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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

DOMINICK LUCENTI *v.* GREG LAVIERO ET AL. (SC 19723)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Robinson and D'Auria, Js.*

Syllabus

The plaintiff, an employee of the defendant L Co., sought to recover damages for injuries he sustained while operating an excavator in the course of his employment. The plaintiff alleged that the defendant L, the owner and principal of L Co., had directed that the excavator be repaired in a manner causing it to run only at full throttle and that this improper repair was reckless and resulted in the plaintiff's injuries. The defendants filed a motion for summary judgment, claiming that, in the absence of intentional conduct, the plaintiff's claim was barred by the exclusivity provision (§ 31-284 [a]) of the Workers' Compensation Act (§ 31-275 et seq.). In support of the motion, the defendants submitted excerpts from a deposition of L indicating, inter alia, that he had operated the excavator both before and after the incident that resulted in the plaintiff's injuries. The plaintiff countered that his claim fell within an exception to the exclusivity provision for cases in which the employer had a subjective belief that its conduct was substantially certain to cause injury to an employee. In support, the plaintiff submitted an affidavit from Q, a former machine operator for L Co., in which Q averred that he had told L that, as rigged, the excavator would injure someone. In a second affidavit, the plaintiff averred that he had informed L that the excavator was dangerous and also that L had concurred but stated that additional money would not be spent on repairs because the excavator was going to be sold. The trial court concluded that there could be no genuine dispute as to whether the defendants believed that their conduct was substantially certain to cause injury because L had himself operated the excavator on a regular basis both before and after the plaintiff's injuries. Accordingly, the trial court granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court. The Appellate Court concluded that the plaintiff had failed to demonstrate that there was a genuine issue as to the defendants' subjective beliefs and, accordingly, affirmed the trial court's judgment. Thereafter, the plaintiff, on the granting of certification, appealed to this court. *Held* that the Appellate Court properly upheld the trial court's decision to grant summary judgment in favor of the defendants, the evidence in the record having failed to establish the existence of a genuine issue of material fact with respect to whether

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

the defendants subjectively believed that there was a substantial certainty that the excavator would injure an employee; on the basis of a review of this state's common law regarding the substantial certainty exception and the case law of other jurisdictions applying similar exceptions, and consistent with the purpose underlying the act, this court concluded that the conduct of the defendants fell short of demonstrating that they subjectively believed that an injury was substantially certain to result, as there was no evidence of prior accidents involving the excavator, a protracted history of workplace safety violations, or any deception on the part of the defendants with respect to any dangers presented by the excavator.

(*One justice concurring separately*; *two justices dissenting in two separate opinions*)

Argued April 4, 2017—officially released January 18, 2018**

Procedural History

Action to recover damages for personal injuries sustained by the plaintiff as a result of the defendants' alleged recklessness, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Hon. Joseph M. Shortall*, judge trial referee, granted the defendants' motion for summary judgment and, exercising the powers of the Superior Court, rendered judgment thereon for the defendants, from which the plaintiff appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Prescott* and *Mullins*, *Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

Edward W. Gasser, with whom, on the brief, was *Gregory M. Potrepka*, for the appellant (plaintiff).

Kathleen F. Adams, with whom, on the brief, was *Peter J. Ponziani*, for the appellees (defendants).

Opinion

ROBINSON, J. In this certified appeal, we consider the contours of the proof necessary, under *Suarez* v.

** January 18, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Dickmont Plastics Corp., 229 Conn. 99, 111, 639 A.2d 507 (1994) (*Suarez I*), and *Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 280–81, 698 A.2d 838 (1997) (*Suarez II*), for an employee to establish an employer's subjective intent to create a dangerous situation with a "substantial certainty of injury" to the employee, for purposes of avoiding application of General Statutes § 31-284 (a), the exclusive remedy provision of the Workers' Compensation Act (act), General Statutes § 31-275 et seq.[1] The plaintiff, Dominick Lucenti, appeals, upon our grant of his petition for certification,[2] from the judgment of the Appellate Court affirming the trial court's grant of summary judgment in favor of the defendants, Greg Laviero and Martin Laviero Contractors, Inc. (Laviero Contractors).[3] *Lucenti* v. *Laviero*, 165 Conn. App. 429, 441, 139 A.3d 752 (2016). On appeal, the plaintiff claims that the Appellate Court improperly concluded that evidence regarding warnings to Laviero from the plaintiff and other employees about the dan-

[1] 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 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."

[2] We granted the plaintiff's petition for certification, limited to the following issue: "Did the Appellate Court correctly affirm the trial court's judgment that there was no issue of material fact regarding the applicability of the substantial certainty exception to the exclusivity provision of the [act]?" *Lucenti* v. *Laviero*, 322 Conn. 909, 140 A.3d 978 (2016).

[3] Greg Laviero is the owner and principal of Laviero Contractors.

gers posed by the use of a particular excavator, which would operate only when "rigged" to run at full throttle, did not establish a genuine issue of material fact as to whether the defendants subjectively believed that the plaintiff's subsequent injuries from the use of that excavator were substantially certain to occur. We conclude that, in the absence of any evidence demonstrating the hallmarks typical of such employer misconduct, the plaintiff has failed to establish a genuine issue of material fact with respect to the defendants' subjective beliefs. Accordingly, we affirm the judgment of the Appellate Court.

The opinion of the Appellate Court aptly sets forth the following relevant facts and procedural history. "The plaintiff claimed that he suffered various injuries on October 28, 2011, while working for Laviero Contractors. On the day of the incident, the plaintiff was replacing a catch basin. To accomplish this task, he was operating an excavator in an attempt to pull the catch basin out of the ground. During this operation, the excavator, while 'running at full throttle [slipped] off the catch basin and [swung] back and then [swung] forward,' injuring the plaintiff.

"On October 23, 2013, the plaintiff commenced this action alleging in a two count complaint that, because of the defendants' 'reckless conduct,' he suffered injuries. The defendants' alleged reckless conduct was, inter alia, 'directing that the excavator not be properly repaired prior to the incident even though [they] knew that there was a likelihood that individuals operating the equipment, including the plaintiff, would likely sustain serious bodily injuries . . . .' The plaintiff alleged that a temporary repair made prior to the incident made 'the excavator run at full throttle thereby making a jerking action.' After the parties conducted discovery, on October 14, 2014, the defendants filed a motion for summary judgment.

"The defendants argued that they were entitled to summary judgment because, pursuant to the exclusivity provision of the act . . . the defendants were exempt from liability for civil damages. The defendants further argued that, because there was 'no wilful, malicious or intentional conduct intended to injure the [p]laintiff . . . there was no exception to the exclusivity provision in this case.' In support of their argument, the defendants submitted excerpts of transcripts from two depositions given by the plaintiff, as well as an excerpt of Laviero's deposition and his affidavit. Pertinent to this appeal, Laviero stated at his deposition that he had operated the excavator a 'week or so' prior to the incident and again after the incident. Laviero also asserted that the excavator operated at 'full throttle' because it was the excavator's hydraulic system that controlled the speed of the machine and not the throttle. In his affidavit, Laviero averred that he neither intended to injure the plaintiff, nor intended to 'create a situation that would result in the [p]laintiff being injured,' and he had not ordered the excavator repaired 'between October 28, 2011, and the time of [his] subsequent operation.'

"The plaintiff filed an objection to the motion for summary judgment. In his memorandum of law, the plaintiff claimed that the defendants had 'rigged' the excavator to operate only at 'full throttle'; thus, the defendants 'intentionally created a dangerous condition that made [the] plaintiff's injuries substantially certain to occur, thereby overcoming the exclusivity rule of the [act].' In support of his argument, the plaintiff submitted an affidavit from Daniel Quick, a former Laviero Contractors employee, as well as his own affidavit and an excerpt from his deposition.

"Quick averred that he worked for Laviero Contractors for 'two seasons' as a machine operator. Quick also averred that in September, 2011, he was using the

excavator at issue when it malfunctioned and would only operate on idle. According to Quick, Laviero instructed a mechanic to 'rig the machine so that it could only be operated at full [throttle].' Quick also averred that he told Laviero that the excavator was 'too dangerous to operate' and, 'as rigged,' somebody would be injured.

"The plaintiff's affidavit provided additional details to support his argument. Specifically, the plaintiff averred that he had notified Laviero that the excavator ran only [at] full throttle and that this was dangerous, to which, according to the plaintiff, Laviero concurred. The plaintiff further averred that Laviero stated that he was unwilling to 'put any money into [the excavator]' because he was going to sell it. Also, the plaintiff averred that after he was injured, he spoke to a mechanic, Michael Lauder. The plaintiff attached to his affidavit a statement purportedly written by Lauder. This unsworn, but signed statement dated October 8, 2013, claimed, inter alia, that although Lauder and some other unnamed persons notified Laviero Contractors that the excavator needed to be repaired, he and the unnamed persons were 'instructed to rig the machine so the throttle would run at full speed at all times.' According to this statement, Laviero Contractors did not 'want to put money into repairs,' because it was considering selling the excavator. Finally, Lauder's purported statement provided that after the plaintiff was injured, Laviero Contractors 'instructed [Lauder] to fix [the excavator] properly,' and the excavator subsequently was sold.

"After a hearing on the motion, the court, *Hon. Joseph M. Shortall*, judge trial referee, issued a memorandum of decision on February 23, 2015, in which it granted the defendants' motion for summary judgment on the ground that the exclusivity provision of the act barred the plaintiff's action against the defendants. The court concluded that the plaintiff could not satisfy [the sub-

stantial certainty exception] to the exclusivity provision . . . set forth in [*Suarez II*, supra, 242 Conn. 255], because he could not 'prove an intent on the part of the defendant[s] to create a working condition that was "substantially certain" to injure [the] plaintiff or other employees.' Specifically, the court found it significant that Laviero regularly operated the excavator at issue, including 'a week before the plaintiff's claimed injury and shortly after his injury . . . .' Thus, the court determined that 'there can be no genuine dispute as to whether the defendants created a condition that they believed was substantially certain to cause injury.' The court reasoned, '[h]ow could a jury conclude that . . . Laviero . . . intentionally created a dangerous condition that was substantially certain to cause injury to someone operating the excavator when he, himself, operated the machine on a regular basis? While it is seldom appropriate for summary judgment to enter where the material fact is the intent of [a] defendant, this is one of those rare cases in which it is appropriate.' " *Lucenti* v. *Laviero*, supra, 165 Conn. App. 431–34.

The plaintiff appealed from the judgment of the trial court to the Appellate Court. Id., 430. In a unanimous decision, the Appellate Court affirmed the judgment of the trial court, rejecting the plaintiff's claim that he had "presented evidence demonstrating that there was a genuine issue of material fact, namely, that the defendants 'rigged' the excavator, and this created a dangerous condition that made the plaintiff's injuries substantially certain to occur." Id., 438. The Appellate Court assumed, for the sake of argument, that the plaintiff correctly asserted that "the excavator was not meant to operate at full throttle and that the excavator was dangerous," with "Quick's affidavit to buttress his argument that the defendants created a dangerous condition that made his injuries substantially certain because the

excavator, as modified, would only operate at full throttle." Id., 439. The court nevertheless relied on its decisions in *Martinez* v. *Southington Metal Fabricating Co.*, 101 Conn. App. 796, 799–800, 924 A.2d 150, cert. denied, 284 Conn. 930, 934 A.2d 246 (2007), and *Sorban* v. *Sterling Engineering Corp.*, 79 Conn. App. 444, 445–47, 830 A.2d 372, cert. denied, 266 Conn. 925, 835 A.2d 473 (2003), to conclude that the "plaintiff does not raise a genuine issue of material fact as to the 'requirement of a showing of the employer's subjective belief that the [plaintiff's] injury was substantially certain to occur' " as a result of the temporarily repaired "excavator that only operates on full throttle." *Lucenti* v. *Laviero*, supra, 165 Conn. App. 439. Accordingly, the Appellate Court affirmed the trial court's grant of summary judgment in favor of the defendants. Id., 441. This certified appeal followed. See footnote 2 of this opinion.

On appeal to this court, the plaintiff argues that the testimony and affidavits submitted in opposition to the defendants' motion for summary judgment establish a genuine issue of material fact regarding the question of whether the defendants knew that "rigging" the excavator was a dangerous act substantially certain to result in injury. The plaintiff emphasizes that requiring more evidence than these warnings to Laviero by Quick and the plaintiff will make the substantial certainty exception meaningless, as it would mean that "[o]nly in the unimaginable case, when an employer admits that he intended an injury, could a plaintiff survive summary judgment." To this end, the plaintiff contends that the Appellate Court's analysis has "functionally overruled" this court's decision in *Suarez I*, supra, 229 Conn. 111, insofar as that decision allows the fact finder to infer "the subjective intent of the employer from the totality of the circumstances surrounding an employee's injury."

In response, the defendants, relying on, among other cases, *Suarez II*, supra, 242 Conn. 257–58, and *Mingachos* v. *CBS, Inc.*, 196 Conn. 91, 100–101, 491 A.2d 368 (1985), contend that the Appellate Court's decision was consistent with existing case law, under which the substantial certainty exception is narrowly construed and requires intentional conduct, rather than mere negligence or recklessness. In particular, the defendants rely heavily on *Stebbins* v. *Doncasters, Inc.*, 263 Conn. 231, 234, 819 A.2d 287 (2003), and *Martinez* v. *Southington Metal Fabricating Co.*, supra, 101 Conn. App. 802–804, and argue that the substantial certainty exception requires evidence that the employer subjectively intended to engage in conduct that was substantially certain to injure the employees.[4] The defendants assert that there is no evidence in the record of an intent to injure the plaintiff through use of the "rigged" excavator, as demonstrated by the fact that Laviero expressly denied any such intention and personally operated the excavator both before and after the plaintiff's injury. The defendants also emphasize that the plaintiff personally elected to use the excavator in question, despite the fact that he was in charge on the job site, had access to other excavators, and could have chosen a different method by which to remove the catch basin. We agree with the defendants and conclude that the Appellate Court properly determined that the evidence set forth in the record did not give rise to a genuine issue of material fact with respect to the substantial certainty exception to workers' compensation exclusivity under § 31-284 (a).

"The standard of review of a trial court's decision granting summary judgment is well established. Prac-

[4] To this end, the defendants rely on sister state authority and argue that a different rule would significantly weaken the exclusive nature of the workers' compensation remedy for employment-related injuries under § 31-284 (a).

tice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Cefaratti* v. *Aranow*, 321 Conn. 637, 645, 138 A.3d 837 (2016). "The courts are in entire agreement that the moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue." (Internal quotation marks omitted.) *State Farm Fire & Casualty Co.* v. *Tully*, 322 Conn. 566, 573, 142 A.3d 1079 (2016). "Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Cefaratti* v. *Aranow*, supra, 645.

By way of background, we observe that this court has consistently "interpreted the exclusivity provision of the [a]ct . . . as a total bar to common law actions brought by employees against employers for job related injuries with one narrow exception that exists when the employer has committed an intentional tort or where the employer has engaged in wilful or serious

misconduct." *Suarez I*, supra, 229 Conn. 106. This exclusivity represents a balancing of interests, insofar as the purpose of the act "is to compensate the worker for injuries arising out of and in the course of employment, without regard to fault, by imposing a form of strict liability on the employer. . . . The act is to be broadly construed to effectuate the purpose of providing compensation for an injury arising out of and in the course of the employment regardless of fault. . . . Under typical workers' compensation statutes, employers are barred from presenting certain defenses to the claim for compensation, the employee's burden of proof is relatively light, and recovery should be expeditious. 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." (Citations omitted; internal quotation marks omitted.) *Mingachos* v. *CBS*, *Inc.*, supra, 196 Conn. 97; see also *Suarez I*, supra, 124 (*Borden*, *J.*, concurring and dissenting) ("in determining whether an employee has sufficiently established his employer's belief that he will be injured, we are not faced with a choice of leaving the employee without any compensation for his work related injuries by holding him to a strict standard"). Put differently, "[a] damage suit as an alternative or additional source of compensation, becomes permissible only by carving a judicial exception in an uncarved statute. . . . Neither moral aversion to the employer's act nor the shiny prospect of a large damage verdict justifies interference with what is essentially a policy choice of the [l]egislature." (Internal quotation marks omitted.) *Mingachos* v. *CBS*, *Inc.*, supra, 106. The "principle of exclusivity is not eroded . . . when the plaintiff alleges an intentional tort, in which case an employee is permitted to pursue remedies beyond those contemplated by the act." *Suarez I*, supra, 115.

This court first recognized this narrow intentional tort exception to workers' compensation exclusivity in

Jett v. *Dunlap*, 179 Conn. 215, 425 A.2d 1263 (1979). See *Suarez I*, supra, 229 Conn. 106–107. In *Jett*, this court exempted from workers' compensation exclusivity an employer's tortious act of intentionally directing or authorizing another employee to assault the injured party. *Jett* v. *Dunlap*, supra, 218.

Moving beyond actual intent to injure, in *Mingachos* v. *CBS, Inc.*, supra, 196 Conn. 100–101, this court declined to extend *Jett*'s intentional tort exception to the workers' compensation exclusivity provision to situations in which an injury resulted from the employer's intentional, wilful, or reckless violations of safety standards as established pursuant to federal or state laws. Instead, this court held in *Mingachos*: "To bypass the exclusivity of the act, the intentional or deliberate . . . conduct alleged must have been designed to cause the injury that resulted." Id., 102. This court noted that "the mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent." (Internal quotation marks omitted.) Id., 103. Accordingly, this court concluded in *Mingachos* that reckless misconduct differs from intentional misconduct, and that the employee must establish that the employer knew that injury was substantially certain to follow its deliberate course of action. Id.

This court elaborated on the contours of this substantial certainty standard as an alternative method of proving intent in *Suarez I* and *Suarez II*, which arose from amputation injuries suffered by an employee who claimed that his foreman had forced him to clean out plastic molding machines while those machines were still running, and forbade him and other employees from using safer cleaning methods under threat of termination of their employment, despite the risk of injury to their hands. *Suarez I*, supra, 229 Conn. 101. Specifically, the employee alleged that the foreman, as the alter ego of the employer, knew the dangers involved with

cleaning the machines, but had told him that he could not use a safer method, such as a stick to reach in, because (1) it would waste material, (2) the operator would lose time, and (3) if he used a safer method, he would be fired. Id., 102. The employee further alleged that the foreman had ordered him to clean the machine during production, "so that the employer could avoid paying personnel overtime." Id., 103. The employee appealed from the trial court's grant of the employer's motion for summary judgment on the ground that the exclusivity provision of the act barred his claim, because he had introduced no evidence that the employer intended to injure him. Id., 101–102.

In applying this substantial certainty exception to the facts of *Suarez I*, this court further defined the terms of the doctrine, concluding that, "intent refers to the consequences of an act . . . [and] denote[s] that the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to follow from it. . . . A result is intended if the act is done for the purpose of accomplishing such a result or with knowledge that to a substantial certainty such a result will ensue. . . . An intended or wilful injury does not necessarily involve the ill will or malevolence shown in express malice, but it is insufficient to constitute such an [intended] injury that the act . . . was the voluntary action of the person involved. . . . Both the action producing the injury and the resulting injury must be intentional. . . . [Its] characteristic element is the design to injure either actually entertained or to be implied from the conduct and circumstances. . . . The intentional injury aspect may be satisfied if the resultant bodily harm was the direct and natural consequence of the intended act. . . . The known danger involved must go from being a foreseeable risk which a reasonable man would avoid and become a substantial certainty. . . .

"The substantial certainty test differs from the true intentional tort test but still preserves the statutory scheme and the overall purposes of the act. The problem with the intentional tort test, i.e., whether the employer intended the specific injury, appears to be that it allows employers to injure and even kill employees and suffer only workers' compensation damages so long as the employer did not specifically intend to hurt the worker. . . . Prohibiting a civil action in such a case would allow a corporation to cost-out an investment decision to kill workers. . . . The substantial certainty test provides for the intent to injure exception to be strictly construed and still allows for [an employee] to maintain a cause of action against an employer where the evidence is sufficient to support an inference that the employer deliberately instructed an employee to injure himself." (Citations omitted; internal quotation marks omitted.) Id., 108–10. Ultimately, this court concluded in *Suarez I* that summary judgment was inappropriate in that case, and it was a jury question with respect to whether the employer's intentional conduct allowed an inference that the employer knew that the occurrence of the injury was a substantial certainty. Id., 111–12.

