001). The Appellate Court concluded that the lost volume seller theory can apply to personal service contracts such as the one between the plaintiff and the hospital; see id., 226, 230; and that, in light of the evidence contained in the record, the trial court should have deemed the plaintiff a lost volume seller and should have awarded him damages equal to his lost profits in 1984 only. Id., 231. Thus, the Appellate Court remanded the case to the trial court for a new hearing

relationship were subject to judicial review. See *Gianetti* v. *Norwalk Hospital*, 211 Conn. 51, 63–64, 557 A.2d 1249 (1989) (*Gianetti I*). See generally General Statutes § 52-235 (a) (providing that "[t]he Superior Court, or any judge of the court, with the consent of all parties of record, may reserve questions of law for the advice of the Supreme Court or Appellate Court in all cases in which an appeal could lawfully have been taken to said court had judgment been rendered therein").

in damages with guidance on the appropriate method of calculating damages. See id., 233.

"We thereafter granted the hospital's petition for certification to appeal limited to two issues. First, '[d]id the Appellate Court properly conclude that the plaintiff was a lost volume seller?' . . . *Gianetti* v. *Norwalk Hospital*, 258 Conn. 945, 788 A.2d 95 (2001). Second, '[d]id the Appellate Court properly conclude that the plaintiff was not required to mitigate damages . . . and that he was entitled to more than nominal damages?' Id., 946. We also granted the plaintiff's petition for certification to appeal limited to the following issue: 'Did the Appellate Court properly conclude that, on the remand, the plaintiff was entitled to prove damages for only one year?' *Gianetti* v. *Norwalk Hospital*, 258 Conn. 946, 788 A.2d 95 (2001)." *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 547–51.

On appeal, we determined that the Appellate Court properly had concluded as a matter of law that the lost volume seller theory applies to personal services contracts but that the Appellate Court's conclusion regarding the plaintiff's status as a lost volume seller under the circumstances of this case had been incorrect. See id., 571. We noted that the issue of whether a party qualifies as a lost volume seller is one of fact. Id., 560. We also observed that it is not ordinarily the function of a reviewing court to make factual findings and that conclusions of fact may be drawn on appeal "only where the subordinate facts found [by the trial court] make such a conclusion inevitable as a matter of law . . . or where the undisputed facts or uncontroverted evidence and testimony in the record make the factual conclusion so obvious as to be inherent in the trial court's decision." (Internal quotation marks omitted.) Id. Under this high standard, "[t]he evidence in the record was inadequate for the purpose of determining whether the plaintiff had possessed the capacity and

intent to perform under the contract with the hospital while simultaneously assuming an increased workload at the [Bridgeport] hospitals. Accordingly, any conclusions derived from those facts that are relevant to the first and third prongs of the lost volume seller test were improper." Id., 571. We also concluded that the record supported the Appellate Court's determination that "it would have been profitable for the plaintiff to perform under the contract with the hospital while also assuming an increased workload at the [Bridgeport] hospitals"; id., 563–64 n.10; but that "the Appellate Court improperly [had] determined that the plaintiff was entitled to damages for lost profits in 1984 only. The proper remedy under these circumstances [was] to remand the case for a new hearing to afford the trial court an opportunity to determine damages with due consideration of the lost volume seller theory and to make factual findings to that end, after which a reviewing court properly [could] determine whether the trial court's factual findings and its conclusions concerning the amount of damages to which the plaintiff is entitled [were] supported by the record." Id., 571. We thus affirmed the judgment of the Appellate Court insofar as it upheld the trial court's denial of injunctive relief but otherwise reversed the judgment and remanded the case for further proceedings. Id.

On remand, the trial court conducted a hearing in damages and, in a memorandum of decision dated April 15, 2009, found that the plaintiff was a lost volume seller under the circumstances of the case. The court also found that, because the plaintiff was a lost volume seller, he was not required to mitigate his damages. The court then determined that the plaintiff had proven lost profits for the years 1984 through 1988 with a reasonable degree of certainty and awarded him damages in the amount of $258,610 plus costs. These appeals followed. Additional facts will be set forth as necessary.

I

THE HOSPITAL'S APPEAL

A

Lost Volume Seller

The hospital first claims that the trial court improperly found that the plaintiff was a lost volume seller. The hospital specifically claims that the plaintiff failed to prove by a preponderance of the evidence that, in the years following the termination of his privileges in 1983, (1) he had the capacity to continue working at Norwalk Hospital while also handling the increased workload at the Bridgeport hospitals, (2) it would have been profitable for him to take on the additional workload at the Bridgeport hospitals, and (3) he probably would have assumed the additional workload at the Bridgeport hospitals even if his privileges at Norwalk Hospital had not been terminated. The plaintiff responds that he had the capacity to perform work at all of the hospitals simultaneously in 1984, that this court conclusively established that it would have been profitable for him to assume the increased workload at the Bridgeport hospitals and that his own testimony demonstrates that he would have handled the increased workload even if his privileges at Norwalk Hospital had not been terminated. We agree with the plaintiff.

The following additional facts are relevant to our resolution of this issue. In its memorandum of decision, the trial court made several factual findings. Among these findings were that (1) the plaintiff "covered the plastic surgery needs of the emergency rooms [at Norwalk Hospital and the Bridgeport hospitals] for the years 1974 to 1983 on a rotation basis with two other plastic surgeons," (2) the plaintiff "covered the plastic surgery needs of the emergency rooms [at two of the Bridgeport hospitals] for the years 1984 to 2001 on a

rotation basis with other plastic surgeons and emergency room doctors," (3) "[t]he need for plastic surgeons in all the emergency rooms diminished over time because emergency room doctors, employees of the hospital, called upon plastic surgeons, less and less," and (4) "[p]lastic surgeons who covered the emergency rooms on rotation were not employees of the hospital and were required to bill and collect their fees independently for any procedure that they were called upon to perform." On the basis of these findings, the trial court concluded that all three prongs of the lost volume seller test had been satisfied. See generally *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 554 (setting forth three prongs of lost volume seller test). The trial court explained that the first prong of the test was satisfied because "[t]he services performed in 1974 through 1983 demonstrate the capability of [the plaintiff] to perform services simultaneously at Norwalk Hospital and the Bridgeport hospitals." The second prong of the test also was satisfied because this court had determined in *Gianetti II* that "the record supports the Appellate Court's conclusion that it would have been profitable for the plaintiff to perform under the contract with the hospital while assuming an increased workload at the [Bridgeport] hospitals." *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 563–64 n.10. Finally, the third prong of the test was satisfied because "the plaintiff was furnishing services to the [Bridgeport] hospitals prior to the termination and continued to furnish those services after his termination."

We begin our analysis by setting forth the standard of review. "The determination of whether a party qualifies as a lost volume seller involves questions of fact to be resolved according to the circumstances of each case." (Internal quotation marks omitted.) Id., 560. We thus review the trial court's findings to determine whether they are clearly erroneous. "A finding of fact

is clearly erroneous when there is no evidence in the record to support it . . . 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. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *Ackerman* v. *Sobol Family Partnership, LLP*, 298 Conn. 495, 507–508, 4 A.3d 288 (2010).

With respect to the applicable legal principles, "[c]omment (f) to § 347 of the Restatement (Second) of Contracts provides that, in cases in which a contract has been breached, if there is a factual finding that an 'injured party could and would have entered into the subsequent contract, even if the [underlying] contract had not been broken, and could have had the benefit of both, he can be said to have "lost volume" and the subsequent transaction is not a substitute for the broken contract.' 3 Restatement (Second), Contracts § 347, comment (f), p. 117 (1981). Thus, '[t]he lost volume seller theory allows [for the] recovery of lost profits despite resale of the services that were the subject of the terminated contract if the seller . . . can prove that he would have entered into both transactions but for the breach.' . . . Although the lost volume seller theory is commonly understood to apply to contracts involving the sale of goods, it applies with equal force to contracts involving the performance of personal services such as employment contracts. 22 Am. Jur. 2d 592, Damages § 509 (1988).

"To qualify as a lost volume seller, a party must prove that the subsequent contract is not a substitute for the opportunity that has been lost as a result of the breach. See 3 Restatement (Second), supra, § 350, comment (d), p. 129. 'A "substitute" is a contract which a volume seller who has suffered the loss of one contract through the breach of another party has entered into in place of the broken contract and which the volume seller would not have been able, with his existing personnel and overhead costs, to perform had there been no breach.' . . .

"Therefore, 'a party claiming to be a lost volume seller must establish that it would have had the benefit of both the original contract and the subsequent contracts had there not been a breach. . . . This test has both objective and subjective components.' . . . Specifically, 'to recover lost profits under [the lost volume seller] theory, a [nonbreaching] party must prove three things: [1] that the seller of services had the capability to perform both contracts simultaneously; [2] that the second contract would have been profitable; and [3] that the seller of services probably would have entered into the second contract even if the first contract had not terminated." (Citations omitted.) *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 552–54. The party claiming to be a lost volume seller has the burden of proving lost volume seller status by a preponderance of the evidence. See *Gianetti* v. *Norwalk Hospital*, supra, 64 Conn. App. 228.

Mindful of these principles, we conclude, with respect to the first prong of the test, that the trial court's determination that the plaintiff had the capacity to continue working at Norwalk Hospital in 1984, in addition to taking on the increased workload at the Bridgeport hospitals, was not clearly erroneous. Although the number of cases that the plaintiff handled at the Bridgeport hospitals increased dramatically from approximately

130 in 1983 to 263 in 1984,[7] there is no evidence in the record that the plaintiff would have had difficulty handling the increased workload or that he would not have had sufficient time to satisfy his emergency room obligations at all of the hospitals during that year. The plaintiff testified that he shared on-call duties at Norwalk Hospital with two other plastic surgeons from 1978 through 1981, and with three other plastic surgeons in 1982 and 1983, and that the number of days each was scheduled for on-call duty was divided equally among them. In other words, the plaintiff was scheduled for on-call duty at Norwalk Hospital approximately 120 days each year from 1978 through 1981, and approximately 90 days in 1982 and 1983. The plaintiff further testified that 60 to 70 percent of the procedures that he performed were only one and one-half to two and one-half hours in length and that the remaining 30 to 40 percent were from two and one-half to three hours in length, thus leaving ample time for him to perform more procedures each day that he was scheduled for on-call duty at the hospitals. Indeed, the record shows that, on many days prior to 1984, the plaintiff not only performed multiple procedures but performed them at different hospitals, including Norwalk Hospital,[8] and

[7] The record discloses that the total number of emergency room cases that the plaintiff handled at all of the hospitals in each of the six years prior to the termination of his privileges varied from 168 to 217, and that the largest number of cases he handled in the Bridgeport hospitals during that period was approximately 130, in 1983. Specifically, the plaintiff handled: 86 cases in Norwalk and 95 in Bridgeport in 1978, for a total of 181 cases; 89 cases in Norwalk and 79 in Bridgeport in 1979, for a total of 168 cases; 72 cases in Norwalk and 97 in Bridgeport in 1980, for a total of 169 cases; 97 cases in Norwalk and 114 in Bridgeport in 1981, for a total of 211 cases; and 103 cases in Norwalk and 114 in Bridgeport in 1982, for a total of 217 cases. The plaintiff handled 46 cases in Norwalk in 1983 but gave inconsistent testimony regarding the number of cases that he had handled in Bridgeport in that year, testifying at one point that he did not recall how many Bridgeport cases he had handled that year, and at another point that it might have been 125 or 130, which, if correct, would have added up to a total of between 171 and 176 cases in 1983.

[8] The plaintiff handled emergency room cases in more than one hospital on 21 days in 1978, 12 days in 1979, 23 days in 1980, 28 days in 1981, and

that, on some days, he performed multiple procedures at more than one hospital.[9] Thus, on one particularly busy day in 1982, the plaintiff handled one case at each of four hospitals, and, on another day in 1980, he handled one case at each of two Bridgeport hospitals and three cases at Norwalk Hospital. Accordingly, the statistical evidence alone supports the trial court's conclusion that the plaintiff had the capacity in 1984 to handle the increased workload at the Bridgeport hospitals while continuing to work at Norwalk Hospital because, even if he had on-call duty only ninety days at Norwalk Hospital in 1984, and even if some of those days overlapped with his on-call days at the Bridgeport hospitals, he conceivably could have handled a combined total of more than 300 cases annually in all locations if he had three or four cases on each of those ninety days.[10]

Furthermore, the trial court was entitled to credit the plaintiff's testimony that he would have been able to perform his duties at all of the hospitals simultaneously in 1984, and there is no contrary evidence that he could not have done so because of the commuting distance between his office and the hospitals[11] or

30 days in 1982. The plaintiff also handled cases in both Norwalk and Bridgeport on 17 days in 1978, 12 days in 1979, 17 days in 1980, 16 days in 1981, and 19 days in 1982.

[9] The plaintiff handled more than one case at each of two different hospitals on 2 days in 1978, 2 days in 1980, 1 day in 1981, and 2 days in 1982. The plaintiff also handled more than one case at one of the two or three hospitals at which he worked on that day on 8 days in 1978, 5 days in 1979, 9 days in 1980, 11 days in 1981, and 7 days in 1982.

[10] This calculation does not take into account that the plaintiff may have been scheduled for on-call duty in the Bridgeport hospitals on days when he was not scheduled for on-call duty at Norwalk Hospital.

[11] The only evidence on the commuting distance from the plaintiff's office to the hospitals was provided by the hospital's expert witness, Edward M. Adams, Jr., who testified that the approximate travel time between the plaintiff's office in Bridgeport and Norwalk Hospital was thirty minutes, between his office and Bridgeport Hospital was fifteen minutes, between his office and St. Vincent's Hospital was three minutes, and between Norwalk Hospital and Bridgeport Hospital was twenty-three minutes.

because of other constraints. The plaintiff also testified that he was never unable to attend to an emergency room call at any of the Bridgeport hospitals while he was in Norwalk or, conversely, that he was unable to attend to an emergency room call at Norwalk Hospital while he was in Bridgeport. The plaintiff explained that, if he received a call from more than one hospital on any given day, he would respond first to the initial call and then proceed to the second or third hospital in sequential order. The plaintiff further testified that, to his knowledge, two other physicians with whom he had shared on-call rotation at the hospitals were able to cover their on-call work in Bridgeport without any difficulty from 1984 through the mid-1990s while continuing to work on rotation at Norwalk Hospital.

Relying on *Penncro Associates, Inc.* v. *Sprint Spectrum, L.P.*, 499 F.3d 1151 (10th Cir. 2007), the hospital contends that the reason why the plaintiff was able to handle more than double the number of cases at the Bridgeport hospitals in 1984 than he had handled in prior years was because his privileges at Norwalk Hospital had been terminated, thus making more time available for him to work at the Bridgeport hospitals. See id., 1161–62 (concluding that plaintiff was not lost volume seller because it had capacity to assume additional work only by virtue of fact that defendant had terminated parties' contract). In support of this claim, the hospital points to evidence that the plaintiff had no large yearly swings of income earned or lost at any one hospital prior to 1984 without a corresponding loss or gain of income at another hospital. We disagree for at least two reasons. First, the plaintiff and other witnesses testified that the number of on-call emergency room cases arising on any particular day was due to the purely random number of accidents that happened to occur, a fact that the hospital also acknowledged in its brief to this court. In other words, the plaintiff would have

been required to handle the same number of cases at the Bridgeport hospitals even if his privileges at Norwalk Hospital had not been terminated. Second, the increase in workload[12] far exceeded the average number of cases that the plaintiff had handled at Norwalk Hospital during any previous year.[13] Accordingly, the fact that the plaintiff may have had more time available because he no longer worked at Norwalk Hospital had nothing to do with his increased workload at the Bridgeport hospitals.

As for his annual swings in income, the plaintiff testified that his fee for each case varied with its complexity and that the amount of income that he derived each year from any of the hospitals was not only a function of the number of cases at that hospital but of the type of procedures that he performed. Thus, because the average fee for his 263 Bridgeport cases in 1984 was only $535, his income of $140,705 from those cases was substantially lower than his income of $208,000 in 1986 from only 106 cases, for which the average fee was $1300. We thus conclude that the evidence does not support the hospital's contention that the plaintiff was able to handle the increased workload in the Bridgeport hospitals only by virtue of the termination of his privileges at Norwalk Hospital and that he did not have the requisite capacity to handle cases at all of the hospitals simultaneously in 1984.

The hospital argues that a lost volume seller is one that has unlimited resources or production capacity, and that the plaintiff in this case had a limited ability to conduct business in the manner that he did over the

[12] The plaintiff handled 158 more Bridgeport cases in 1984 than he did on average in the six preceding years, a number determined by subtracting the average number of cases that the plaintiff had handled each year in Bridgeport for the years 1978 through 1983 (105) from the 263 Bridgeport cases that he handled in 1984.

[13] The plaintiff handled an average of 82 cases in Norwalk each year from 1978 through 1983.

six year period prior to the termination of his privileges because he was physically capable of performing only a limited number of procedures each year. We disagree. The concept of capacity in this context is not absolute, and is not intended to focus on a theoretical ability to supply unlimited services but on a practical ability to continue providing the services lost as well as those added after the contract was terminated. See J. Holisky, comment, "Finding the 'Lost Volume Seller': Two Independent Sales Deserve Two Profits Under Illinois Law," 22 J. Marshall L. Rev. 363, 379–80 (1988). Consequently, there being no evidence in the record that counters the plaintiff's testimony that he had sufficient capacity in 1984 to handle cases at all of the hospitals simultaneously, we conclude that the trial court's finding that the plaintiff had sufficient capacity to qualify as a lost volume seller under the first prong of the test was not clearly erroneous.

The hospital further argues that the only evidence in the record that the plaintiff could handle all of his on-call work at the hospitals and that he never missed a call was in the form of his own testimony but that there was other testimony that the plaintiff could not always be located to service emergency room calls or respond to on-call needs. The hospital thus claims that the trial court could not have concluded that the plaintiff's testimony alone constituted the required overwhelming and uncontroverted evidence of his capacity to handle cases at Norwalk Hospital while also assuming an increased workload at the Bridgeport hospitals. This claim has no merit.

Insofar as the hospital argues that there was testimony from other plastic surgeons that the plaintiff could not always be located to handle an emergency room call, "[i]t is well established that [i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine

the credibility and effect to be given the evidence. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Internal quotation marks omitted.) *State* v. *Lawrence*, 282 Conn. 141, 155, 920 A.2d 236 (2007). Thus, the trial court was entitled to credit the plaintiff's testimony that he would have been able to handle cases at all of the hospitals simultaneously in 1984, that he never missed a call at any of the hospitals and that, if he was working at one hospital when he received a call from another, he would complete his work at the first hospital and then go to the second. Moreover, even if the plaintiff missed occasional calls, that fact alone would have little or no significance in light of the large number of cases that he handled in 1984.

Finally, the trial court was not required to rely on uncontroverted and overwhelming evidence to conclude that the plaintiff had the required capacity, as the hospital contends. The hospital refers to our conclusion in *Gianetti II* that "the limited evidence in the record concerning the plaintiff's capacity and intent to perform under the contract with the hospital while simultaneously assuming an increased workload at the other hospitals [was] neither uncontroverted nor sufficiently clear as to warrant the conclusion that the plaintiff [was] a lost volume seller *as a matter of law*." (Emphasis added.) *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 561. In *Gianetti II*, however, we applied the higher standard and reversed the Appellate Court's judgment because the trial court had made no factual

finding as to whether the plaintiff was a lost volume seller, and a reviewing court cannot make a factual determination unless the record contains such uncontroverted and overwhelming evidence that the factual determination would be inevitable as a matter of law, a principle that the Appellate Court overlooked. See id., 562–63, 571. We thus remanded the case to the trial court to determine whether the plaintiff was a lost volume seller. Id., 563, 571. The trial court now having made that determination, this court cannot apply the standard of "uncontroverted" and "overwhelming" evidence in the present appeal; id., 562; but must decide whether the trial court's finding was clearly erroneous. In other words, we must determine whether "there is no evidence in the record to support [the trial court's finding] . . . or when although there is evidence to support it, [on the entire evidence we are] left with the definite and firm conviction that a mistake has been committed. . . . [W]e [thus] do not examine the record to determine whether the [trial court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *Ackerman* v. *Sobol Family Partnership, LLP*, supra, 298 Conn. 507–508. Accordingly, we conclude that the trial court's finding that the plaintiff had the capacity in 1984 to handle cases at all of the hospitals simultaneously was not clearly erroneous.

We next consider, under the second prong of the lost volume seller test, whether it would have been profitable for the plaintiff to have continued working at Norwalk Hospital in 1984 while also assuming the increased workload at the Bridgeport hospitals. The hospital argues that the cost effectiveness of handling cases in both Norwalk and Bridgeport would have resulted in lost income when the Norwalk cases took the plaintiff away from his Bridgeport practice. We disagree. In *Gianetti II*, this court affirmed the Appellate

Court's determination in *Gianetti* v. *Norwalk Hospital*, supra, 64 Conn. App. 229, that it would have been profitable for the plaintiff to continue working at Norwalk Hospital in 1984 while also assuming the increased workload at the Bridgeport hospitals.[14] See *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 563–64 n.10. Accordingly, this court conclusively established in *Gianetti II* that the profitability prong of the test had been satisfied.

[14] In *Gianetti II*, we reasoned as follows: "We have not addressed the remaining prong of the lost volume seller test, namely, whether it would have been profitable for the plaintiff to have maintained his contract with the hospital while increasing his workload elsewhere. In the context of this case—one involving a contract for personal services—the relevant inquiry under the profitability prong is whether the plaintiff could have performed under the contract with the hospital and assumed the increased workload at the other hospitals the year after the breach without having incurred additional costs that would have eliminated the profitability of such an increased workload. . . . [T]he plaintiff presented evidence at the hearing in damages demonstrating that he could have . . . [worked for] the hospital profitably while serving several [Bridgeport] hospitals. Furthermore, there was no evidence that, as the plaintiff performed more medical and surgical procedures, the corresponding costs eventually would eliminate the profitability of such work. See 3 Restatement (Second), supra, § 347, comment (f), p. 117 ('[I]t is possible that an additional transaction would not have been profitable and that the injured party would not have chosen to expand his business by undertaking it had there been no breach. It is sometimes assumed that he would have done so, but the question is one of fact to be resolved according to the circumstances of each case.'); cf. *R.E. Davis Chemical Corp.* v. *Diasonics, Inc.*, 826 F.2d 678, 684 (7th Cir. 1987) ('as a seller's volume increases . . . a point will inevitably be reached where the cost of selling each additional item diminishes the incremental return to the seller and eventually makes it entirely unprofitable to conclude the next sale' . . .). Although the trial court correctly may have observed that the plaintiff's work for the hospital was not as profitable as it was at some of the [Bridgeport] hospitals, testimony adduced at the hearing in damages, as well as the reasonable inferences that can be drawn therefrom, supports the claim that it would have been profitable for the plaintiff to continue working for the hospital while increasing his workload elsewhere. Thus, the record supports the Appellate Court's conclusion that it would have been profitable for the plaintiff to [work for] the hospital while assuming an increased workload at the [Bridgeport] hospitals. See *Gianetti* v. *Norwalk Hospital*, supra, 64 Conn. App. 229." (Citation omitted.) *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 563–64 n.10.