On remand following *Suarez I*, a jury returned a verdict for the employee under the actual intent standard, rather than under the substantial certainty exception, and the employer then appealed to this court. See *Suarez II*, supra, 242 Conn. 261 and n.2. In *Suarez II*, this court restated the substantial certainty test "to emphasize that the employer must be shown *actually to believe that the injury would occur* . . . ." (Emphasis added.) R. Carter et al., 19 Connecticut Practice Series: Workers' Compensation (2008) § 15:16. In *Suarez II*, this court described its decision in *Suarez I* as establishing an exception to workers' compensation exclusivity if the employee can prove "either that the

employer actually intended to injure the [employee] or that the employer intentionally created a dangerous condition that made the [employee's] injuries substantially certain to occur . . . ." *Suarez II*, supra, 257–58. Although the employee in *Suarez II* urged this court to conclude that the employer's insistence that he clean the machines with his hands while the machines were operating, along with the reprimands and threats received by the employee when he had attempted to utilize safer cleaning methods, "served as a basis upon which the jury could have found the [employer's] specific intent to injure," the court instead concluded that such evidence "was sufficient to allow an inference that the employer knew that the occurrence of the injury was a substantial certainty" but that "it was inadequate to support a rational inference that the [employer] specifically intended for the [employee] to be injured."[5] Id., 278.

In *Suarez II*, this court further clarified the substantial certainty exception by noting: "[P]ermitting an employee to sue an employer for injuries intentionally caused to him constitutes a narrow exception to the exclusivity of the act. . . . Since the legal justification for the common-law action is the nonaccidental character of the injury from the . . . employer's standpoint, the common-law liability of the employer cannot . . . be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer *short of a conscious*

[5] The trial court in *Suarez II* had submitted special interrogatories, at the employer's request, asking the jury whether the employee had proved that the employer believed that the injuries were substantially certain to occur, as well as whether the employer instructed the employee to deliberately injure himself. *Suarez II*, supra, 242 Conn. 261 and n.2. The jury answered in the negative to the former but in the affirmative to the latter. Id. Accordingly, this court was constrained to consider only whether there was sufficient evidence to establish the employer's actual intent to injure. Id., 277–81.

and deliberate intent directed to the purpose of inflicting an injury. . . . What is being tested is not the degree of gravity of the employer's conduct, but, rather, the narrow issue of intentional versus accidental conduct." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 278–79; see also id., 279–80 (reiterating definition of intent from *Suarez I*).

Consistent with the focus in *Suarez I* and *Suarez II* on employer knowledge and intent, it is now well established under Connecticut law that proof of the employer's intent with respect to the substantial certainty exception demands a purely subjective inquiry. See *Motzer* v. *Haberli*, 300 Conn. 733, 744–46, 15 A.3d 1084 (2011); *Sullivan* v. *Lake Compounce Theme Park, Inc.*, 277 Conn. 113, 118–20, 889 A.2d 810 (2006); *Stebbins* v. *Doncasters, Inc.*, supra, 263 Conn. 234; *Martinez* v. *Southington Metal Fabricating Co.*, supra, 101 Conn. App. 802–804; *DaGraca* v. *Kowalsky Brothers, Inc.*, 100 Conn. App. 781, 788–89, 919 A.2d 525, cert. denied, 283 Conn. 904, 927 A.2d 917 (2007); *Morocco* v. *Rex Lumber Co.*, 72 Conn. App. 516, 528, 805 A.2d 168 (2002); *Ramos* v. *Branford*, 63 Conn. App. 671, 680, 778 A.2d 972 (2001); *Melanson* v. *West Hartford*, 61 Conn. App. 683, 689–90, 767 A.2d 764, cert. denied, 256 Conn. 904, 772 A.2d 595 (2001); see also *Bye* v. *Cianbro Corp.*, 951 F. Supp. 2d 322, 327 (D. Conn. 2013) (applying Connecticut law). Put differently, satisfaction of the substantial certainty exception requires a showing of the employer's subjective intent to engage in activity that it knows bears a substantial certainty of injury to its employees.[6]

[6] We note that this purely subjective inquiry is consistent with the American Law Institute's most recent understanding of the term "substantial certainty." See Restatement (Third), Torts, Liability for Physical and Emotional Harm § 1, comment (c), p. 7 (2010) ("[K]nowledge that harm is substantially certain to result is sufficient to show that the harm is intentional even in the absence of the purpose to bring about that harm. Of course, a mere showing that harm is substantially certain to result from the actor's conduct is not sufficient to prove intent; it must also be shown that the actor was aware of this."); see also id., comment (e), p. 8 ("The substantial-certainty

It is, however, well settled that "[i]ntent is clearly a question of fact that is ordinarily inferred from one's conduct or acts under the circumstances of the particular case." *Suarez I*, supra, 229 Conn. 111; see also, e.g., *DeLuca* v. *C. W. Blakeslee & Sons, Inc.*, 174 Conn. 535, 547, 391 A.2d 170 (1978) ("[a] person's intention in any regard is to be inferred from his conduct . . . and ordinarily can be proven only by circumstantial evidence" [citation omitted; internal quotation marks omitted]). Although Connecticut has an ample body of appellate case law rejecting employees' claims of entitlement to the substantial certainty exception in a variety of factual settings, this court has yet to describe the kind of evidence that would allow for an inference that an employer subjectively believed that employee injury was substantially certain to follow its actions.

In this regard, we note that the substantial certainty exception is a common feature in workers' compensation law in other jurisdictions. We find particularly instructive a series of decisions from New Jersey. Applying that state's leading decision articulating the substantial certainty test, *Millison* v. *E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 178–79, 501 A.2d 505 (1985), New Jersey courts "engage in a [two step] analysis. First, a court considers the conduct prong, examining the employer's conduct in the setting of the particular case. . . . Second, a court analyzes the context prong, considering whether the resulting injury or disease, and the circumstances in which it is inflicted on the worker, [may] fairly be viewed as a fact of life of industrial employment, or whether it is plainly beyond anything the legislature could have contemplated as

definition of intent requires an appreciation of its limits. In those occupational-injury cases in which courts have applied the substantial-certainty test, there generally is a localized job-site hazard, which threatens harm to a small number of identifiable employees during a relatively limited period of time.").

entitling the employee to recover only under the [New Jersey Workers' Compensation Act]." (Citation omitted; internal quotation marks omitted.) *Van Dunk* v. *Reckson Associates Realty Corp.*, 210 N.J. 449, 461, 45 A.3d 965 (2012).

With respect to the conduct prong, which is closely akin to the factual inquiry that Connecticut courts undertake in determining whether the employer knew of a substantial certainty of employee harm,[7] the New

[7] We note that the "context prong" is "related" to the employer's conduct and may "overlap to great degree." *Van Dunk* v. *Reckson Associates Realty Corp.*, supra, 210 N.J. 473. The "context prong acts as an additional check against overcoming the statutory bar to a common-law tort action. It was added to the analysis to reinforce the strong legislative preference for the workers' compensation remedy. That preference is overcome only when it separately can be shown to the court, as the gatekeeper policing the [New Jersey Workers' Compensation] Act's exclusivity requirement, that as a matter of law an employee's injury and the circumstances in which the injury is inflicted are plainly beyond anything the legislature could have contemplated as entitling the employee to recover only under the [New Jersey Workers' Compensation Act]." (Emphasis omitted; internal quotation marks omitted.) Id., 473. In New Jersey, the context prong sets a "high threshold" and "where the exclusivity [provision of the New Jersey Workers' Compensation Act] operates to foreclose tort actions against employers for reckless[ness] or gross negligence under the substantial-certainty test . . . one cannot reasonably conclude that the type of mistaken judgment by the employer and ensuing employee accident that occurred on this construction site was so far outside the bounds of industrial life as never to be contemplated for inclusion in the [exclusivity provision]. While a single egregiously wrong act by an employer might, in the proper circumstances, satisfy the intentional-wrong standard, not every intentional, or indeed [wilful] violation of . . . safety requirements constitutes a wrong that is plainly beyond anything the legislature could have contemplated as entitling the employee to recover only under the [New Jersey Workers'] Compensation Act." (Emphasis omitted; internal quotation marks omitted.) Id., 474. In contrast to the factually-driven conduct prong, the inquiry under the context prong is a pure question of law for the court. See *Laidlow* v. *Hariton Machinery Co., Inc.*, 170 N.J. 602, 623, 790 A.2d 884 (2002).

Although we view New Jersey's context prong as a potentially useful mechanism for effectuating the legislature's intent with respect to workers' compensation exclusivity under § 31-284 (a), we need not consider at this point whether to adopt it as a matter of Connecticut law because there is no genuine issue of material fact as to the defendants' intent in the present case. We do not, however, foreclose in future cases the adoption of legal

Jersey Supreme Court has emphasized that "[m]ere knowledge by an employer that a workplace is dangerous does not equate to an intentional wrong. . . . [T]he dividing line between negligent or reckless conduct on the one hand and intentional wrong on the other must be drawn with caution, so that the statutory framework . . . is not circumvented simply because a known risk later blossoms into reality. We must demand a virtual certainty." (Citation omitted; internal quotation marks omitted.) Id., 470. In considering whether the totality of the circumstances indicates that the conduct prong is satisfied, New Jersey courts consider factors such as: (1) prior similar accidents related to the conduct at issue that have resulted in employee injury, death, or a near-miss,[8] (2) "deliberate deceit" on the part of the employer with respect to the existence of the dangerous condition, (3) "intentional and persistent" violations of safety regulations over a lengthy period of time, and (4) affirmative disabling of safety devices. Id., 471–73. With respect to decisions made to cut corners as to safety in order to save time or money, the New Jersey Supreme Court considers a "profit motive" of only "lim-

doctrine akin to New Jersey's context prong as a backstop to ensure, as a matter of public policy, that only the most egregious cases of intentional misconduct on the part of employers will avoid the bar of workers' compensation exclusivity.

[8] We emphasize that proof of prior injuries or deaths is not necessary, and do not suggest that there is the equivalent of a "one free bite" rule in the context of workers' compensation exclusivity. "The appreciation of danger can be obtained in a myriad of ways other than personal knowledge or previous injuries. Simply because people are not injured, maimed or killed every time they encounter a device or procedure is not solely determinative of the question of whether that procedure or device is dangerous and unsafe." (Internal quotation marks omitted.) *Laidlow* v. *Hariton Machinery Co., Inc.*, 170 N.J. 602, 621, 790 A.2d 884 (2002). Requiring an actual accident or injury "would be tantamount to giving every employer one free injury for every decision, procedure or device it decided to use, regardless of the knowledge or substantial certainty of the danger that the employer's decision entailed. . . . It is not incumbent that a person be burned before one knows *not* to play with fire." (Emphasis in original; internal quotation marks omitted.) Id.

ited relevance," applicable "only to critique an employer's long-term choice specifically to sacrifice employee safety for product-production efficiency." Id., 473.

New Jersey's body of case law applying the factors that guide the conduct prong of the substantial certainty exception demonstrates that proof of negligent or even reckless conduct will not suffice, and only the most egregious examples of employer conduct will defeat workers' compensation exclusivity. Compare id., 472–73 (conduct prong was not satisfied, despite intentional violation of federal safety regulations pertaining to work in trenches at construction site, where "on-site supervisor made a quick but extremely poor decision, candidly admitted to having been made 'out of frustration' with unfolding circumstances that morning"), *Tomeo* v. *Thomas Whitesell Construction Co.*, 176 N.J. 366, 376–77, 823 A.2d 769 (2003) (conduct prong was not satisfied where employer was "grossly negligent" and deactivated safety stop lever on snow blower and placed electrical tape over it to prevent its activation because, although employee was severely injured when he inserted his hand into blower's chute, he "knew or should have known that the propellers were operating when he inserted his hand into the chute"), and *Mann* v. *Heil Packer*, Docket No. A-1293-08T2, 2010 WL 98883, *7 (N.J. Super. App. Div. January 13, 2010) (conduct prong was not satisfied because town did not know that retrofitting of garbage truck to add riding step on back was substantially certain to cause injury where it had never been cited by regulatory or law enforcement authority, there was no concealment of risk, and previous accidents involved minor injuries from moving forward, and were not result of backing up, unlike accident that killed plaintiff), with *Mull* v. *Zeta Consumer Products*, 176 N.J. 385, 392–93, 823 A.2d 782 (2003) (reasonable jury could find that conduct prong was satisfied where employee suffered amputation injury from plas-

tic bag spooling machine that had suddenly activated when it had safety devices disengaged, employer had knowledge of prior citations from federal inspectors for failure to implement safety procedures, multiple employees had complained about machine suddenly operating without warning on multiple occasions, and plaintiff's coworker previously had sustained injury), *Laidlow* v. *Hariton Machinery Co.*, 170 N.J. 602, 622–23, 790 A.2d 884 (2002) (reasonable jury could find that conduct prong was satisfied, despite lack of prior injuries, where employer left safety guard off rolling mill for speed and convenience for thirteen year period leading up to plaintiff's injury, and reinstalled it only for federal safety inspections in course of "deliberate and systematic deception," despite knowledge of close calls when unguarded machine had nearly injured plaintiff and coworker), and *Millison* v. *E.I. du Pont de Nemours & Co.*, supra, 101 N.J. 179–83 (concluding that employees' occupational disease claims were not barred by workers' compensation exclusivity as matter of law because complaint included allegations that employer fraudulently concealed fact that employees suffered from asbestos related diseases to keep those employees from leaving workforce, including having company physicians falsely give employees healthy physical examination results); see also *Almanzar* v. *C & C Metal Products, Inc.*, Docket No. 07-4002, 2010 WL 1372301, *8 (D.N.J. March 31, 2010) (denying employer's motion for summary judgment because "a reasonable jury could find that the safety devices on the die casting machine were rendered essentially ineffectual by [employer's] training and instructions to its employees and, that, through the prior [federal safety] citations and prior accidents, [employer] knew of the dangerous condition and seriousness of the potential injury created when an employee was required to insert his hand into the die casting area without the machine being appropriately shut down").

Other sister state cases applying the substantial certainty doctrine are consistent with the factors applied in New Jersey. Compare *Turner* v. *PCR, Inc.*, 754 So. 2d 683, 691 (Fla. 2000) (genuine issue of material fact existed regarding substantial certainty exception where employer had been informed of explosion risk in writing, knew of highly explosive nature of chemical but did not disclose that to employees, and "knew of prior similar explosions with the same and similar chemicals involved in the explosion at issue"), superseded in part by Fla. Stat. § 440.11 (2009), and *Helf* v. *Chevron U.S.A., Inc.*, 203 P.3d 962, 974–75 (Utah 2009) (trial court improperly dismissed claim by employee who was rendered ill during evening shift by toxic fumes caused by open air process of neutralizing caustic sludge that violated numerous state and federal regulations, where employer allegedly did not tell employee that numerous day shift employees became ill when that process was performed earlier, failed to provide information about chemicals or treatment, and did not warn her to wear respiratory protection), with *McMillin* v. *Mueller*, 695 N.W.2d 217, 224 (S.D. 2005) (despite fact that another employee complained of difficulty breathing, which he attributed to claustrophobia, employer merely failed to follow federally approved safety plan and did not have substantial certainty that his employees would be asphyxiated upon entering into underground molasses tank because, inter alia, he lowered his own head into tank for approximately one minute, and his family members had routinely entered tank on regular basis to clean it), and *Fryer* v. *Kranz*, 616 N.W.2d 102, 107–108 (S.D. 2000) (substantial certainty exception was not satisfied in case in which employee suffered severe respiratory illness after being directed to use undiluted muriatic acid to clean floor tile grout in small, unventilated room because employer participated, and, "had he purposely intended to injure his employees by exposing them to

the noxious fumes, it is simply not rational to believe that he would have also knowingly and deliberately exposed himself to the fumes by helping his employees clean the grout").

Connecticut's appellate case law also is consistent with New Jersey's multifactor standard, including our decisions that stand for the proposition that, although warnings to the employer regarding the safety of workplace conditions are relevant evidence,[9] they do not, without more, raise a genuine issue of material fact to defeat summary judgment with respect to whether an employer subjectively believes that its employee's injuries are substantially certain to result from its action. We find instructive both *Stebbins* v. *Doncasters, Inc.*, 47 Conn. Supp. 638, 820 A.2d 1137 (2002), which was a Superior Court decision subsequently adopted by this court in *Stebbins* v. *Doncasters, Inc.*, supra, 263 Conn. 235, and the Appellate Court's decision in *Sorban* v. *Sterling Engineering Corp.*, supra, 79 Conn. App. 444.

First, in *Stebbins* v. *Doncasters, Inc.*, supra, 47 Conn. Supp. 640, employees who allegedly contracted hypersensitivity pneumonitis after being exposed to contaminated airborne droplets in the workplace brought a civil action against their employer. Initially, the employer submitted documentary evidence that indicated that it harbored no belief that its actions were substantially certain to cause respiratory illness in the employees. Id., 642. In response, the employees presented evidence

[9] We acknowledge that objective facts, such as warnings received, may be used to discredit an employer's statement that he did not believe that any injury was substantially certain to occur as a result of his action. This is relevant circumstantial evidence on the issue of the employer's subjective intent; see, e.g., *Suarez I*, supra, 229 Conn. 111; *DeLuca* v. *C. W. Blakeslee & Sons, Inc.*, supra, 174 Conn. 547; by itself, however, it is not dispositive. If we were to hold such objective evidence irrelevant as a matter of law, an employer conceivably could avoid tort liability simply by disclaiming such a belief, even when there is circumstantial evidence that indicates otherwise. See also footnote 10 of this opinion.

that the employer repeatedly failed to follow certain warnings and recommendations provided by the University of Connecticut Health Center. Id., 643. The employees also introduced evidence that the employer had violated other safety rules and regulations. Id. Despite evidence that the defendant received these warnings and did not follow them, the court ultimately held that the evidence submitted by the employees proved nothing more than a mere failure to provide appropriate safety or protective measures. Id., 644. The court concluded that "[t]he [employees'] submissions may show that the [employer] exhibited a lackadaisical or even cavalier attitude toward worker safety, but are bereft of evidence from which one might reasonably and logically infer that the [employer] believed its conduct was substantially certain to cause hypersensitivity pneumonitis in these [employees]." Id. Thus, the evidence did not establish that the employer believed that its conduct was substantially certain to cause injury to the employees, and the act's exclusivity provision barred the employees' claim. Id., 644–45. Accordingly, this court subsequently concluded on appeal that the trial court properly granted the employer's motion for summary judgment. *Stebbins* v. *Doncasters, Inc.*, supra, 263 Conn. 231.

Additionally, in *Sorban* v. *Sterling Engineering Corp.*, supra, 79 Conn. App. 446, an employee warned his supervisor that a lathe was not working properly. In response, the supervisor told the employee to be careful. Id. When the lathe malfunctioned, it threw a piece of material that broke through a safety shield guard, and struck the employee's arm, causing a severe laceration. Id. The employee presented evidence that the employer was aware that employees operated the machines without the proper safety shield guards in place. Id. Despite the fact that the injured employee had previously warned his employer of the dangerous

working condition, the court concluded: "Although the [employer's] failure (1) to repair the lathe, (2) to provide adequate butt blocks and shield guards, and (3) to alert employees to a policy regarding the use of the rotating table may constitute negligence, gross negligence or even recklessness, those allegations fail to meet the high threshold of substantial certainty . . . . The combination of factors demonstrated a failure to act; however, such a failure is not the equivalent of an intention to cause injury."[10] Id., 457–58; see also *Martinez* v. *Southington Metal Fabricating Co.*, supra, 101 Conn. App. 806–807 (testimony that employee's injuries were substantially certain to occur when employee's arm was crushed while positioning steel plate in metal bending machine was not sufficient to defeat summary judgment); *DaGraca* v. *Kowalsky Brothers, Inc.*, supra, 100 Conn. App. 791–93 (expert testimony opining that

[10] We acknowledge that, in *Sorban* v. *Sterling Engineering Corp.*, supra, 79 Conn. App. 455–56, the Appellate Court appeared to use an objective standard to determine entitlement to the substantial certainty exception, rather than a subjective test, stating that "to satisfy the substantial certainty test, the employee must show that *a reasonable person in the position of the employer* would have known that the injury or death suffered by the employee was substantially certain to follow from the employer's actions." (Emphasis added.) We rely on *Sorban* solely to demonstrate our body of appellate case law surrounding the relationship between evidence of warnings and the substantial certainty exception, under which warnings are relevant, but not dispositive evidence. See footnote 9 of this opinion. To the extent that *Sorban* employs an objective substantial certainty test, it is the single outlier in the plethora of Supreme and Appellate Court cases, decided both prior to and after *Sorban*, all of which utilize a subjective standard. See *Motzer* v. *Haberli*, supra, 300 Conn. 744–46; *Sullivan* v. *Lake Compounce Theme Park, Inc.*, supra, 277 Conn. 118; *Stebbins* v. *Doncasters, Inc.*, supra, 263 Conn. 234; *Martinez* v. *Southington Metal Fabricating Co.*, supra, 101 Conn. App. 802–804; *DaGraca* v. *Kowalsky Brothers, Inc.*, supra, 100 Conn. App. 788–89; *Morocco* v. *Rex Lumber Co.*, supra, 72 Conn. App. 528; *Ramos* v. *Branford*, supra, 63 Conn. App. 680; *Melanson* v. *West Hartford*, supra, 61 Conn. App. 689–90; see also *Bye* v. *Cianbro Corp.*, supra, 952 F. Supp. 2d 327 (applying Connecticut law). Accordingly, we do not view *Sorban* as an accurate statement of the current law governing the substantial certainty exception, and instead follow the remainder of our well established body of case law that utilizes a subjective standard.

employer, based on its experience, had to have known of dangers of untested manholes was not sufficient to defeat summary judgment).

Turning to the record in the present case, and construing all allegations and facts in this case in the light most favorable to the plaintiff, we conclude that the evidence contained within the record does not give rise to a genuine issue of material fact as to whether the defendants subjectively believed that an injury was substantially certain to occur as a result of operating the temporarily repaired, or "rigged," excavator. Specifically, in support of their motion for summary judgment, the defendants proffered Laviero's affidavit, in which he stated that he did not intend to harm the plaintiff and did not believe that the excavator was dangerous. *Lucenti* v. *Laviero*, supra, 165 Conn. App. 432. This belief was further evidenced by Laviero's statement in his deposition testimony that he personally had operated the excavator one week or so prior to the incident and again *after* the incident. Id.

The burden to demonstrate the existence of a genuine issue of material fact then shifted to the plaintiff, who produced two affidavits in support of his opposition to the defendants' motion: one from himself, and one from Quick, a former employee of the defendants. In Quick's affidavit, he stated that he had worked for two seasons as a machine operator. Id. He stated that he was using the excavator when it malfunctioned and would only operate at idle speed. Id. He then claimed that Laviero instructed a mechanic to rig the excavator so that it could be operated only at full throttle. Id. Quick claimed that he had informed Laviero that the excavator was "too dangerous to operate . . . as rigged" because it would injure someone. (Internal quotation marks omitted.) Id. According to the plaintiff's affidavit, he claimed that he had notified the defendants that the excavator ran only at full throttle and that this was dangerous.

Id., 433. The plaintiff averred that Laviero had concurred, but stated that he was unwilling to put any money into the excavator because he was going to sell it. Id. Further, the plaintiff said that, after he was injured, he spoke to Lauder, a mechanic. Id. In an unsworn statement submitted to the court, Lauder claimed to have notified Laviero that the excavator needed repair, but Laviero instructed him to rig the excavator instead. Id. According to Lauder, after the incident, Laviero instructed Lauder to fix the excavator, and the excavator was sold.[11] Id.

As the previously discussed case law demonstrates, although these warnings, and Laviero's acknowledgment of a potential danger from the use of the rigged excavator, are relevant circumstantial evidence to establish the defendants' subjective intent, in and of themselves, they are insufficient to satisfy the substantial certainty exception to the exclusivity provision of the act. That exception requires employer conduct that so obviously and intentionally creates a danger to the employee that "the employer cannot be believed if it denies that it knew the consequences were certain to follow." *Sorban* v. *Sterling Engineering Corp.*, supra, 79 Conn. App. 455.

For the following reasons, we conclude that the evidence in this record fails to establish the existence of a genuine issue of material fact with respect to whether

[11] We acknowledge the defendants' argument that the statements contained in the plaintiff's affidavit regarding his conversation with Lauder, and the statement of Lauder attached thereto, should not be considered in opposition to the defendants' motion for summary judgment because they constitute inadmissible hearsay. See, e.g., *Jaiguay* v. *Vasquez*, 287 Conn. 323, 363, 948 A.2d 955 (2008) ("factual assertions based on inadmissible hearsay are insufficient for purposes of opposing a motion for summary judgment"). In the interest of giving the plaintiff every possible benefit of the doubt, and because the defendants did not object to the consideration of these statements in their reply memorandum filed in the trial court, we consider them in connection with the plaintiff's appeal.

the defendants believed there was a substantial certainty that the rigged excavator would injure the plaintiff or any other employee. First, there is no evidence of prior accidents involving the rigged excavator causing, or nearly causing, injury or death. Second, there is no evidence of an extensive or protracted history of workplace safety violations by Laviero with respect to his motor equipment or, in particular, this excavator. Third, there is no evidence of deception on the part of the defendants, particularly Laviero himself, with respect to any danger presented by the rigged excavator. In fact, the record established that Laviero knew that the plaintiff was aware of the purported danger. Thus, Laviero reasonably could presume that the plaintiff would try his best to avoid injuring himself if injury could be avoided with the exercise of due care.[12]

Additionally, the present case is distinguishable from *Suarez I*, the lone case in which this court determined that the evidence presented was enough to create a genuine issue of material fact as to the substantial certainty exception. *Suarez I*, supra, 229 Conn. 117–18. Most notably, in that case, there was evidence that the employer placed its employees under significant duress

[12] We emphasize that Laviero's apparent acknowledgment of the existence of the potentially "dangerous condition" created by the excavator is relevant evidence, but does not by itself create a genuine issue of material fact as to whether the defendants subjectively believed that, because of their actions, the plaintiff's injuries were substantially certain to occur as a result of that condition. This inquiry does not focus on whether the employer believed that a workplace condition was dangerous. See *Van Dunk* v. *Reckson Associates Realty Corp.*, supra, 210 N.J. 470. Put differently, the defendants, as the plaintiff's employer, could have known that the rigged excavator might be dangerous, yet also have believed either that the injury was unlikely to occur, its risk could be mitigated by the exercise of due care, or the excavator was unlikely to cause the type of injuries that the plaintiff sustained. Because the plaintiff presented no other evidence bearing on the defendant's subjective belief that the plaintiff's injuries were substantially certain to occur, the uncontroverted evidence that Laviero himself continued to use the excavator compels the conclusion that no genuine issue of material fact exists on this point.

insofar as their foreman, as an alter ego of the employer, specifically threatened them with termination of their employment if they did not clean running machinery in an unsafe manner in order to save time and money. *Suarez I*, supra, 229 Conn. 101–102. In contrast, there is no evidence in the present case that the defendants, as the employer, exerted significant duress or other coercive actions, beyond those ordinarily inherent to the employment relationship, upon the plaintiff such that he would conduct himself in a manner that would "support an inference that the employer deliberately instructed an employee to injure himself." Id., 110. In fact, evidence to the contrary exists, insofar as the plaintiff himself testified at his deposition that, although multiple methods exist for the removal of a catch basin, the plaintiff chose to operate the rigged excavator without further protest, despite his belief that it was dangerous.[13] Although the plaintiff testified that Laviero had instructed him to use the excavator on the job at which the injury occurred, there was no evidence that Laviero had prohibited the plaintiff from using other, safer means.[14] In the absence of any evidence of deception, coercion or duress, and without other evidence of intent to injure on the part of the defendants, we decline to impute the requisite subjective intent to the defendants.[15]

[13] We note that the plaintiff testified at his deposition that he owned an excavator, and that he knew the defendants owned three excavators at the time of the accident. There is no evidence that the defendants refused to give him permission to use another excavator instead of the rigged one. There also is no evidence with respect to whether it was feasible to bring one of those other excavators to the job site.

[14] At his deposition, the plaintiff testified that he operated the excavator because "I was told to operate it. I worked for the guy. I operated it."

[15] Echoed by Chief Justice Rogers, Justice Eveleigh's dissenting opinion suggests that we deem Laviero's use of the excavator to be "dispositive and, as a matter of law, demonstrates that he did not know that an injury was substantially certain to occur." Both dissenting justices similarly suggest that we improperly discount the warnings received by Laviero in this case. Finally, Justice Eveleigh suggests that we require the presence of coercion or duress in all cases. We respectfully disagree with the dissenting justices'

Despite viewing the evidence in the record in the light most favorable to the plaintiff, we conclude that no evidence exists to raise a genuine issue of material fact as to whether the defendants subjectively believed that, because they provided an excavator that would work only on full throttle, the plaintiff's injuries were substantially certain to occur. Rather, we agree with the Appellate Court that "[t]he defendants' rationale in having the excavator operate in such fashion may be reckless and may demonstrate a cavalier attitude toward worker safety," but that falls short of demonstrating that the defendants believed that the conduct at issue was substantially certain to cause the plaintiff harm.[16] (Internal quotation marks omitted.) *Lucenti* v. *Laviero*, supra, 165 Conn. App. 439; see also *Sullivan*

understanding of this opinion. We emphasize that these are all factors that are part of the totality of the circumstances analysis, and the presence or absence of any one factor is not necessarily outcome determinative.

[16] The plaintiff also claims, as he did before the Appellate Court, that the trial court changed the applicable legal standard by asking the rhetorical question, "[h]ow could a jury conclude that . . . Laviero . . . intentionally created a dangerous condition that was substantially certain to cause injury to someone operating the excavator when he, himself, operated the machine on a regular basis?" Although we agree with the plaintiff that the use of such rhetorical devices runs the risk of appearing to invade the province of the jury, that risk was nevertheless mitigated in the present case insofar as the trial court acknowledged that issues of intent are typically jury questions not appropriate for summary judgment, unless the case is like this one, with a record completely lacking such evidence. See, e.g., *United Oil Co.* v. *Urban Redevelopment Commission*, 158 Conn. 364, 376, 260 A.2d 596 (1969) ("summary judgment procedure is particularly inappropriate where the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions"). Thus, we agree with the Appellate Court that "[a] careful reading of the [trial] court's memorandum of decision . . . demonstrates that the court was not modifying the substantial certainty standard; rather, it was merely suggesting that it would be logical to conclude that because Laviero was willing to use the excavator before and after the incident thereby potentially exposing himself to harm, the plaintiff cannot show that the defendants had the requisite intent required to overcome the exclusivity provision of the act." *Lucenti* v. *Laviero*, supra, 165 Conn. App. 440.

v. *Lake Compounce Theme Park, Inc.*, supra, 277 Conn. 118.

Finally, notwithstanding the dissenting justices' characterization of our decision as a virtual nullification of the substantial certainty exception, we note that a holding to the contrary in this case would have the effect of elevating relatively routine workplace disagreements about safety to evidence that would defeat the high bar of workers' compensation exclusivity. This represents a drastic undermining of the purpose of the act, which this court—and many others throughout the United States—have understood "to limit common-law tort actions for injuries arising out of and in the course of employment and to satisfy as many claims as possible under the . . . act." *Jett* v. *Dunlap*, supra, 179 Conn. 222. It also would be inconsistent with this court's historic view of the substantial certainty exception, which we did "not believe [would] encourage significant additional litigation, for only in those rare instances when an employer's conduct allegedly falls within the very narrow exception to the act will such litigation result." *Suarez I*, supra, 229 Conn. 117–18. Accordingly, we conclude that the Appellate Court properly affirmed the judgment of the trial court, which granted the defendants' motion for summary judgment.

The judgment of the Appellate Court is affirmed.

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

PALMER, J., concurring. I agree with and join the majority opinion. I write separately only to underscore the importance of the fact that the defendant Greg Laviero regularly operated the excavator that caused the injuries to the plaintiff, Dominick Lucenti. As the trial court, the Appellate Court and a majority of this court have explained, it is virtually impossible to fathom

that Laviero would have operated the excavator on a regular basis if he was substantially certain that he would have been seriously injured from such operation. Indeed, there is nothing in the record to indicate that Laviero would have engaged in such intentionally self-destructive behavior. Although Laviero's own use of the excavator is not the only fact that leads me to conclude that the plaintiff cannot demonstrate a subjective belief by Laviero that an injury was substantially certain to result from the operation of the excavator, it is a consideration that distinguishes this case from virtually all other cases in which an employee has been able to surmount the exclusivity provision of the Workers' Compensation Act, General Statutes § 31-275 et seq.

Accordingly, I concur.

ROGERS, C. J., dissenting. The majority concludes that there is no genuine issue of material fact as to whether the defendants, Greg Laviero, and Martin Laviero Contractors, Inc. (Laviero Contractors), subjectively believed that it was substantially certain that the plaintiff, Dominick Lucenti, would be injured if he operated the excavator that was "rigged" to operate at full throttle. I agree with the majority that the substantial certainty exception to the exclusive remedy provision of the Workers' Compensation Act, General Statutes § 31-284 (a), requires a showing of the employer's subjective intent to engage in an activity that the employer knows bears a substantial certainty of injury to its employees. I disagree with the majority's conclusion, however, that there is no genuine issue of material fact as to whether this standard has been met in the present case.

The plaintiff presented evidence that Daniel Quick, a former employee of Laviero Contractors, had used the excavator at issue, that it malfunctioned, that Laviero ordered a mechanic to "rig" the excavator so that it

would operate only at full throttle, that Quick told Laviero that the rigged excavator "was too dangerous to operate" and that, if Quick operated it, "either I am going to get hurt or I am going to hurt someone."[1] In addition, the plaintiff presented evidence that he had told Laviero that the rigged excavator was "jerky and dangerous," that Laviero agreed that it was dangerous and that he had no intention of repairing it because he planned to sell it. In my view, a jury reasonably could conclude on the basis of this evidence that Laviero knew that there was a substantial certainty that anyone who operated the excavator would be injured. Indeed, if this evidence does not establish a genuine issue of material fact with respect to the proof required to satisfy the substantial certainty exception, I cannot imagine how that exception could ever be established.

I recognize that, in addition to this evidence, the defendants have presented evidence that Laviero himself operated the rigged excavator both before and after the plaintiff was injured. As I understand the majority opinion, the majority relies heavily on this evidence to support its conclusion that "no genuine issue of material fact exists" regarding whether "the defendants subjectively believed that, because of their actions, the plaintiff's injuries were substantially certain to occur as a result of [the dangerous condition created by the rigged

[1] The majority states that warnings "do not, without more, raise a genuine issue of material fact to defeat summary judgment with respect to whether an employer subjectively believes that its employee's injuries are substantially certain to result from its action." Thus, according to the majority, even if an employer was advised by an experienced safety officer that it was substantially certain that requiring employees to engage in certain conduct would result in serious injury to the employees, that would be insufficient to submit the case to the jury. I cannot agree. Although I would agree that warnings alone may not *always* be sufficient, there clearly are cases in which they are. In my view, Quick's warning to Laviero that "I am going to get hurt or I am going to hurt someone" is sufficient to allow the jury to draw a reasonable inference that Laviero knew that injury was substantially certain to occur.

excavator].'' See footnote 12 of the majority opinion; see also Justice Palmer's concurring opinion. Although I agree with the majority that a juror reasonably could conclude from this evidence that Laviero did not subjectively believe that it was substantially certain that Lucenti would be injured if he operated the excavator, I do not agree that this evidence *compels* that conclusion. A jury could find that Laviero had used the excavator only briefly, that he was aware of, but indifferent to, the risk of injury and/or that there was some other explanation for his behavior that would be consistent with the knowledge that operating the rigged excavator was substantially certain to result in injury. Because I believe that there is a genuine issue of material fact as to the proof required to satisfy the substantial certainty exception, and I am concerned that the majority's decision may essentially preclude the availability of this exception, I respectfully dissent.

EVELEIGH, J., dissenting. I respectfully dissent. Unlike the majority, in my view, the plaintiff, Dominick Lucenti, has demonstrated the existence of a genuine issue of material fact with respect to whether the defendants, Greg Laviero and Martin Laviero Contractors, Inc. (Laviero Contractors), subjectively believed that the altered excavator made the plaintiff's injuries substantially certain to occur. Accordingly, I would reverse the judgment of the Appellate Court.

I agree with the facts and procedural history set forth in the majority opinion. ''The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment,

the trial court must view the evidence in the light most favorable to the nonmoving party. . . . 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. . . . Our review of the trial court's decision to grant [a] defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Cefaratti* v. *Aranow*, 321 Conn. 637, 645, 138 A.3d 837 (2016).

We consistently have interpreted General Statutes § 31-284 (a), the exclusivity provision of the Workers' Compensation Act (act), General Statutes § 31-275 et seq., "as a total bar to common law actions brought by employees against employers for job related injuries with one narrow exception that exists when the employer has committed an intentional tort or where the employer has engaged in wilful or serious misconduct." *Suarez* v. *Dickmont Plastics Corp.*, 229 Conn. 99, 106, 639 A.2d 507 (1994) (*Suarez I*); see also *Jett* v. *Dunlap*, 179 Conn. 215, 217, 425 A.2d 1263 (1979).

This court revisited the substantial certainty standard in *Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 279–80, 698 A.2d 838 (1997) (*Suarez II*). In that case, this court explained as follows: "In defining intent, we have stated that intent refers to the consequences of an act . . . [and] denote[s] that the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to follow from it. . . . A result is intended if the act is done for the purpose of accomplishing such a result or with knowledge that to a substantial certainty such a result will ensue. . . . An intended or wilful injury does not

necessarily involve the ill will or malevolence shown in express malice, but it is insufficient to constitute such an [intended] injury that the act . . . was the voluntary action of the person involved. . . . Therefore, to escape the exclusivity of the act, the victim of an intentional injury must rely on the intended tort theory or the substantial certainty theory. Under the former, the actor must have intended both the act itself and the injurious consequences of the act. Under the latter, the actor must have intended the act and have known that the injury was substantially certain to occur from the act." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id. "Under either theory of employer liability, however, the characteristic element [of wilful misconduct] is the design to injure either actually entertained or to be implied from the conduct and circumstances. . . . Not only the action producing the injury but the resulting injury also must be intentional." (Internal quotation marks omitted.) *Morocco* v. *Rex Lumber Co.*, 72 Conn. App. 516, 523, 805 A.2d 168 (2002). "This intent is distinguishable from reckless behavior. . . . . High foreseeability or strong probability are insufficient to establish this intent. . . . Although such intent may be proven circumstantially, what must be established is that the employer knew that the injury was substantially certain to follow the employer's deliberate course of action. . . . To hold otherwise would undermine the statutory scheme and purpose of the workers' compensation law and usurp legislative prerogative." (Citations omitted.) *Martinez* v. *Southington Metal Fabricating Co.*, 101 Conn. App. 796, 801, 924 A.2d 150, cert. denied, 284 Conn. 930, 934 A.2d 246 (2007); see also *Sullivan* v. *Lake Compounce Theme Park, Inc.*, 277 Conn. 113, 118, 889 A.2d 810 (2006) ("To satisfy the substantial certainty standard, a plaintiff must show more than that [a] defendant exhibited a lackadaisical or even cavalier attitude

toward worker safety . . . . Rather, a plaintiff must demonstrate that his employer *believed* that its conduct was substantially certain to cause the employee harm." [Emphasis in original; citation omitted; internal quotation marks omitted.]).

This view is consistent with cases from other jurisdictions that also require that the intent of the employer must be decided on the basis of the totality of the circumstances presented. "Cases involving workplace intentional torts must be judged on the totality of the circumstances surrounding each incident. . . . Mere knowledge and appreciation of a risk do not establish intent on the part of the employer. . . . Proof that the employer knew to a substantial certainty that harm to the employee would result often must be demonstrated through circumstantial evidence and inferences drawn from the evidence. . . . Proof of the employer's intent . . . is by necessity a matter of circumstantial evidence and inferences drawn from alleged facts appearing in the depositions, affidavits and exhibits. . . . An employer may be liable for the consequences of its acts even though it never intended a specific result. . . . If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." (Citations omitted; internal quotation marks omitted.) *Estep* v. *Rieter Auto North America, Inc.*, 148 Ohio App. 3d 546, 551, 774 N.E.2d 323 (2002). As the Supreme Court of Florida has explained, "under the [substantial certainty] method of satisfying the [intentional tort] exception, the employer's actual intent is not controlling. . . . Rather, this method requires a court to look to the totality of the circumstances . . . ." (Citation omitted; internal quotation marks omitted.) *Travelers Indemnity Co.* v. *PCR Inc.*, 889 So. 2d 779, 783–84 (Fla. 2004).