Turning to the third prong of the test, we conclude that the trial court properly determined that the plaintiff would have performed the additional work at the Bridgeport hospitals even if his privileges at Norwalk Hospital had not been terminated. The plaintiff testified that he had maintained privileges at all of the hospitals, subject to annual renewal at each hospital, for six years before his privileges at Norwalk Hospital were terminated without knowing exactly how many on-call cases he would be asked to handle at each hospital, and that he fully intended to, and did, continue maintaining his privileges at the Bridgeport hospitals after 1983. In addition, the plaintiff testified that he never was unable to respond to an on-call case at any of the hospitals. The evidence thus established that the plaintiff would have continued his affiliations with the Bridgeport hospitals and handled the increased workload at those hospitals in 1984 even if his privileges at Norwalk Hospital had not been terminated.

The hospital reiterates that the only reason that the plaintiff handled more cases at the Bridgeport hospitals in 1984 was because the termination of his privileges at Norwalk Hospital made more time available for him to work in Bridgeport. Although the hospital concedes that the plaintiff's ability to handle the increased workload in Bridgeport indicates that the plaintiff did not reach his capacity before 1984, it argues that, given the dramatic increase in the number of Bridgeport cases in 1984, the plaintiff would have been constrained by the commuting distance between Norwalk and Bridgeport from handling the increased workload in Bridgeport if his privileges had not been terminated. The hospital also contends that the fact that the plaintiff never sought additional employment opportunities with any other hospital following the termination of his privileges suggests that his capacity had been reached by virtue of

the increased workload at the Bridgeport hospitals. We disagree.

To the extent the hospital repeats its argument that termination of the plaintiff's privileges at Norwalk Hospital gave him more time in 1984 to assume an increased workload in Bridgeport, we reject that argument for all of the same reasons discussed in our prior analysis. We also reject the hospital's argument that the plaintiff's failure to seek work at other hospitals suggests that he recognized that he had no further capacity to handle cases in Norwalk. As previously stated, it is within the province of the trial court to determine credibility; see, e.g., *State* v. *Lawrence*, supra, 282 Conn. 155; and, accordingly, the trial court was entitled to credit testimony by the plaintiff that he did not apply for privileges at Griffin Hospital in the town of Derby, another local hospital, because it was too far away geographically, he had been advised not to apply for privileges at Griffin Hospital because of the prior termination of his privileges at Norwalk Hospital, and he did not want his record to reflect a possible rejection. We therefore conclude that the trial court's finding that the plaintiff was a lost volume seller was not clearly erroneous.

B

Sufficiency of Evidence

The hospital next claims that the trial court improperly concluded that the record contained sufficient evidence to support a finding that the plaintiff proved damages with reasonable certainty for the years 1984 through 1988. The hospital claims that the damage award was highly speculative because the calculations were affected by a large number of variables that would have limited the plaintiff's profitability after 1983. The hospital specifically contends that the plaintiff's models for calculating damages, on which the trial court partially relied, failed to consider that the plaintiff shared

his on call work at the hospital with only two other plastic surgeons from 1978 through 1981, and that his on call work was wholly unpredictable because the need for plastic surgery procedures was a function of the number of accidents involving patients that required emergency room treatment. In addition, the hospital contends that there was no evidence that it would have granted the plaintiff privileges for five more years, especially in light of their rapidly deteriorating and turbulent relationship in 1983, let alone that the relationship would have remained profitable for the plaintiff over that length of time. The plaintiff responds that the record contained sufficient evidence to support the trial court's finding that he proved damages with reasonable certainty for the years 1984 through 1988. The plaintiff argues that evidence of his deteriorating relationship with the hospital is relevant only as to liability, which already had been established, and that the calculation of damages must be based on the intent of the parties to engage in a long-term relationship when they entered into a contractual relationship in 1974. We conclude that the evidence was sufficient to support the trial court's finding that the plaintiff proved damages with reasonable certainty for the years 1984 through 1988.

The following additional facts are relevant to our resolution of this claim. After the trial court concluded that the plaintiff was not required to mitigate his damages because he was a lost volume seller, it noted that the plaintiff had the burden of proving lost profits with reasonable certainty, describing such profits as the amount that the plaintiff would have earned from the performance of work at Norwalk Hospital were it not for the breach, less any cost attributable to the performance of this work. The court acknowledged that any calculation of the plaintiff's potential earnings at the hospital from 1984 through 2001 would be subject to many variables, including (1) the number of plastic sur-

gery procedures needed by the hospital's emergency room, (2) the number of plastic surgeons on rotation to cover those needs,[15] (3) the number of plastic surgery procedures performed by emergency room physicians other than plastic surgeons, (4) the diminution of injuries requiring plastic surgery due to increased usage of seat belts and air bags, (5) the reduction in fee reimbursement by health insurance companies, (6) the number of uninsured patients who do not pay for their treatment, and (7) the rise in fees for surgical procedures due to cost-of-living adjustments.

In light of these variables, the trial court concluded that the plaintiff had sustained his burden of proof only for the years 1984 through 1988. The court explained that the effect of the variables during those years would be reasonably similar to their effect during the prior six years, and, consequently, a projection of lost profits could be made with reasonable certainty for the years immediately following the termination of the plaintiff's privileges. The court also concluded, however, that the cumulative effect of the variables for the years after 1988 was "so substantial" that any finding of lost profits would be based on "surmise and conjecture."

The court then adopted one of several formulas suggested by the plaintiff as a basis for calculating his potential earnings for the years 1984 through 1988. The formula was premised in part on the assumption that the plaintiff would have treated at least eighty-eight patients at the hospital[16] each year following the termination of his contract. Employing this formula, the court concluded that the plaintiff would have had a total gross

[15] The court observed that there were two other plastic surgeons in Norwalk Hospital's emergency room on-call rotation from 1978 to 1981, not including the plaintiff, three in 1982, 1984 and 1985, four in 1986 and 1987, six in 1988, seven in 1989, and eight from 1990 to 1995.

[16] Eighty-nine is the median number of emergency room cases that the plaintiff handled at Norwalk Hospital for the years 1978 to 1982.

income from his work at Norwalk Hospital of $427,842, total deductions of $169,232, and a net lost profit of $258,610.

The legal principles that govern our review of damage awards are well established. We have recognized that "[t]he trial court has broad discretion in determining damages. . . . The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous. . . . [W]hether the decision of the trial court is clearly erroneous . . . involves a two part function: where the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision; where the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . In a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . On appeal, we will give the evidence the most favorable reasonable construction in support of the verdict to which it is entitled. . . . A factual finding may be rejected by this court only if it is clearly erroneous. . . . A finding is clearly erroneous 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. . . .

"We are, therefore, constrained to accord substantial deference to the fact finder on the issue of damages. In deciding whether damages properly have been awarded, however, we are guided by the well established principle that such damages must be proved with reasonable certainty. . . . Although we recognize that damages for lost profits may be difficult to prove with

exactitude . . . such damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount with reasonable certainty. . . . Consequently, we have permitted lost profits to be calculated by extrapolating from past profits. . . . We have stated, however, that the plaintiff cannot recover for the mere possibility of making a profit. . . . A damage theory may be based on assumptions so long as the assumptions are reasonable in light of the record evidence. . . .

"In order to recover lost profits, therefore, the plaintiff must present sufficiently accurate and complete evidence for the trier of fact to be able to estimate those profits with reasonable certainty." (Citations omitted; internal quotation marks omitted.) *Beverly Hills Concepts, Inc.* v. *Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 68–70, 717 A.2d 724 (1998).

We conclude that there was sufficient evidence in the record for the trial court to calculate the plaintiff's lost profits with reasonable certainty. The court did not ignore the variables that affected the plaintiff's potential earnings from 1984 through 1988 but expressly identified and addressed them at the outset of its decision, determining that their effect was reasonably similar during those years to their effect during the preceding years. The court noted evidence in the record that the number of plastic surgeons on call at Norwalk Hospital from 1984 through 1988 was the same, or only slightly greater than, the number of plastic surgeons on call at Norwalk Hospital from 1978 through 1982. See footnote 15 of this opinion. With respect to the unpredictable number of emergency room cases that the plaintiff would have handled in any given year, the court accepted the plaintiff's estimate that the median number of cases from 1984 through 1988 would have remained the same as the median number of cases from 1978 through 1982, which was not unreasonable in light

of evidence that the number of cases that he handled from 1978 through 1982 did not fluctuate wildly.[17] The trial court's reliance on the median number of cases also was not unreasonable given that any potential increase in the number of Norwalk cases, similar to the increase in the number of Bridgeport cases from 1984 through 1988,[18] very likely would have been offset by the increased number of on-call plastic surgeons at Norwalk Hospital in 1986, 1987 and 1988. Moreover, there is no evidence that the effect of any of the other variables identified by the court, such as the number of plastic surgery procedures performed by emergency room physicians other than plastic surgeons and the reduction in injuries requiring plastic surgery due to increased use of seat belts and air bags, occurred immediately rather than gradually after 1984.

To the extent that the hospital claims that the trial court's calculation of lost profits was speculative because the supposition that a five year relationship would have continued is contradicted by evidence that its relationship with the plaintiff was turbulent in 1983, the year in which his privileges were terminated, we disagree. The trial court specifically addressed that issue, scoured the record and concluded that the hospital's contractual relationship with the plaintiff would have been the same as it was with the other on-call plastic surgeons who had been working at Norwalk Hospital from 1984 to 1988 and that it had found no evidence indicating that the hospital would not have continued its contractual relationship with any of the other plastic surgeons. Moreover, there is no reason

[17] The plaintiff handled 86 Norwalk Hospital cases in 1978, 89 cases in 1979, 72 cases in 1980, 97 cases in 1981, and 103 cases in 1982. The plaintiff handled only 46 cases in 1983 but explained that this noticeable reduction was due to his issues with the hospital during that year. See footnote 7 of this opinion.

[18] The plaintiff handled 263 cases in the Bridgeport hospitals in 1984, 206 cases in 1985, 160 in 1986, 218 in 1987, and 197 in 1988.

why the parties' turbulent relationship in 1983 would have had any effect on the trial court's conclusion because, without the required hospital hearing, it was not possible to determine how a full discussion of the issues would have affected the parties' future relationship. See part I C of this opinion. Accordingly, the trial court properly declined to differentiate between the plaintiff and the other on-call plastic surgeons working at Norwalk Hospital in discussing prospects for the parties' continued relationship over the next five years.

The hospital, relying on *Westport Taxi Service, Inc.* v. *Westport Transit District*, 235 Conn. 1, 664 A.2d 719 (1995), and *Humphrys* v. *Beach*, 149 Conn. 14, 175 A.2d 363 (1961), argues that the proper basis for estimating the plaintiff's lost profits was the income that he received from his work at Norwalk Hospital in the year preceding the termination of his privileges. Both of those cases, however, are inapposite. In *Westport Taxi Service, Inc.* v. *Westport Transit District*, supra, 3, 12, in which the plaintiff sought damages for injuries caused by an antitrust violation involving predatory pricing, we stated that a plaintiff injured by an antitrust violation may recover lost *past* profits for the probable value of the business and the time that the defendant directly competed with the plaintiff, which had been approximately fourteen months. Id., 32, 33. Similarly, in *Humphrys*, the plaintiff, who was the owner of a barn that was destroyed by a fire, sought damages to recover for his loss of the barn, his equipment, two horses and his profits for the fifteen months that he was out of business because of the fire. *Humphreys* v. *Beach*, supra, 15–16, 20. The circumstances in the present case are distinguishable. We therefore conclude that the hospital's claim has no merit and that there was sufficient evidence in the record to support the trial court's finding that the plaintiff proved damages

with reasonable certainty for the years 1984 through 1988.

C

Admissibility of Evidence

The hospital next claims that the trial court improperly precluded relevant evidence directly related to the parties' reasonable expectations as to the length of the contractual relationship and the determination of damages. The hospital claims that, although the plaintiff may have intended to perform work at Norwalk Hospital indefinitely, the excluded evidence demonstrated that the hospital wanted to remove the plaintiff from the emergency room rotation because he was increasingly unavailable to cover the procedures due to his simultaneous obligations at the Bridgeport hospitals. Consequently, the hospital claims that the evidence would have demonstrated that the hospital's intention was not to allow the plaintiff to continue working at Norwalk Hospital. The plaintiff responds that the excluded evidence is irrelevant because its goes to the issue of liability rather than damages, and the relevant question is the intention of the parties when they first entered into a contractual relationship in the 1970s. We conclude that the trial court properly excluded the proffered evidence.

The following additional facts are necessary to our resolution of this issue. At the hearing in damages, the hospital made several attempts to introduce evidence that the plaintiff missed emergency room calls, did not follow directions or hospital policies, and that his rotational schedule was "reduced drastically or eliminated completely." This evidence included (1) a letter to the plaintiff from the hospital's acting chairman of the department of surgery, dated April 8, 1983, discussing the plaintiff's tardiness and unavailability for emergency room duties, (2) a letter to the plaintiff from the

hospital's chief of plastic and reconstructive surgery, dated July 21, 1983, reminding the plaintiff that he was under supervision and that he was not allowed to perform surgical procedures without his supervisor present, and (3) a letter to the plaintiff from the hospital's chairman of the department of surgery, dated December 20, 1983, informing the plaintiff that his surgical privileges had been suspended because he had treated a patient in the emergency room without notifying his supervisor. The trial court sustained the plaintiff's objections, however, and did not admit the letters into evidence. Other documents that the hospital proffered but that the court declined to admit included a recommendation, dated September 22, 1983, from the chairman of the department of surgery to the chairman of the hospital's credentials committee, a record of the minutes of an October 4, 1983 meeting of the credentials committee regarding the reappointment of individuals applying for privileges with the hospital's department of surgery for the years 1983 through 1984, and the meeting minutes dated September 13, 1983, of the hospital's plastic surgery section reflecting that the department was not planning to include the plaintiff in the emergency room rotation in 1984. The trial court also sustained the plaintiff's objections to testimony from various witnesses regarding the plaintiff's behavior in 1983. For example, the court did not allow Carmine Calabrese, a plastic surgeon who worked at Norwalk Hospital at the same time as the plaintiff, to explain his reasons for no longer referring cases to the plaintiff after 1984. Similarly, Lynda Nemeth, the hospital's director of risk management at the time of the hearing in damages, was not allowed to testify as to why the plaintiff was placed under supervision in 1983 or answer questions regarding the plastic surgery section meeting minutes and the hospital's on-call rotation schedule for 1984.

Thereafter, the trial court concluded that the parties reasonably could have expected their contractual relationship to continue through 1988 because the hospital had continued the privileges of two other plastic surgeons who had practiced at Norwalk Hospital while also maintaining their privileges at the Bridgeport hospitals. The court also concluded that it was not necessary to determine the expectations of the parties beyond 1988 because the plaintiff had failed to prove lost profits after that year.

Following the trial court's ruling and the hospital's appeal, the hospital filed a motion for articulation of the trial court's decision to exclude the proffered evidence. The hospital argued that the excluded evidence and testimony were relevant and necessary to determine the parties' reasonable expectations as to the length of the contractual relationship, which would directly affect the award of damages for lost profits. In response, the trial court articulated that "[t]he rejection of said evidence was based on relevancy. The content of the offered evidence went to the claimed causes of the plaintiff being denied hospital privileges. Those issues were relevant to the hearing that was never held in accordance with the [hospital's] bylaws."

"A trial court's ruling on the admissibility of evidence is entitled to great deference. . . . [T]he trial court has broad discretion in ruling on the admissibility . . . of evidence . . . [and its] ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling . . . . Moreover, evidentiary rulings will be overturned on appeal only where there was . . . a showing by the defendant of substantial prejudice or injustice." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 109, 956 A.2d 1145 (2008).

In *Gianetti II*, we stated that "the plaintiff had a right to reappointment until the governing authorities determined after a hearing conforming to the minimum requirements of procedural due process that he did not meet the reasonable standards of the hospital. . . . The fact that review of this appointment [was] made mandatory on an annual . . . basis . . . [could] by no means be said to render it probationary or tentative in effect." (Citation omitted; internal quotation marks omitted.) *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 568–69. We then added: "[B]efore we can properly review the rights and duties arising out of [the parties'] contractual relationship, it is essential to determine [t]he intention of the parties manifested by their words and acts . . . . Thus, before any determination can be made with respect to the amount of damages to which the plaintiff is entitled as a result of the hospital's breach, it first must be determined how long the parties reasonably expected the contractual relationship to extend. See *HLO Land Ownership Associates Ltd. Partnership* v. *Hartford*, 248 Conn. 350, 356–57, 727 A.2d 1260 (1999) ([t]he intention of the parties to a contract is to be determined from . . . [inter alia] the circumstances connected with the transaction . . .). Such inquiry, being a determination of the parties' intent, is a question of fact . . . .

"Accordingly, upon remand, in order to determine the appropriate time period for calculating the plaintiff's lost profits, the trial court must also determine how long the parties reasonably could have expected the contractual relationship to have continued." (Citations omitted; internal quotation marks omitted.) *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 569–70.

As indicated in the foregoing passages, the intent of the parties to a contract is to be determined from the circumstances connected with the transaction. In *Gianetti I*, we concluded that the "transaction" occurred

when the hospital initially granted privileges to the plaintiff in the 1970s. See *Gianetti* v. *Norwalk Hospital*, 211 Conn. 54, 63, 557 A.2d 1249 (1989). We explained that, "[i]n granting privileges, [the] hospital extended to the plaintiff those benefits to his medical practice that are to be gained by the use of the hospital, including its facilities and admissions to the hospital. . . . In return for that, the plaintiff agreed to abide by its medical staff bylaws. Therefore, the requisite contractual mutuality was then present. . . . The hospital changed its position by granting medical staff privileges and the plaintiff physician has likewise changed his position in doing something he was not previously bound to do, i.e., to 'abide' by the hospital medical staff bylaws. Therefore, there is a contractual relationship between the hospital and the plaintiff." (Citations omitted.) Id.

The evidence that the hospital proffered on the issue of intent at the trial court's most recent hearing in damages, however, related to conduct by the plaintiff and communications between the parties in 1983, nearly one decade later. Although the evidence and testimony that the hospital offered may have been relevant to the issue of liability, it was not relevant to the parties' expectations when they entered into a contractual relationship. Moreover, even if the proffered evidence and testimony suggested that that hospital was not happy in 1983 with the plaintiff's conduct, without the required hearing during which the plaintiff would have had an opportunity to present possibly mitigating evidence, no conclusion can be drawn as to whether the parties might have been able to resolve their differences and to continue their relationship as it previously existed. Accordingly, we conclude that the trial court acted within its broad discretion in excluding the proffered evidence on the ground of relevancy.

II

THE PLAINTIFF'S APPEAL

A

Calculation of Damages

The plaintiff claims that the trial court incorrectly calculated the damage award by (1) failing to follow this court's directive in *Gianetti II* to determine first, on remand, how long the parties reasonably expected the contractual relationship to continue, (2) making inconsistent findings that the plaintiff was a lost volume seller and that he failed to prove lost profits, (3) concluding that lost profits could not be determined after 1988, even though this court in *Gianetti II* concluded that it would have been profitable for the plaintiff to continue working at the hospital after his privileges were terminated, (4) finding that the plaintiff suffered no lost profits after 1988 because of certain variables, even though the same variables existed prior to 1988 and the similar practices of two other plastic surgeons were profitable after 1988, (5) failing to specify the variables that prevented a determination of lost profits after 1988, (6) concluding, without evidentiary support, that the increase in the number of plastic surgeons at the hospital necessarily translated to a reduced caseload available to the plaintiff after 1988, and (7) using the average market approach rather than the marginal cost approach in calculating the plaintiff's lost profits. The hospital responds that the trial court made no error in calculating the damage award. We agree with the hospital.

As explained in part I B of this opinion, "[t]he trial court has broad discretion in determining damages. . . . The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous. . . . A finding is clearly erroneous 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. . . .

"We are, therefore, constrained to accord substantial deference to the fact finder on the issue of damages. In deciding whether damages properly have been awarded, however, we are guided by the well established principle that such damages must be proved with reasonable certainty. . . . Although we recognize that damages for lost profits may be difficult to prove with exactitude . . . such damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount with reasonable certainty. . . . A damage theory may be based on assumptions so long as the assumptions are reasonable in light of the record evidence. . . .

"In order to recover lost profits, therefore, the plaintiff must present sufficiently accurate and complete evidence for the trier of fact to be able to estimate those profits with reasonable certainty." (Citations omitted; internal quotation marks omitted.) *Beverly Hills Concepts, Inc.* v. *Schatz & Schatz, Ribicoff & Kotkin*, supra, 247 Conn. 68–70.

1

The plaintiff first claims that the trial court improperly failed to follow the remand directive in *Gianetti II* that required it *first* to determine "how long the parties reasonably could have expected the contractual relationship to have continued" before calculating the amount of the damage award. *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 570. The hospital responds that the trial court properly followed the remand directive. We agree with the hospital.