In examining the totality of the circumstances, courts in other jurisdictions have often looked to warnings received by the employer about the dangerous condition prior to the accident in question. See, e.g., *Pendergrass* v. *R.D. Michaels, Inc.*, 936 So. 2d 684, 690 (Fla. App.) ("[o]ther cases finding a substantial certainty of injury or death from the employer's intentional conduct concentrate either on knowledge of prior incidents or an employer's concealment of knowledge of the dangers"), cert. denied, 969 So. 2d 1014 (Fla. 2007); *Mull* v. *Zeta Consumer Products*, 176 N.J. 385, 392–93, 823 A.2d 782 (2003) (employer's conduct in disengaging critical safety devices on piece of industrial machinery precluded summary judgment in favor of employer); *Woodson* v. *Rowland*, 407 S.E.2d 223, 231 (N.C. 1991) ("[The employer] had been cited at least four times in six and one-half years immediately preceding this incident for violating multiple safety regulations governing trenching procedures. He was aware of safety regulations designed to protect trench diggers from serious injury or death. He knew he was not following these regulations in digging the trench in question."); *Howard* v. *Columbus Products Co.*, 82 Ohio App. 3d 129, 135, 611 N.E. 2d 480 (1992) ("[w]here an employer is expressly warned that a device is unsuitable for its intended use in a process or system which is already known to be dangerous, and the employer installs the device despite this knowledge, the employer may be treated as if it desired the harm which results from its conduct"); see also *Recalde* v. *Emhart Industries, Inc.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-96-0053222-S (February 4, 1999) (24 Conn. L. Rptr. 126, 133) ("courts often look to warnings received by the employer concerning a dangerous condition or machine prior to the accident in question from other workers or individuals").

In the present case, in opposition to the motion for summary judgment, the plaintiff presented two affida-

vits and excerpts from his deposition. The affidavits were from himself and Daniel Quick, a former Laviero Contractors employee. In his affidavit, Quick averred that in September, 2011, he was using the excavator at issue and it malfunctioned. Quick further averred that Laviero instructed a mechanic to "rig the machine so that it could only be operated at full [throttle]." Quick averred that he spoke to Laviero about the excavator and told him that the excavator was "too dangerous to operate" and, "as rigged, either I am going to get hurt or I am going to hurt someone."

In his affidavit, the plaintiff averred that he had notified Laviero that the excavator operated only at full throttle and that this was dangerous. The plaintiff further averred that Laviero concurred with the plaintiff's opinion on the excavator, but stated that he was unwilling to "put any money into" the excavator because he was going to sell it. The plaintiff also averred that he spoke to a mechanic, Michael Lauder, after the accident and that Lauder told him that he had notified Laviero Contractors that the excavator needed to be repaired.[1] The plaintiff averred that Lauder told him that instead of fixing the excavator, Laviero Contractors instructed him to "rig the machine so the throttle would run at full speed at all times." The plaintiff also averred that Lauder had told him that, after the plaintiff was injured, Laviero Contractors "instructed [Lauder] to fix [the excavator] properly." Considering this evidence in the light most favorable to the plaintiff, I am persuaded that a genuine issue of material fact exists as to whether

[1] Although I recognize this constitutes hearsay, I consider it for the limited purpose of showing that the plaintiff could produce such competent evidence at trial in the form of testimony from Lauder. See *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 423 n.20, 944 A.2d 925 (2008) ("We recognize that many of the documents relied upon by both sides [on a motion for summary judgment] constitute hearsay. We, however, may consider these documents only for the limited purposes of showing that the parties could produce such competent evidence at trial in the form of testimony . . . ." [Emphasis omitted.]); see also footnote 11 of the majority opinion.

the defendants believed that the conduct at issue was substantially certain to cause an employee harm.

Specifically, the plaintiff produced evidence that Laviero was expressly told prior to the accident in which the plaintiff was injured that his continued conduct—i.e. ordering employees to use the "rigged" excavator—was certain to cause injury. It is important to note that the exception at issue only requires that a defendant be substantially certain that the consequences of his actions will occur, not that they occur 100 percent of the time. See *Suarez I*, supra, 229 Conn. 111. In my view, the fact that Laviero received warnings that running the excavator was both dangerous and certain to result in injuries and, nevertheless, ordered the plaintiff to operate the excavator is sufficient to overcome a motion for summary judgment.

Laviero averred that he did not intend to hurt anyone and operated the machine himself.[2] These facts allowed

[2] The concurring justice writes separately "only to underscore the importance of the fact that . . . Laviero regularly operated the excavator that caused the injuries to the plaintiff . . . ." I disagree with the concurring justice's reliance on evidence of Laviero's use of the excavator in the present case. Laviero testified at his deposition, and averred in his affidavit, that he used the excavator "regularly" and that used it approximately one week prior to the plaintiff's accident. Laviero's testimony does not demonstrate whether he used it "regularly" during the period that it was rigged and after he had received warnings regarding the excavator's safety. It also does not indicate the nature and extent of his use of the excavator. The mere fact that Laviero used the rigged excavator in some capacity and at some point in time—quite possibly before it was rigged—does not make it "virtually impossible to fathom that Laviero would have operated the excavator on a regular basis if he was substantially certain that he would have been seriously injured from such operation." In the present case, the plaintiff's injury resulted from an alteration that was made to the excavator at some point during the defendants ownership of the excavator. Therefore, Laviero testimony that he used it "regularly" does not indicate whether the defendants were substantially certain that an injury would result from operating the machine once it was rigged. We do not know how frequently Laviero used the rigged excavator, the extent to which he used the rigged excavator on the worksite, or whether he used it to perform tasks similar to the tasks the plaintiff was required to perform with it. Indeed, on the basis of the evidence presented by the defendants, Laviero may have merely used the

the defendants to meet their initial burden of demonstrating that there was no genuine issue of material with respect to whether the defendants had a subjective belief that an injury was substantially certain to occur. Nevertheless, the burden then shifted to the plaintiff to demonstrate an evidentiary foundation of a factual predicate, based on the totality of the circumstances, supporting an inference that there was such a belief. I would conclude that the plaintiff met that burden. The plaintiff's affidavit states that he had told Laviero that operating the excavator while rigged was dangerous and that "Laviero agreed . . . it was dangerous and told me 'I'm not going to put any money into it because I am selling it.' " On the basis of this statement, which was not refuted by Laviero, a jury could infer that Laviero considered operating the excavator as "rigged" was unsafe. The question of whether such an inference would overcome the strong inference that Laviero's natural instinct to protect his own safety would have stopped him from using the "rigged" excavator if he thought it was unsafe is not properly decided on a motion for summary judgment. A review of the record at summary judgment demonstrates that there is an evidentiary factual predicate for a reasonable inference to the contrary. Choosing which of these competing inferences to draw is the province of the jury.[3] "A spe-

rigged excavator only briefly to move it from one location to another. Without more, such evidence has little, if any, bearing on whether Laviero thought injury was substantially certain to occur when the rigged excavator was used in the manner in which he required the plaintiff to use it. Cf. *Fryer* v. *Kranz*, 616 N.W.2d 102, 103–104 (S.D. 2000) (concluding that employer who had used undiluted muriatic acid alongside her employees did not have requisite belief regarding substantial certainty of injury to employees resulting from improper use of acid).

[3] Although the majority acknowledges that the fact that Laviero received warnings, "may be used to discredit an employer's statement that he did not believe that any injury was substantially certain to occur as a result of his action. This is relevant circumstantial evidence on the issue of the employer's subjective intent." See footnote 10 of the majority opinion. Nevertheless, it concludes that "the uncontroverted evidence that Laviero himself continued to use the excavator compels the conclusion that no genuine

cific intent to produce injury is not the only permissible inference to be drawn from [the] defendant's [conduct], but it is one that a jury should be permitted to consider. It is for the finder of fact, not the court on summary judgment, to determine what inferences to draw." (Internal quotation marks omitted.) *Suarez I*, supra, 229 Conn. 111. Indeed, at trial, the factual record could be developed to demonstrate that Laviero, as the owner of the company, was willing to assume considerable risk by using the excavator in order to reap the financial benefits for his company. See *Santos* v. *Ashforth Co.*, Superior Court, judicial district of Stamford-Norwalk, Complex Litigation Docket, Docket No. X08-CV-020192764-S (June 24, 2008) (45 Conn. L. Rptr. 833, 834–35) (finding genuine issue of material fact existed even where evidence at summary judgment demonstrated that supervisor, acting as alter ego of employer, went on roof and worked with plaintiffs in allegedly

issue of material fact exists on this point." See footnote 12 of the majority opinion. I disagree. First, despite acknowledging that the substantial certainty standard is based on examining "the totality of the circumstances," the majority concludes that one factor—namely Laviero's own use of the excavator—is dispositive and, as a matter of law, demonstrates that he did not know that an injury was substantially certain to occur. Second, the majority's repeated acknowledgment that the evidence of employer warnings in the present case is relevant evidence, but does not raise a genuine issue of material fact, places too high a burden on a party seeking to oppose a motion for summary judgment. As this court has explained: "The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case." (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 310, 94 A.3d 553 (2014). In the present case, the plaintiff has provided an evidentiary foundation to demonstrate that Laviero received warnings about the safety of the excavator, that he acknowledged that there were safety concerns, but chose not to act on them. I would conclude, therefore, that the plaintiff has provided an evidentiary foundation of a fact that will make a difference in determining whether the defendants subjectively believed that an injury was substantially certain to occur.

unsafe working environment where plaintiffs were ultimately injured).[4]

[4] The majority asserts that "insofar as the plaintiff himself testified at his deposition that, although multiple methods exist for the removal of a catch basin, the plaintiff chose to operate the rigged excavator without further protest, despite his belief that it was dangerous. . . . In the absence of any evidence of deception, coercion or duress, and without other evidence of intent to injure on the part of the defendants, we decline to impute the requisite subjective intent to the defendants." (Footnotes omitted.) I disagree. The mere fact that Laviero used the rigged excavator "before and after" the plaintiff's injury is not sufficient to establish that there is no genuine issue of material fact regarding whether the defendants were substantially certain that an injury would result from operating the machine as rigged. As stated previously in this dissenting opinion, the record does not reveal how frequently Laviero used the rigged excavator, the extent to which he used the rigged excavator on the worksite, or whether he used it to perform tasks similar to the tasks which the plaintiff was required to perform with it. See footnote 2 of this dissenting opinion.

Furthermore, the majority reasons that "[w]e note that the plaintiff testified at his deposition that he owned an excavator, and that he knew the defendants owned three excavators at the time of the accident. There is no evidence that the defendants refused him permission to use another excavator instead of the rigged one. There also is no evidence with respect to whether it was feasible to bring one of those other excavators to the job site." See footnote 13 of the majority opinion. I disagree with the majority's reliance on this evidence. First, there is no requirement that a plaintiff must establish either coercion or duress in order to establish a claim under the substantial certainty standard. To the contrary, as I have explained previously in this dissenting opinion, a claim under the substantially certain exception requires a plaintiff to establish only that the employer knew that the injury was substantially certain to follow the employer's deliberate course of action. Nothing in the standard requires that the employee must be coerced or under duress when following the employer's directions. Indeed, to impute such a standard into our case law would essentially require an employee to refuse to perform his job unless threatened in order to recover under this exception. Nothing in our case law imposes such a requirement and I would refuse to do so in the present case. Furthermore, the evidence contained within the record demonstrates that, although the defendants may have owned other excavators and that there may have been other methods of removing a catch basin, the plaintiff was instructed to operate this particular excavator in the manner he did on the date of the accident. Indeed, the plaintiff testified as follows at his deposition:

"Q. [O]n the day of the accident, prior to attempting to remove the catch basin, was the excavator running at full throttle?

"A. Yes.

"Q. And did you believe it was dangerous?

"A. Yeah.

"Q. So why did you operate it?

Taking the evidence in the light most favorable to the plaintiff, as is required for summary judgment, there is at least a genuine issue of material fact as to whether, in light of the totality of the circumstances presented, a jury could reasonably infer that the defendants had a subjective belief that the conduct at issue was substantially certain to result in injury to an employee. Specifically, viewing the affidavits and deposition testimony submitted by the plaintiff in opposition to the motion for summary judgment, I believe that there is a genuine issue of material fact regarding whether, in light of

"A. I was told to.

"Q. All right. Even though it was dangerous?

"A. I was told to operate it. I worked for the guy. I operated it."

The plaintiff further explained as follows:

"Q. And so even though you knew it was dangerous to operate the machine, you chose to operate it on the day of the accident, is that right?

"A. I was told to operate the machine on the day of the accident. I was told it was all right to run it. And I ran it. . . .

"Q. Even though you knew it was dangerous to run that machine, is that right?

"A. I was told to run the machine the day of the accident. I ran the machine the day of the accident.

"Q. The time you ran the machine on the day of the accident, did you believe it was dangerous to do so?

"A. It ran through my head, yes.

"Q. And so even though you thought it might be dangerous to run the machine, you chose to do so?

"A. I needed my job.

"Q. Didn't you have your own business at the time?

"A. Yes, actually, no.

"Q. You didn't?

"A. No, I don't think I did. I don't think I was working then, myself."

On the basis of the foregoing, I would decline to adopt the majority's requirement that the plaintiff establish the existence of duress or coercion in order to satisfy the substantial certainty standard.

Indeed, the majority's approach to substantial certainty cases so severely limits this exception as to make it virtually nonexistent. Furthermore, if employers are able to establish that an employer's use of a dangerous machine or practice—regardless of duration—establishes, as a matter of law, that the employer did not know that an injury was substantially certain to occur, the majority would allow an employer to use a machine for a matter of minutes in order to insulate himself from claims of injury by an employee who is required to use the machine all day, every day of his or her employment.

repeated warnings, the defendants knew that ordering employees to operate an excavator rigged in a manner forcing operation at full throttle presented a dangerous condition that was substantially certain to cause injury. That issue should have properly been submitted to the jury. See *United Oil Co.* v. *Urban Redevelopment Commission*, 158 Conn. 364, 376, 260 A.2d 596 (1969). Accordingly, I would conclude that the Appellate Court incorrectly affirmed the trial court's granting of summary judgment in favor of the defendants.[5]

Accordingly, I respectfully dissent.

[5] I note that the defendants attempt to challenge the legal sufficiency of the allegations in the complaint for the first time on appeal. Because this issue was not raised before the trial court and is not part of the question certified, I decline to address it.

ORDERS

CONNECTICUT REPORTS

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ROBERT TEIXEIRA *v.* HOME DEPOT, INC.

The plaintiff's petition for certification to appeal from the Appellate Court, 173 Conn. App. 594 (AC 38382), is dismissed.

MULLINS, J., did not participate in the consideration of or decision on this petition.

Robert Teixeira, self-represented, in support of the petition.

Decided January 18, 2018

STATE OF CONNECTICUT *v.* PAUL DAVIS

The defendant's petition for certification to appeal from the Appellate Court, 178 Conn. App. 324 (AC 37582), is denied.

MULLINS, J., did not participate in the consideration of or decision on this petition.

Mary A. Beattie, assigned counsel, in support of the petition.

Rocco A. Chiarenza, assistant state's attorney, in opposition.

Decided January 18, 2018

STATE OF CONNECTICUT *v.*
TYRIECE S. FULLER

The defendant's petition for certification to appeal from the Appellate Court, 178 Conn. App. 575 (AC 38166), is denied.

Lisa J. Steele, assigned counsel, in support of the petition.

Melissa L. Streeto, senior assistant state's attorney, in opposition.

Decided January 18, 2018

STATE OF CONNECTICUT *v.* SIDNEY WADE

The defendant's petition for certification to appeal from the Appellate Court, 178 Conn. App. 459 (AC 38719), is denied.

John C. Drapp III, assigned counsel, in support of the petition.

Jennifer F. Miller, deputy assistant state's attorney, in opposition.

Decided January 18, 2018

STATE OF CONNECTICUT *v.* DARYL PETITT

The defendant's petition for certification to appeal from the Appellate Court, 178 Conn. App. 443 (AC 38993), is denied.

Daniel J. Foster, assigned counsel, in support of the petition.

James M. Ralls, assistant state's attorney, in opposition.

Decided January 18, 2018

ANGELA PICARD *v.* THE GUILFORD HOUSE, LLC, ET AL.

The petition by the plaintiff in error Linda Lehmann for certification to appeal from the Appellate Court, 178 Conn. App. 134 (AC 39856), is denied.

Norman A. Pattis, in support of the petition.

David J. Robertson and *Christopher H. Blau*, in opposition.

Decided January 18, 2018

STATE OF CONNECTICUT *v.* JOSE E. RAMOS

The defendant's petition for certification to appeal from the Appellate Court, 178 Conn. App. 400 (AC 40390), is denied.

Jeremiah Donovan, assigned counsel, in support of the petition.

Decided January 18, 2018

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CONNECTICUT REPORTS

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

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ANTHONY MARTINEZ ET AL. *v.* CITY OF NEW HAVEN ET AL.
(SC 19850)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Robinson, D'Auria and Espinosa, Js.*

Syllabus

The plaintiffs sought to recover damages from, among others, the defendant city and the defendant board of education for negligent supervision in connection with injuries sustained by the named plaintiff, M, when he was accidentally cut in the face during an incident in which other students were running with safety scissors in an auditorium prior to the start of school. M had been injured when he attempted to pick up the scissors after they had fallen to the ground. The plaintiffs claimed, pursuant to the statute (§ 52-557n) permitting certain negligence actions against municipalities, that the defendants were negligent in failing to properly supervise the students in the auditorium, to inspect the premises for dangerous objects, and to remove the dangerous object that caused M's injuries. After the defendants filed an answer denying the allegations of negligence, they filed a motion for leave to amend their answer to include, inter alia, the special defense of governmental immunity, but the trial court never explicitly ruled on that motion. The case was tried to the court, which concluded that M had proven the imminent harm to identifiable persons exception to governmental immunity. From the judgment rendered in part for the plaintiffs, the defendants appealed and the plaintiffs cross appealed. *Held*:

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

1. The trial court incorrectly determined that M satisfied the imminent harm to identifiable persons exception to governmental immunity, M having failed to prove the imminent harm prong of that exception because he failed to establish that it was apparent to the defendants that the claimed dangerous condition, namely, students running with safety scissors, was so likely to cause harm that a clear and unequivocal duty to act immediately was created; there was no evidence that possessing safety scissors in the auditorium violated any school policy, there was no prohibition on students having safety scissors at the school, the teacher who was supervising the students in the auditorium at the time of the incident had never experienced any behavioral problems with any of the students involved and did not see the students running or the safety scissors, there had been no previous incidents of a similar nature that would have alerted the defendants that additional safety procedures were needed in the auditorium, and, thus, the defendants had no reasonable way to anticipate that a student would be cut in the course of attempting to pick up safety scissors.

(*One justice dissenting*)

2. The plaintiffs could not prevail on their claim, raised as an alternative ground for affirming the judgment, that the defendants had failed to plead governmental immunity as a special defense in the operative answer: although the trial court never expressly ruled on the defendants' request for leave to amend their answer to include governmental immunity as a special defense, or the plaintiffs' objection to that request, a thorough review of the record demonstrated that the trial court implicitly granted the defendants' request to amend their answer and overruled the plaintiffs' objection, as the trial court's memorandum of decision treated the special defense of governmental immunity as the primary issue to be resolved in the case, nearly the entire decision was devoted to addressing governmental immunity and the imminent harm to identifiable persons exception, and nowhere in that decision did the court treat the matter as a simple negligence case; moreover, because the plaintiffs did not argue that the trial court abused its discretion in implicitly granting the defendants' request to amend their answer, this court would not disturb the trial court's decision to allow the defendants to assert the special defense of governmental immunity.

Argued September 21, 2017—officially released January 30, 2018

Procedural History

Action to recover damages for personal injuries sustained by the named plaintiff as a result of the defendants' negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Agati*, *J.*; verdict and judgment

in part for the plaintiffs, from which the named defendant et al. appealed and the plaintiffs cross appealed. *Reversed in part*; *judgment directed.*

Audrey C. Kramer, assistant corporation counsel, for the appellants-cross appellees (named defendant et al.).

Terrence M. Wynne, for the appellees-cross appellants (plaintiffs).

Opinion

ROBINSON, J. The principal issue in this appeal is whether the trial court properly determined that the named plaintiff, Anthony Martinez,[1] proved the imminent harm to identifiable persons exception to the defense of governmental immunity with respect to facial injuries that he sustained when other students engaged in horseplay by running with a pair of safety scissors in the auditorium of his school. The plaintiff commenced this action against the defendants, the city of New Haven (city), the Board of Education of the City of New Haven (board), and Garth Harries, the Superintendent of New Haven Public Schools,[2] seeking damages for, inter alia, their negligent supervision of

[1] We note that the present action was commenced on behalf of Anthony Martinez by and through his mother, Luz Mercado, as next friend and parent, who was also listed as a plaintiff in her individual capacity. We further note that, during the pendency of the present appeal, the trial court granted a motion substituting Anthony Martinez' father, Jorge Martinez, as next friend. For the sake of simplicity, we hereinafter refer to Anthony Martinez as the plaintiff.

[2] We note that, because the trial court rendered judgment in favor of Harries, he did not join the city and the board in filing the present appeal. See footnote 5 of this opinion. For the sake of simplicity, we hereinafter refer to the city and the board, collectively, as the defendants.

students pursuant to General Statutes § 52-557n (a).[3] On appeal,[4] the defendants claim, inter alia, that the trial court improperly held that the plaintiff satisfied the imminent harm to identifiable persons exception to governmental immunity, which this court recently clarified in *Haynes* v. *Middletown*, 314 Conn. 303, 101 A.3d 249 (2014). The plaintiff disagrees, and also claims, as an alternative ground for affirming the judgment of the trial court, that the defendants failed to plead governmental immunity as a special defense in the operative answer. We conclude that the plaintiff has failed to prove that the defendants' conduct had subjected an identifiable person to imminent harm. We also conclude that the trial court implicitly granted the defendants' request to amend their answer to plead governmental immunity as a special defense. Accordingly, we reverse in part the judgment of the trial court.

The record reveals the following facts, as found by the trial court, and procedural history relevant to our resolution of this appeal. On March 19, 2013, the plaintiff, who was eleven years old, attended the Engineering Science University Magnet School (school) in New Haven. Upon his arrival at the school that day, the

[3] General Statutes § 52-557n (a) provides in relevant part: "(1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties; (B) negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit . . . . (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. . . ."

[4] 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 § 65-1.

plaintiff went to the auditorium to eat breakfast and wait for classes to start. At that time, a teacher, David Scott Stewart, was present in the auditorium because the principal had assigned him to supervise student behavior. There were between seventy and seventy-five students in the auditorium that morning. While there, the plaintiff observed two female students running around the auditorium chasing after one of the plaintiff's friends. Stewart did not see the students running because he was talking to other students at the time. One of the female students had safety scissors in her hand as she ran. As that female student approached the plaintiff, the scissors fell to the ground. The plaintiff and the other female student bent down to retrieve the scissors and, as that female student lifted the open scissors from the ground, she accidentally cut the plaintiff on the left side of his face.

The plaintiff's laceration began to bleed, so he went to the bathroom with his friend to tend to the injury. Other students advised another teacher, Karissa Stolzman, of the incident. Stolzman went to the bathroom and gave the plaintiff paper towels to care for the cut and then took him to the main office. Stolzman then reported the incident to the principal and filed an incident report. The school informed the plaintiff's parents of the incident and called an ambulance to transport him to a hospital emergency room for treatment.

The plaintiff subsequently commenced this action against the defendants, seeking monetary damages for his injuries. In the operative complaint, the plaintiff alleged that the defendants had failed to supervise the students in the auditorium properly. The plaintiff further alleged that the defendants failed to inspect the premises properly to ascertain the presence of dangerous objects, and, as such, they failed to remove the dangerous object that caused his injuries. The plaintiff also alleged that the defendants and their agents, ser-

vants or employees were negligent, and that the action was being brought pursuant to § 52-557n. The defendants filed their first answer on July 29, 2015, which denied the plaintiff's allegations of negligence. On September 11, 2015, the defendants filed a request for leave to amend their answer to include, inter alia, the special defense of governmental immunity. The trial court never explicitly ruled on that motion for leave to amend the answer.

The matter was tried to the court, which found in favor of the plaintiff on counts one and two of the complaint. Specifically, the trial court concluded that the plaintiff satisfied the imminent harm to identifiable persons exception to governmental immunity under the standard articulated in *Haynes* v. *Middletown*, supra, 314 Conn. 303. The trial court rendered judgment on counts one and two of the complaint awarding the plaintiff past economic damages of $2814.19, future economic damages of $3000, and noneconomic damages of $35,000. The trial court rendered judgment against the plaintiff on the remaining three counts of the complaint. See footnote 5 of this opinion. This appeal followed. See footnote 6 of this opinion.

On appeal, the defendants claim, inter alia, that the trial court improperly concluded that the plaintiff was an identifiable person subject to imminent harm. The plaintiff disagrees and also posits, as an alternative ground for affirmance, that the defendants failed to plead the special defense of governmental immunity in the operative answer.[5] We address these issues in turn.

[5] The plaintiff also filed a cross appeal, claiming that the trial court improperly (1) awarded him only $35,000 in noneconomic damages, which was inadequate to compensate him for his permanent scarring and pain and suffering, and (2) rendered judgment in favor of the defendants on counts three, four, and five of the complaint, which he contends asserted an official capacity claim against Harries and derivative claims against the city and the board pursuant to General Statutes §§ 7-465 (a) and 10-235 (a). Because we conclude that the plaintiff has failed to satisfy the imminent harm to identifiable persons exception to governmental immunity, we need not

I

We first address the question of whether the trial court properly determined that the plaintiff met his burden of proving the imminent harm to identifiable persons exception to governmental immunity. Specifically, the defendants contend that, because the trial court did not identify how the harm was imminent, the plaintiff could not be found to be an identifiable person. Additionally, the defendants argue that the trial court did not identify the dangerous condition or explain how that dangerous condition was apparent to Stewart. Finally, the defendants contend that the trial court's reliance on whether the harm was foreseeable is improper because this court rejected that standard in *Haynes* v. *Middletown*, supra, 314 Conn. 303.[6]

In response, the plaintiff contends that the trial court properly concluded that he was a member of an identifiable class of victims as a student at school during school hours. Moreover, the plaintiff further contends that the dangerous condition was students running with scissors and that it was, or should have been, apparent to Stewart that the plaintiff was in danger of imminent harm. To this end, the plaintiff argues that *Haynes* did not reject the foreseeability standard; rather, it rejected the notion that foreseeability was limited only to temporal and geographical considerations.

address these claims. See *Grady* v. *Somers*, 294 Conn. 324, 338, 984 A.2d 684 (2009) ("[a] tort claimant seeking to establish the liability of a municipal employee or official arising out of the negligent performance of a discretionary act necessary for indemnification by the municipality under § 7-465 [a] must . . . overcome the qualified immunity afforded to those employees or officials").

[6] We note that the defendants also claim that the trial court's finding of fact that the students were still running when the plaintiff's injury occurred was clearly erroneous. Because we ultimately conclude that the plaintiff failed to satisfy the imminent harm to identifiable persons exception to governmental immunity, even under the facts as the trial court found them, we need not address this claim.

Our analysis begins with a review of the law concerning governmental immunity, including the imminent harm to identifiable persons exception. "[Section] 52-557n abandons the common-law principle of municipal sovereign immunity and establishes the circumstances in which a municipality may be liable for damages. . . . One such circumstance is a negligent act or omission of a municipal officer acting within the scope of his or her employment or official duties. . . . [Section] 52-557n (a) (2) (B), however, explicitly shields a municipality from liability for damages to person or property caused by the 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." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Edgerton* v. *Clinton*, 311 Conn. 217, 229, 86 A.3d 437 (2014).

"This court has recognized an exception to discretionary act immunity that allows for liability when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . . This identifiable person-imminent harm exception has three requirements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm. . . . All three must be proven in order for the exception to apply." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 230–31. "[T]he ultimate determination of whether [governmental] immunity applies is ordinarily a question of law for the court . . . [unless] there are unresolved factual issues . . . properly left to the jury." (Internal quotation marks omitted.) *Strycharz* v. *Cady*, 323 Conn. 548, 574, 148 A.3d 1011 (2016).

We note at the outset that this court has held that public schoolchildren are "an identifiable class of bene-

ficiaries" of a school system's duty of care for purposes of the imminent harm to identifiable persons exception. *Burns* v. *Board of Education*, 228 Conn. 640, 649, 638 A.2d 1 (1994), overruled on other grounds by *Haynes* v. *Middletown*, supra, 314 Conn. 303. Indeed, "[t]he only identifiable class of foreseeable victims that we have recognized . . . is that of schoolchildren attending public schools during school hours . . . ." (Internal quotation marks omitted.) *Grady* v. *Somers*, 294 Conn. 324, 352, 984 A.2d 684 (2009). Thus, given that the plaintiff was a public school student at school during school hours, he was an identifiable person for purposes of the imminent harm to identifiable persons exception.[7] Accordingly, our focus in this appeal is on whether the trial court properly concluded that the defendants' acts or omissions subjected the plaintiff to imminent harm.

Recently, in *Haynes* v. *Middletown*, supra, 314 Conn. 322–23, we clarified the imminent harm prong of the exception, holding that "the proper standard for determining whether a harm was imminent is whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm."[8] Applying that stan-

[7] We note that, to the extent that the defendants argue that the plaintiff was not, in fact, a member of an identifiable class of foreseeable victims, we need not reach this claim given our ultimate conclusion that the plaintiff has failed to establish that the defendants' acts or omissions subjected him to imminent harm.

[8] In clarifying the imminent harm standard, we concluded in *Haynes* that *Burns* v. *Board of Education*, supra, 228 Conn. 640, "incorrectly held that a foreseeable harm may be deemed imminent if the condition that created the risk of harm was only temporary and the risk was significant and foreseeable. Our statement in *Evon* v. *Andrews*, [211 Conn. 501, 508, 559 A.2d 1131 (1989)], that a harm is not imminent if it 'could have occurred at any future time or not at all' was not focused on the *duration* of the alleged dangerous condition, but on the *magnitude of the risk* that the condition created." (Emphasis in original.) *Haynes* v. *Middletown*, supra, 314 Conn. 322; see id., 323 ("[w]e therefore overrule *Burns* and [*Purzycki* v. *Fairfield*, 244 Conn. 101, 708 A.2d 937 (1998)] to the extent that they adopted a different standard").

dard to the facts in *Haynes*, we held that, because a jury reasonably could infer that school officials knew both that a locker had been broken for seven months and that horseplay was an ongoing problem in the locker room, a jury reasonably could have inferred "that the dangerous condition was apparent to school officials." Id., 325.

Our next occasion to apply the imminence standard clarified in *Haynes* was in *Strycharz* v. *Cady*, supra, 323 Conn. 548. In *Strycharz*, this court held that a high school student, who was struck by a vehicle at the intersection of the school's driveway, failed to satisfy the imminent harm prong of the exception. Id., 550–51, 588. This court explained that the plaintiff did not prove it was apparent to the municipal defendants that this type of harm was imminent because there was no evidence from which a jury could conclude that the school was aware that students were crossing the intersection in violation of school policy. Id. Moreover, the question of whether the defendants *could* have prevented the plaintiff from leaving school property, while relevant to whether the defendants had breached a ministerial duty, was "irrelevant to the issue of whether it was *apparent* to them that students were, in fact, leaving school property, which is what the plaintiff must demonstrate to establish . . . the identifiable person-imminent harm exception to governmental immunity." (Emphasis in original.) Id., 590. Significantly, this court explained that, even if the exact number of students who were crossing the street was known, "there [was] nothing in the record to indicate that the defendants would have seen them doing it." Id., 589. Thus, this court concluded that a reasonable juror could not find that the defendants would have been aware of the problem. Id., 589–90.[9]

[9] We note that the question of whether an imminent harm was apparent to a municipal defendant is an evolving area of the law. For example, we recently granted a petition for certification in *Northrup* v. *Witkowski*, 175

Turning to the record in the present case, we conclude that the plaintiff failed to satisfy the imminent harm prong of the exception because he failed to prove that it was apparent to the defendants that the claimed dangerous condition, namely, students running with safety scissors,[10] was so likely to cause harm that a clear and unequivocal duty to act immediately was created. First, there is no evidence that possessing safety scissors in the auditorium violated any school policy. On the contrary, Stolzman testified that there was no prohibition on students having these safety scissors at school. Additionally, Stewart testified that he had never experienced any behavioral problems with any of the students involved. There is also no evidence that any

Conn. App. 223, 167 A.3d 443, cert. granted, 327 Conn. 971, 173 A.3d 392 (2017). In that case, the Appellate Court held that the plaintiffs had failed to prove the imminent harm prong of the exception because the risk of flooding, due to the allegedly improper maintenance of a storm water drainage system, was not so great that there was a "clear and urgent need for action on the part of the [municipal] defendants." Id., 244–45. Similarly, in *Washburne* v. *Madison*, 175 Conn. App. 613, 630, 167 A.3d 1029 (2017), petition for cert. filed (Conn. September 5, 2017) (No. 170201), the Appellate Court concluded that the plaintiff "presented no evidence that . . . the defendants were aware that an injury similar to the one suffered by [the plaintiff, namely, a broken leg while playing soccer,] was so likely to happen that they should have acted to prevent it . . . ."

[10] We note that the parties disagree about what constituted the dangerous condition in this case. The plaintiff asserts that the dangerous condition was students running with scissors. The defendants, on the other hand, contend that the trial court did not "identify the dangerous condition that caused the plaintiff's harm . . . ." Specifically, the defendants seem to argue that the students had stopped running before the scissors fell, and, therefore, "the running and the scissors had no connection with the plaintiff's injury . . . ." For its part, the trial court's memorandum of decision provides little insight into what it considered the dangerous condition. It noted: "[One of the female students] had safety scissors in her hand as she chased after [the plaintiff's friend]. As they approached the area where [the plaintiff] was in the auditorium, the scissors fell to the ground. . . . In picking up the scissors, [the other female student] cut the plaintiff . . . ." Regardless of whether the dangerous condition was students running with safety scissors or simply the presence of the safety scissors, however, the plaintiff has not identified any facts in the record that would have made it apparent to the defendants that this type of harm was imminent in the present case.

similar incident had occurred in the past that would have alerted the defendants that additional safety procedures were needed in the auditorium. In fact, Stewart never previously had experienced problems caused by any dangerous student behavior in the auditorium, students running with scissors or otherwise. Moreover, Stewart saw neither the students running nor the safety scissors. Unlike the broken locker and student horseplay in the locker room in *Haynes*, which the school had been aware was a problem since the beginning of the school year; *Haynes* v. Middletown, supra, 314 Conn. 325; the defendants had not experienced any problems with student behavior in the auditorium. Thus, the defendants had no reasonable way to anticipate that a student would be cut in the course of attempting to pick up safety scissors in the auditorium at the same time as another student. Similar to the defendants in *Strycharz* v. *Cady*, supra, 323 Conn. 548, it was not apparent to the defendants that any harm was imminent.[11] Accordingly, we conclude that the trial court improperly determined that the plaintiff satisfied the imminent harm to identifiable persons exception to governmental immunity.

II

We now turn to the plaintiff's alternative ground for affirmance, namely, that the defendants failed to plead governmental immunity as a special defense in their operative answer and, as such, this is simply a negli-

[11] We emphasize that the plaintiff was not required to prove actual knowledge on the part of the defendants. "[T]he applicable test for the apparentness prong of the identifiable person-imminent harm exception is an objective one, pursuant to which we consider the information available to the [school official] at the time of [his or] her discretionary act or omission. . . . Under that standard, [w]e do not ask whether the [school official] actually knew that harm was imminent but, rather, whether the circumstances would have made it apparent to a reasonable [school official] that harm was imminent." (Citation omitted; internal quotation marks omitted.) *Strycharz* v. *Cady*, supra, 323 Conn. 589.

gence case. In response, the defendants contend that the plaintiff failed to raise this issue distinctly before the trial court, and, thus, the trial court was "under no obligation to decide the question." Practice Book § 5-2. Additionally, the defendants argue that the plaintiff did not adequately brief this issue on appeal because he failed to cite to any legal authority in support of his position. We conclude that the trial court implicitly granted the defendants' request for permission to amend their answer to plead governmental immunity as a defense, and that the plaintiff failed to show that the trial court abused its discretion by allowing that amendment to the pleadings.

The record reveals the following additional relevant facts and procedural history. In response to the plaintiff's complaint, the defendants filed their first answer on July 29, 2015. That answer denied the plaintiff's allegations of negligence but failed to raise any special defenses. Thereafter, on September 11, 2015, the defendants filed a request for leave to amend their answer to include certain special defenses. In the attached amended answer, the defendants asserted four special defenses, specifically, that (1) the plaintiff's claims were barred by the doctrine of governmental immunity pursuant to § 52-557n, (2) the plaintiff's claims for damages were barred by § 52-557n (b) (6),[12] (3) the plaintiff's complaint failed to state a claim upon which relief may be granted, and (4) the intervening and superseding acts and omissions of the other students caused the plaintiff's injuries. On September 25, 2015, the plaintiff filed an objection to that motion.

[12] General Statutes § 52-557n (b) provides in relevant part: "Notwithstanding the provisions of subsection (a) of this section, a political subdivision of the state or any employee, officer or agent acting within the scope of his employment or official duties shall not be liable for damages to person or property resulting from . . . (6) the act or omission of someone other than an employee, officer or agent of the political subdivision . . . ."

At the conclusion of the trial, the defendants reminded the court that "there was an amended answer to the plaintiff's complaint, [dated] September 11, 2015, which the plaintiff objected to, but it was never resolved. And there [is] the [defense] of governmental immunity in our amended answer." The plaintiff responded that the motion was never decided by the court, so the original July 29, 2015 answer was the operative pleading. At that time, the trial court did not resolve the issue, but instead responded, "[a]ll right," and then proceeded to explain that it was reserving decision on an unrelated motion to dismiss filed by the defendants. Subsequently, the trial court issued a memorandum of decision concluding that the plaintiff had satisfied the imminent harm to identifiable persons exception to governmental immunity. That memorandum of decision does not, however, expressly address the defendants' motion for permission to amend their answer to assert governmental immunity as a special defense, or the plaintiff's objection to that motion.

Although the trial court never expressly exercised its discretion in ruling on the defendants' request to amend their answer or the plaintiff's objection to that motion, based on a thorough review of the record and the memorandum of decision, we conclude that it implicitly granted the defendants' request to amend their answer and overruled the plaintiff's objection. See *Community Collaborative of Bridgeport, Inc.* v. *Ganim*, 241 Conn. 546, 560, 698 A.2d 245 (1997) (although trial court did not make explicit finding that plaintiff's board failed to ratify unilateral action of one of its members, that finding was implicit in trial court's dismissal of action for lack of standing); cf. *Gonzales* v. *Langdon*, 161 Conn. App. 497, 509, 128 A.3d 562 (2015) ("we should infer from the [trial] court's silence that it implicitly denied the plaintiff's request for leave to amend"); *Spencer* v. *Star Steel Structures, Inc.*, 96 Conn. App. 142, 155, 900

A.2d 42 ("[w]e may construe the [trial] court's decision to grant the application [for a prejudgment remedy] as an implicit finding that the defendants were not prejudiced by the short delay in their receipt of notice of the hearing on the application"), cert. denied, 280 Conn. 914, 908 A.2d 539 (2006). The trial court's memorandum of decision treats the special defense of governmental immunity as the primary issue to be resolved in the present case. Nearly the entire decision is devoted to addressing governmental immunity and the exception for imminent harm to an identifiable person. Nowhere in the memorandum of decision does the trial court treat the matter as "simply a negligence case," as the plaintiff now attempts to characterize it. Accordingly, we disagree with the plaintiff's claim that the defendants never pleaded the special defense of governmental immunity, because the record demonstrates that the trial court granted—albeit implicitly—the defendants' motion for permission to amend their answer. Moreover, because the plaintiff does not argue that the trial court abused its discretion by granting the defendants' motion for permission to amend their answer,[13] we do

[13] We note, however, that it appears from the face of the record that the trial court did not abuse its discretion by granting the defendants' motion for permission to amend their answer. Whether to allow a party to amend the pleadings under Practice Book § 10-60 (a) rests within the discretion of the trial court. See, e.g., *Motzer* v. *Haberli*, 300 Conn. 733, 747, 15 A.3d 1084 (2011); *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 184, 73 A.3d 742 (2013); see also *Briere* v. *Greater Hartford Orthopedic Group, P.C.*, 325 Conn. 198, 206 n.8, 157 A.3d 70 (2017) (stating that relation back inquiry presents question of law, but "once the trial court finds that a pleading relates back, its decision whether to allow an amendment is subject to an abuse of discretion standard of review"). "Factors to be considered in passing on a motion to amend are the length of the delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. . . . Whether to allow an amendment is a matter left to the sound discretion of the trial court. This court will not disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion." (Internal quotation marks omitted.) *Rizzuto* v. *Davidson Ladders, Inc.*, 280 Conn. 225, 255, 905 A.2d 1165 (2006). Considering these factors, we observe that the defendants filed their request for permission to amend their answer on September 11, 2015, almost two months prior to the start of trial. Addition-

not disturb the trial court's decision to allow the defendants to assert the special defense of governmental immunity.

The judgment is reversed as to counts one and two of the plaintiff's complaint and the case is remanded with direction to render judgment for the defendants on those counts; the judgment is affirmed in all other respects.

In this opinion ROGERS, C. J., and PALMER, McDONALD, D'AURIA and ESPINOSA, Js., concurred.