In addressing the plaintiff's claim in *Gianetti II* that he was entitled to more than one year of damages, we

stated that, "before any determination can be made with respect to the amount of damages to which the plaintiff is entitled as a result of the hospital's breach, it first must be determined how long the parties reasonably expected the contractual relationship to extend." Id., 569. We subsequently noted that the record at that time contained no evidence pertaining to the parties' expectations regarding the length of the contractual relationship. Id., 570. We thus concluded that "the Appellate Court improperly [had] determined that the plaintiff's damages should [have been] limited to lost profits for 1984 only"; id.; and that, on remand, "in order to determine the appropriate time period for calculating the plaintiff's lost profits, the trial court [was required to] determine how long the parties reasonably could have expected the contractual relationship to have continued. Of course, the party proving lost profits must comply with our well settled law that such damages must be proved with reasonable certainty." (Internal quotation marks omitted.) Id. Thereafter, we merely added that, after the trial court had made factual findings as to whether the plaintiff was a lost volume seller, the reviewing court would be able to determine "whether the trial court's factual findings and its conclusions concerning the amount of damages to which the plaintiff is entitled are supported by the record." Id., 571.

It is well settled that "[d]etermining the scope of a remand is a matter of law because it requires the trial court to undertake a legal interpretation of the higher court's mandate in light of that court's analysis. See, e.g., *Higgins* v. *Karp*, 243 Conn. 495, 502–503, 706 A.2d 1 (1998) (duty of trial court to comply with Supreme Court mandate according to its true intent and meaning . . .). Because a mandate defines the trial court's authority to proceed with the case on remand, determining the scope of a remand is akin to determining subject matter jurisdiction. See, e.g., *Matey* v. *Estate of Dember*,

85 Conn. App. 198, 207, 856 A.2d 511 (2004) (Appellate Court lacks jurisdiction when Supreme Court's remand order is ignored because [there is] no final judgment pursuant to remand). We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 383, 3 A.3d 892 (2010).

We conclude that the trial court properly interpreted and applied the remand order. As previously discussed, we made the general point in *Gianetti II* that the Appellate Court's conclusion that the plaintiff was entitled to no more than one year of damages was improper because it was unsupported by evidence relating to the expectations of the parties. *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 570. We then stated that, before the trial court could determine the amount of damages, it first would be necessary to determine how long the parties expected their relationship to continue. Id. Subsequently, however, we stated more specifically that, "*upon remand*, in order to determine the appropriate time period for calculating the plaintiff's lost profits, the trial court must *also* determine how long the parties reasonably could have expected the contractual relationship to have continued." (Emphasis added.) Id. We conclude that the trial court followed these instructions. Although the court did not discuss the parties' expectations until the end of its decision, it noted that this court, in remanding the case, had stated that "the trial court must *also* determine how long the parties reasonably could have expected the contractual relationship to have continued." (Emphasis added.) The trial court observed that other plastic surgeons who had worked with the plaintiff at Norwalk Hospital prior to 1984 had continued to maintain their privileges at the hospital for the next four years, and it could not find anything in the record indicating that the hospital

also would not have continued its relationship with the plaintiff during those years. In addition, the trial court stated in its articulation that the question of the parties' expectations after 1988 was moot because damages could not be proven with reasonable certainty after that time. The fact that the trial court did not address the parties' expectations until the end of its decision and in its articulation is immaterial because it could not have calculated the damage award in the manner that it did *without* considering the parties' expectations and the period during which damages could be ascertained with reasonable certainty. Thus, in light of the fact that the remand language itself did not require the trial court to consider the parties' expectations in any particular sequence relative to other matters, it being self-evident that their expectations were an integral part of the damage calculations, we conclude that the court properly construed the remand order because it did, in fact, make clear in its decision and articulation that it had considered the parties' expectations.

2

The plaintiff's second claim is that the trial court's conclusion that he was a lost volume seller, and by definition, profitable, is inconsistent with its conclusion that he failed to prove lost profits after 1988. The plaintiff contends that, once the trial court concluded that the plaintiff was a lost volume seller, damages should have been awarded for the entire eighteen year period following the termination of his privileges until he retired because the hospital had relinquished its right to unilaterally terminate his privileges by failing to comply with the requisite procedural standards. The plaintiff thus claims that the trial court improperly combined the issue of the period of time that the parties would have continued their relationship and the amount of lost profits to which he was entitled. The hospital responds that, in *Gianetti II*, this court specifically

directed the trial court to determine the appropriate period of time for calculating the plaintiff's lost profits by examining the *parties'* reasonable expectations; see *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 570; and that the hospital did not forfeit its right to challenge the plaintiff's reappointment until the plaintiff no longer desired to be reappointed. The hospital also argues that the plaintiff ignores the effect of the variables that the trial court discussed in concluding that he had failed to prove with reasonable certainty the amount of profits that he would have lost after 1988. We agree with the hospital.

To the extent that the plaintiff argues that he should have been awarded damages for eighteen years following the termination of his privileges because only his expectations, and not those of the hospital, were relevant, he relies on the following language in *Gianetti II*: "On the basis of our review of the bylaws . . . the plaintiff had a right to reappointment until the governing authorities determined after a hearing conforming to the minimum requirements of procedural due process that he did not meet the reasonable standards of the hospital. . . . The fact that review of this appointment is made mandatory on an annual . . . basis . . . can by no means be said to render it probationary or tentative in effect." (Citation omitted; internal quotation marks omitted.) Id., 568–69. The plaintiff, however, ignores the language that *directly follows* this passage, in which the court explained: "Our review of the bylaws does not completely resolve the present issue . . . . As this court already has concluded in an earlier decision in this matter, the [hospital's] . . . bylaws, by themselves, do not constitute an enforceable contract between th[e] hospital and the plaintiff; *Gianetti* v. *Norwalk Hospital*, supra, 211 Conn. 59; but, rather, form an integral part of the contractual relationship . . . . Id., 64. Before we can properly review the rights and

duties arising out of this contractual relationship, it is essential to determine [t]he intention of the parties manifested by their words and acts . . . . Thus, before any determination can be made with respect to the amount of damages to which the plaintiff is entitled as a result of the hospital's breach, it first must be determined how long the parties reasonably expected the contractual relationship to extend." (Citations omitted; internal quotation marks omitted.) *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 569. Accordingly, the trial court properly considered both parties' reasonable expectations in determining how long the relationship could be expected to continue.

As for the plaintiff's claim that he should have been awarded damages for eighteen years, the trial court found that, because the plaintiff had failed to prove lost profits beyond the year 1988, the issue of the parties' intentions to continue their relationship after that time was moot. The trial court explained that variables affecting the plaintiff's potential earnings at the hospital after 1988 to the time of his retirement were "so substantial, that any finding of lost profits for those years would be based on surmise and conjecture." The plaintiff has cited no evidence that contradicts this finding. We therefore conclude that there is no inconsistency between the trial court's finding that the plaintiff was a lost volume seller and its finding that lost profits should be awarded only for the years 1984 through 1988.

3

The plaintiff's third claim is that the trial court improperly concluded that lost profits could not be determined after 1988 in light of this court's ruling in *Gianetti II*, under the second prong of the lost volume seller test, that it would have been profitable for the plaintiff to continue working at Norwalk Hospital after that year. The hospital replies that the trial court did

not conclude that lost profits could not be determined after 1988 but that the plaintiff had failed to present sufficiently accurate and complete evidence to estimate profits for those years with reasonable certainty. We determine that the plaintiff's claim has no merit.

The plaintiff is operating under two misconceptions. First, the trial court did not rule that lost profits could not be determined after 1988 but, rather, that the plaintiff had not sustained his burden of proving lost profits after 1988. Second, the plaintiff's claim is based on a misunderstanding of *Gianetti II*. We did not conclude that it would have been profitable for the plaintiff to remain at the hospital for all eighteen years following the termination of his privileges until he retired. Rather, we stated that, in determining whether the plaintiff could be a lost volume seller "the relevant inquiry under the profitability prong is whether the plaintiff could have performed under the contract with the hospital and assumed the increased workload at the other hospitals *the year after the breach* without having incurred additional costs that would have eliminated the profitability of such an increased workload." (Emphasis added.) *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 563 n.10. Thus, our statement that "the record supports the Appellate Court's conclusion that it would have been profitable for the plaintiff to perform under the contract with the hospital while assuming an increased workload at the other hospitals"; id., 563–64 n.10; referred to the year following the termination of his privileges, and we made no comment as to how long after that time it would have been profitable for the plaintiff to continue working at the hospital. Indeed, we expressly directed the trial court, on remand, to determine damages and to make factual findings and conclusions concerning "the appropriate time period for calculating the plaintiff's lost profits . . . [and] how long the parties reasonably could have expected the

contractual relationship to have continued." Id., 570. We therefore reject the plaintiff's claim that our reasoning in *Gianetti II* cannot be reconciled with the trial court's conclusion that lost profits could not be determined with reasonable certainty after 1988.

4

The plaintiff's fourth and fifth claims, which we consider together because of their similarity, are that (a) the trial court improperly concluded that the plaintiff suffered no lost profits after 1988 because the effect of certain variables on his projected income, on which the trial court relied, also existed prior to 1988, and two plastic surgeons with similar practices earned profits after 1988, and (b) there was insufficient evidence in the record to support the trial court's conclusion that the effect of the variables after 1988 was so problematic that the trial court could not have determined lost profits between 1988 and the year that the plaintiff retired. The hospital responds that the trial court's conclusions were supported by sufficient evidence. We agree with the hospital.

Before we address these claims, we reexamine the trial court's reasoning. The trial court concluded that damages could be calculated with reasonable certainty from 1984 through 1988 because the evidence established that the effect of the variables on the plaintiff's earnings during those years was reasonably similar to their effect on his earnings prior to 1984. In support of its conclusion, the trial court observed that there were three to four plastic surgeons on call at Norwalk Hospital from 1978 through 1982, including the plaintiff, and that there were three plastic surgeons on call in 1984 and 1985, four in 1986 and 1987, and six in 1988. The court thus accepted the plaintiff's estimate, despite the slight increase in the number of on-call plastic surgeons at the hospital after 1984, that he would have performed

at least eighty-eight emergency room procedures each year from 1984 through 1988, which was the median number of procedures that he had performed each year from 1978 through 1982. The court was not willing, however, to accept the plaintiff's estimate of procedures for the years after 1988 because there were more plastic surgeons on call at the hospital during that time, and the plaintiff testified that he had handled fewer cases because of the variables cited by the court, which was reflected in evidence that the number of cases that he handled at the Bridgeport hospitals had declined steadily over the following ten years. The trial court ultimately concluded that, because there was insufficient evidence as to the effect of these and other variables after 1988, it was unable to project lost profits with reasonable certainty.

We first note that the plaintiff's claim that two other plastic surgeons had profitable practices after 1988 is irrelevant in considering the propriety of the trial court's calculation of the damage award because it has no bearing on whether there was sufficient evidence in the record to determine the *amount* of profits that the plaintiff would have lost under the circumstances of this case. In other words, even if the trial court had concluded that the plaintiff might have earned profits from his work at Norwalk Hospital after 1988, that conclusion sheds no light on the question of exactly what those profits would have been, which would have required more detailed evidence than the plaintiff presented. We therefore consider each of the variables that the trial court listed to determine whether there was sufficient evidence to support its conclusion that lost profits after 1988 could not be calculated with reasonable certainty.

With respect to the first variable, the number of emergency room plastic surgery procedures after 1988, Joel B. Singer, a plastic surgeon, testified that there had

"definitely" been a downward trend in the number of emergency room procedures since the early 1990s. Calabrese, another plastic surgeon, similarly testified that the number of calls to the emergency room in 1996 and 1997 had "drastically decreased." In addition, the plaintiff submitted an exhibit showing that the number of cases that he handled in the Bridgeport hospitals had dropped significantly from 1989 to 1999, a trend that the trial court could have extrapolated to the number of Norwalk cases that he might have handled during those years.[19] The evidence was therefore sufficient to support the trial court's conclusion that the number of cases handled by on-call plastic surgeons after 1988 steadily declined over the next ten years, and, as a result, the plaintiff's workload at Norwalk Hospital could not be determined with sufficient accuracy during that period.

With respect to the second variable, the number of plastic surgeons on rotation at Norwalk Hospital to cover its emergency room needs, the evidence established that the number of plastic surgeons increased slightly from 1984 to 1988, and then more significantly in the years that followed.[20] See footnote 15 of this

[19] The exhibit indicated that the plaintiff handled the following amount of cases at the Bridgeport hospitals between 1989 and 1999: 152 cases in 1989; 114 cases in 1990; 92 cases in 1991; 79 cases in 1992; 80 cases in 1993; 61 cases in 1994; 68 cases in 1995; 84 cases in 1996; 85 cases in 1997; 82 cases in 1998; and 38 cases in 1999.

To the extent that the plaintiff challenges this conclusion by citing Singer's testimony that the number of general emergency room visits nationwide increased in the 1990s, that fact is not inconsistent with evidence in the record that the number of emergency room plastic surgery procedures decreased in the 1990s. Singer testified that factors such as the increased use of seat belts and air bags, fewer drunken drivers due to stricter laws, and an increased tendency for emergency room physicians to perform work on minor lacerations had the effect of reducing the number of emergency room calls for plastic surgeons, in particular.

[20] Seven plastic surgeons were on call at Norwalk Hospital in 1989, and eight plastic surgeons were on call from 1990 through 1995.

opinion. Both Singer and Calabrese testified that the emergency room schedule for plastic surgeons was rotational and that the number of days of emergency room call was divided equally among the number of plastic surgeons who were available so that each surgeon would be assigned the same number of days. On the basis of this evidence, the trial court reasonably could have concluded that the increase in the number of on-call plastic surgeons at Norwalk Hospital might have resulted in a decrease in the number of cases performed by each surgeon, a fact that the plaintiff himself acknowledged,[21] thus making it difficult to determine his workload at the hospital after 1988.

With respect to the third variable, the number of plastic surgery procedures performed by emergency room physicians other than plastic surgeons, Singer and Calabrese testified that, in the 1990s, emergency room physicians began to handle certain procedures that were previously handled by plastic surgeons, which would have resulted in a decrease in the number of emergency room procedures that on-call surgeons were asked to perform. The plaintiff similarly testified that the declining number of plastic surgery cases he handled in the Bridgeport hospitals in the 1990s may have been due to the fact that "doctors in the emergency room [were] doing more of the kind of procedures that . . . plastic surgeons used to do . . . ." Accordingly, the evidence supported the trial court's finding that any calculation of lost profits after 1988 would be based on "surmise and conjecture."

With respect to the fourth variable, the diminution in the number of injuries requiring plastic surgery due to increased use of seat belts and air bags, Singer testified

[21] The plaintiff testified that the increasing number of on-call plastic surgeons could have been one of the reasons for the decline in the number of his on-call cases at the Bridgeport hospitals in the 1990s.

directly to that effect, and the trial court was entitled, as the finder of fact, to credit Singer's testimony. Similarly, the trial court was entitled to credit testimony regarding the fifth, sixth and seventh variables, respectively, that there had been a reduction in fees paid for plastic surgery procedures by health insurance companies,[22] that a number of uninsured patients did not pay for their treatment,[23] and that medical fees had risen due to cost-of-living adjustments, in ruling that the "cumulative" effect of the seven variables beyond 1988 was "so substantial" that "any finding of lost profits for those years would be based on surmise and conjecture." Accordingly, there is no merit to the plaintiff's claim that there was insufficient evidence to support the trial court's conclusion that it could not calculate lost profits after 1988 with reasonable certainty.

5

The plaintiff's next claim is that the trial court's conclusion that it could not assess the plaintiff's lost profits after 1988 was based on an improper assumption that the increase in the number of on-call plastic surgeons at the hospital during that time necessarily translated to fewer cases per plastic surgeon and a reduced caseload available to the plaintiff, when there was no evidence to support that conclusion. The hospital responds that the court properly concluded that the increase in the number of plastic surgeons with privileges at Norwalk Hospital resulted in a reduction in the number of cases available to each on-call plastic surgeon. The plaintiff's claim has no merit.

[22] Calabrese testified that health insurance companies gradually became the most common source of reimbursement and that emergency room income had "drastically" declined because of this development.

[23] The hospital's expert witness, John Allen Kosowsky, testified that a certain number of uninsured patients did not pay for their treatment. The plaintiff further testified that emergency room physicians sometimes treated uninsured patients, who were less likely to pay for their treatment.

The plaintiff misstates the trial court's reasoning and conclusion. Although the trial court discussed evidence regarding the number of plastic surgeons on call at the hospital from 1978 through 1995, which increased significantly after 1987, the court made no direct connections between the growing number of surgeons and a reduction in their caseload but merely stated that "[t]he cumulative variables for the years 1989 and beyond [were] so substantial, that any finding of lost profits for those years would be based on surmise and conjecture." The number of plastic surgeons was only one of those variables. Other variables that would have affected the plaintiff's workload included the number of plastic surgery procedures required by the hospital's emergency room patients, the number of plastic surgery procedures performed by emergency room physicians other than plastic surgeons, and the diminution in injuries requiring plastic surgery due to the increased use of seat belts and air bags. Accordingly, we conclude that the plaintiff's claim has no merit.

6

The plaintiff's final claim is that the trial court, in its calculation of lost profits, improperly relied on the average market approach instead of the marginal cost approach in estimating the expenses associated with his Westport office for the years 1984 through 1988. The hospital responds that the trial court properly used the average market approach in estimating these expenses. We agree with the hospital.

The following additional facts are relevant to our resolution of this issue. At trial, two certified public accountants provided expert testimony on the proper methodology for estimating the expenses associated with the plaintiff's Westport office for the years 1984 through 1988, which were deducted from the plaintiff's gross earnings to determine lost profits. The hospital's

expert, John Allen Kosowsky, recommended the "average market approach." Under that approach, Kosowsky calculated the plaintiff's net income by examining the plaintiff's income tax returns and identifying the actual operating expenses for his Bridgeport practice during the years 1984 through 1988, and then applying the same ratio of expenses to gross income to the plaintiff's projected gross income from his Norwalk practice for each of those years. Kosowsky stated that he had used this approach because Connecticut law does not differentiate between separate offices and requires that all expenses be lumped together in a single category.

The plaintiff's expert, Christopher A. Gallo, recommended the marginal cost approach, under which he had examined each line item of expenses on the plaintiff's income tax returns for the years 1980 through 1983, which did not differentiate between his Bridgeport and Westport offices,[24] and identified the expenses relating to the operation of his Westport office. Gallo determined the amounts to be deducted by discussing each line item with the plaintiff, asking him to identify the expenses relating to his Norwalk practice and deciding whether the plaintiff's estimate seemed reasonable. Gallo then calculated the operating expenses as a percentage of the plaintiff's gross income for the years 1980, 1981 and 1982, and averaged those percentages to arrive at a ratio of expenses to gross income of 11.41 percent over the three years. He thus computed the plaintiff's projected net income from the Norwalk practice by deducting 11.41 percent from his projected gross income for the years 1984 through 1988. Gallo explained that the marginal cost approach was intended to identify the expenses that would disappear after the plaintiff's Norwalk practice was closed, and that a determination of "what [the plaintiff's] profitability was in the Norwalk

[24] The plaintiff maintained an office in Westport, a town in close proximity to the city of Norwalk, to qualify for privileges at Norwalk Hospital.

practice under the tax rules" was a "different . . . assignment." Gallo repeated on cross-examination that his numbers were based on estimates that he had made following discussions with the plaintiff and not on invoices or detailed records such as telephone bills or checks, and that he believed that the plaintiff's information was accurate.

Thereafter, the trial court adopted, in part, one of several alternative formulas provided by the plaintiff for the purpose of calculating his lost profits. Pursuant to that formula, the court determined that the plaintiff's yearly lost[25] gross income would have been $74,785 in 1984, $79,477 in 1985, $85,428 in 1986, $91,100 in 1987 and $97,052 in 1988. The court next calculated the plaintiff's net profit by following the average market approach and examining his income tax returns for the years 1984 through 1988. After determining that the ratio of expenses to gross income from the plaintiff's Bridgeport practice was 33.3 percent in 1984, 43.54 percent in 1985, 44.82 percent in 1986, 37.55 percent in 1987 and 38.36 percent in 1988, the court applied the same ratios to the plaintiff's anticipated gross income from his Norwalk practice, which resulted in a reduction in the plaintiff's earnings of $24,903 in 1984, $34,604 in 1985, $38,288 in 1986, $34,208 in 1987 and $37,229 in 1988.

In his motion for articulation, the plaintiff asked the court to explain its decision to use the average market approach instead of the marginal cost approach in calculating his lost profits. The plaintiff argued that courts generally do not include fixed costs in the calculation of lost profits and that the trial court's reasons for departing from the established rule should be articu-

[25] The court based its calculations on eighty-nine patients and per patient fees adjusted by the consumer price index for medical services provided by the plaintiff in the first formula.

lated. The trial court responded that "[t]he use of 'average costs' rather than 'marginal costs' in computing lost profits was justified by the requirement that the plaintiff had to maintain a separate office in Westport to qualify as a staff physician in Norwalk. Based on that requirement, this court determined that 'average costs' were the appropriate costs in computing net profit."

Comment (f) to § 347 of the Restatement (Second) of Contracts provides that the injured party's damages in lost volume seller cases are "based on the net profit that he has lost as a result of the broken contract." 3 Restatement (Second), supra, § 347, comment (f), p. 117; see also id., illus. 16, p. 117.[26] Subsection (2) of § 2-708 of the Uniform Commercial Code, which "embodies the lost volume seller theory in the context of contracts for the sale of goods"; *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 553 n.6; similarly provides: "If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale." Uniform Commercial Code § 2-708 (2), 1C U.L.A. 78 (2004); see also 22 Am. Jur. 2d 407–408, Damages § 458 (2003) ("the expenses saved because of the wrongful act . . . must be subtracted from any recovery").

[26] Illustration 16 in § 347 of the Restatement (Second) of Contracts, provides: "A contracts to pave B's parking lot for $10,000. B repudiates the contract and A subsequently makes a contract to pave a similar parking lot for $10,000. A's business could have been expanded to do both jobs. Unless it is proved that he would not have undertaken both, A's damages are based on the net profit he would have made on the contract with B, without regard to the subsequent transaction."

With respect to the calculation of lost profits, " 'net profit' is the gross amount that would have been received, less the cost of running the business. What does or does not have to be deducted to reach a net lost profit figure may vary." 22 Am. Jur. 2d 409, supra, § 458. "[Lost profits may be] ascertained by deducting from the contract price those expenses necessary for completing performance . . . . It is . . . not proper to base the profits lost on the work not completed on the profit margin realized on the work that was completed; it is necessary to provide proof on the projected cost of the uncompleted work." Id., § 459, pp. 409–10. "Profit margin (or the percentage of sales income remaining after the payment of costs) can [also] result in an accurate estimate of lost net profits, but only if the formula used to determine the profit margin properly takes into account the costs that would have been incurred if there had been no breach . . . ." Id., § 458, p. 409. "A claim for lost profits based on an assertion that the nonbreaching party makes a certain percentage of the sale price as profit must be supported by some evidence showing how the clamant arrived at this percentage profit factor, or the claim for lost profits can be dismissed, even though it is established that the contract was breached." Id., § 459, p. 410.

In the present case, the trial court chose to follow the average market approach, which was advocated by the hospital's expert, Kosowsky. The court thus examined the plaintiff's income tax returns for the years 1984 through 1988 to determine the ratio of expenses to gross income from his Bridgeport practice and applied the same ratio to the plaintiff's projected gross income from his Norwalk practice. The calculation was based on the same income tax returns that Kosowsky consulted, which contain detailed information regarding the plaintiff's expenses that the plaintiff had entered into evidence for each of those years. Because any deter-

mination of the plaintiff's net profits would have been based on an estimate of his expenses regardless of the approach employed, we conclude that there was sufficient evidence in the record to support the trial court's conclusion that the expected gross income from his Norwalk practice would have been reduced by the same percentage of expenses as the gross income from his Bridgeport practice.

The plaintiff relies on *Kutner Buick, Inc.* v. *American Motors Corp.*, 868 F.2d 614 (3d Cir. 1989), in arguing that the trial court should have used the marginal cost approach for calculating his projected expenses. He contends that the expenses listed on his income tax returns were primarily fixed costs that were not likely to change significantly by continuing, or not continuing, to work at Norwalk Hospital, and that the trial court should have identified only those "extra" expenses that he would have incurred if he had continued to work at the hospital, which were modest in comparison to the tax return cost data and which Gallo testified were, on average, 11.41 percent of his expected gross income. We disagree.

In *Kutner Buick, Inc.*, the plaintiff, a retail distributor of automobiles, owned a facility in which it conducted at least two separate business activities: the sale of products from American Motors Corporation (American Motors) and the sale of Buicks for General Motors Corporation. Id., 615–17. When American Motors contracted with another dealer to sell its products in the same area, the plaintiff terminated its relationship with American Motors and sought damages for breach of contract. See id., 616. The Third Circuit Court of Appeals determined that the District Court improperly had rejected the theory offered by the plaintiff's expert that, with respect to the computation of net lost profits from the termination of the sale of American Motors products, fixed costs for the facility should be disregarded.

Id., 617–18. The court stated: "The effect on net income must be measured by revenue lost less costs avoided. This translates into lost revenue less the variable cost of producing this lost revenue. Fixed or unavoidable costs are by definition unrelated to the individual income producing activity and thus are not relevant to the change in net profit calculation. . . .

"Fixed costs remain the same over a relevant range of activity for a given time period; whereas, variable costs change in total in relation to changes in total activity. . . . Whether a cost is fixed or variable depends upon and may change with the specific inquiry. For example, if at a business facility, a single activity was being conducted, all costs, whether denominated as fixed or as variable for financial reporting purposes, should be taken into account in determining the effect on net profit of the termination of that activity. Under these circumstances, all costs would eventually be variable because at some point after all activity ceases all costs would cease. If at a business facility more than one activity was being conducted, however, in calculating the effect on net profit from terminating one of them, fixed overhead costs would be irrelevant." (Citations omitted.) Id., 618.

Kutner Buick, Inc., is inapplicable to the present context because it is factually distinguishable. In that case, the issue of net profits was discussed in the context of a business that conducted more than one activity at a single business facility. See id., 617. In contrast, the plaintiff in the present case operated out of two separate facilities, one in Bridgeport to serve his Bridgeport practice and one in Westport to serve his Norwalk practice. Thus, the court was presented with the entirely different question of how to calculate expenses associated with an independent business facility. The plaintiff introduced his income tax returns to establish his gross income and expenses for the years 1978 through 1997,

but the expenses were not allocated between his Westport and Bridgeport offices. Consequently, while there may have been some differences between the costs arising from the plaintiff's operations in the two locations, the trial court determined that the better approach would be the one recommended by Kosowsky, and it thus used the ratio of expenses to gross income in the plaintiff's Bridgeport office to calculate the expenses that he would have incurred in connection with his Norwalk practice for each of the years in question. Although Gallo introduced evidence relating to the ratio of expenses to gross income from the plaintiff's Norwalk practice for the three years preceding 1984 that he claimed provided a more accurate basis for estimating the plaintiff's expenses, the trial court apparently did not find his testimony as credible as Kosowsky's, perhaps in part because Gallo admitted on cross-examination that his estimate of expenses for the Westport office was not based on detailed records, receipts or other documentation but on the plaintiff's unsupported statements and assurances. Accordingly, we conclude that the trial court properly relied on the average market approach instead of the marginal cost approach in calculating the plaintiff's lost profits for the years 1984 through 1988.

B

Interest

The plaintiff's next claim is that the trial court improperly declined to award prejudgment and postjudgment interest. The plaintiff argues that he should be awarded prejudgment interest from 1984 to 1987 because the hospital breached its contractual relationship with the plaintiff at the end of 1983. The plaintiff also argues that he should be awarded postjudgment interest from 1987 to the present because the court concluded in 1987 that an enforceable contractual relationship existed

between the parties and that the hospital had breached that relationship by failing to follow the procedural requirements of its bylaws when it declined to renew the plaintiff's privileges. The hospital responds that the trial court correctly followed the law and acted within its discretion in denying the plaintiff's request for prejudgment and postjudgment interest because the dispute is over the amount of damages due, and the trial court did not determine that the plaintiff was a lost volume seller until 2009. See, e.g., *Travelers Property & Casualty Co.* v. *Christie*, 99 Conn. App. 747, 766, 916 A.2d 114 (2007). We agree with the hospital.

Before addressing this claim, we briefly review the relevant facts. The plaintiff filed a complaint against the hospital in January, 1984. On May 4, 1987, the attorney trial referee concluded in his report to the trial court that the hospital had breached "an enforceable contract" with the plaintiff. After this court in *Gianetti I* determined that there was a contractual relationship between the parties and that it was enforceable; see *Gianetti* v. *Norwalk Hospital*, supra, 211 Conn. 63, 66; the trial court accepted the attorney trial referee's report on June 17, 1993, rendered judgment in favor of the plaintiff on the issue of liability only and referred the matter for a hearing in damages. A hearing was subsequently held, and, on September 9, 1999, the trial court awarded the plaintiff $1 as nominal damages, explaining that he was not a lost volume seller and, therefore, that the doctrine of mitigation of damages applied. The plaintiff appealed to the Appellate Court from that part of the judgment awarding nominal damages, and the Appellate Court reversed the judgment in 2001 on the ground that the lost volume seller theory can apply to personal service contracts and that the trial court should have deemed the plaintiff a lost volume seller and awarded him damages for lost profits for 1984 only. See *Gianetti* v. *Norwalk Hospital*, supra,

64 Conn. App. 229–31, 233. The hospital appealed from that judgment to this court in *Gianetti II*, in which we concluded in 2003 that the record at that time contained insufficient evidence to determine whether the plaintiff was a lost volume seller under the circumstances of this case and remanded the case to the trial court for an evidentiary hearing to determine whether the plaintiff was a lost volume seller and, if so, his damage award. *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 561, 563, 571. On remand, the trial court concluded in its memorandum of decision dated April 15, 2009, and its articulation dated November 19, 2009, that the plaintiff was a lost volume seller and awarded him damages for the years 1984 through 1988. It is the plaintiff's appeal from the trial court's decision that is now before this court.

The plaintiff did not seek prejudgment and postjudgment interest until he sought permission to file a second amended complaint dated May 15, 2008.[27] At that time, the plaintiff argued that, because a judgment had been rendered in 1987, postjudgment interest from 1987 to the present automatically should be included in the court's assessment of damages. The plaintiff also argued that he was entitled to an award of prejudgment interest under General Statutes § 37-3a[28] from 1984 through 1987.

Discussing the issue of interest in its memorandum of decision dated April 15, 2009, the trial court noted that prejudgment interest is allowed and may be recov-

[27] This complaint was preceded by the plaintiff's original complaint filed in January, 1984, and his first amended complaint dated August 1, 2007.

[28] General Statutes § 37-3a provides in relevant part: "(a) Except as provided in sections 37-3b, 37-3c and 52-192a, interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions . . . as damages for the detention of money after it becomes payable. . . .

"(b) In the case of a debt arising out of services provided at a hospital, prejudgment and postjudgment interest shall be no more than five per cent per year. The awarding of interest in such cases is discretionary."

ered under § 37-3a as damages for the detention of money after it becomes payable. It also cited case law indicating that such interest is primarily an equitable determination within the discretion of the trial court; see *Westport Taxi Service, Inc.* v. *Westport Transit District*, supra, 235 Conn. 41; and that the focus of a prejudgment interest award under § 37-3a is to provide interest at the discretion of the court when there is no dispute over the sum due and the liable party has without justification refused to pay. *Travelers Property & Casualty Co.* v. *Christie*, supra, 99 Conn. App. 765. The trial court then concluded: "The defendant made a good faith claim that the plaintiff was not a lost volume seller and thereby was required to mitigate his damages. [The] court finds that the defendant was justified in refusing to pay plaintiff's claimed damages prior to the resolution of the issue of whether the plaintiff was a lost volume seller. The [p]laintiff's claim for prejudgment interest is therefore denied."

Both parties filed motions for articulation,[29] with the plaintiff specifically requesting the court to address the issue of postjudgment interest, which it had failed to do in its decision. The court responded that it "ha[d] articulated in its decision its rationale by which the date of the running of interest would commence."

We begin with General Statutes § 37-3a, which provides in relevant part: "(a) Except as provided in sections 37-3b, 37-3c and 52-192a, interest at the rate of ten per cent a year, and no more, may be recovered and allowed [with certain exceptions] in civil actions or arbitration proceedings under chapter 909 . . . as damages for the detention of money after it becomes payable. . . ."

We recently considered a similar claim for prejudgment and postjudgment interest in *MedValUSA Health*

[29] The plaintiff filed his motion for articulation on June 12, 2009. The hospital filed a similar motion on August 25, 2009.

Programs, *Inc.* v. *MemberWorks*, *Inc.*, 273 Conn. 634, 636, 872 A.2d 423, cert. denied sub nom. *Vertrue*, *Inc.* v. *MedValUSA Health Programs*, *Inc.*, 546 U.S. 960, 126 S. Ct. 479, 163 L. Ed. 2d 363 (2005), in which the trial court confirmed an arbitration award in favor of the plaintiff and awarded $5 million in punitive damages but declined to award the plaintiff prejudgment and postjudgment interest. The plaintiff had argued that the purpose of arbitration is the speedy resolution of disputes and that the deference generally accorded a trial court's determination regarding prejudgment and postjudgment interest should not be granted in the context of an arbitration award. Id., 666. The trial court rejected this claim, however, on the ground that the defendant's arguments in support of its motion to vacate the arbitration award had not been frivolous. Id. On appeal, this court stated that "[t]he decision of whether to grant interest under § 37-3a is primarily an equitable determination and a matter lying within the discretion of the trial court. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . The court's determination regarding the award of interest should be made in view of the demands of justice rather than through the application of any arbitrary rule. . . . Whether interest may be awarded depends on whether the money involved is payable . . . and whether the detention of the money is or is not wrongful under the circumstances. . . .

"The trial court cited as its primary reason for denying the plaintiff's motion for interest pursuant to § 37-3a that the defendant had not wrongfully withheld the money because its arguments in opposition to the application to confirm the award and in support of its motion to vacate the award were not frivolous. This was an appropriate equitable consideration within the discretion of the trial court. The trial court's decision, there-

fore, was not an abuse of discretion." (Citations omitted; internal quotation marks omitted.) Id.

The same reasoning applies to the plaintiff's claim for prejudgment and postjudgment interest in the present case. Although the attorney trial referee concluded in his 1987 report that "an enforceable contract" existed between the hospital and the plaintiff, the trial court did not render judgment for the plaintiff on the issue of liability until 1993, following this court's determination in 1989 that there was an enforceable contractual relationship between the plaintiff and the hospital. See *Gianetti* v. *Norwalk Hospital*, supra, 211 Conn. 63, 66. Moreover, the trial court deemed the judgment as to liability "interlocutory," leaving the determination of damages to a future hearing. The issue of whether the plaintiff was a lost volume seller was not decided by the trial court until 2009, and that decision is the subject of the present appeal. If this court had concluded that the plaintiff was not a lost volume seller, the hospital very likely would not have been required to pay damages because the plaintiff earned a higher gross income in 1984 than he had earned in any previous year. Like the defendant in *MedValUSA Health Programs*, *Inc.*, the hospital made good faith arguments as to liability and damages throughout the litigation, and the parties did not know if the plaintiff would receive a damage award until the trial court determined in 2009 that the plaintiff was a lost volume seller. Accordingly, we conclude that the trial court did not abuse its discretion in declining to award the plaintiff prejudgment and postjudgment interest.

C

Attorney's Fees

The plaintiff next claims that the trial court improperly declined to award him attorney's fees. He claims that he should have been awarded attorney's fees

because the hospital acted in bad faith in choosing to continue the litigation for twenty-eight years instead of reinstating the plaintiff's privileges or providing him with the due process hearing to which he was entitled. He also claims that he should be awarded attorney's fees because the hospital owed him a fiduciary duty to follow its bylaws and to provide him with a hearing before terminating his privileges, and that it breached this duty when it failed to do so. The hospital responds that both arguments are inapplicable because it did not act in bad faith and the violation at issue involved a breach of duty arising out of a contractual relationship, not a breach of fiduciary duty. We agree with the hospital.

"It is well established that we review the trial court's decision to award attorney's fees for abuse of discretion. . . . This standard applies to the amount of fees awarded . . . and also to the trial court's determination of the factual predicate justifying the award. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *Simms* v. *Chaisson*, 277 Conn. 319, 325, 890 A.2d 548 (2006).

The following additional facts are relevant to our resolution of this issue. In his original complaint, the plaintiff sought reasonable attorney's fees only with respect to his request for injunctive relief. After the request for injunctive relief was denied in 1999 and the denial was upheld by this court in 2003; *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 571; the plaintiff sought leave to file an amended complaint on August 1, 2007, to include an award of attorney's fees on the

ground that the prolonged nature of the litigation, which had been ongoing for more than twenty-eight years, and the failure of the hospital to restore his privileges or grant him the required hearing, constituted evidence that the hospital had "acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . ." (Internal quotation marks omitted.) In a second request to file an amended complaint dated May 15, 2008, the plaintiff again sought, inter alia, attorney's fees, adding allegations that the hospital had breached its fiduciary duty in failing to comply with its bylaws when it terminated his privileges. The trial court did not respond to either of the plaintiff's requests to file an amended complaint. The court nonetheless addressed his claim for attorney's fees in its decision. Perhaps because it had considered and rejected the bad faith claim in the context of the plaintiff's request for prejudgment and postjudgment interest, the court did not consider that claim again in connection with his request for attorney's fees but, rather, only considered whether the hospital had breached a fiduciary duty "relating to the staffing and running of hospitals." The court ultimately denied the claim on the ground that "[t]he concept may be related to the patients of these health [care] providers who implicitly rely on a beneficial relationship with a health [care] provider, but [the] court is not persuaded that it extends to health [care] providers on staff." Thereafter, the plaintiff requested in his motion for articulation that the trial court further explain "the basis of [its] conclusion that . . . the 'fiduciary concept' does not extend to health care providers," thereby precluding an award of attorney's fees. The court responded that the case law that the plaintiff cited concerning fiduciary duty did "not equate 'fiduciary duty' with 'fiduciary concept' " and that it was not "persuaded that such an equation should be drawn."

Insofar as the plaintiff alleges that the hospital acted in bad faith by extending the litigation and failing to

restore his privileges or to grant him a hearing, we stated in *Maris* v. *McGrath*, 269 Conn. 834, 850 A.2d 133 (2004), that, "[a]s a substantive matter, [t]his state follows the general rule that, except as provided by statute or in certain defined exceptional circumstances, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser. . . . That rule does not apply, however, where the opposing party has acted in bad faith. . . . It is generally accepted that the court has the inherent authority to assess attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. . . . This bad faith exception applies, not only to the filing of an action, but also in the conduct of the litigation. . . . It applies both to the party and his counsel. . . . Moreover, the trial court must make a specific finding as to whether counsel's [or a party's] conduct . . . constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent powers to impose attorney's fees for engaging in bad faith litigation practices." (Citations omitted; internal quotation marks omitted.) Id., 844–45.

We reject the plaintiff's claim, for the reasons cited in our discussion of prejudgment and postjudgment interest in part II B of this opinion. The hospital's liability was not finally established until 1993, and the issue of whether the plaintiff was entitled to damages could not be resolved until the trial court determined whether he was a lost volume seller, which the court was unable to do because of continuing litigation until 2009. Moreover, the trial court specifically found that the hospital had not acted in bad faith when it considered the plaintiff's bad faith argument in the context of his request for prejudgment and postjudgment interest.[30]

[30] The plaintiff's reliance on *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, 296 Conn. 315, 994 A.2d 153 (2010), is misplaced. In *Harris*, we concluded that the trial court improperly denied the plaintiff's motion for punitive damages because the evidence was sufficient to show that the defendant hospital had acted with intent to injure or in reckless

We also reject the plaintiff's claim that he should be awarded attorney's fees on the ground that the hospital breached its fiduciary duty to comply with its bylaws when it failed to hold the required hearing on the revocation of the plaintiff's privileges. The plaintiff relies on *Owens* v. *New Britain General Hospital*, 229 Conn. 592, 643 A.2d 233 (1994), in support of this claim. In *Owens*, we considered the proper test for determining whether a hospital had complied with its bylaws in terminating a physician's medical staff privileges; id., 593; and concluded that "a substantial compliance test . . . is the proper test by which to measure whether a hospital has sufficiently complied with its bylaws in terminating a physician's medical staff privileges" because of the "overarching function that medical staff bylaws are designed to serve—the provision of quality medical care to the surrounding public community. . . . Medical staff bylaws reflect what the medical community considers to be crucial to the effective administration of the hospital and the provision of quality medical care by physicians whose performance has earned them privileges. At the same time, the procedural protocol of the bylaws provide, outside of the judicial system, a fair method for making decisions concerning staff privileges." (Citation omitted; internal quotation marks omitted.) Id., 604. We added that "the obligation to follow medical staff bylaws is paramount and that a hospital must afford its medical staff all the process and protections encompassed by its bylaws"; id.; because that obligation "can stem from a contractual relationship between the hospital and the physician," "a preexisting legal duty imposed by our state department of health regulations," "the recognition of *a 'fiduciary concept,'* " or "the public's substantial inter-

disregard of the plaintiff's rights. Id., 346–48. *Harris* thus did not involve a claim for attorney's fees based on the defendant hospital's bad faith conduct, and our holding in that case, which was premised on an entirely different standard, is inapplicable in the present case.

est in the operation of hospitals, public or private." (Emphasis added.) Id., 605.

It is clear from this passage that our reference to a "'fiduciary concept'" in *Owens* was intended to describe the relationship of a hospital to the surrounding community, not to a physician. This is supported by our citation, immediately following the "fiduciary concept" language, to *Greisman* v. *Newcomb Hospital*, 40 N.J. 389, 192 A.2d 817 (1963), for the proposition that hospital officials "must recognize that their powers, particularly those relating to the selection of staff members, are powers in trust which are always to be dealt with as such." Id., 404; accord *Owens* v. *New Britain General Hospital*, supra, 229 Conn. 605. The court in *Greisman* had explained that such powers must be exercised "in furtherance of the common good"; *Greisman* v. *Newcomb Hospital*, supra, 404; and that, "while the managing officials [of private hospitals] may have discretionary powers in the selection of the medical staff, those powers are deeply embedded in public aspects, and are rightly viewed, for policy reasons . . . as fiduciary powers to be exercised reasonably and for the public good." Id., 402. Thus, neither *Greisman* nor *Owens* recognized the existence of a fiduciary duty of a hospital to a physician, and we reject the plaintiff's claim that he was entitled to attorney's fees on that ground.

The judgment is affirmed.

In this opinion the other justices concurred.

418 MEADOW STREET ASSOCIATES, LLC *v.* CLEAN AIR PARTNERS, LLC (SC 18699)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan and Harper, Js.

Syllabus

Pursuant to statute (§ 34-187 [a]), a lawsuit on behalf of a limited liability company may be brought in the name of the company by any member or members of the company if such a lawsuit is authorized by a vote of the majority in interest of the members, except as otherwise provided in the company's operating agreement.

Pursuant further to § 34-187 (b), in determining whether there has been a vote of the majority in interest, the vote of any member who has an interest in the lawsuit that is adverse to the limited liability company shall be excluded.

The plaintiff limited liability company sought to recover damages from the defendant company for the alleged breach of a lease agreement. Two of the plaintiff's members having a combined 50 percent interest in the plaintiff voted to bring the present action against the defendant. Another member, B, who had the remaining 50 percent interest in the plaintiff, expressly disapproved of the action and did not vote. B's husband had a 20 percent ownership interest in the defendant, although B herself had no ownership interest in the defendant. The trial court rendered judgment for the defendant, concluding, inter alia, that the plaintiff lacked standing to maintain the action because, under § 34-187, the plaintiff did not have the necessary majority vote to authorize the lawsuit. The trial court specifically concluded that, in order for B's vote to be excluded under § 34-187 (b), B needed to have a proprietary, or ownership, interest in the defendant or be named as a party to the action, and, because B did not have such an interest and was not a party, she was not disqualified as a voting member. The plaintiff thereafter appealed to the Appellate Court, which upheld the trial court's determination that the plaintiff lacked standing. The Appellate Court specifically concluded that B had no individual proprietary interest in the outcome of the present action that was adverse to the plaintiff's interest and that her husband's ownership interest in the defendant was not significant enough to assign to B an interest adverse to the outcome of the action on the basis of their personal relationship alone. On the granting of certification, the plaintiff appealed to this court. *Held*:

1. The Appellate Court improperly upheld the trial court's determination that the plaintiff lacked standing on the ground that § 34-187 (b) encompasses only adverse proprietary interests: on the basis of the plain language of the statute and the common definition and usage of the terms "adverse" and "adverse interest," this court concluded that the adverse interest

to which § 34-187 (b) refers is any interest of a member that is contrary or opposed to the limited liability company's interest in the outcome of the litigation, and, therefore, the statute's application is not limited to circumstances in which a member's adverse interest is a proprietary one; furthermore, when a spouse of a member of a limited liability company holds an interest or maintains a position of control in the defendant company, such as in the present case, the limited liability company member's interest properly is considered adverse to the outcome of a lawsuit that the limited liability company brings against the defendant company, and, therefore, B's interest in the outcome of the present action was adverse to that of the plaintiff's in light of her husband's ownership interest in the defendant.