EVELEIGH, J., dissenting. I respectfully disagree with the majority opinion. In my view, the trial court properly applied the test from *Haynes* v. *Middletown*, 314 Conn. 303, 101 A.3d 249 (2014), and made findings of fact in accordance with that test in rendering judgment in favor of the named plaintiff, Anthony Martinez,[1] in the preset action, which was commenced against the defendants, the city of New Haven (city), the Board of Education of the City of New Haven (board), and Garth Harries, the Superintendent of New Haven Public Schools. This court should not be disturbing the trial court's findings of fact since they are not, in my view, clearly erroneous. Therefore, I respectfully dissent.

The trial court found the following: "Based upon the [the imminent harm to identifiable persons exception to the defense of governmental immunity] as expressed [in *Haynes*], this court finds that the plaintiff was [an]

ally, throughout the one day trial, both the plaintiff and the defendants focused on the issues of governmental immunity and the exception for imminent harm to an identifiable person. As such, there is no indication that allowing the amendment was unfair to the plaintiff. Accordingly, it appears that the trial court did not abuse its discretion by permitting the defendants to amend their answer.

[1] I note that Luz Mercado is also named as a plaintiff in the present action. See footnote 1 of the majority opinion. For the sake of simplicity, I hereinafter refer to Anthony Martinez as the plaintiff.

identifiable victim. The court further finds that the harm which the plaintiff was exposed to was foreseeable, and [that] a duty was imposed on [David Scott] Stewart to supervise students and to act immediately to prevent the harm. Therefore, liability . . . under General Statutes § 52-557n is found by the court."

Under our case law, the main purpose of charging school officials with a duty of care is to ensure that schoolchildren in their custody are protected from imminent harm. See generally *Haynes* v. *Middletown*, supra, 314 Conn. 303 (schools have a duty to protect students from imminent harm). The imposition of that duty is predicated, in part, on our settled understanding of the need "to safeguard children of tender years from their propensity to disregard dangerous conditions." (Internal quotation marks omitted.) *Strycharz* v. *Cady*, 323 Conn. 548, 578, 148 A.3d 1011 (2016). As this court stated in *Strycharz*, "it is inarguable that the plaintiff became a member of the identifiable class of foreseeable victims when he arrived at school on the school bus . . . [because] his attendance was legally required, and his parents were statutorily mandated to relinquish their protective custody to school officials. Accordingly, we agree with the plaintiff and the trial court that the school officials' duty to protect the plaintiff from imminent harm attached once he arrived at school on the day of the accident." Id., 576. Therefore, I agree with the majority that there can be no question that the trial court was correct when it found that the plaintiff was an identifiable victim in the present case.

Regarding the issue of imminent harm, I respectfully disagree with the majority opinion. In my view, this incident cannot be regarded as an isolated event of two children going to pick up a pair of safety scissors and one accidently getting cut. Rather, I view the case as a failure to supervise the continuum of activity that revolved around two students, one of whom had safety

scissors in her hand, chasing another student. In my opinion, this activity, which the trial court found began after Stewart, the assigned supervisor, arrived at 9:15 a.m. and continued for a period of time thereafter, should have been stopped prior to the scissors being dropped. The plaintiff certainly presented enough evidence to allow a determination of fact by the trial court, which was acting as the finder of fact in the present case. The trial court found facts in favor of the plaintiff, and I do not believe that we should be interfering with those findings because they are not clearly erroneous.

In *Strycharz*, this court held that, "[b]ecause we are unable to conclude, on the basis of the record before us, that a reasonable juror could find that the circumstances were such that the defendants would have been aware of this problem, the defendants are entitled to judgment as a matter of law on this claim." Id., 590. However, in the present case, a teacher specially assigned to an auditorium to supervise students, most of whom are eating breakfast, would have been aware of children running around the auditorium. At the very least, this issue presents a question for the finder of fact—namely, whether it would have been apparent to Stewart that, unless he acted, there was a risk of imminent harm.

Moreover, I disagree, respectfully, with the majority when it downplays the nature of the harm that may be caused by safety scissors. For instance, the majority states that "there is no evidence that possessing safety scissors in the auditorium violated any school policy." While that fact may be true, it belies the real issue, which is whether there was a policy against either horseplay or children running after one another. Even if a specific policy does not exist, in my view, the situation presented an issue of fact that a risk of imminent harm existed. There was certainly a risk of imminent harm created by the horseplay. The child with the scissors

could have fallen on the scissors and injured herself or others in the process of the fall. The fact that a child was injured while attempting to pick up the scissors, after the scissors dropped during the horseplay, while unfortunate, was certainly understandable as a direct result of the horseplay.

Second, the majority states that "[t]here is also no evidence that any similar incident had occurred in the past that would have alerted the defendants that additional safety procedures were needed in the auditorium. In fact, Stewart never previously had experienced problems caused by any dangerous student behavior in the auditorium, students running with scissors or otherwise." This was an incident of horseplay. The question of whether such conduct had occurred previously, while important from a notice standpoint for the defendant, does not change the fact that a fact finder could reasonably find that that conduct created a risk of imminent harm. There may not have been a need for additional safety procedures if the teacher had been attentive to his duties of supervision.

Third, the majority states that "[m]oreover, Stewart saw neither the students running nor the safety scissors." Respectfully, this is the central point of my disagreement with the majority. As we stated in *Strycharz*, the question is whether a reasonable fact finder could find that a teacher "would" have been aware of this problem if he had been executing his duties properly. *Strycharz* v. *Cady*, supra, 323 Conn. 590. Certainly, it cannot be enough to excuse one charged with the duty of supervising young schoolchildren that he did not see the challenged activity in a room that he was in charge of supervising. Indeed, if that were the case, every teacher charged with supervision could escape liability by saying that he or she never saw the incident.

In my view, the present case is very similar to *Haynes*, in which this court held that "[t]he jury reasonably could

have inferred from this evidence that the dangerous condition was apparent to school officials. Although this evidence is far from compelling, we are unable to conclude that no reasonable juror could find that it was apparent to school officials that, in combination, the ongoing problem of horseplay in the locker room and the presence of the broken locker were so likely to cause an injury to a student that the officials had a clear and unequivocal duty to act immediately to prevent the harm either by supervising the students . . . to prevent horseplay or by fixing the broken locker." (Footnote omitted.) *Haynes* v. *Middletown*, supra, 314 Conn. 325. In my view, this case is even stronger than *Haynes* because, in that case, a teacher was not present in the locker room. In the present case, a teacher was physically present in the auditorium. Thus, in my view, a reasonable fact finder could find that it would have been apparent to Stewart that students were engaging in horseplay with a pair of scissors, and that Stewart had a clear and unequivocal duty to act immediately to prevent the horseplay and potential injury. It is axiomatic that the purpose of assigning a teacher to the auditorium was to maintain order, answer questions, and promote student safety.

I note that the majority has criticized the clarity of the trial court's decision. However, "an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding." *Fisher* v. *Big Y Foods, Inc.*, 298 Conn. 414, 424–25, 3 A.3d 919 (2010). Furthermore, "[w]e read an ambiguous trial court record so as to support, rather than contradict, its judgment." (Internal quotation marks omitted.) *Matza* v. *Matza*, 226 Conn. 166, 187, 627 A.2d 414 (1993). In the present case, the trial court applied the proper law to the facts. On the basis of the trial court's findings, I would affirm the judgment of the trial court.

Therefore, I respectfully dissent.

STATE OF CONNECTICUT *v.* DELANO JOSEPHS (SC 19900)

Rogers, C. J., and Palmer, McDonald, Robinson and D'Auria, Js.

Syllabus

Pursuant to statute (§ 53-247 [a]), a person is guilty of cruelty to animals when he, inter alia, "unjustifiably injures any animal . . . ."

The defendant, who was convicted of one count of cruelty to animals in connection with an incident in which he shot a cat with a BB gun, appealed, claiming that, under § 53-247 (a), the state was required to prove that he had the specific intent to injure the cat, that § 53-247 (a) is unconstitutionally vague as applied to his conduct, and that the evidence was insufficient to support his conviction. The defendant's neighbor, L, testified that, about ten days after another witness had seen the defendant on his property stalking something with a BB gun, she noticed that one of her cats was injured. A veterinarian later confirmed that the cat had a metal object, consistent with a BB, lodged adjacent to one of the cat's vertebrae. L complained about the injury to an animal control officer, who testified that he interviewed the defendant and that the defendant had admitted to having a BB gun and to shooting at L's cats to scare them so as to prevent them from coming on his property but claimed that he did not mean to hurt the cats. The trial court found the defendant guilty of unjustifiably injuring L's cat after concluding that § 53-247 (a) required only a general intent to engage in the conduct in question. *Held*:

1. The trial court properly concluded that the state was not required to prove that the defendant possessed the specific intent to injure L's cat in order to find him guilty under the unjustifiably injuring an animal clause of § 53-247 (a): the plain and unambiguous language of that clause required proof of only a general intent to engage in the conduct at issue, as the legislature did not include any specific intent language in the unjustifiably injuring an animal clause but clearly did require proof of specific intent in certain other clauses and other subsections of § 52-247; moreover, there was no merit to the defendant's claim that requiring proof of only a general intent would lead to the absurd result of a person who accidentally hits an animal while driving a car being subject to conviction for cruelty to animals, as the general intent to do the act of striking the animal would be lacking in such a case, and the state still would need to prove that the injury was unjustifiable in order to secure a conviction.

2. The defendant could not prevail on his unpreserved claim that § 53-247 (a) was unconstitutionally vague when applied to his conduct, as his conduct clearly came within the unmistakable core of the conduct prohibited under § 53-247 (a); the defendant's conduct clearly constituted

an unjustifiable injury to L's cat, as there were other statutes also prohibiting the defendant's conduct of discharging a firearm in a manner likely to cause injury to a domestic animal and of unlawfully injuring any companion animal, and the defined circumstances that allow someone to kill or injure an animal do not include mere trespassing.

3. The evidence presented was sufficient for the trial court to find the defendant guilty of cruelty to animals pursuant to § 53-247 (a): the trial court reasonably could have concluded that the defendant intentionally shot L's cat with a BB gun thereby causing the cat's injury, as the evidence established that the defendant was seen with a BB gun on his property close to the time when L's cat was injured, he admitted to owing a BB gun and to shooting at L's cats, and one of those cats was injured by a BB gun, which, according to the veterinarian who testified at trial, was a rare occurrence; furthermore, the trial court was free to discredit the defendant's testimony that he did not purchase the BB gun until a later date, and this court deferred to the trial court's credibility determination of testimony that the defendant was seen with a BB gun more than one week before L's cat was shot.

Argued October 17, 2017—officially released January 30, 2018

Procedural History

Substitute information charging the defendant with two counts of the crime of cruelty to animals, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, and tried to the court, *Nastri*, *J.*; verdict and judgment of guilty of one count of cruelty to animals, from which the defendant appealed. *Affirmed.*

Katherine C. Essington, for the appellant (defendant).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Elizabeth M. Moseley*, assistant state's attorney, for the appellee (state).

Opinion

ROGERS, C. J. This case requires us to examine the meaning of language used in General Statutes § 53-247

(a),[1] a provision that criminalizes a broad range of acts of cruelty to animals. The defendant, Delano Josephs, appeals[2] from the judgment of conviction of a single violation of § 53-247 (a), stemming from his shooting of his neighbor's cat with a BB gun.[3] The defendant claims that (1) the trial court improperly concluded that the clause of § 53-247 (a) applicable to his conviction, which bars a person from "unjustifiably injur[ing]" an animal, requires only a general intent to engage in the behavior causing the injury, (2) the phrase "unjustifiably injures" in § 53-247 (a) is unconstitutionally vague both facially and as applied to the facts of this case and (3) the evidence was insufficient to support the defendant's conviction pursuant to § 53-247 (a). We dis-

[1] General Statutes § 53-247 (a) provides in relevant part: "*Any person who* overdrives, drives when overloaded, overworks, tortures, deprives of necessary sustenance, mutilates or cruelly beats or kills or *unjustifiably injures any animal*, or who, having impounded or confined any animal, fails to give such animal proper care or neglects to cage or restrain any such animal from doing injury to itself or to another animal or fails to supply any such animal with wholesome air, food and water, or unjustifiably administers any poisonous or noxious drug or substance to any domestic animal or unjustifiably exposes any such drug or substance, with intent that the same shall be taken by an animal, or causes it to be done, or, having charge or custody of any animal, inflicts cruelty upon it or fails to provide it with proper food, drink or protection from the weather or abandons it or carries it or causes it to be carried in a cruel manner, or fights with or baits, harasses or worries any animal for the purpose of making it perform for amusement, diversion or exhibition, *shall*, *for a first offense*, *be fined not more than one thousand dollars or imprisoned not more than one year or both* . . . ." (Emphasis added.) Since the events underlying this appeal, General Statutes § 53-247 (a) was the subject of several amendments that have no bearing on the issues presented herein. See, e.g., Public Acts 2012, No. 12-86 (amending statute to add penalty for subsequent offense). In the interest of simplicity, we refer to the current revision of the statute.

[2] The defendant 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.

[3] The defendant was charged by way of a long form information with two counts of cruelty to animals pursuant to § 53-247 (a). He was found not guilty of the first count, which alleged that he had injured another cat with a BB gun, but guilty of the second count.

agree with each of these claims and, accordingly, affirm the judgment of conviction.

The defendant was convicted after a trial to the court. The record reveals the following facts that the trial court reasonably could have found. At the time of the events in question, the defendant lived next door to Lorraine Leiner, who kept a number of cats as pets and allowed them to roam outdoors. On June 3, 2012, Peter Bombard, who was visiting one of Leiner's tenants,[4] was parked by Leiner's house when he heard three distinct noises that he identified as a BB gun being discharged. Bombard exited his car and saw a man he recognized as the defendant walking with a BB gun in his hands. Bombard testified that the man acted "like he was stalking something" and moved "the way a hunter would walk." Upon noticing Bombard, the defendant cocked the gun and made "direct eye contact" before "slowly back[ing] up out of [his] view . . . ."

On the night of June 14, 2012, Leiner's cat, Wiggles, came inside, and, the next morning, Leiner noticed blood on Wiggles' shoulder. She brought the cat to the Animal Hospital of Berlin for treatment where Veterinarian David Hester took a radiograph of Wiggles and determined that the cat had a "metal opacity" of about "three or four millimeters," consistent with a BB, located "[a]djacent to about the tenth vertebra" of its spine. Hester treated Wiggles but did not remove the BB. At the defendant's trial, Hester testified that BB gun injuries to cats are uncommon and rarely seen.

After Hester treated Wiggles, Leiner complained to the police that "a neighbor was shooting her cats." In investigating the complaint, Animal Control Officer James Russo spoke with the defendant in his driveway in late July or early August, 2012. Russo testified that

[4] Leiner testified that she lived on the first floor of a multifamily home and that her tenants lived on the second and third floors.

the defendant "openly admitted that he does have a BB gun" and that "he was shooting at the cats to scare them away" from coming onto his property, although he also stated that "he had no means of hurting any cats."

The defendant alleged during his oral motion for a judgment of acquittal that the "unjustifiably injures" clause of § 53-247 (a) required specific intent to "harm the animal, to shoot the animal." In its final ruling, the trial court rejected this argument, determining that "[t]he state [was] not required to prove the defendant intended to injure the animal" because the crime only required a general intent to engage in the conduct in question.

The trial court found that "the credible evidence establishes the state prove[d] the elements of the offense [of] cruelty to animals pursuant to § 53-247 (a) beyond a reasonable doubt and, therefore, [found] the defendant guilty [of one count of cruelty to animals]." See footnote 3 of this opinion. The defendant was sentenced to thirty days incarceration, execution suspended, and six months of probation. This appeal followed.

I

MENS REA

The defendant, who was convicted pursuant to the portion of § 53-247 (a) that bars a person from "unjustifiably injur[ing]" an animal, claims first that the trial court committed reversible error by applying the wrong mens rea for the crime. Although acknowledging that the "unjustifiably injures" clause of § 53-247 (a) is unaccompanied by any mens rea qualifier, the defendant contends that the state must prove that he had the specific intent to injure Wiggles, rather than the general intent to do the act that led to the injury. In response, the state argues that "[t]he plain language of § 53-247 (a),

its relationship to the other statutes and its legislative history all demonstrate that the legislature intended for the prohibition against unjustifiably injuring an animal to require only the general intent to engage in the action that ultimately results in injury to the animal." We agree with the state.

The issue of the requisite mens rea applicable to the "unjustifiably injures" clause of § 53-247 (a) "is a question of statutory interpretation, over which our review is plenary." *State ex rel. Gregan* v. *Koczur*, 287 Conn. 145, 152, 947 A.2d 282 (2008). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply." (Internal quotation marks omitted.) Id. Pursuant to 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 . . . 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." A statute is ambiguous if, "when read in context, [it] is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *State* v. *Pond*, 315 Conn. 451, 467, 108 A.3d 1083 (2015).

Connecticut's case law distinguishes between general and specific intent. "In determining [whether a crime] requires proof of a general intent [or] of a specific intent, the language chosen by the legislature in enacting a particular statute is significant. When the elements of a crime consist of a description of a particular act and a mental element not specific in nature, the only issue is whether the defendant intended to do the proscribed act. If he did so intend, he has the requisite general

intent for culpability. When the elements of a crime include a defendant's intent to achieve some result additional to the act, the additional language distinguishes the crime from those of general intent and makes it one requiring a specific intent." (Internal quotation marks omitted.) *State* v. *Roy*, 173 Conn. 35, 45, 376 A.2d 391 (1977); see also General Statutes § 53a-5 ("[w]hen the commission of an offense . . . or some element of an offense, requires a particular mental state, such mental state is ordinarily designated in the statute defining the offense by use of the terms 'intentionally,' 'knowingly,' 'recklessly' or 'criminal negligence' "). Moreover, "[w]e are not permitted to supply statutory language that the legislature may have chosen to omit." *Vaillancourt* v. *New Britain Machine/Litton*, 224 Conn. 382, 396, 618 A.2d 1340 (1993).

Section 53-247 is comprised of subsections (a) through (e). Subsections (b) through (e) each include explicit specific intent terms, specifically, "maliciously and intentionally," "knowingly," and "intentionally," that apply to all of the acts proscribed by the particular subsection. General Statutes § 53-247 (b) through (e).[5]

[5] General Statutes § 53-247 (b) provides in relevant part: "Any person who *maliciously and intentionally* maims, mutilates, tortures, wounds or kills an animal [shall be guilty of a class C or D felony]. . . ." (Emphasis added.)

General Statutes § 53-247 (c) provides: "Any person who *knowingly* (1) owns, possesses, keeps or trains an animal engaged in an exhibition of fighting for amusement or gain, (2) possesses, keeps or trains an animal with the intent that it be engaged in an exhibition of fighting for amusement or gain, (3) permits an act described in subdivision (1) or (2) of this subsection to take place on premises under his control, (4) acts as judge or spectator at an exhibition of animal fighting for amusement or gain, or (5) bets or wagers on the outcome of an exhibition of animal fighting for amusement or gain, shall be guilty of a class D felony." (Emphasis added.)

General Statutes § 53-247 (d) provides in relevant part: "Any person who *intentionally* injures any animal while such animal is in the performance of its duties under the supervision of a peace officer . . . or *intentionally* injures a dog that is a member of a volunteer canine search and rescue team . . . while such dog is in the performance of its duties under the supervision of the active individual member of such team, shall be guilty of a class D felony." (Emphasis added.)

In contrast, § 53-247 (a) lacks a mens rea term that applies to every proscribed act listed therein and, instead, contains some clauses that include a specific intent term and others that do not. See footnote 1 of this opinion. This differing structure strongly supports a conclusion that the legislature did not intend for all of the acts proscribed by § 53-247 (a) to be accompanied by the same mens rea.

Additionally, unlike the clause at issue, in other clauses of § 53-247 (a), the adverb "unjustifiably" appears in conjunction with additional language that clearly requires specific intent. Specifically, the clause under which the defendant was convicted refers to any person who "unjustifiably injures any animal," but other portions of subsection (a) later refer to any person who "unjustifiably administers any poisonous or noxious drug or substance to any domestic animal or unjustifiably exposes any such drug or substance, *with intent* that the same shall be taken by an animal . . . ." (Emphasis added.) General Statutes § 53-247 (a). This plainly indicates that, in § 53-247 (a), "unjustifiably" means something different from "intentionally" and that the legislature will include specific intent language along with the word "unjustifiably" when it intends for a specific intent to apply. See *State* v. *Roy*, supra, 173 Conn. 45. The legislature's differing treatment of these two clauses within the same subsection convinces us that the "unjustifiably injures any animal" clause, under which the defendant was charged, requires only a general intent. General Statutes § 53-247 (a).