2. The defendant could not prevail on its claim, as an alternative ground for affirming the Appellate Court's judgment, that, because the plaintiff's operating agreement was silent as to whether it adopted or incorporated by reference § 34-187 (b), that statute did not exclude B's vote for purposes of determining whether there was the required vote of the majority in interest; § 34-187 (a) applies to all limited liability companies unless a company's operating agreement provides for a different rule that conflicts with the statute or provides that the statute does not apply at all, and, because the plaintiff's operating agreement did not include any provision concerning how to calculate votes for the purpose of brining a lawsuit in the plaintiff's name, the statute controlled.

Argued January 6—officially released May 22, 2012

Procedural History

Action to recover damages for, inter alia, the named defendant's alleged breach of a lease agreement, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where Clean Air Group, Inc., was added as a party defendant; thereafter, the case was tried to the court, *Hon. John P. Maiocco, Jr.*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment for the defendants, from which the plaintiff appealed to the Appellate Court, *DiPentima, C. J.*, and *Alvord* and *Foti, Js.*, which set aside the trial court's judgment and remanded the case to that court with direction to render judgment dismissing the action for lack of subject matter jurisdiction, and the plaintiff, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Andrew M. McPherson, with whom, on the brief, was *William J. Kupinse, Jr.*, for the appellant (plaintiff).

Michael J. Leventhal, for the appellees (defendants).

Opinion

ZARELLA, J. This case requires us to define the contours of the term "adverse" in General Statutes § 34-187 (b), which excludes the vote of a member of a limited liability company authorizing the company to bring a lawsuit when that member has an interest in the outcome of the lawsuit that is adverse to the company's interest. On appeal, the plaintiff, 418 Meadow Street Associates, LLC, claims that the Appellate Court incorrectly concluded that the trial court properly had determined that the plaintiff lacked standing to bring the present action against the defendant, Clean Air Partners, LLC.[1] The plaintiff argues specifically that the Appellate Court incorrectly concluded that the trial court properly had interpreted § 34-187 (b) narrowly and that, under a correct interpretation of the statute, the plaintiff has the requisite authorization and standing to bring the present action. The defendant responds that the Appellate Court properly upheld the trial court's interpretation of the statute and deferred to its findings of fact, which support the determination that the plaintiff lacked standing. The defendant also advances an alternative ground for affirmance of the Appellate Court's judgment, namely, that the plaintiff did not bring the present action in accordance with its operating agreement, and, therefore, the action was not properly authorized. We conclude that the Appellate Court improperly affirmed the trial court's judgment because an "adverse" interest, as that term is used in § 34-187

[1] Clean Air Group, Inc., which was added as a defendant in the present action, is the successor in interest to the defendant, Clear Air Partners, LLC. In the interest of simplicity, we refer to them collectively as the defendant throughout this opinion.

(b), is not limited to circumstances in which a member has a direct, adverse *proprietary* interest. Accordingly, we reverse the judgment of the Appellate Court.

The record reveals the following procedural history and relevant facts as found by the trial court. The plaintiff, a Connecticut limited liability company, owns and manages a commercial office building located at 418 Meadow Street in the town of Fairfield. From at least 1998 until 2005, Steven Levine and Barbara Levine, who are spouses, held equal ownership interests in the plaintiff. In 2005, Steven Levine sold his 50 percent interest to Michael Weinshel, with Barbara Levine retaining her 50 percent interest. Thereafter, Weinshel sold a 16.67 percent interest to Mark Wynnick, retaining a 33.33 percent interest. Thus, at the time the present action was commenced, the plaintiff was owned by Barbara Levine, Weinshel and Wynnick, who respectively held 50 percent, 33.33 percent, and 16.67 percent interests in the plaintiff.

The defendant leases and occupies space in the plaintiff's building, and pays monthly rent to the plaintiff for use of the space. Steven Levine has a 20 percent ownership interest in the defendant.[2] Barbara Levine

[2] Neither party disputes that Steven Levine holds an ownership interest in the defendant, although the defendant, in its brief and at oral argument, represents that Steven Levine's ownership interest was only 1 percent when the present action was commenced; the trial court, however, found his interest to be 20 percent at that time. To the extent that the defendant is challenging the trial court's finding on appeal, we conclude that the finding is not clearly erroneous. See, e.g., *Brymer* v. *Clinton*, 302 Conn. 755, 765, 31 A.3d 353 (2011) ("[a] factual finding is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made" [internal quotation marks omitted]). The record reveals that Steven Levine, Barbara Levine and James McManus, the defendant's chief financial officer, all testified that Steven Levine's ownership interest in the defendant has ranged from 1 percent to 100 percent, and McManus specifically testified that Steven Levine owned a 20 percent interest when the present action was commenced.

holds no proprietary interest in the defendant. At some point during the defendant's occupancy of the plaintiff's building, a dispute arose between the plaintiff and the defendant over the scope of the lease and payment of rent.[3] This dispute resulted in Weinshel and Wynnick bringing the present action, in the name of the plaintiff, against the defendant to enforce the lease and to collect rent. Barbara Levine expressly disapproved of bringing a lawsuit against the defendant, notified Weinshel and Wynnick of her disapproval, and did not vote to bring the action.

As a special defense to the plaintiff's complaint, the defendant asserted that the plaintiff lacked corporate authority to bring the action and, therefore, lacked standing. The defendant claimed that the plaintiff's operating agreement provides that the plaintiff shall not undertake certain activities, including the bringing of a lawsuit, without the approval of members holding a majority ownership interest in the plaintiff.[4] Because Barbara Levine did not consent to retaining counsel or to bringing the lawsuit, and because Weinshel and Wynnick collectively hold only a 50 percent interest in the plaintiff, there was no approval by members holding a majority ownership interest. Thus, the defendant argued, the plaintiff lacked standing to maintain the present action.

[3] The nature of the dispute is not relevant for purposes of this opinion but can be found in the trial court's memorandum of decision. See *418 Meadow Street, LLC* v. *Clean Air Partners, LLC*, Superior Court, judicial district of Fairfield, Docket No. FBT-CV-07-5006781-S (January 8, 2009).

[4] The operating agreement provides in relevant part: "5.1.2. General Powers. . . . Notwithstanding anything to the contrary in this [a]greement, the [m]anagers shall not undertake any of the following without the approval of those [m]embers holding a majority of the [p]ercentages:

* * *

"5.1.2.10. make any and all expenditures . . . including, without limitation, all legal, accounting and other related expenses incurred in connection with the organization and financing and operation of the [c]ompany . . . ."

The operating agreement is silent, however, as to whether and when a member may be disqualified from voting his or her interest.

The plaintiff, in response, claimed that it had standing and was properly authorized to bring the action because Barbara Levine had an interest in the outcome of the action that was adverse to the interest of the plaintiff by virtue of her husband's ownership interest in the defendant. Relying on § 34-187 (b),[5] the plaintiff contended that Barbara Levine's vote was properly excluded when Weinshel and Wynnick decided to bring an action against the defendant because she had an interest in the outcome of the action that was adverse to the plaintiff's due to her husband's interest in the defendant and due to another pending action in which Weinshel and Wynnick had filed a counterclaim alleging mismanagement by Barbara Levine.[6] According to the plaintiff, because Weinshel's and Wynnick's interests comprised the majority ownership interests under these circumstances, the lawsuit against the defendant was properly authorized.

After holding a hearing on the plaintiff's complaint and receiving posttrial briefs on the defendant's special defense that the plaintiff lacked standing, the trial court issued a memorandum of decision. The trial court interpreted the meaning of "an interest . . . adverse to the

[5] General Statutes § 34-187 provides: "(a) Except as otherwise provided in an operating agreement, suit on behalf of the limited liability company may be brought in the name of the limited liability company by: (1) Any member or members of a limited liability company, whether or not the articles of organization vest management of the limited liability company in one or more managers, who are authorized to sue by the vote of a majority in interest of the members, unless the vote of all members shall be required pursuant to subsection (b) of section 34-142; or (2) any manager or managers of a limited liability company, if the articles of organization vest management of the limited liability company in one or more managers, who are authorized to sue by the vote required pursuant to section 34-142.

"(b) In determining the vote required under section 34-142 for purposes of this section, the vote of any member or manager who has an interest in the outcome of the suit that is adverse to the interest of the limited liability company shall be excluded."

[6] In the other pending action, Barbara Levine was seeking to dissolve the plaintiff.

interest of the limited liability company"; General Statutes § 34-187 (b); and concluded that a member must have a proprietary, or ownership, interest in the defendant in order for his or her vote to be excluded under § 34-187 (b). Finding that "Barbara Levine [was] not a party to the action and [that] she [did] not have a *proprietary* interest in [the defendant]"; (emphasis added); the trial court concluded that "[s]he [could not] be assigned an interest in the case simply because she is the wife of a co-owner of the defendant." The court determined that "the plaintiff lack[ed] standing because Barbara Levine's interest [was] insufficient to disqualify her as a voting member" and rendered judgment for the defendant.[7]

The plaintiff appealed to the Appellate Court from the trial court's judgment, arguing that the trial court improperly found that the plaintiff lacked standing to maintain this action. The Appellate Court noted that, "[a]lthough the determination that a plaintiff lacks standing is a conclusion of law that is subject to plenary review, [the court] conduct[s] that plenary review . . . in light of the trial court's findings of fact, which . . . will not [be] overturn[ed] unless they are clearly erroneous. . . . A finding is clearly erroneous when either there is no evidence in the record to support it, or the reviewing court is left with the definite and firm conviction that a mistake has been made." (Citation omitted; internal quotation marks omitted.) *418 Meadow Street Associates, LLC* v. *Clean Air Partners, LLC*, 123 Conn. App. 416, 421, 1 A.3d 1194 (2010).

The Appellate Court, applying the foregoing standard of review, concluded that "the record support[ed] the [trial] court's finding that Barbara Levine had no individual *proprietary* interest in the outcome of the action

[7] After determining that the plaintiff lacked standing, the trial court nevertheless ruled on the merits of the plaintiff's claim in the defendant's favor.

adverse to the plaintiff's interest and that her husband's ownership interest was not significant enough to assign her with an interest adverse to the outcome of the action based on their personal relationship alone." (Emphasis added.) Id., 422. The Appellate Court concluded further that, "[a]t the time the vote was taken to pursue litigation, Barbara Levine was not facing claims against her by Weinshel and Wynnick, and, therefore, the [trial] court could have found that those claims, which were nonexistent at the time the present case was filed, did not create an adverse interest to the outcome of the action. Accordingly, the [trial] court's decision was not erroneous in light of the record."[8] Id., 423.

Thereafter, this court granted the plaintiff's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly conclude that the plaintiff lacked standing to bring this action, since one of its member's votes should not have been excluded pursuant to . . . § 34-187 (b) on the ground that she had 'an interest in the outcome of the suit that is adverse to the interest of the [plaintiff]?' " *418 Meadow Street Associates, LLC* v. *Clean Air Partners, LLC*, 298 Conn. 932, 5 A.3d 490 (2010). Additional facts will be set forth as necessary.

I

The issue in this appeal is whether the Appellate Court properly concluded that the plaintiff lacked

[8] Noting that the trial court also reached the merits of the plaintiff's complaint; see footnote 7 of this opinion; the Appellate Court set aside the trial court's judgment and remanded the case with direction to modify the judgment in accordance with the trial court's decision that it lacked subject matter jurisdiction. See *418 Meadow Street Associates, LLC* v. *Clean Air Partners, LLC*, supra, 123 Conn. App. 424 ("[t]he form of the judgment is improper, the judgment is set aside and the case is remanded with direction to render judgment dismissing the action for lack of subject matter jurisdiction"); see also id., 418 n.4 ("[a]fter concluding that the plaintiff lacked standing, the [trial] court should have dismissed the action for lack of subject matter jurisdiction and proceeded no further").

standing on the basis of its interpretation of § 34-187 (b).[9] We conclude that the Appellate Court improperly interpreted the statute, and, therefore, we reverse the judgment of the Appellate Court.

The plaintiff's appeal requires us to interpret § 34-187 (b), specifically, the meaning of the phrase, "an interest in the outcome of the suit that is adverse to the interest of the limited liability company . . . ." In other words, we must determine when a member's interest is sufficiently adverse to the limited liability company's interest such that the member's vote is excluded pursuant to § 34-187 (b).[10]

[9] The parties present arguments concerning the proper standard of review applied by the Appellate Court. Because our decision turns solely on the proper interpretation of the statute, we need not address the parties' arguments with regard to the standard of review applicable to other issues presented in the trial court or on appeal to the Appellate Court.

[10] For purposes of clarity, and even though it is not directly disputed by the parties, we repeat the Appellate Court's conclusion that "the language of § 34-187 (b) provides that an individual is excluded from a vote 'for purposes of this section' when such individual has an interest in the outcome of 'the suit . . . .' General Statutes § 34-187 (b). The statute's reference to the 'purposes of this section' and 'the suit' . . . suggest[s] that the adverse interest must be in the outcome of the action that is being voted on pursuant to § 34-187 [a], not in another action pending with different parties and separate issues. The statute, on its face, indicates that an individual's exclusion for an adverse interest in the outcome of the suit must pertain to the litigation in question for the vote." *418 Meadow Street Associates, LLC* v. *Clean Air Partners, LLC*, supra, 123 Conn. App. 423.

We note that the plaintiff argues that the court, in determining whether Barbara Levine's interest was adverse to the interest of the plaintiff, may take notice of other pending litigation between the plaintiff and Barbara Levine. The plaintiff's argument is problematic for two reasons. First, it asks the court retroactively to impute an adverse inference to Barbara Levine's objection to bringing the present action on the basis of a lawsuit filed by the plaintiff against her after the plaintiff decided to bring the present action. Second, it seeks to apply the standards for breach of fiduciary duty, as alleged in the subsequent lawsuit, to § 34-187 (b). Whether Barbara Levine breached her fiduciary duty by objecting to bringing the present action is an inquiry wholly separate from whether she had an interest in the outcome of the present litigation that is adverse to the interest of the plaintiff. Although we need not reach the merits of the plaintiff's argument in this regard, we are skeptical that such reasoning could prevail in another case.

We begin with the applicable standards of review. First, issues of statutory construction are questions of law over which we exercise plenary review. E.g., *Stewart* v. *Watertown*, 303 Conn. 699, 710, 38 A.3d 72 (2012). "The principles that govern statutory construction are well established. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When 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.) *Wilcox* v. *Schwartz*, 303 Conn. 630, 638–39 n.5, 37 A.3d 133 (2012).

Conversely, when reviewing findings of fact, we defer to the trial court's determination unless it is clearly erroneous. See, e.g., *Goodspeed Airport, LLC* v. *East Haddam*, 302 Conn. 70, 76, 24 A.3d 1205 (2011). "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . 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." (Internal quotation marks omitted.) Id. "Under the

clearly erroneous standard of review, a finding of fact must stand if, on the basis of the evidence before the court and the reasonable inferences to be drawn from that evidence, a trier of fact reasonably could have found as it did." (Internal quotation marks omitted.) *McBurney* v. *Paquin*, 302 Conn. 359, 368, 28 A.3d 272 (2011).

According to the trial court, "Barbara Levine is not a party to the action, and she does not have a proprietary interest in [the defendant]. She cannot be assigned an interest in the case simply because she is the wife of a co-owner of the defendant." In upholding the trial court's conclusion, the Appellate Court stated that "the record support[ed] the [trial] court's finding that . . . [Barbara Levine's] husband's ownership interest was not significant enough to assign her with an interest adverse to the outcome of the action based on their personal relationship alone." *418 Meadow Street Associates, LLC* v. *Clean Air Partners, LLC*, supra, 123 Conn. App. 422. Thus, the Appellate Court's conclusion is slightly different from the conclusion that the trial court reached. The trial court's decision suggests that, under the facts of this case, § 34-187 (b) would not have excluded Barbara Levine's vote because she did not have a direct, proprietary interest in the defendant. Furthermore, the trial court stated that the spousal relationship alone was not enough to support a claim that a member has an interest adverse to the interest of the limited liability company. The Appellate Court's decision, on the other hand, suggests that a spousal relationship may be sufficient to support an adverse interest claim in some circumstances, depending on the extent of the spouse's interest in the defendant company. In other words, the Appellate Court apparently accepted the proposition that a member's interest could be considered adverse by virtue of his or her spouse's interest but that, in the present case, Steven Levine's interest

in the defendant was too minor to attribute it to Barbara Levine. We need not address the differences between the trial court's and Appellate Court's decisions, however, because our decision turns solely on a matter of statutory interpretation.

We begin with the plain language of the statute. Section 34-187 (b) does not define what constitutes an adverse interest, nor is that concept defined elsewhere in the Connecticut Limited Liability Company Act, of which § 34-187 (b) is a part.[11] "When a statute does not provide a definition, words and phrases in a particular statute are to be construed according to their common usage. . . . To ascertain that usage, we look to the dictionary definition of the term." (Internal quotation marks omitted.) *Potvin* v. *Lincoln Service & Equipment Co.*, 298 Conn. 620, 633, 6 A.3d 60 (2010); see also General Statutes § 1-1 (a). As almost universally defined, "adverse" means opposed to one's interest. See, e.g., Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) (defining "adverse" as "acting against or in a contrary direction: hostile," or "opposed to one's interests . . . unfavorable," or "opposite in position"); see also Black's Law Dictionary (9th Ed. 2009) (defining "adverse" as "[a]gainst; opposed [to]," or "[h]aving an opposing or contrary interest, concern, or position," or

[11] We note that General Statutes § 34-101 provides definitions for terms in the act, including the following: "[U]nless the context otherwise requires:

* * *

"(11) 'Limited liability company membership interest' or 'interest' or 'interest in the limited liability company' means a member's share of the profits and losses of the limited liability company and a member's right to receive distributions of the limited liability company's assets, unless otherwise provided in the operating agreement."

We conclude that this definition does not apply to the use of the word "interest" in § 34-187 (b), quite simply because such an application would be nonsensical, as the context specifically refers to an interest in the outcome of a lawsuit. See, e.g., *Barrett* v. *Montesano*, 269 Conn. 787, 797, 849 A.2d 839 (2004) ("we interpret statutes to avoid bizarre or nonsensical results" [internal quotation marks omitted]).

"[c]ontrary [to] or in opposition [to]," or "[h]ostile"); cf. Black's Law Dictionary, supra (defining "adverse interest" as "[a]n interest that is opposed to or contrary to that of someone else").

We need not go beyond the plain language of the statute, as the common usage of the term "adverse," as well as the common definition of "adverse interest," when applied to § 34-187 (b), does not lead to absurd or unworkable results.[12] See General Statutes § 1-2z. Simply put, the term "adverse" in § 34-187 (b) encompasses any interest of a member that is contrary or opposed to the limited liability company's interest in the outcome of the litigation. We therefore conclude, contrary to the trial court, that the statute's application is not limited to circumstances in which a member's adverse interest is a proprietary one.

We also conclude that, when a spouse of a limited liability company member holds an interest or maintains a position of control in a defendant company, as in the present case, that member's interest properly is considered adverse to the outcome of a lawsuit that the limited liability company brings against the defendant company. The law generally affords a different treatment to spouses than to other parties, and we see no reason to deviate from that treatment in the present case. For example, under our fraudulent transfer law,

[12] Similarly, we conclude that the common definition of the word "interest" as an "advantage" or "benefit"; Merriam-Webster's Collegiate Dictionary, supra; also applies to the statute. Although the term "interest" is subject to more than one definition, and is also defined more specifically in other statutes governing different types of business organizations; see, e.g., General Statutes § 34-9 (8); General Statutes § 34-301 (5); see also footnote 11 of this opinion; we conclude that the context of § 34-187 (b), combined with the lack of a more specific definition in this statute, demonstrates the legislature's intent that the common meaning of this term should apply. See, e.g., *State* v. *Desimone*, 241 Conn. 439, 455, 696 A.2d 1235 (1997) (in absence of compelling reason, court will not impute to legislature intent that is contrary to plain statutory language).

a spouse is considered an insider to the transferee and treated specially. See General Statutes § 52-552b (7) (" '[i]nsider' includes: [A] [i]f the debtor is an individual, [i] a relative of the debtor or of a general partner of the debtor . . . [B] if the debtor is a corporation . . . [vi] a relative of a general partner, director, officer or person in control of the debtor; [C] if the debtor is a partnership . . . [ii] a relative of a general partner in, a general partner of, or a person in control of the debtor"); see also General Statutes § 52-552e (a) ("[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made or the obligation was incurred and if the debtor made the transfer or incurred the obligation: [1] With actual intent to hinder, delay or defraud any creditor of the debtor"); General Statutes § 52-552e (b) ([i]n determining actual intent under subdivision [1] of subsection [a] of this section, consideration may be given, among other factors, to whether: [1] The transfer or obligation was to an insider"). Also instructive is the statutory scheme governing conflicting interest transactions for nonstock corporations, which presumes a conflict of interest in transactions between a corporation and any person related to the corporation's director. See General Statutes § 33-1127 (1) (" '[d]irector's conflicting interest transaction' means a transaction effected or proposed to be effected by the corporation, or by an entity controlled by the corporation . . . [C] respecting which, at the relevant time, the director knew that a related person was a party or had a material financial interest"); General Statutes § 33-1127 (5) (" '[r]elated person' means: [A] The director's spouse, or a parent or sibling thereof"). Simply put, under § 34-187 (b), the sweeping scope of the term "adverse" requires that the interests of a member's spouse be imputed to the member.

Affording § 34-187 (b) broad treatment is consistent with the principle that limited liability company law

provides a set of default rules governing such companies, which organizers and members can elect to modify at their discretion through the company's operating agreement.[13] Under § 34-187 (b), the default rule is that a member will be ascribed the interests of his or her spouse. Thus, a member's vote to bring or not to bring a lawsuit will be excluded when the limited liability company's interest in the outcome of the lawsuit is adverse, or contrary to, the interest of that member *or* the interest of that member's spouse. Of course, organizers and members can always elect to proceed differently by drafting or amending the limited liability company's operating agreement so as to allow a member's vote to be included even when his or her spouse's

[13] Because the present case concerns a relatively recent statutory development, we pause to summarize the background of limited liability companies. "A limited liability company . . . has been described as an unincorporated association of investors, called members in [common] parlance, whose personal liability for obligations of the venture are limited to the amount invested. . . . It is a distinct business entity that adopts and combines features of both partnership and corporate forms. . . .

"From the partnership form, the [limited liability company] borrows characteristics of informality of organization and operation, internal governance by contract, direct participation by members in the company, and no taxation at the entity level. . . . From the corporate form, the [limited liability company] borrows the characteristic of protection of members from investor-level liability. . . . Flexible in nature, the [limited liability company] allows direct involvement and control by its members yet also permits a corporate representative form of governance if the entity elects to be governed by managers." *Gottsacker* v. *Monnier*, 281 Wis. 2d 361, 370–71, 697 N.W.2d 436 (2005).

Wisconsin's limited liability company law is similar in many regards to Connecticut's, and Wisconsin has a statute identical in all material respects to § 34-187 (b). See Wis. Stat. § 183.1101 (1) (2009–10). The key defining feature or purpose of a limited liability company, as distinguished from other corporate forms, is that it is "a business entity providing limited liability, flow-through taxation, and simplicity." (Internal quotation marks omitted.) *Gottsacker* v. *Monnier*, supra, 281 Wis. 2d 372; see also *Ott* v. *Monroe*, 282 Va. 403, 408, 719 S.E.2d 309 (2011) ("[t]he [limited liability company] is a hybrid entity, borrowing from both the corporate and partnership models to combine a corporation's limited liability for its owners with a partnership's pass-through treatment for income tax purposes" [internal quotation marks omitted]).

interest may conflict with the company's interest. See General Statutes § 34-187 (a) ("[e]xcept as otherwise provided in an operating agreement"). Thus, even though we read § 34-187 (b) as categorically disqualifying a member's vote when his or her spouse has an interest in the outcome of a lawsuit that is adverse to the limited liability company's interest, members can always elect whether they want to be bound by that statute.

For that reason, we envision no situation in which this categorical rule would have an inequitable effect on a limited liability company's operation, and, therefore, it will not lead to an unworkable result. Cf. General Statutes § 1-2z. A categorical rule is preferable to the alternative because limited liability company members will be aware from the outset whether their votes may be excluded because of a spouse's interest. It avoids any need to determine the nature of the relationship between the member and his or her spouse (e.g., the extent to which they share in each other's financial gains and losses), and the nature of the relationship between the spouse and the defendant company (e.g., whether the spouse holds a sufficient interest in the company). Simply put, such a rule prevents unnecessary debate, which likely may lead to litigation among members as to whether their votes should be counted. Should the limited liability company members not wish to be bound by this rule, the statute allows them to modify the operating agreement to provide for a different rule in calculating votes when deciding to bring a lawsuit in the name of the limited liability company. Accordingly, we conclude that the Appellate Court improperly upheld the trial court's determination that the plaintiff lacked standing because § 34-187 (b) encompasses only adverse proprietary interests.

II

The defendant offers an alternative ground for affirming the judgment of the Appellate Court.[14] The thrust of the defendant's argument is that, because the operating agreement is silent as to whether it adopts or incorporates by reference § 34-187, the statute does not apply to the plaintiff.[15] Although we conclude that the defendant's argument is meritless, we explain why it is in the interest of providing additional clarity to the law governing limited liability companies.

The defendant's argument misconstrues both the meaning of the phrase, "[e]xcept as otherwise provided in an operating agreement," in § 34-187 (a), as well as the general operation of the law governing limited liability companies. Contrary to the defendant's claim, § 34-187 applies to *all* limited liability companies *unless* the operating agreement provides for a different rule that conflicts with the statute or provides that the statute does not apply at all. That is the plain meaning of the statutory language, "[e]xcept as otherwise *provided* . . . ." (Emphasis added.) General Statutes § 34-187 (a). Thus, if the operating agreement is silent as to the applicability of the statute, the statute controls.[16] See,

[14] We note that the plaintiff claims that the defendant did not properly raise its alternative ground for affirmance. Our analysis of the defendant's alternative ground for affirmance is not prejudicial to the plaintiff, however, because we reject it, and, therefore, we need not address the plaintiff's claim. Cf. *Furs* v. *Superior Court*, 298 Conn. 404, 413, 3 A.3d 912 (2010) ("[w]e have the discretion to review [improperly presented] claims [of alternative grounds for affirmance] . . . but do not review them when such review would prejudice the opposing party" [citation omitted]).

[15] In the defendant's own words, "[t]he language in the operating agreement does not include any provision for the exclusion of a member's vote due to an adverse interest. The operating agreement does not incorporate the provisions of . . . § 34-187 (b), and [§] 34-187 (a) [provides] that the statute applies '[e]xcept as otherwise provided in an operating agreement.' "

[16] If the defendant's argument were taken to its logical end, then *only* those statutory provisions explicitly mentioned or referenced in the operating agreement would control. Yet, the Limited Liability Company Act does not even require that a limited liability company have an operating agreement.

e.g., *Ott* v. *Monroe*, 282 Va. 403, 410, 719 S.E.2d 309 (2011) (holding that statutory provision governing dissociation was applicable to limited liability company because operating agreement did not "address statutory dissociation and [did] not state an intent to supersede" statutory provision and, therefore, that "it lack[ed] specific language that would constitute an exception to the rule of dissociation set forth in [the statute]"). In other words, and as we stated previously; see part I of this opinion; the statutory scheme controls and provides for the default method of operation, unless the organizers or members of the limited liability company contract, through the operating agreement, for another method of operation. Indeed, this is one of the foundational principles of the law governing limited liability companies.[17]

In the present case, the operating agreement does not include any provision concerning how to calculate votes for the purpose of bringing a lawsuit in the plaintiff's name. Thus, § 34-187 controls. Accordingly, we reject the defendant's alternative ground for affirmance.

[17] As the Supreme Court of Wyoming recently stated: "It is not fatal to an operating agreement that it does not cover all pertinent concerns. If certain subjects are not addressed in the operating agreement, the limited liability company is guided in regard thereto by the default provisions of the statutes. Perhaps because of the statutory default concept, limited liability statutes typically do not mandate a particular structure or particular provisions for operating agreements:

"The statutes allow the owners of the business to use the operating agreement to set up the management of the entity pretty much as they please, and in a manner far less restrictive than the special close corporation statutes, which generally share the same goal of circumventing the mandatory provisions of the general corporation statute to facilitate managerial flexibility." (Citation omitted; internal quotation marks omitted.) *In re Kite Ranch, LLC*, 234 P.3d 351, 360 (Wyo. 2010).

We perceive statements by this court to be particularly significant with respect to foundational principles of limited liability company law because Wyoming was the first state to enact laws governing such companies. See, e.g., S. Hamill, "The Origins Behind the Limited Liability Company," 59 Ohio St. L.J. 1459, 1460 (1998).

For the foregoing reasons, we conclude that the Appellate Court incorrectly determined that the trial court properly interpreted § 34-187 (b) in finding that the plaintiff lacked standing. Instead, it is clear, as a matter of law, that the plaintiff properly excluded Barbara Levine from voting her interest in determining whether to bring the present action because her interest in the outcome of the action was adverse to that of the plaintiff's in light of her husband's ownership interest in the defendant.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the trial court's judgment and to remand the case to that court for further proceedings according to law.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* TORRENCE BENTON (SC 18850)

Rogers, C. J., and Palmer, Zarella, McLachlan, Harper and Vertefeuille, Js.

Syllabus

Convicted, on a plea of nolo contendere, of carrying a pistol without a permit and criminal possession of a pistol or revolver, the defendant appealed challenging the trial court's denial of his motion to suppress certain evidence obtained in a search incident to his arrest. Specifically, the defendant claimed that the police had seized him prior to his arrest without reasonable and articulable suspicion that he was engaged in criminal activity in violation of his rights under the federal and state constitutions. The defendant was observed by police officers on foot patrol while he was riding a bicycle with two other friends in a neighborhood of New Haven that recently had several shootings, at least one of which involved perpetrators riding bicycles. The officers also observed the defendant, who was dressed in attire consistent with membership in one of the rival street gangs, make a gesture that was consistent with adjusting a handgun tucked into the waistband of his pants. The police officers, who were armed and in uniform but did not draw their weapons, attempt to signal or speak to the bicyclists, or otherwise make a demonstrable show of authority, stepped out into the street approximately

twenty-five feet in front of the defendant and his companions. When they noticed the police, the two companions reversed direction and the defendant uttered an expletive, veered his bicycle away from the police and attempted to accelerate. The police officers then ordered the defendant to stop, but he ignored their command and continued pedaling his bicycle until the police apprehended him. During an ensuing struggle, the police recovered a loaded handgun from the defendant's possession. At trial, the defendant argued that the police had seized him by walking into the street in front of him and that his attire, his companions and his ambiguous hand motion did not justify his seizure at that point. He alternatively claimed that even if the officers had seized him only at the point of their command to stop, the defendant fled after having been provoked by the police and, therefore, his flight could not properly contribute to reasonable suspicion to stop him. The trial court denied the motion to suppress, concluding that the defendant had not been seized until the police ordered him to stop, and that his unprovoked flight, combined with the officers' observations and training, provided sufficient reasonable and articulable suspicion to conduct an investigatory stop. The court further concluded that the defendant's continued flight after being told to stop created probable cause for his arrest and that the discovery of the handgun was the result of a permissible search incident to that arrest. On the defendant's appeal, *held* that, in light of the totality of the circumstances, namely, the recent shootings in the area, the defendant's attire, his gesture consistent with handgun possession and concealment, and his unprovoked flight from the police officers, the officers possessed adequate reasonable and articulable suspicion to stop the defendant: the trial court properly determined that the defendant was not seized until the officers had ordered him to stop because, although their act of stepping into the road could not reasonably have been ignored by the defendant, that act would not have caused a reasonable person to believe that the only available response was to stop and engage with the officers, and in the absence of any aggressive behavior or an affirmative signal by the officers, the significance of their presence was uncertain; furthermore, it was objectively reasonable for the police officers to have concluded that the defendant was fleeing from them in light of the fact that upon seeing the officers, the defendant uttered an expletive and attempted to accelerate away from them, while the defendant's companions reversed direction and rode away after they saw the officers, and such evidence of unprovoked flight indicated consciousness of guilt and provided a reasonable basis to stop the defendant.

Argued March 22—officially released May 29, 2012

Procedural History

Substitute information charging the defendant with the crimes of carrying a pistol without a permit and

criminal possession of a firearm, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, where the court, *A. Hadden*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the defendant was presented to the court, *Richards*, *J.*, on a conditional plea of nolo contendere; judgment of guilty, from which the defendant appealed. *Affirmed*.

David C. Warner, assistant public defender, with whom, on the brief, was *Alton Burton, Jr.*, for the appellant (defendant).

Alexander Copp, certified legal intern, with whom were *Harry Weller*, senior assistant state's attorney, *Laura DeLeo*, assistant state's attorney, and, on the brief, *Michael Dearington*, state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Torrence Benton, appeals[1] from his conviction on charges of carrying a pistol without a permit in violation of General Statutes § 29-35 (a) and criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c. On appeal, the defendant claims that the trial court improperly denied his motion to suppress evidence obtained in a search incident to his arrest. Specifically, he contends that police seized him prior to his arrest without reasonable and articulable suspicion that he was engaged in criminal activity, as required by the fourth amendment of the constitution of the United States and article first, §§ 7 and 9, of the constitution of Connecticut. We disagree and conclude that the totality of the circumstances in this case furnished sufficient reasonable and articulable suspicion that the defendant was engaged

[1] 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 § 65-1.

in criminal activity to justify the police stopping him. Accordingly, we affirm the judgment of the trial court.

The record and the trial court's findings reveal the following undisputed facts. In April, 2010, at approximately 5:30 p.m., two uniformed New Haven police officers on foot patrol observed the defendant and two other males riding bicycles on a street in the Newhallville neighborhood of New Haven. The officers, who had been on the police force for less than two years, had spent the past six months on foot patrol in the Newhallville neighborhood and were familiar with the area and its residents. The defendant, a twenty-two year old black man, was wearing red and black clothing as well as a red, black and white beaded necklace and a Cincinnati Reds baseball cap. This attire, as the officers knew, is consistent with membership in the Bloods, a criminal street gang that was in conflict with the R2 gang, then the predominant street gang in the Newhallville neighborhood. The officers were also aware that several shootings had recently occurred at houses in the neighborhood occupied by members of the R2 gang and that at least one of those incidents involved bicycle riding perpetrators. The officers further observed the defendant make a gesture consistent with adjusting an unholstered handgun tucked into his pants' waistband.

The officers, until this point unobserved by the defendant or his companions, stepped into the road approximately twenty to twenty-five feet ahead of the three cyclists, two of whom then reversed direction and rode away from the officers. The defendant, upon making eye contact with the officers, immediately uttered an expletive, veered his bicycle away from the officers, stood on his pedals and attempted to accelerate. The officers ordered the defendant to stop; he ignored the command and continued to pedal away. The officers then apprehended the defendant, and, in the course of

the ensuing struggle, they discovered and recovered a loaded handgun in the defendant's possession.

At trial, the defendant filed a motion to suppress the handgun recovered by the police officers, contending that they unconstitutionally seized him without reasonable and articulable suspicion and that the evidence subsequently recovered was the fruit of that illegal seizure. In support of this claim, the defendant made two arguments in the alternative. First, he contended that the officers had seized him by walking into the roadway ahead of him and that his attire, companions and an ambiguous hand motion toward the waistband of his pants could not justify seizing him at that point. Alternatively, he contended that, even if the officers had seized him only at the moment they ordered him to stop, the seizure still was unreasonable because the only additional piece of information available to police—the fact that he fled—had been provoked by the police and therefore could not properly contribute to reasonable suspicion. The trial court denied the motion, concluding that the defendant had not been seized until he was ordered to stop and that the defendant's unprovoked flight, combined with the officers' other observations and training, provided sufficient reasonable and articulable suspicion to conduct an investigatory stop. The court further concluded that the defendant's continued flight after being ordered to stop created probable cause for his arrest and that the discovery of the handgun was the result of a permissible search incident to that arrest.[2] The defendant was convicted following a plea of nolo contendere, and this appeal followed.

On appeal, the defendant does not challenge the accuracy of the trial court's factual findings, and he reiter-

[2] The defendant does not independently challenge the trial court's determination that his flight furnished probable cause for his arrest or that the gun was seized pursuant to a valid search incident to the arrest.

ates his contention that the seizure of his person was constitutionally unreasonable. We therefore review de novo the trial court's legal conclusions regarding whether a seizure occurred and whether such a seizure was constitutionally reasonable.[3] "Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. . . . [When] the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . . When considering the validity of a . . . stop, our threshold inquiry is twofold. . . . First, we must determine at what point, if any . . . the encounter between [the police officers] and the defendant constitute[d] an investigatory stop or seizure. . . . Next, [i]f we conclude that there was such a seizure, we must then determine whether [the police officers] possessed a reasonable and articulable suspicion [that the individual is engaged in criminal activity] at the time the seizure occurred." (Citation omitted; internal quotation marks omitted.) *State* v. *Courchesne*, 296 Conn. 622, 642, 998 A.2d 1 (2010). In assessing whether the police officers possessed the requisite "reasonable and articulable suspicion," we must consider whether, "relying on the whole picture, the detaining officers had a particularized and objective basis for suspecting the particular person stopped of criminal activity. When reviewing the legality of a stop, a court must examine the specific

[3] Although the defendant claims a violation of both the state and federal constitutions, under settled law, "[i]f a party does not provide an independent analysis asserting the existence of greater protection under the state constitutional provision than its federal counterpart . . . we will not of our own initiative address that question." *Barton* v. *Ducci Electrical Contractors, Inc.*, 248 Conn. 793, 812–13 n.15, 730 A.2d 1149 (1999). Because the defendant has provided no such independent analysis, we analyze his claim under the assumption that his constitutional rights are coextensive under the state and federal constitutions, except where our case law specifically has held otherwise.

information available to the police officer at the time of the initial intrusion and any rational inferences to be derived therefrom." (Internal quotation marks omitted.) Id., 643.

We begin with the question of when the defendant was seized. The defendant contends that he was seized as soon as the police officers stepped into the road ahead of him; the state rejoins that the defendant was not seized until the officers ordered him to stop. We agree with the state.[4]

"We have . . . defined a person as seized under our state constitution when by means of physical force or a show of authority, his freedom of movement is restrained. . . . In determining the threshold question of whether there has been a seizure, we examine the effect of the police conduct at the time of the alleged seizure, applying an objective standard. Under our state constitution, a person is seized only if in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." (Internal quotation marks omitted.) *State* v. *Clark*, 297 Conn. 1, 8, 997 A.2d 461 (2010). As the United States Supreme Court has recognized, "[t]he [seizure] test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." *Michigan* v. *Ches-*

[4] We note that, although the United States Supreme Court has held that a police officer's command to stop does not constitute a seizure if not obeyed; *California* v. *Hodari D.*, 499 U.S. 621, 626, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991); as the state concedes, such a command *does* constitute a seizure for purposes of article first, §§ 7 and 9, of the constitution of Connecticut. *State* v. *Oquendo*, 223 Conn. 635, 652, 613 A.2d 1300 (1992).

ternut, 486 U.S. 567, 573, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988).

In the present case, the police officers stepped into the road in front of the defendant and his companions. According to testimony from one of the officers, after walking into the road, the officers were less than halfway between the sidewalk and the line dividing the road's two lanes of traffic and the cyclists were approximately twenty to twenty-five feet away. The officers, though armed and in uniform, did not draw their weapons, attempt to signal or speak to the cyclists, or otherwise make a demonstrable show of authority.

Under these circumstances, we cannot say that by simply stepping into the road the police officers exercised physical force or made a show of authority such that a reasonable person would feel restrained from departing. With respect to the physical force prong of this inquiry, we find little support for the defendant's contention that the two officers, who were approximately twenty feet away and occupied less than one quarter of a two lane road, cut the defendant off or otherwise acted "in an aggressive manner to block [his] course or otherwise control the direction or speed of his movement." Id., 575; id. (no seizure when officers in patrol car followed and drove alongside suspect pedestrian); cf. *United States* v. *Kerr*, 817 F.2d 1384, 1386–87 (9th Cir. 1987) (seizure when officer "pulled into and blocked the one lane driveway as [the defendant] was backing out . . . [which] conduct thus precipitated the confrontation with [the defendant]"); *United States* v. *Bowles*, 625 F.2d 526, 532 (5th Cir. 1980) (seizure when officer, after passing defendant, "held out his credentials and turned to face [the] defendant, blocking his path and stopping him").

Even though the presence of the police officers in the road did not physically compel the defendant to

stop and engage with the officers, we also must carefully examine the communicative effect of the officers' actions—that is, we must consider how a reasonable person in the defendant's position would interpret the sudden appearance of two uniformed police officers in the roadway. That the officers did not draw their weapons or signal to the defendant cannot be dispositive. It is not only an officer's gun, but also his badge that conveys a police officer's authoritative power, and the arresting effect of two uniformed police officers entering the road and making eye contact should not be too quickly discounted. We therefore must look to the specific factual details that characterize the scene in this particular case.

Upon a review of the totality of the circumstances, we conclude that, although the police officers' act of stepping into the road could not reasonably have been ignored by someone in the defendant's position, that act would not have caused a reasonable person to believe that the only available response was to stop and engage with the officers. In the absence of aggressive behavior or an affirmative signal by the officers, the significance of their presence is necessarily uncertain: the officers' appearance could foreshadow an impending stop, consensual or otherwise,[5] but it could

[5] In connection with his assertion that he was seized when the police stepped into the street, the defendant claims that, because he was on a bicycle, our analysis should proceed as if he were in a motor vehicle and that a consensual encounter between the defendant and the police was therefore impossible. The defendant raises this claim for the first time before this court and offers no case law to support his contention; moreover, he has failed to show that an "encounter," consensual or otherwise, occurred between him and the police when the police stepped into the road. We therefore do not consider whether a police officer may engage in a consensual encounter with a person on a bicycle. We do note, however, that the constitutional classification sought by the defendant is at best a double-edged sword, for "our automobile exception permits a warrantless search of an automobile whenever the police have probable cause to do so . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Winfrey*, 302 Conn. 195, 202, 24 A.3d 1218 (2011).

just as easily reflect the officers' desire to passively observe the defendant from a convenient vantage point. Alternately, a reasonable person in the defendant's position might conclude that the police stepped into the street not primarily in order to stop or even watch the cyclists, but, rather, in order to make their existence known and to communicate through such visible police presence that law enforcement was watching over the area. Indeed, the officers' decision to walk into the street could reasonably be construed as signaling nothing at all. To construe such ambiguous police behavior as a seizure for constitutional purposes would be to collapse the important distinction between routine community policing and the exercise of coercive police authority.

We turn next to the moment at which the police officers commanded the defendant to stop. The state, consistent with this court's decision in *State* v. *Oquendo*, 223 Conn. 635, 653, 613 A.2d 1300 (1992), concedes that the officers seized the defendant at this point. In analyzing the reasonableness of that stop, we must look to the totality of the information available to the officers at the time to determine whether the officers possessed objective, particularized information—rather than a mere subjective hunch, however well-founded—upon which to base the seizure.