General Statutes § 53-247 (e) provides in relevant part: "Any person who *intentionally* kills any animal while such animal is in the performance of its duties under the supervision of a peace officer . . . or *intentionally* kills a dog that is a member of a volunteer canine search and rescue team . . . while such dog is in the performance of its duties under the supervision of the active individual member of such team, shall be fined not more than ten thousand dollars or imprisoned not more than ten years, or both." (Emphasis added.)

The defendant argues that we should read a specific intent requirement into the prohibition in § 53-247 (a) against "unjustifiably injur[ing]" an animal because subsection (b) of § 53-247 punishes "maliciously and intentionally" maiming, mutilating, torturing, wounding or killing an animal, and, in the defendant's view, there is "no discernable reason to have two different standards of proof for conduct that . . . could be charged under either subsection of the statute." We are not persuaded by this argument because there is a clear reason for an additional mens rea element in subsection (b), namely, the punishment imposed by subsection (b) is more severe than that imposed by subsection (a).[6] General Statutes § 53-247 (a) and (b).

The defendant further contends that the trial court should have required proof of specific intent to injure an animal because requiring only general intent would lead to absurd results. In the defendant's view, a person who accidentally hit a dog while driving a car would be liable under a general intent interpretation of the statute. We disagree because, even in such circumstances, a general intent to do the act of striking the animal still would be lacking. Moreover, in such situations, the state would still need to prove that the injury was unjustifiable in order to obtain a conviction.

As demonstrated by the foregoing analysis, the plain and unambiguous language of the clause in § 53-247 (a) that the defendant was charged with violating required

[6] We also reject the defendant's claim that the "legislators may have been unaware that the language of [§ 53-247 (b), enacted in 1996 separately from subsection (a)] was somewhat duplicative of a portion of subsection (a), or they may have been uncertain themselves as to what constitutes a 'justifiable' injury to an animal." When the meaning of a statute is plain, we do not consider legislative intent. See *State* v. *Pond*, supra, 315 Conn. 467 (pursuant to § 1-2z, "[i]f . . . the meaning of [the statute's] 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]).

only a general intent when read in the context of the entirety of subsection (a) and within § 53-247 as a whole. Accordingly, the trial court properly concluded that the state was not required to prove that the defendant possessed the specific intent to injure Wiggles.

II

VOID FOR VAGUENESS

The defendant claims next that § 53-247 (a), when applied to his conduct, is unconstitutionally vague. Because this claim is unpreserved, he seeks review of it pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[7] We conclude that, although the record is adequate for review and the defendant has raised a claim of constitutional magnitude, he has not shown the existence of a constitutional violation that deprived him of a fair trial.

Section 53-247 (a) provides in relevant part: "Any person who . . . unjustifiably injures any animal . . . shall, for a first offense, be fined not more than one thousand dollars or imprisoned not more than one year or both . . . ." The defendant contends that the phrase " 'unjustifiably injures' " is unconstitutionally vague on its face and as applied to him "because it does not indicate when an injury to an animal is unjustifiable" and judicial gloss has not cured this infirmity. The state responds that any person of ordinary intelligence would understand that shooting a cat with a BB gun so as to

[7] In *State* v. *Golding*, supra, 213 Conn. 239–40, this court held that "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis omitted; footnote omitted.) Id.; see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*).

cause an injury is not a justifiable act when that cat is simply trespassing on his property. Thus, the state contends, the defendant's claim fails under the third prong of *Golding*. We agree with the state.

The following principles govern our consideration of the defendant's claim. "A statute . . . [that] forbids or requires conduct in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process. . . . Laws must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. . . . A statute is not void for vagueness unless it clearly and unequivocally is unconstitutional, making every presumption in favor of its validity. . . . To demonstrate that [a statute] is unconstitutionally vague as applied to [him], the [defendant] therefore must . . . demonstrate beyond a reasonable doubt that [he] had inadequate notice of what was prohibited or that [he was] the victim of arbitrary and discriminatory enforcement. . . . [T]he void for vagueness doctrine embodies two central precepts: the right to fair warning of the effect of a governing statute . . . and the guarantee against standardless law enforcement. . . . If the meaning of a statute can be fairly ascertained a statute will not be void for vagueness since [m]any statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties." (Internal quotation marks omitted.) *State ex rel. Gregan* v. *Koczur*, supra, 287 Conn. 156. In particular, pursuant to General Statutes § 1-1 (a), "[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly." "References to judicial opinions involving the statute,

the common law, legal dictionaries, or treatises may be necessary to ascertain a statute's meaning to determine if it gives fair warning." (Internal quotation marks omitted.) *State* v. *Winot*, 294 Conn. 753, 759, 988 A.2d 188 (2010). "Unless a vagueness claim implicates the first amendment right to free speech, '[a] defendant whose conduct clearly comes within a statute's unmistakable core of prohibited conduct may not challenge the statute because it is vague as applied to some hypothetical situation . . . .' " *State ex rel. Gregan* v. *Koczur*, supra, 156–57. In contrast, "[i]n a facial vagueness challenge, we . . . examine the challenged statute to see if it is impermissibly vague in all of its applications. A statute that is impermissibly vague in all its applications is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. . . . Such a provision simply has *no* core. . . . A defendant whose conduct clearly comes within a statute's unmistakable core of prohibited conduct may not raise a facial vagueness challenge to the statute." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Indrisano*, 228 Conn. 795, 804, 640 A.2d 986 (1994).

We agree with the defendant that the phrase "unjustifiably injures" in § 53-247 (a) is susceptible to differing interpretations and, therefore, could be vague when applied to some situations. See, e.g., *People* v. *Arroyo*, 3 Misc. 3d 668, 669, 679, 777 N.Y.S.2d 836 (2004) (holding that New York statute, worded similarly to § 53-247 (a), that prohibits "unjustifiably injur[ing]" animals was unconstitutionally vague as applied to defendant who chose not to provide veterinary care to terminally ill dog). Nevertheless, our careful review of the record in this case, as well as other relevant law, satisfies us that the defendant's conduct came within the unmistakable

core of prohibited conduct under § 53-247 (a). First, General Statutes § 53-203[8] makes it abundantly clear that injuring a neighbor's pet cat by shooting it with a BB gun is not permissible, and, further, General Statutes § 22-351[9] disallows the injuring or killing of a companion animal by any means when such act is not authorized by law. Second, although the statutes governing companion animals, as well as our historical common law, allow for the killing, and by extension injuring, of such animals under certain defined circumstances; see, e.g., General Statutes § 22-358 (a) (permitting killing of dog observed to be "pursuing or worrying any . . . domestic animal or poultry"); General Statutes § 22-358 (b) (permitting person bitten by dog or cat, when not present on owner's premises, to kill such dog or cat during attack); General Statutes § 22-359 (b) (permitting "humane euthaniz[ation]" of rabid dog or cat without prior notice to owner); see also *Woolf* v. *Chalker*, 31 Conn. 121, 128–31 (1862) (enumerating similar concepts as to dogs); but see *Vendrella* v. *Astriab Family Ltd. Partnership*, 311 Conn. 301, 315, 87 A.3d 546 (2014) (recognizing certain principles described in *Woolf* inconsistent with subsequent case law); those circumstances clearly do not encompass a mere trespass by an animal. See *Soucy* v. *Wysocki*, 139 Conn. 622, 628, 96 A.2d 225 (1953) (defendant was not justified in shooting dog that had trespassed and was retreating from pens where defendant kept his pheasants); *Johnson* v.

[8] General Statutes § 53-203 provides in relevant part: "Any person who intentionally, negligently or carelessly discharges any firearm in such a manner as to be likely to cause bodily injury or death to persons *or domestic animals* . . . shall be guilty of a class C misdemeanor." (Emphasis added.) Relatedly, the Penal Code defines " 'firearm' " broadly to include any weapon from which a shot may be discharged. General Statutes § 53a-3 (19).

[9] General Statutes § 22-351 (a) provides in relevant part: "Any person . . . who unlawfully kills or injures any companion animal, shall be fined not more than one thousand dollars or imprisoned not more than six months, or both. For a second offense, or for an offense involving more than one companion animal, any such person shall be guilty of a class E felony."

Patterson, 14 Conn. 1, 5, 11 (1840) (defendant was not justified in poisoning plaintiff's fowls, which had trespassed on defendant's land). Additionally, decisions from other jurisdictions lend further support to our conclusion that the defendant's actions here clearly constituted unjustifiable injury and, therefore, unlawful cruelty to Wiggles. See *Commonwealth* v. *Szewczyk*, 89 Mass. App. 711, 713, 717, 53 N.E.3d 1286 (2016) (defendant's shooting of dog with pellet gun to discourage her from returning to, and defecating on, defendant's property was unjustifiable infliction of pain pursuant to anticruelty to animals statute); *Bartlett* v. *State*, 929 So. 2d 1125, 1126 (Fla. App. 2006) (defendant's repeated shooting of opossum with BB gun after driving it from his garage was infliction of unnecessary pain pursuant to anticruelty to animals statute); see also 4 Am. Jur. 2d 486, Trespassing Animals § 110 (2007) ("[o]rdinarily, the intentional killing or maiming of trespassing animals merely because they are trespassing is considered to be wrongful and to render the person killing or maiming the animal liable in damages").

For all the foregoing reasons, the defendant's vagueness claim fails because his conduct clearly came within the core of the activity prohibited by § 53-247 (a).[10]

III

SUFFICIENCY OF THE EVIDENCE

The defendant finally claims that the evidence was insufficient to prove beyond a reasonable doubt that

[10] Because we conclude that the statutory language was not vague as applied to the defendant's conduct, we need not review the defendant's facial challenge to the statute. See *State* v. *Wilchinski*, 242 Conn. 211, 218, 700 A.2d 1 (1997) ("[o]ur analysis terminates once we determine that the statute, strictly construed, is not vague as applied to the defendant's conduct").

he violated § 53-247 (a) and, therefore, that his conviction was improper.[11] We disagree.

In evaluating a claim of evidentiary insufficiency, we "review the evidence and construe it as favorably as possible with a view toward sustaining the conviction, and then . . . determine whether, in light of the evidence, the trier of fact could reasonably have reached the conclusion it did reach." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Jordan*, 314 Conn. 354, 385, 102 A.3d 1 (2014). A trier of fact is permitted to make reasonable conclusions by "draw[ing] whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . [These inferences, however] cannot be based on possibilities, surmise or conjecture." (Internal quotation marks omitted.) Id.

"We note that the [trier of fact] must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but]

[11] The defendant makes no claim that, because the trial court reserved ruling on his motion for a judgment of acquittal at the close of the state's evidence, it would be improper for this court to consider the evidence that he presented as part of determining whether the evidence was sufficient to support his conviction. See *State* v. *Seeley*, 326 Conn. 65, 67 n.3, 161 A.3d 1278 (2017) ("[W]hen a motion for [a judgment of acquittal] at the close of the state's evidence is denied, a defendant may not secure appellate review of the trial court's ruling without [forgoing] the right to put on evidence in his or her own behalf. The defendant's sole remedy is to remain silent and, if convicted, to seek reversal of the conviction because of insufficiency of the state's evidence. If the defendant elects to introduce evidence, the appellate review encompasses the evidence in toto." [Internal quotation marks omitted.]); see also Practice Book § 42-41. Although the defendant did not renew his motion for a judgment of acquittal, regardless of whether his claim is unpreserved, "any defendant found guilty on the basis of insufficient evidence has been deprived of a constitutional right, and would therefore necessarily meet the four prongs of *Golding* . . . . [Thus] we review an unpreserved sufficiency of the evidence claim as though it had been preserved." (Citation omitted; internal quotation marks omitted.) *State* v. *Revels*, 313 Conn. 762, 777, 99 A.3d 1130 (2014), cert. denied, U.S. , 135 S. Ct. 1451, 199 L. Ed. 2d 404 (2015).

each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Perkins*, 271 Conn. 218, 246, 856 A.2d 917 (2004). "Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence." (Internal quotation marks omitted.) Id.

In the present case, the defendant challenges his conviction of cruelty to animals on the basis that there was insufficient evidence to prove beyond a reasonable doubt that he shot Wiggles with a BB gun. In order to sustain a conviction of cruelty to animals, the state must have presented evidence from which the trier of fact reasonably could have found, beyond a reasonable doubt, that the defendant "unjustifiably injur[ed] [an] animal" with the requisite general intent. General Statutes § 53-247 (a); see part I of this opinion. We conclude that the state satisfied that burden.

In particular, the defendant contends that none of the state's witnesses actually saw him shoot Wiggles, that the state failed to connect the BB that was found inside Wiggles with the BB gun owned by the defendant and that there was no proof that he owned that gun at the time Wiggles was injured.[12] The defendant's argument, however, fails to follow the test applicable to a sufficiency of the evidence claim. See *State* v. *Jordan*, supra, 314 Conn. 385.

We begin our review with the evidence cited by the trial court in its bench ruling: "[T]he state introduced

[12] The defendant also contends that the evidence did not prove that he "possessed the necessary [specific intent] required for the offense." Because we already have concluded that the defendant's conviction required only a general intent, we need not address this argument. See part I of this opinion.

evidence from [Hester] and [Leiner] that on June 15, 2012, [Leiner] brought her cat, Wiggles, to the animal hospital [where] [u]sing a radiograph [Hester] determined the cat had a metal object consistent with a BB lodged in the muscle. [Hester] treated the animal but did not remove the metal object. On cross-examination, [Hester] testified [that] he rarely sees animals shot by a BB gun."

The state also presented evidence that the defendant was observed with a BB gun about ten days before Wiggles was found injured. In this regard, the trial court found that "[Bombard] testified credibly that when he stepped from his car [after hearing three distinct sounds that he associated with the discharge of a BB gun], he saw an individual he recognized as the defendant with a BB [gun] in his hands walking like a hunter stalking prey. The defendant cocked the [gun] and then made eye contact with [Bombard]. When they made eye contact, the defendant slowly stepped backward until he was out [of] [Bombard's] sight." The animal control officer who investigated Leiner's complaint testified that "[t]he defendant admitted to [him] that he owned a BB gun and shot at the cats to scare them away, although he [claimed he] didn't mean to hurt them." On the basis of a "thorough examination of all of the evidence, both documentary and testimonial, the [trial court found] the credible evidence establishes [that] the state prove[d] the elements of the offense [of] cruelty to animals [pursuant to] § 53-247 (a) beyond a reasonable doubt . . . ."

This evidence, viewed as favorably as possible to sustaining the verdict, establishes that the defendant was seen with a BB gun in a shooting stance in his yard close to the time when Wiggles was injured, he admitted that he owned a BB gun and that he had used it to shoot at Leiner's cats, and one of those cats was injured by a BB gun, which, according to Hester, is a rare

occurrence. On the basis of this circumstantial evidence and the reasonable inferences drawn therefrom, the trial court reasonably could have concluded that the defendant intentionally shot Wiggles with his BB gun, resulting in the cat's injury.[13] Although the defendant points to his own testimony that he did not purchase the BB gun until a later date, the trial court, as the finder of fact, was free to discredit this assertion. Moreover, we defer to the trial court's credibility determination of Bombard's testimony that he saw the defendant with a BB gun more than one week before Wiggles was shot. Thus, we conclude that the evidence presented was sufficient for the trial court to find the defendant guilty of cruelty to animals pursuant to § 53-247 (a).

The judgment is affirmed.

In this opinion the other justices concurred.

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[13] The defendant contends that it was "likely that there were other individuals in the vicinity who were unhappy with the presence of the cats." Regardless of whether this is true, the defendant, in essence, requests that this court make impermissible inferences "based on possibilities, surmise or conjecture" about unsupported and barely articulated alternative theories of Wiggles' injury. (Internal quotation marks omitted.) *State* v. *Jordan*, supra, 314 Conn. 385. We decline to do so.

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CONNECTICUT APPELLATE REPORTS

Vol. 179

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

US BANK NATIONAL ASSOCIATION, TRUSTEE *v.* BONNIE L. CHRISTOPHERSEN ET AL.
(AC 38914)

DiPentima, C. J., and Kahn and Sullivan, Js.

Syllabus

The plaintiff bank, as trustee, sought to foreclose a mortgage on certain real property owned by the defendant C. In accordance with an agreement between the parties in which C agreed to a judgment of strict foreclosure in exchange for an eight month law day, the court rendered a judgment of strict foreclosure and set a law day. Thereafter, the law day was automatically stayed when C filed a bankruptcy petition. Approximately four months later, the bankruptcy court lifted the stay, and the plaintiff filed a motion to open and modify the judgment. In its motion, the plaintiff requested that the court make a new finding of debt, award the plaintiff additional costs and attorney's fees, set a new law day and enter either a judgment of strict foreclosure or a judgment of foreclosure

by sale, whichever it deemed more appropriate. C subsequently filed four successive motions for a continuance of the hearing on the plaintiff's motion to open and modify the judgment, the last of which the court denied. During the hearing on the plaintiff's motion, C requested that the court order a judgment of foreclosure by sale and advised the court that she would be filing such a motion, which she did that day following the hearing. In ruling on the plaintiff's motion, the trial court opened the judgment and, relying on the plaintiff's affidavit of debt, rendered a modified judgment of strict foreclosure with new findings as to additional debt and a revised fair market value of the subject property. The court also set a new law day. In reaching its decision, the court found that approximately $63,000 of equity existed in the property but determined that it was barred from ordering a judgment of foreclosure by sale pursuant to the relevant statute (§ 49-15 [b]), which provides that, following the filing of a bankruptcy petition, a foreclosure judgment is automatically opened but only with respect to the law day. On C's appeal to this court, *held*:

1. The plaintiff had standing to commence the foreclosure action; the plaintiff presented evidence, including various documents and an affidavit related to the assignment of the subject note, that indicated that the note was endorsed in blank and delivered to the plaintiff prior to the commencement of the action, which constituted prima facie evidence that the plaintiff was the holder of the note and entitled to enforce it at the time the action was commenced, and C offered no evidence to rebut the presumption of the plaintiff's ownership of the underlying debt.
2. C could not prevail on her claim that the trial court denied her right to due process and abused its discretion by relying on the plaintiff's affidavit of debt in rendering its modified judgment without considering her written objections, challenges and offers of evidence; the court granted C three separate continuances, which provided her with ample time to prepare for the hearing on the plaintiff's motion to open and modify the judgment, and gave C a full opportunity to be heard at that hearing, but C failed to present any evidence that questioned the amount stated in the plaintiff's affidavit of debt, and there was no evidence in the record to establish that the court failed to consider C's concerns regarding the amount of debt when it rendered its modified judgment.
3. The trial court did not abuse its discretion in denying C's fourth motion for a continuance to allow her more time to complete discovery; in denying the motion, the court observed that it already had decided the issues on which C sought discovery and had granted her first three motions for a continuance, even though the case had been pending for more than four years, and, therefore, the court properly considered the age of the case, the accommodations it already had made for C and the basis on which she sought the continuance.
4. The trial court erred in failing to rule on C's request for a judgment of foreclosure by sale, that court having improperly concluded that it lacked

statutory authority to modify the judgment of strict foreclosure: although the court correctly determined that § 49-15 (b) did not grant it authority to modify the judgment, it incorrectly determined that no statutory authority existed to permit it to do so, and because the plaintiff had filed a motion to open and modify the judgment, which requested the court to render either a judgment of strict foreclosure or foreclosure by sale, § 49-15 (a) (1) conferred authority on the court to modify the judgment, and the court's failure to entertain the request for a judgment of foreclosure by sale constituted error; accordingly, because the trial court failed to take action on C's motion for a judgment of foreclosure by sale, the case was remanded to the trial court with direction to rule on C's motion.

Argued September 20, 2017—officially released January 30, 2018

Procedural History

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant Wells Fargo Bank, N.A., was defaulted for failure to appear and the defendant Southern Connecticut Gas Company et al. were defaulted for failure to plead; thereafter, the court, *Mintz*, *J.*, denied the named defendant's motion to dismiss; subsequently, the court, *Mintz*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon; thereafter, the court, *Hon. David R. Tobin*, judge trial referee, denied the named defendant's motion for a continuance, granted the plaintiff's motion to open and modify the judgment and rendered a modified judgment of strict foreclosure, from which the named defendant appealed to this court. *Reversed in part; further proceedings.*

Bonnie L. Christophersen, self-represented, the appellant (named defendant).

Jeffrey M. Knickerbocker, for the appellee (plaintiff).