We consider the pieces of information available to the police officers in the order in which the unfolding of events brought them to light. Beginning with the relevant background information, we note that the officers were patrolling a neighborhood in which, as they knew, houses occupied by the R2 gang had been targeted in several recent shootings. The officers were further aware that members of the Bloods, a gang known to be in conflict with the R2 gang, could at least sometimes be identified by red clothing and, more specifically, by attire associated with the Cincinnati

Reds.[6] These two facts certainly do not entitle the police to search every person wearing red clothing in the Newhallville neighborhood, but they do provide important contextual clues. "An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. . . . But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation."[7] (Citation omitted.) *Illinois* v. *Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000). Similarly, although the fact that a person is wearing attire consistent with gang membership does not supply the sort of particularized information that is required for a valid seizure, that detail does have some place in the analysis of the "whole picture" called for in *State* v. *Courchesne*, supra, 296 Conn. 643. See *United States* v. *Michael R.*, 90 F.3d 340, 346 (9th Cir. 1996) ("the fact that the young men had haircuts that were characteristic of gang members has evidentiary significance under the totality of circumstances analy-

[6] As one of the officers testified, the Cincinnati Reds logo, in addition to being red, signals disrespect for another of the Bloods' rival gangs, the Crips.

[7] The defendant, in support of his contention that the recent shootings involving the Bloods and the R2 gang have "no significance" in the reasonable suspicion analysis, points out that the trial court made no finding that the neighborhood in this case was a " 'high crime area.' " We are not persuaded. The relevance of a location's character does not turn on a crude distinction between places defined by the magic words "high crime area" and those not so labeled. The trial court in this case made specific findings regarding the recent, repeated occurrence of crimes involving gun violence in the Newhallville neighborhood and regarding the relationship between the targets of those crimes and another group of identifiable individuals. Our constitution does not require police to ignore these details in making reasonable judgments; indeed, reliance on these specific considerations certainly cannot be more suspect, constitutionally speaking, than the permissible reliance on the generic, value-laden determination that a location qualifies as a "high crime area." See *State* v. *Lipscomb*, 258 Conn. 68, 71, 74, 779 A.2d 88 (2001) (reasonable suspicion supported by defendant's presence in "high crime area").

sis"); *United States* v. *Flett*, 806 F.2d 823, 828 (8th Cir. 1986) (The Court of Appeals noted, in upholding the stop and frisk of an individual "dressed in attire similar to that of gang members and whose physical appearance matched that of known gang members," that "the factor of similarity of appearance taken alone could not justify a stop and frisk and should be viewed with caution. . . . However, the factor of similarity of appearance and attire taken together with the location of the [defendant] in the home of a known gang member charged with a narcotic violation support a reasonable inference that the [defendant] may be a gang member and may be armed and dangerous." [Citation omitted.]).

We next consider the officers' observation of the defendant making a gesture toward his waist that was consistent with checking or adjusting a concealed weapon. Although testimony on this point was equivocal, and the gesture could perhaps be explained as innocent behavior, as the United States Supreme Court made clear in *Terry* v. *Ohio*, 392 U.S. 1, 22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), police officers may reasonably act upon observation of "a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation." We therefore turn to the next in the series of acts leading up to the seizure.

When the cyclists observed the officers stepping into the road ahead of them, the defendant's companions reversed course, while the defendant uttered an expletive, veered away and stood on his pedals in an attempt to accelerate. The defendant, who has conceded the accuracy of all of the trial court's factual findings, nevertheless challenges the permissibility of the officers' relying on his flight as a reasonable basis for seizing him.[8]

[8] Although the defendant, in his brief and at oral argument before this court, has clearly conceded the accuracy of the trial court's factual findings, he also asserts that the trial court improperly characterized his behavior as an attempted flight. In light of the defendant's blanket concession regarding

Specifically, the defendant claims that, because the officers stepped into the road twenty-five feet in front of him, his act of veering was an ambiguous response to police presence and could reasonably be construed as an innocent maneuver required to avoid the physical obstacle posed by the police. Therefore, he asserts, his actions could not be construed as the sort of unambiguous "headlong" and "unprovoked" flight that properly may be considered in forming a reasonable suspicion. See *Illinois* v. *Wardlow*, supra, 528 U.S. 124. We address the significance of each of the modifiers "headlong" and "unprovoked" in turn.

As the United States Supreme Court observed in upholding the seizure of a suspect who, while holding an opaque bag, fled from an area known for frequent drug activity upon seeing police converge on the area, "[h]eadlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." Id. The defendant does not contest that police may sometimes take such headlong flight into account when deciding whether to stop a suspect; rather, he asserts that his reaction to the police was too ambiguous to contribute to the formation of a reasonable and articulable suspicion that he was engaged in criminal activity. We are not persuaded.

We agree with the defendant that merely veering off course may be a wholly appropriate response to the sudden appearance of police officers in the roadway and is consistent with "going about one's business . . . ." (Internal quotation marks omitted.) Id., 125; id. ("[f]light, by its very nature, is not 'going about one's business'; in fact, it is just the opposite"). The defen-

the trial court's factual findings, we construe his claim as a challenge to the legal significance that properly may be imputed to the defendant's act of fleeing, not as a claim that he did not flee.

dant's claimed innocent explanation for his behavior, however, is belied by the confluence of three related considerations. First, the defendant uttered an expletive in response to seeing the police. Alone a trivial detail, this utterance was accompanied by the defendant's standing up on his pedals in order to accelerate away from the officers. These two acts collectively could, at the very least, be reasonably construed as "nervous, evasive behavior," which "is a pertinent factor in determining reasonable suspicion." Id., 124. Moreover, the officers also had access to a third piece of information, namely, that the defendant's companions unambiguously reversed direction and rode away upon spotting the police officers. The police properly could have relied on this clear evidence of flight by the other cyclists with whom the defendant was riding to resolve any ambiguity regarding the defendant's own behavior—uttering an expletive, veering and accelerating—and to conclude that these actions represented flight from police. See *United States* v. *Wheeler*, 800 F.2d 100, 103 (7th Cir. 1986) ("The question before the [D]istrict [C]ourt was whether an inference that [the defendant] was armed and dangerous because he entered a bar with a group of men who are [members of the Outlaw Motorcycle Club], seemingly armed, and behaving suspiciously was reasonable. It is significant that the behavior of the group as a whole was suspicious and that led [the officer] to believe they were about to commit a crime involving violence."), overruled on other grounds by *United States* v. *Sblendorio*, 830 F.2d 1382, 1393 (7th Cir. 1987); *United States* v. *Bell*, 762 F.2d 495, 501 (6th Cir. 1985) ("[T]he agent was not obliged to ignore the fact that [the defendant] was in the company of a man known to be potentially armed and dangerous in assessing the potential risk posed by [the defendant] himself. That is, the fact of companionship, while not

itself justifying a frisk, was permissibly considered in analyzing whether there was reasonable cause to believe that [the defendant] was potentially armed and dangerous.").

Having concluded that it was objectively reasonable for the officers to conclude that the defendant was fleeing from them, we next consider whether that flight was "provoked" by police conduct. This court has held that, "[w]hile a suspect's flight may, in certain cases, be considered in determining whether there existed a reasonable and articulable basis of suspicion . . . police conduct that *provokes* flight precludes the consideration of this factor. . . . Were it otherwise, the officer could use the suspicious conduct that he himself induced as evidence that the defendant was acting suspiciously." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Oquendo*, supra, 223 Conn. 655–56; see id., 642, 655 (holding police could not draw reasonable suspicion from flight that occurred after police had impermissibly stopped defendant). Similarly, the United States Supreme Court held that, where a police officer "affirmatively misrepresented his mission at the outset . . . [and] never adequately dispelled the misimpression engendered by his own ruse"; *Wong Sun* v. *United States*, 371 U.S. 471, 482–83, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); the suspect's flight "signified a guilty knowledge no more clearly than it did a natural desire to repel an apparently unauthorized intrusion." Id., 483. In elaborating on why such flight could therefore not provide reasonable suspicion to justify seizing the suspect, the court explained: "A contrary holding here would mean that a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked. . . . That result would have the same essential vice as a proposition we have consistently rejected—that a search

unlawful at its inception may be validated by what it turns up." (Citation omitted.) Id., 484. By contrast, the Supreme Court has characterized as *unprovoked* a defendant's flight upon observing a caravan of four police vehicles converging on an area known for heavy narcotics trafficking. *Illinois* v. *Wardlow*, supra, 528 U.S. 121–22, 124.

As these cases make clear, the judicial concern over provoked flight does not arise every time police conduct precipitates flight, but, rather, pertains to situations in which police have engaged in the sort of provocative conduct that could cause a reasonable individual to take flight for reasons other than criminal culpability. In the present case, the officers were plainly identifiable as police officers, and the fact that they stepped into the road approximately twenty-five feet in front of the defendant was not itself an illegal seizure or otherwise a provocative act of the sort that would render the defendant's flight necessarily an ambiguous gesture that might as easily reflect reasonable prudence as consciousness of guilt. We therefore reject the defendant's claim that his flight necessarily was provoked.

In light of the entirety of the circumstances of this case—the recent shootings in the area, the defendant's attire, his gesture consistent with handgun possession and concealment, and his unprovoked flight from the police—we conclude that the officers possessed adequate reasonable and articulable suspicion to stop the defendant.[9]

The judgment is affirmed.

In this opinion the other justices concurred.

[9] As we have noted previously; see footnote 2 of this opinion; the defendant does not independently challenge the lawfulness of his subsequent arrest or the seizure of the pistol.

Note

Supreme Court Orders begin at page 901. Page numbers 854 to 900 are intentionally omitted.

Reporter of Judicial Decisions

ORDERS

OSMAN ASIF *v.* COMMISSIONER OF CORRECTION

The petitioner Osman Asif's petition for certification for appeal from the Appellate Court, 132 Conn. App. 526 (AC 32307), is denied.

Michael D. Day, assigned counsel, in support of the petition.

James A. Killen, senior assistant state's attorney, in opposition.

Decided February 29, 2012

GERALD W. *v.* COMMISSIONER OF CORRECTION

The petitioner Gerald W.'s petition for certification for appeal from the Appellate Court, 133 Conn. App. 901 (AC 31897), is denied.

Matthew J. Collins, assigned counsel, in support of the petition.

Susann E. Gill, supervisory assistant state's attorney, in opposition.

Decided February 29, 2012

STATE OF CONNECTICUT *v.* RONALD BROWN

The petition by the state of Connecticut for certification for appeal from the Appellate Court, 133 Conn. App. 140 (AC 32597), is granted, limited to the following issues:

"1. Did the Appellate Court properly determine that the trial court abused its discretion in denying the defendant's motion to correct an illegal sentence?

"2. If the answer to question one is in the affirmative, did the Appellate Court properly determine that the

appropriate remedy was to remand the case for resentencing, rather than to vacate the defendant's guilty pleas?"

The Supreme Court docket number is SC 18926.

Timothy F. Costello, assistant state's attorney, in support of the petition.

Christopher Y. Duby, assigned counsel, in opposition.

Decided February 29, 2012

DARCUS HENRY *v.* COMMISSIONER OF CORRECTION

The petitioner Darcus Henry's petition for certification for appeal from the Appellate Court, 133 Conn. App. 902 (AC 32599), is denied.

Michael Zariphes, assigned counsel, in support of the petition.

Robert J. Scheinblum, senior assistant state's attorney, in opposition.

Decided February 29, 2012

STATE OF CONNECTICUT *v.* DAVID DESHAWN EUBANKS

The defendant's petition for certification for appeal from the Appellate Court, 133 Conn. App. 105 (AC 32603), is denied.

Elizabeth M. Inkster, senior assistant public defender, and *Brian Young*, certified legal intern, in support of the petition.

Timothy J. Sugrue, senior assistant state's attorney, in opposition.

Decided February 29, 2012

DONALD ROBINSON *v.* COMMISSIONER OF CORRECTION

The petitioner Donald Robinson's petition for certification for appeal from the Appellate Court, 133 Conn. App. 905 (AC 32669), is denied.

Laljeebhai R. Patel, assigned counsel, in support of the petition.

Timothy F. Costello, assistant state's attorney, in opposition.

Decided February 29, 2012

STATE OF CONNECTICUT *v.* TODD WATSON

The defendant's petition for certification for appeal from the Appellate Court, 133 Conn. App. 901 (AC 32756), is denied.

Mary H. Trainer, assigned counsel, in support of the petition.

Kathryn Ward Bare, assistant state's attorney, in opposition.

Decided February 29, 2012

VORCELIA OLIPHANT *v.* DEPARTMENT OF TRANSPORTATION ET AL.

The plaintiff's petition for certification for appeal from the Appellate Court (AC 33151) is dismissed.

Vorcelia Oliphant, pro se, in support of the petition.

Decided February 29, 2012

KAREN INCARDONA, ADMINISTRATRIX (ESTATE OF HAZEL SMART), ET AL. *v.* DAVID ROER ET AL.

KAREN INCARDONA, ADMINISTRATRIX (ESTATE OF HAZEL SMART), ET AL. *v.* SAINT MARY'S HOSPITAL ET AL.

The plaintiffs' petition for certification for appeal from the Appellate Court (AC 33960) is granted, limited to the following issue:

"Did the Appellate Court properly dismiss the plaintiffs' appeal for lack of subject matter jurisdiction?"

EVELEIGH, J., did not participate in the consideration of or decision on this petition.

The Supreme Court docket number is SC 18925.

Karen L. Dowd and *Brendon P. Levesque*, in support of the petition.

Augustus R. Southworth III and *Todd R. Michaels*, in opposition.

Decided February 29, 2012

CAMBRIDGE MUTUAL FIRE INSURANCE COMPANY *v.* JOHN A. SAKON ET AL.

The named defendant's petition for certification for appeal from the Appellate Court, 132 Conn. App. 370 (AC 32109), is denied.

John A. Sakon, pro se, in support of the petition.

Frank H. Santoro and *Laura E. Waltman*, in opposition.

Decided March 7, 2012

KEYIN T. WORTH ET AL. *v.* STEVEN E. KORTA II, COMMISSIONER OF TRANSPORTATION, ET AL.

The named plaintiff's petition for certification for appeal from the Appellate Court, 132 Conn. App. 154 (AC 32297), is denied.

Keyin T. Worth, pro se, in support of the petition.

Decided March 7, 2012

MUSLUM AYNA *v.* GRAEBEL/CT MOVERS, INC., ET AL.

The plaintiff's petition for certification for appeal from the Appellate Court, 133 Conn. App. 65 (AC 32559), is denied.

John T. Bochanis, in support of the petition.

Timothy D. Ward, in opposition.

Decided March 7, 2012

AMY RATHBUN ET AL. *v.* HEALTH NET OF THE NORTHEAST, INC.

The plaintiffs' petition for certification for appeal from the Appellate Court, 133 Conn. App. 202 (AC 32712), is granted, limited to the following issue:

"Did the Appellate Court properly conclude that General Statutes § 17b-265 permitted the defendant to bring an action against the plaintiffs to recover its collateral source payments?"

ROGERS, C. J., and EVELEIGH, J., did not participate in the consideration of or decision on this petition.

The Supreme Court docket number is SC 18928.

Eric P. Smith, in support of the petition.

Linda L. Morkan and *Elizabeth S. Massey*, in opposition.

Decided March 7, 2012

ROFIO GREENFIELD *v.* COMMISSIONER OF CORRECTION

The petitioner Rofio Greenfield's petition for certification for appeal from the Appellate Court, 133 Conn. App. 904 (AC 32885), is denied.

Mark Diamond, assigned counsel, in support of the petition.

Leon F. Dalbec, Jr., senior assistant state's attorney, in opposition.

Decided March 7, 2012

DIANA MICHELE MILTON ET AL. *v.* DOROTHY ROBINSON ET AL.

The plaintiffs' petition for certification for appeal from the Appellate Court, 131 Conn. App. 760 (AC 32150), is denied.

NORCOTT and PALMER, Js., did not participate in the consideration of or decision on this petition.

Diana Michele Milton, pro se, and *Clive Milton*, pro se, in support of the petition.

James H. Rotondo, *James E. Hennessey*, *Jeffrey R. Babbin*, *Kevin M. Smith* and *Bradley W. Moore*, in opposition.

Decided March 14, 2012

J. WILLIAM GAGNE, JR. *v.* ENRICO VACCARO

The plaintiff's petition for certification for appeal from the Appellate Court, 133 Conn. App. 431 (AC 32247/AC 32830), is granted, limited to the following issue:

"Did the Appellate Court properly conclude that General Statutes § 51-183c required the trial court to recuse itself from presiding over the hearing on the plaintiff's motion for attorney's fees?"

PALMER and McLACHLAN, Js., did not participate in the consideration of or decision on this petition.

The Supreme Court docket number is SC 18937.

Peter A. Ventre, in support of the petition.

Eugene A. Skowronski, in opposition.

Decided March 14, 2012

EMILIO D'ASCANIO ET AL. *v.* TOYOTA INDUSTRIES CORPORATION ET AL.

The petition by the defendants Toyota Material Handling USA, Inc., BT Prime Mover, Inc., and Summit Handling Systems, Inc., for certification for appeal from the Appellate Court, 133 Conn. App. 420 (AC 32361), is granted, limited to the following issue:

"Did the Appellate Court properly determine that the trial court's exclusion of expert testimony and refusal to grant a mistrial constituted an abuse of discretion?"

The Supreme Court docket number is SC 18935.

Paul D. Williams, *Erick M. Sandler* and *James E. Hennessey*, in support of the petition.

Jack G. Steigelfest, in opposition.

Decided March 14, 2012

STATE OF CONNECTICUT *v.* IRVIN ROSE

The defendant's petition for certification for appeal from the Appellate Court (AC 33931) is denied.

McLACHLAN and EVELEIGH, Js., did not participate in the consideration of or decision on this petition.

Deborah G. Stevenson, assigned counsel, in support of the petition.

Timothy F. Costello, assistant state's attorney, in opposition.

Decided March 14, 2012

FIRST CONNECTICUT CAPITAL, LLC, ET AL.
v. HOMES OF WESTPORT, LLC, ET AL.

The petition by the defendants John A. Braca, Jr., and Patricia A. Braca for certification for appeal from the Appellate Court (AC 34073) is denied.

John A. Braca, Jr., pro se, and *Patricia A. Braca*, pro se, in support of the petition.

Matthew B. Woods, in opposition.

Decided March 14, 2012

STATE OF CONNECTICUT *v.* JAMES JORDAN

The defendant's petition for certification for appeal from the Appellate Court, 132 Conn. App. 817 (AC 32157), is denied.

Cameron Dorman, assigned counsel, in support of the petition.

Timothy F. Costello, assistant state's attorney, in opposition.

Decided March 21, 2012

MARGARET A. MUELLER *v.* ISIDORE TEPLER ET AL.

The petition by the plaintiff Charlotte Stacey for certification for appeal from the Appellate Court, 132 Conn. App. 742 (AC 32489), is granted, limited to the following issues:

"1. Did the Appellate Court properly affirm the trial court's grant of the defendants' motion to strike based on grounds distinct from those that the trial court considered when granting the motion?

"2. Did the Appellate Court properly conclude that the plaintiff Charlotte Stacey was not entitled to loss of consortium damages where she was not married to her domestic partner at the time of the partner's injury because neither civil unions nor same sex marriages were recognized at that time?"

EVELEIGH, J., did not participate in the consideration of or decision on this petition.

The Supreme Court docket number is SC 18939.

Joshua D. Koskoff and *Sean K. McElligott*, in support of the petition.

Eric J. Stockman and *Simon I. Allentuch*, in opposition.

Decided March 21, 2012

BRUCE ZOLLO *v.* COMMISSIONER OF CORRECTION*

The petitioner Bruce Zollo's petition for certification for appeal from the Appellate Court, 133 Conn. App. 266 (AC 31763), is granted, limited to the following issue:

"Did the Appellate Court properly affirm the dismissal of the petitioner's second habeas petition as successive, where it is argued by the petitioner that a fact that was first discovered during the initial habeas proceeding constituted 'new evidence' sufficient to support the second petition?"

The Supreme Court docket number is SC 18938.

Lori Welch-Rubin, assigned counsel, in support of the petition.

Kathryn Ward Bare, assistant state's attorney, in opposition.

Decided March 21, 2012

JOHN BREWER *v.* COMMISSIONER OF CORRECTION

The petitioner John Brewer's petition for certification for appeal from the Appellate Court, 133 Conn. App. 904 (AC 32428), is denied.

Justin R. Clark, assigned counsel, in support of the petition.

Rocco A. Chiarenza, deputy assistant state's attorney, in opposition.

Decided March 21, 2012

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* The appeal was dismissed May 1, 2013.

STANROD T. CARMICHAEL ET AL. *v.* JOHN J. STONKUS ET AL.

The named defendant's petition for certification for appeal from the Appellate Court, 133 Conn. App. 302 (AC 32549), is denied.

McLACHLAN, J., did not participate in the consideration of or decision on this petition.

Eddi Z. Zyko, in support of the petition.

John M. Wolfson and *Benjamin M. Wattenmaker*, in opposition.

Decided March 21, 2012

KATARI HASLAM-JAMES *v.* KIMBERLY LAWRENCE

The plaintiff's petition for certification for appeal from the Appellate Court, 133 Conn. App. 321 (AC 32761), is denied.

Cecil J. Thomas, in support of the petition.

Doris B. D'Ambrosio, in opposition.

Decided March 21, 2012

EDDIE RODRIGUEZ *v.* COMMISSIONER OF CORRECTION

The petitioner Eddie Rodriguez' petition for certification for appeal from the Appellate Court, 131 Conn. App. 336 (AC 31539), is granted, limited to the following issue:

"Did the Appellate Court properly apply *Phillips* v. *Warden*, 220 Conn. 112, 595 A.2d 1356 (1991), and conclude that the petitioner had failed to demonstrate that

the trial attorney had a conflict of interest of constitutional magnitude?"

The Supreme Court docket number is SC 18940.

April E. Brodeur, assigned counsel, in support of the petition.

Timothy J. Sugrue, senior assistant state's attorney, in opposition.

Decided March 27, 2012

GARY SADLER *v.* COMMISSIONER OF CORRECTION

The petitioner Gary Sadler's petition for certification for appeal from the Appellate Court, 132 Conn. App. 335 (AC 31455), is denied.

NORCOTT, J., did not participate in the consideration of or decision on this petition.

Gary Sadler, pro se, in support of the petition.

Denise B. Smoker, senior assistant state's attorney, in opposition.

Decided March 27, 2012

SUNSET GOLD REALTY, LLC *v.* PREMIER BUILDING AND DEVELOPMENT, INC., ET AL.

The defendants' petition for certification for appeal from the Appellate Court, 133 Conn. App. 445 (AC 32745), is denied.

Robert G. Golger, in support of the petition.

Thomas T. Lonardo, in opposition.

Decided March 27, 2012

STATE OF CONNECTICUT *v.* VICTOR LUIS AYALA, SR.

The defendant's petition for certification for appeal from the Appellate Court, 133 Conn. App. 514 (AC 32800), is denied.

Glenn W. Falk, assigned counsel, in support of the petition.

Lisa A. Riggione, senior assistant state's attorney, in opposition.

Decided March 27, 2012

JAMES D. BATCHELDER ET AL. *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF VERNON

The plaintiffs' petition for certification for appeal from the Appellate Court, 133 Conn. App. 173 (AC 32859), is denied.

Derek V. Oatis, in support of the petition.

Susan Boyan, in opposition.

Decided March 27, 2012

STATE OF CONNECTICUT *v.* ROBERT DEARING

The defendant's petition for certification for appeal from the Appellate Court, 133 Conn. App. 332 (AC 33015), is denied.

Auden Grogins, assigned counsel, in support of the petition.

Nancy L. Chupak, senior assistant state's attorney, in opposition.

Decided March 27, 2012

STATE OF CONNECTICUT *v.* AKOV ORTIZ

The defendant's petition for certification for appeal from the Appellate Court, 133 Conn. App. 118 (AC 31638), is granted, limited to the following issues:

"1. Should this court overrule *State* v. *Pommer*, 110 Conn. App. 608, 955 A.2d 637, cert. denied, 289 Conn. 951, 961 A.2d 418 (2008), which holds that the act of preventing someone from giving a statement to the police falls within the witness tampering statute, General Statutes § 53a-151 (a)?

"2. If so, did the Appellate Court erroneously conclude that there was sufficient evidence to sustain the defendant's conviction of tampering with a witness?"

The Supreme Court docket number SC 18946.

Pamela S. Nagy, assigned counsel, in support of the petition.

Michele C. Lukban, senior assistant state's attorney, in opposition.

Decided April 4, 2012

STATE OF CONNECTICUT *v.* MATTHEW BOUTILIER

The defendant's petition for certification for appeal from the Appellate Court, 133 Conn. App. 493 (AC 32207), is denied.

Jodi Zils Gagne, assigned counsel, in support of the petition.

Ronald G. Weller, senior assistant state's attorney, in opposition.

Decided April 4, 2012

STATE OF CONNECTICUT *v.* LUIS RODRIGUEZ

The defendant's petition for certification for appeal from the Appellate Court, 133 Conn. App. 721 (AC 32279), is granted, limited to the following issue:

"Did the Appellate Court properly conclude that the trial court acted within its discretion in permitting testimony from the attorney for the victim of the defendant's assault?"

The Supreme Court docket number is SC 18945.

Elizabeth M. Inkster, senior assistant public defender, and *Kelly M. Berwick*, assigned counsel, in support of the petition.

Leon F. Dalbec, Jr., senior assistant state's attorney, in opposition.

Decided April 4, 2012

MAURICE BLACKWELL *v.* COMMISSIONER OF CORRECTION

The petitioner Maurice Blackwell's petition for certification for appeal from the Appellate Court, 133 Conn. App. 903 (AC 32643), is denied.

Martha Brooke Hansen, assigned counsel, in support of the petition.

James A. Killen, senior assistant state's attorney, in opposition.

Decided April 4, 2012

STATE OF CONNECTICUT *v.* CHARLOTTE HUNGERFORD HOSPITAL

The defendant's petition for certification for appeal from the Appellate Court, 133 Conn. App. 479 (AC 32856), is granted, limited to the following issue:

"Did the Appellate Court properly determine that the subpoena power conferred upon the claims commissioner by General Statutes § 4-151 (c) permits him to subpoena documents from a respondent that has not been named as a party to the suit that the claims commissioner has been asked to authorize?"

The Supreme Court docket number is SC 18947.

Stephen V. Manning and *Donna R. Zito*, in support of the petition.

Jane R. Rosenberg and *Lynn D. Wittenbrink*, assistant attorneys general, in opposition.

Decided April 4, 2012

BILLBOARDS DIVINITY, LLC *v.* COMMISSIONER OF TRANSPORTATION ET AL.

The plaintiff's petition for certification for appeal from the Appellate Court, 133 Conn. App. 405 (AC 32860), is denied.

Derek V. Oatis, in support of the petition.

Paul K. Pernerewski, assistant attorney general, in opposition.

Decided April 4, 2012

JIMMY GARDNER *v.* COMMISSIONER OF CORRECTION

The petitioner Jimmy Gardner's petition for certification for appeal from the Appellate Court, 133 Conn. App. 908 (AC 33019), is denied.

Heather Golias, assigned counsel, in support of the petition.

Kathryn Ward Bare, assistant state's attorney, in opposition.

Decided April 4, 2012

DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE *v.* FRANCIS DELMASTRO ET AL.

The plaintiff's petition for certification for appeal from the Appellate Court, 133 Conn. App. 669 (AC 33236), is denied.

Gerald L. Garlick, in support of the petition.

George J. Kelly, Jr., in opposition.

Decided April 4, 2012

EARL G. *v.* COMMISSIONER OF CORRECTION

The petitioner Earl G.'s petition for certification for appeal from the Appellate Court, 132 Conn. App. 903 (AC 31980), is denied.

Michael Stone, assigned counsel, in support of the petition.

Margaret Gaffney Radionovas, senior assistant state's attorney, in opposition.

Decided April 12, 2012

MATTHEW WEATHERS *v.* COMMISSIONER OF CORRECTION

The petitioner Matthew Weathers' petition for certification for appeal from the Appellate Court, 133 Conn. App. 440 (AC 31994), is denied.

Annacarina Jacob, senior assistant public defender, in support of the petition.

Decided April 12, 2012

STATE OF CONNECTICUT *v.* MAHENDRA NARAIN

The defendant's petition for certification for appeal from the Appellate Court, 133 Conn. App. 681 (AC 32398), is denied.

Elizabeth M. Inkster, senior assistant public defender, and *Mario Cerame*, certified legal intern, in support of the petition.

Rocco A. Chiarenza, deputy assistant state's attorney, in opposition.

Decided April 12, 2012

TOWN OF STRATFORD *v.* A. SECONDINO AND SON, INC.

The plaintiff's petition for certification for appeal from the Appellate Court, 133 Conn. App. 737 (AC 32589), is denied.

Bryan L. LeClerc, in support of the petition.

Glenn A. Duhl, in opposition.

Decided April 12, 2012

ANTHONY VENDRELLA ET AL. *v.* ASTRIAB FAMILY LIMITED PARTNERSHIP ET AL.

The defendants' petition for certification for appeal from the Appellate Court, 133 Conn. App. 630 (AC 32735), is granted, limited to the following issue:

"Did the Appellate Court properly conclude that a horse belongs to a species so naturally inclined to do mischief or be vicious to human beings that the minor plaintiff's injuries were reasonably foreseeable, regardless of whether the particular horse has shown a prior vicious disposition known to the keeper?"

The Supreme Court docket number is SC 18949.

Lester Katz and *Christian Sterling*, in support of the petition.

William F. Gallagher and *Hugh D. Hughes*, in opposition.

Decided April 12, 2012

HOUSING AUTHORITY OF THE CITY OF NORWALK *v.* JOI LEE

The defendant's petition for certification for appeal from the Appellate Court, 133 Conn. App. 908 (AC 32839), is denied.

Abram J. Heisler, in support of the petition.

Decided April 12, 2012

LEEROY HARRIS *v.* COMMISSIONER OF CORRECTION

The petitioner Leeroy Harris' petition for certification for appeal from the Appellate Court, 134 Conn. App. 44 (AC 32093), is denied.

Michael Zariphes, assigned counsel, in support of the petition.

Susann E. Gill, supervisory assistant state's attorney, in opposition.

Decided April 12, 2012

TOWN OF MIDDLEFIELD *v.* GLORIA SADLOWSKI

The defendant's petition for certification for appeal from the Appellate Court (AC 33810) is denied.

Gloria Sadlowski, pro se, in support of the petition.

Decided April 12, 2012

KIM MICHALSKY *v.* GLORIA SADLOWSKI

The defendant's petition for certification for appeal from the Appellate Court (AC 33811) is denied.

Gloria Sadlowski, pro se, in support of the petition.

Decided April 12, 2012

STATE OF CONNECTICUT *v.* ROBBIN FOSTER

The defendant's petition for certification for appeal from the Appellate Court (AC 33945) is granted, limited to the following issue:

"Did the Appellate Court properly dismiss the defendant's appeal from the trial court's order of a second competency exam by the state's expert on the ground that the order was not a final judgment under the second prong of *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983)?"

The Supreme Court docket number is SC 18950.

David I. Channing, public defender, in support of the petition.

Nancy L. Chupak, senior assistant state's attorney, in opposition.

Decided April 12, 2012

STATE OF CONNECTICUT *v.* OLES J. BAPTISTE

The petition by the state of Connecticut for certification for appeal from the Appellate Court, 133 Conn. App. 614 (AC 28718), is granted, limited to the following issue:

"Did the Appellate Court properly determine that the trial court's instructions to the jury regarding the charge of assault of a peace officer were inadequate?"

McLACHLAN, J., did not participate in the consideration of or decision on this petition.

The Supreme Court docket number is SC 18957.

Lisa A. Riggione, senior assistant state's attorney, in support of the petition.

Annacarina Jacob, senior assistant public defender, in opposition.

Decided April 17, 2012

STATE OF CONNECTICUT *v.* ALBERTO VASQUEZ

The defendant's petition for certification for appeal from the Appellate Court, 133 Conn. App. 785 (AC 30889), is denied.

Christine Perra Rapillo, executive assistant public defender, in support of the petition.

Emily Graner Sexton, special deputy assistant state's attorney, in opposition.

Decided April 17, 2012

YELLOW BOOK SALES AND DISTRIBUTION COMPANY, INC. *v.* DAVID VALLE

The plaintiff's petition for certification for appeal from the Appellate Court, 133 Conn. App. 75 (AC 32588), is granted, limited to the following issue:

"Did the Appellate Court properly affirm the trial court's grant of summary judgment?"

McLACHLAN, J., did not participate in the consideration of or decision on this petition.

The Supreme Court docket number is SC 18956.

Jeffrey R. Babbin, in support of the petition.

Anthony J. Natale and *Brian L. Wolinetz*, in opposition.

Decided April 17, 2012

ROSS V. *v.* COMMISSIONER OF CORRECTION

The petitioner Ross V.'s petition for certification for appeal from the Appellate Court, 133 Conn. App. 907 (AC 32668), is denied.

Wayne A. Francis, assigned counsel, in support of the petition.

Marjorie Allen Dauster, senior assistant state's attorney, in opposition.

Decided April 17, 2012

CLAUDE M. BROUILLARD *v.* CONNECTICUT SITING COUNCIL ET AL.

The plaintiff's petition for certification for appeal from the Appellate Court, 133 Conn. App. 851 (AC 32846), is denied.

ROGERS, C. J., did not participate in the consideration of or decision on this petition.

Claude M. Brouillard, pro se, in support of the petition.

Robert L. Marconi, assistant attorney general, and *Joey Lee Miranda*, in opposition.

Decided April 17, 2012

JAMAL JENKINS *v.* COMMISSIONER OF CORRECTION

The petitioner Jamal Jenkins' petition for certification for appeal from the Appellate Court, 134 Conn. App. 901 (AC 32206), is denied.

Mary Boehlert, assigned counsel, in support of the petition.

Leon F. Dalbec, Jr., senior assistant state's attorney, in opposition.

Decided April 17, 2012

COPPOLA CONSTRUCTION COMPANY, INC. *v.* HOFFMAN ENTERPRISES LIMITED PARTNERSHIP ET AL.

The petition by the defendant Jeffrey S. Hoffman for certification for appeal from the Appellate Court, 134

Conn. App. 203 (AC 33102), is granted, limited to the following issue:

"Did the Appellate Court properly conclude that the plaintiff had stated a legally sufficient claim for negligent misrepresentation?"

PALMER and McLACHLAN, Js., did not participate in the consideration of or decision on this petition.

The Supreme Court docket number is SC 18955.

Richard P. Weinstein and *Nathan A. Schatz*, in support of the petition.

Fletcher C. Thomson, in opposition.

Decided April 17, 2012

CITY OF NORWICH *v.* SHERI SPEER ET AL.

The named defendant's petition for certification for appeal from the Appellate Court (AC 34084) is denied.

Sheri Speer, pro se, in support of the petition.

Decided April 17, 2012

H. P. T. *v.* COMMISSIONER OF CORRECTION

The respondent's amended petition for certification for appeal from the Appellate Court, 127 Conn. App. 480 (AC 31281), is granted, limited to the following issue:

"Did the Appellate Court properly affirm the remedy fashioned by the habeas court for ineffective assistance of counsel during plea negotiations?"

The Supreme Court docket number is SC 18962.

Michael Proto, assistant state's attorney, in support of the petition.

Adele V. Patterson, senior assistant public defender, in opposition.

Decided April 25, 2012

STATE OF CONNECTICUT *v.*
CHRISTOPHER CARRION

The defendant's petition for certification for appeal from the Appellate Court, 128 Conn. App. 46 (AC 31166), is granted, limited to the following issues:

"1. Did the Appellate Court properly conclude that the defendant had a meaningful opportunity to review the trial court's final jury instructions and therefore waived his unpreserved claim of instructional impropriety under *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), when defense counsel did not receive those instructions until immediately prior to the lunch break on the day that the court instructed the jury, thereby affording counsel only one hour to review the instructions?

"2. Under the circumstances presented, did the Appellate Court properly conclude that the trial court reasonably permitted the state to introduce as substantive evidence a videotaped interview of a child complainant in this sexual abuse case under *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986)?"

The Supreme Court docket number is SC 18960.

Daniel Jonah Krisch, assigned counsel, and *Michael S. Taylor*, assigned counsel, in support of the petition.

Harry Weller, senior assistant state's attorney, in opposition.

Decided April 25, 2012

LISA ROBBINS, ADMINISTRATRIX (ESTATE OF ELIJAH JAMAL HEZEKIA ROBBINS MARTIN), ET AL. *v.* PHYSICIANS FOR WOMEN'S HEALTH, LLC, ET AL.

The petition by the defendants Physicians for Women's Health, LLC, and Women's Health USA, Inc., for certification for appeal from the Appellate Court, 133 Conn. App. 577 (AC 31816), is granted, limited to the following issue:

"Did the Appellate Court properly determine that a covenant not to sue, executed by the plaintiff in favor of a corporate tortfeasor, does not foreclose the imposition of successor liability, as a matter of law, on the subsequent purchaser of that company's assets?"

The Supreme Court docket number is SC 18961.

Frank H. Santoro and *R. Cornelius Danaher, Jr.*, in support of the petition.

Steven D. Ecker and *M. Caitlin S. Anderson*, in opposition.

Decided April 25, 2012

STATE OF CONNECTICUT *v.* RICHARD FONTAINE

The defendant's petition for certification for appeal from the Appellate Court, 134 Conn. App. 224 (AC 32607), is denied.

Joseph Visone, assigned counsel, in support of the petition.

Timothy F. Costello, assistant state's attorney, in opposition.

Decided April 25, 2012

ROBERTO HERNANDEZ *v.* STATE OF CONNECTICUT ET AL.

The plaintiff's petition for certification for appeal from the Appellate Court, 134 Conn. App. 124 (AC 32872), is denied.

A. Paul Spinella, in support of the petition.

Linsley J. Barbato, assistant attorney general, in opposition.

Decided April 25, 2012

IN RE JEFFREY M.

The petition by the respondent Jeffrey M. for certification for appeal from the Appellate Court, 134 Conn. App. 29 (AC 33602), is granted, limited to the following issue:

"Did the Appellate Court properly determine that General Statutes § 46b-140 (f) does not authorize a trial judge to order the direct placement of a child committed to the department of children and families to an out-of-state residential facility?"

The Supreme Court docket number is SC 18959.

Aaron J. Romano, in support of the petition.

Michael Besso, assistant attorney general, in opposition.

Decided April 25, 2012

DISCIPLINARY COUNSEL *v.* FRANCIS A. MINITER

The defendant's petition for certification for appeal from the Appellate Court (AC 34154) is denied.

PALMER, J., did not participate in the consideration of or decision on this petition.

Francis A. Miniter, pro se, in support of the petition.

Suzanne B. Sutton, assistant disciplinary counsel, in opposition.

Decided April 25, 2012

H. P. T. *v.* COMMISSIONER OF CORRECTION

The respondent's petition for certification for appeal from the Appellate Court, 127 Conn. App. 480 (AC 31281), it is hereby ordered that no action is necessary on the petition in light of the court's ruling on the petitioner's amended petition for certification.

Michael Proto, assistant state's attorney, in support of the petition.

Adele V. Patterson, senior assistant public defender, in opposition.

Decided April 25, 2012

ROBERT L. PETERSON *v.* LAURIE SYKES-PETERSON

The plaintiff's petition for certification for appeal from the Appellate Court, 133 Conn. App. 660 (AC 32314), is denied.

Jon L. Schoenhorn, in support of the petition.

Steven D. Ecker and *M. Caitlin S. Anderson*, in opposition.

Decided May 2, 2012

STATE OF CONNECTICUT *v.* CHARLES F.

The defendant's petition for certification for appeal from the Appellate Court, 133 Conn. App. 698 (AC 32608), is denied.

Auden Grogins, assigned counsel, in support of the petition.

Rita M. Shair, senior assistant state's attorney, in opposition.

Decided May 2, 2012

STATE OF CONNECTICUT *v.* KURTIS TURNER

The defendant's petition for certification for appeal from the Appellate Court, 133 Conn. App. 812 (AC 33013), is denied.

Deborah G. Stevenson, assigned counsel, in support of the petition.

Stephen M. Carney, senior assistant state's attorney, in opposition.

Decided May 2, 2012

MICHAEL HANNAFORD, ADMINISTRATOR (ESTATE OF RUTH GORYN) *v.* DAVID MANN ET AL.

The named defendant's petition for certification for appeal from the Appellate Court, 134 Conn. App. 265 (AC 32731), is denied.

Peter M. Van Dyke, in support of the petition.

William J. Sweeney, Jr., in opposition.

Decided May 2, 2012

MARIANNE OLSON *v.* FUSAINI MOHAMMADU

The defendant's petition for certification for appeal from the Appellate Court, 134 Conn. App. 252 (AC 32889), is granted, limited to the following issue:

"Did the Appellate Court properly conclude that the defendant was not entitled to a modification of his alimony and child support obligations because his voluntary return to Connecticut to be closer to his son was an 'unacceptable reason' for his decreased income under *Sanchione* v. *Sanchione*, 173 Conn. 397, 378 A.2d 522 (1977)?"

The Supreme Court docket number is SC 18963.

John F. Morris, in support of the petition.

Decided May 2, 2012

CHANNY N. KHUTH *v.* COMMISSIONER OF CORRECTION

The petitioner Channy N. Khuth's petition for certification for appeal from the Appellate Court, 134 Conn. App. 903 (AC 33194), is denied.

Laljeebhai R. Patel, assigned counsel, in support of the petition.

Melissa Patterson, assistant state's attorney, in opposition.

Decided May 2, 2012

STATE OF CONNECTICUT *v.* JARED CHARLES

The defendant's petition for certification for appeal from the Appellate Court, 134 Conn. App. 242 (AC 33840), is denied.

Darcy McGraw, assistant public defender, in support of the petition.

Melissa L. Streeto, assistant state's attorney, in opposition.

Decided May 2, 2012

MARY MARGARET FARREN *v.* J. MICHAEL FARREN

The defendant's petition for certification for appeal from the Appellate Court (AC 33996) is dismissed.

Timothy G. Moynahan and *Regina Duchin Kraus*, in support of the petition.

Kenneth J. Bartschi and *Brendon J. Levesque*, in opposition.

Decided May 2, 2012

EDWARD WABNO *v.* CITY OF DERBY

The plaintiff's petition for certification for appeal from the Appellate Court, 133 Conn. App. 232 (AC 30399), is denied.

Richard M. Franchi, in support of the petition.

Decided May 9, 2012

BRUCE FELDER *v.* COMMISSIONER OF CORRECTION

The petitioner Bruce Felder's petition for certification for appeal from the Appellate Court, 133 Conn. App. 906 (AC 32209), is denied.

Michael D. Day, assigned counsel, in support of the petition.

Sarah Hanna, assistant state's attorney, in opposition.

Decided May 9, 2012

BRUCE FELDER *v.* COMMISSIONER OF CORRECTION

The petitioner Bruce Felder's petition for certification for appeal from the Appellate Court, 133 Conn. App. 908 (AC 32210), is denied.

Michael D. Day, assigned counsel, in support of the petition.

Sarah Hanna, assistant state's attorney, in opposition.

Decided May 9, 2012

STEPHEN S. *v.* COMMISSIONER OF CORRECTION

The petitioner Stephen S.'s petition for certification for appeal from the Appellate Court, 134 Conn. App. 801 (AC 32727), is denied.

Mary H. Trainer, assigned counsel, in support of the petition.

Margaret Gaffney Radionovas, senior assistant state's attorney, in opposition.

Decided May 9, 2012

IN RE DESTINY R.

The petition by the respondent father for certification for appeal from the Appellate Court, 134 Conn. App. 625 (AC 33842), is denied.

Dana M. Hrelic and *Michael S. Taylor*, in support of the petition.

Susan T. Pearlman, assistant attorney general, in opposition.

Decided May 9, 2012

ROBERT HAIR *v.* COMMISSIONER OF CORRECTION

The petitioner Robert Hair's petition for certification for appeal from the Appellate Court (AC 34114) is denied.

Brian J. Woolf, in support of the petition.

Susan E. Gill, supervisory assistant state's attorney, in opposition.

Decided May 9, 2012

THOMAS CHARLES *v.* EASTERN SAVINGS BANK, FSB

The plaintiff's petition for certification for appeal from the Appellate Court (AC 34123) is denied.

Thomas Charles, pro se, in support of the petition.

Robert J. Pisicitelli, in opposition.

Decided May 9, 2012