Opinion

KAHN, J. The defendant Bonnie L. Christophersen[1] appeals from the judgment of strict foreclosure, rendered in favor of the plaintiff, US Bank National Association, as Trustee of Maiden Lane Asset-Backed Securities I Trust 2008-1. On appeal, the defendant claims that (1) the plaintiff lacked standing to bring the foreclosure action, (2) the court improperly failed to consider the defendant's concerns regarding the amount of debt, (3) the court abused its discretion in denying her motion for a continuance, and (4) the court abused its discretion in ordering a judgment of strict foreclosure rather than a foreclosure by sale. We affirm in part and reverse in part the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. On July, 11 2003, the defendant secured a promissory note in the amount of $460,000 by a mortgage on premises known as 2 Woodcock Lane in Westport. As of September, 2008, the defendant had failed to pay the installments of principal and interest. In May, 2011, the plaintiff commenced this action, seeking to foreclose the mortgage on the defendant's property.[2] The plaintiff subsequently filed a motion for a judgment of strict foreclosure, to which

[1] The complaint also named as defendants Wells Fargo Bank, N.A., Southern Connecticut Gas Company, and Gordon & Scalo, but they were defaulted for failure to appear or plead. The trial court permitted John R. Christophersen, both individually and as trustee, Richard J. Margenot, successor trustee, and Theodore A. Youngling, successor trustee, to intervene as defendants. The court, however, subsequently granted the plaintiff's motion for default as to the intervening defendants for their failure to disclose a defense. Bonnie Christophersen, representing herself, filed this appeal and will be referred to in this opinion as the defendant.

[2] The plaintiff filed five motions to substitute Kondaur Capital Corporation (Kondaur) as the plaintiff, all of which the court, *Mintz*, *J.*, denied. In May, 2012, the defendant filed a motion to dismiss claiming that the plaintiff lacked standing because Kondaur was the party entitled to enforce the note. The court denied the motion to dismiss.

the defendant objected.[3] On February 21, 2014, the defendant, who then was represented by counsel,[4] filed an answer and special defenses. The parties later negotiated an agreement that the defendant would accept a judgment of strict foreclosure in exchange for an eight month law day. On April 14, 2014, the defendant informed the court of that agreement and withdrew both her answer and her objection to the plaintiff's motion for a judgment of strict foreclosure. The court accepted the agreement and, accordingly, granted the plaintiff's motion for a judgment of strict foreclosure, setting a law day of January 6, 2015. On December 24, 2014, the defendant filed a motion to open the judgment and extend the law day. The court denied the motion to open but sua sponte set a new law day of March 31, 2015. Just prior to the expiration of the new law day, on March 27, 2015, the defendant filed a bankruptcy petition, which resulted in an automatic stay of the foreclosure proceeding. On August 7, 2015, however, acting on a motion filed by the plaintiff, the bankruptcy court lifted the automatic stay.

Following the termination of the bankruptcy stay, the plaintiff, on October 1, 2015, filed a motion to open and modify the judgment of strict foreclosure. In its motion, the plaintiff requested that the court make a new finding of debt, award the plaintiff additional costs and attorney's fees, and set a new law day. The defendant filed

[3] At the time that the defendant filed her objection to the motion for a judgment of strict foreclosure, she had been defaulted for failure to plead. Along with her objection, she filed a motion seeking to open the default that had been entered against her. On April 14, 2014, the parties requested that the court vacate its existing orders, including the order defaulting the defendant. The court vacated those orders, and the defendant subsequently withdrew both her objection to the plaintiff's motion for a judgment of strict foreclosure and her motion to open the default.

[4] On September 2, 2014, the court granted the motion of the defendant's counsel to withdraw his appearance. Thereafter, the defendant represented herself.

four successive motions for a continuance of the hearing on the plaintiff's motion to open and modify the judgment. The court, *Povodator*, *J.*, granted the plaintiff's first three motions for a continuance, and the court, *Hon. David R. Tobin*, judge trial referee, denied the fourth motion for a continuance. On January 19, 2016, following a hearing, Judge Tobin granted the plaintiff's motion to open and rendered a modified judgment of strict foreclosure with the law days to commence on March 1, 2016. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the plaintiff lacked standing to bring the foreclosure action. We disagree.

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [When] a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . 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." (Citation omitted; internal quotation marks omitted.) *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 125–26, 74 A.3d 1225 (2013).

"Generally, in order to have standing to bring a foreclosure action the plaintiff must, *at the time the action is commenced*, be entitled to enforce the promissory note that is secured by the property. . . . Whether a party is entitled to enforce a promissory note is determined by the provisions of the Uniform Commercial Code, as codified in General Statutes § 42a-1-101 et seq. . . . Under [the Uniform Commercial Code], only a

holder of an instrument or someone who has the rights of a holder is entitled to enforce the instrument. . . .

"The plaintiff's possession of a note endorsed in blank is prima facie evidence that it is a holder and is entitled to enforce the note, thereby conferring standing to commence a foreclosure action. . . . After the plaintiff has presented this prima facie evidence, the burden is on the defendant to impeach the validity of [the] evidence that [the plaintiff] possessed the note at the time that it commenced the . . . action or to rebut the presumption that [the plaintiff] owns the underlying debt . . . . The defendant [must] . . . prove the facts which limit or change the plaintiff's rights." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Bliss*, 159 Conn. App. 483, 488–89, 124 A.3d 890, cert. denied, 320 Conn. 903, 127 A.3d 186 (2015), cert. denied, U.S. , 136 S. Ct. 2466, 195 L. Ed. 2d 801 (2016).

The trial court had before it evidence that, as of the time of the commencement of the foreclosure action in May, 2011, the plaintiff was the holder of the note endorsed in blank by virtue of an assignment. In a motion to substitute filed on January 16, 2013, the plaintiff attached documents detailing a chain of assignments, including: (1) an assignment of the mortgage deed, executed by the defendant, from Wells Fargo Bank, N.A., successor by merger to Wells Fargo Home Mortgage, Inc., to EMC Mortgage Corporation on January 18, 2007; (2) an assignment of the mortgage from EMC Mortgage Corporation to the plaintiff on December 12, 2008; (3) an assignment of the mortgage deed from the plaintiff to Kondaur Capital Corporation in December, 2011; and (4) an assignment of the mortgage deed from Kondaur Capital Corporation back to the plaintiff on September 12, 2012.[5] At a hearing on August

[5] Additionally, attached to the motion for relief from automatic stay, which was filed in bankruptcy court, was the original note and subsequent assignments, including the 2008 assignment to the plaintiff. See *Drabik* v. *East*

20, 2012, the plaintiff submitted an affidavit of an employee of Nationstar Mortgage, LLC, the mortgage loan servicer from July, 2010 to October, 2011, which stated that the promissory note reflected that on July 11, 2003, the defendant owed Wells Fargo Home Mortgage, Inc., $460,000. The note was endorsed in blank and delivered to the plaintiff on or before July 7, 2010. The assignment of the note to the plaintiff and the plaintiff's possession of it at the commencement of the foreclosure action was prima facie evidence that the plaintiff was the holder of the note at the relevant time and thus was entitled to enforce the note.

The defendant offered no evidence to rebut this presumption of ownership of the underlying debt. See *HSBC Bank USA, N.A.* v. *Navin*, 129 Conn. App. 707, 711–12, 22 A.3d 647, cert. denied, 302 Conn. 948, 31 A.3d 384 (2011) (plaintiff had standing to commence foreclosure action where defendant offered no evidence contesting plaintiff's affidavit asserting that note endorsed in blank was delivered to plaintiff prior to commencement of action). The plaintiff, as assignee of the mortgage, was entitled to bring the action in its own name. "General Statutes § 52-118 . . . provides in relevant part that [an] assignee . . . may sue . . . in his own name. . . . The legislature's use of the word may in the statute indicates that an assignee merely has the option to sue in [its] name. Conversely . . . an assignee also has the option to maintain [an] action in the name of his assignor." (Internal quotation marks omitted.) *Dime Savings Bank of Wallingford* v. *Arpaia*, 55 Conn. App. 180, 184, 738 A.2d 715 (1999). We conclude, therefore, that the plaintiff had standing to commence the foreclosure action.

Lyme, 234 Conn. 390, 398, 662 A.2d 118 (1995) ("[t]here is no question that the trial court may take judicial notice of the file in another case, whether or not the other case is between the same parties" [internal quotation marks omitted]).

II

The defendant next claims that the court denied her right to due process and abused its discretion when it relied on the plaintiff's affidavit of debt in rendering its modified judgment of strict foreclosure without considering her oral and written objections, challenges, and offers of evidence. We disagree and, accordingly, conclude that the defendant's due process rights were not denied and the court did not abuse its discretion when it relied on the plaintiff's affidavit of debt.

The defendant cannot prevail on her due process claim. "[T]here is no violation of due process when a party in interest is given the opportunity at a meaningful time for a court hearing to litigate the question [at issue]." *Hartford Federal Savings & Loan Assn.* v. *Tucker*, 196 Conn. 172, 176–77, 491 A.2d 1084, cert. denied, 474 U.S. 920, 106 S. Ct. 250, 88 L. Ed. 2d 258 (1985). The defendant had notice and ample time to prepare for the hearing. After the automatic stay was lifted, the defendant filed three motions for a continuance—on November 25 and December 10, 2015, and January 6, 2016—all of which the court granted. After granting the three separate continuances, the court gave the defendant a full opportunity to be heard at the January 19, 2016 hearing where she raised numerous concerns and objections.

We are also mindful of the principle that "[w]ithout some evidence to the contrary, we will not presume that the trial court improperly applied the law." *Farrell* v. *Farrell*, 36 Conn. App. 305, 313, 650 A.2d 608 (1994). Tellingly, the defendant failed to present *any* evidence at the hearing on her motion—notwithstanding the passage of five months following the lift of the automatic stay—that called into question the amount stated in the plaintiff's affidavit of debt, and the court expressly gave her an opportunity to do so. That is, during the hearing,

the court asked the defendant, "Do you have a calculation of what you believe the debt to be?" The defendant responded that she was not prepared to answer that question. Finally, our review confirms that there is no evidence in the record, and the defendant directs us to none, to establish that the court failed to consider the defendant's concerns regarding the amount of debt when the court opened the judgment and rendered a modified judgment of strict foreclosure.

III

The defendant next claims that the court abused its discretion in denying her fourth motion for a continuance to allow her more time to complete discovery.[6] We disagree.

"The trial court has a responsibility to avoid unnecessary interruptions, to maintain the orderly procedure of the court docket, and to prevent any interference with the fair administration of justice. . . . In addition, matters involving judicial economy, docket management [and control of] courtroom proceedings . . . are particularly within the province of a trial court. . . . Accordingly, [a] trial court holds broad discretion in granting or denying a motion for a continuance. Appellate review of a trial court's denial of a motion for

[6] The defendant also claims that the denial of her fourth motion for a continuance violated her right to due process. "Ordinarily, a reviewing court analyzes a denial of a motion for a continuance in terms of whether the trial court abused its discretion. If, however, the refusal to grant a continuance interferes with a specific constitutional right, the analysis will involve whether there has been a denial of due process. . . . [W]hen an act is shown by reliable facts to affect a specific constitutional right . . . the analysis should turn on whether a due process violation exists rather than whether there has been an abuse of discretion." (Citations omitted; internal quotation marks omitted.) *Tyler* v. *Shenkman-Tyler*, 115 Conn. App. 521, 525, 973 A.2d 163, cert. denied, 293 Conn. 920, 979 A.2d 493 (2009). The defendant has not identified any specific constitutional right that was implicated by the court's denial of the motion for a continuance. As such, we will review this claim under an abuse of discretion standard.

a continuance is governed by an abuse of discretion standard that, although not unreviewable, affords the trial court broad discretion in matters of continuances." (Citations omitted; internal quotation marks omitted.) *Peatie* v. *Wal-Mart Stores, Inc.*, 112 Conn. App. 8, 12, 961 A.2d 1016 (2009).

For two reasons, the trial court's denial of the fourth motion for a continuance was well within its broad discretion. First, as the court observed when it rendered its oral decision denying the continuance during the January 19, 2016 hearing, it already had decided the issues on which the defendant sought discovery. Second, as we have noted in this opinion, the court already had granted the defendant's first three motions for a continuance, even though the case had been pending for more than four years. In denying the continuance, the court properly considered the age of the case, the accommodations it already had made for the defendant and the basis on which the defendant sought the fourth continuance. We therefore conclude that the court did not abuse its discretion in denying the defendant's motion. See id., 13 ("[s]ince the trial court had already granted one continuance, we find no abuse of discretion in the court's refusal to grant the [party's] motion for a further continuance"); see also *State* v. *Yednock*, 14 Conn. App. 333, 344–45, 541 A.2d 887 (1988).

IV

The defendant's final claim is that because the trial court found that there was approximately $63,000 of equity in the property, the court abused its discretion when, on January 19, 2016, it ordered a judgment of strict foreclosure instead of a foreclosure by sale. Following oral argument, this court sua sponte ordered the parties to submit supplemental briefs addressing the related issue of whether the trial court's refusal to entertain the defendant's "request for the entry of a

foreclosure by sale violated the provisions of [General Statutes] § 49-15 or was based on an erroneous application of . . . § 49-15."[7] We conclude that, under the facts of the present case, the trial court incorrectly interpreted § 49-15 to deprive the court of the authority to order a foreclosure by sale. Because the court's incorrect application of § 49-15 prevented the court from exercising its authority, we remand the case to the trial court with direction to rule on the defendant's motion for a judgment of foreclosure by sale. See footnote 9 of this opinion. The question of whether the court's factual finding regarding the equity in the property required it to order a judgment of foreclosure by sale may arise on remand. We therefore address that issue. We conclude that in circumstances where a court finds that the value of the property substantially exceeds the mortgage being foreclosed, a judgment of strict foreclosure would give the plaintiff an improper windfall. See *Brann* v. *Savides*, 48 Conn. App. 807, 812, 712 A.2d 963 (1998).

[7] General Statutes § 49-15 provides in relevant part: "(a) (1) Any judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified, notwithstanding the limitation imposed by section 52-212a, upon such terms as to costs as the court deems reasonable, provided no such judgment shall be opened after the title has become absolute in any encumbrancer except as provided in subdivision (2) of this subsection. . . .

"(b) Upon the filing of a bankruptcy petition by a mortgagor under Title 11 of the United States Code, any judgment against the mortgagor foreclosing the title to real estate by strict foreclosure shall be opened automatically without action by any party or the court, provided, the provisions of such judgment, other than the establishment of law days, shall not be set aside under this subsection, provided no such judgment shall be opened after the title has become absolute in any encumbrancer or the mortgagee, or any person claiming under such encumbrancer or mortgagee. The mortgagor shall file a copy of the bankruptcy petition, or an affidavit setting forth the date the bankruptcy petition was filed, with the clerk of the court in which the foreclosure matter is pending. Upon the termination of the automatic stay authorized pursuant to 11 USC 362, the mortgagor shall file with such clerk an affidavit setting forth the date the stay was terminated."

The following additional facts and procedural history are relevant to our resolution of this issue. At the January 19, 2016 hearing on the plaintiff's motion to open and modify the 2014 judgment of strict foreclosure, the court began by observing that the judgment, which had been predicated on an eight month law day, had been rendered irrelevant due to the passage of four months during the automatic bankruptcy stay. Therefore, the court reasoned, it was proper to grant the motion to open.

The plaintiff contended that under § 49-15 (b) everything with respect to that judgment remained in place and the court could only reset the law days. The court reminded the plaintiff that its motion requested greater relief than simply the reentry of the original judgment of strict foreclosure and the resetting of the law days.

The court next turned to the question of determining the amount of the debt. The plaintiff urged the court to rely on its most recent affidavit of debt, dated January 13, 2016. Prior to rendering a modified judgment, the court questioned its authority to modify the judgment by awarding additional fees and costs. In its remarks to counsel, the court indicated that it believed that the scope of its authority to act on the plaintiff's motion to open the judgment of strict foreclosure was governed by § 49-15 (b). The court further questioned whether that statutory provision granted the court the authority to take any action other than opening the judgment and setting new law days. The plaintiff suggested that the court *did* have such authority, pursuant to paragraph F of the Uniform Foreclosure Standing Orders issued by the Superior Court.[8] The court expressed skepticism

[8] Paragraph F of the Uniform Foreclosure Standing Orders provides: "At a hearing on a motion to open judgment after bankruptcy in order to set a new sale or law date after receiving relief from the automatic bankruptcy stay, a bankruptcy dismissal or any other bankruptcy order or law that allows the plaintiff to proceed with its foreclosure action, the plaintiff must present to the court an updated affidavit of debt that the court will use to make a new finding of the judgment debt as of the date of the hearing.

that a standing order of the Superior Court could grant the court greater authority than contemplated by the General Statutes. Nonetheless, the court accepted the plaintiff's argument and its affidavit of debt. The court then rendered a modified judgment of strict foreclosure with new findings as to additional debt and a revised fair market value of the property.

Although the court already had taken action on the motion to open that went beyond merely setting a new law day, it determined that § 49-15 (b) barred it from ordering a judgment of foreclosure by sale. Specifically, when the defendant asked whether the court would order a foreclosure by sale, the court stated: "No, this is a law day, a law day. *I cannot grant a motion for foreclosure by sale at this point because the statute precludes me from entertaining that. I can only deal with the motion—the matter that the statute allows me to which is to reset the law day.*"[9] (Emphasis added.) At the close of the hearing, the court set a law day of March 1, 2016.

We first address the question of whether the trial court properly concluded that it lacked authority pursuant to § 49-15 (b) to order a judgment of foreclosure by sale. In general, the court enjoys broad discretion in determining whether to order a judgment of foreclosure by sale or a judgment of strict foreclosure. Our Supreme Court has explained: "In a foreclosure proceeding the authority of the trial court to order either

Additionally, if the last finding made by the court as to the fair market value of the premises is more than 120 days old, then the plaintiff must also present to the court an updated appraisal for the court to make an updated finding of the fair market value of the premises on the date of the hearing." Uniform Foreclosure Standing Orders, form JD-CV-104, available at http://jud.ct.gov/webforms/form/cv104.pdf (last visited January 22, 2018).

[9] We observe that although the defendant had not filed a motion for a judgment of foreclosure by sale at the time of the hearing, she advised the court that she had prepared such a motion and would be filing the motion. The record reflects that the defendant filed such a motion on that same day, presumably following the conclusion of the hearing.

a strict foreclosure or a foreclosure by sale is clear. General Statutes § 49-24 provides: All liens and mortgages affecting real property may, on the written motion of any party to any suit relating thereto, be foreclosed by a decree of sale instead of a strict foreclosure at the discretion of the court before which the foreclosure proceedings are pending. In interpreting this statute, we have stated that [i]n Connecticut, the law is well settled that whether a mortgage is to be foreclosed by sale or by strict foreclosure is a matter within the sound discretion of the trial court. . . . The foreclosure of a mortgage by sale is not a matter of right, but rests in the discretion of the court before which the foreclosure proceedings are pending." (Citations omitted; internal quotation marks omitted.) *Fidelity Trust Co.* v. *Irick*, 206 Conn. 484, 488, 538 A.2d 1027 (1988).

The trial court was correct that § 49-15 (b) does not grant the court authority to modify a judgment of strict foreclosure. Specifically, § 49-15 (b) provides that when a mortgagor files a bankruptcy petition under title 11 of the United States Code, any existing judgment of strict foreclosure "shall be opened automatically without action by any party or the court, provided, the provisions of such judgment, other than the establishment of law days, shall not be set aside under this subsection . . . ." See footnote 7 of this opinion.

The trial court incorrectly concluded, however, that merely because § 49-15 (b) does not grant the court authority to modify the judgment, no statutory authority existed to allow the court to do so. This court has explained that, "[b]y its express terms, subsection (b) of § 49-15 governs what occurs *automatically* following the filing of a bankruptcy petition: the judgment is opened, but only with respect to the law day. It does not refer to how a plaintiff may request the court [not only to] reset the law day [but also] reenter [a modified]

judgment of strict foreclosure following the dismissal or discharge of the bankruptcy.

"In order to have the court reset the law day and reenter [a modified] judgment of strict foreclosure, a plaintiff must comply with subsection (a) (1) of § 49-15." (Emphasis added.) *U.S. Bank, N.A., Trustee* v. *Morawska*, 165 Conn. App. 421, 426–27, 139 A.3d 747 (2016). Because the plaintiff filed a motion to open and modify the judgment of strict foreclosure, § 49-15 (a) (1) conferred authority on the trial court to modify the judgment. In fact, the plaintiff's motion contained, among the relief sought, a request to enter either a judgment of strict foreclosure or foreclosure by sale, whichever the court deemed appropriate. The plaintiff's motion recognized the court's authority to modify the judgment and, within its discretion, to order a foreclosure by sale. Accordingly, the court had authority to order a judgment of foreclosure by sale.

The court's failure to entertain the request for a judgment of foreclosure by sale constituted error. "[I]n a case in which the court has discretion to act, but fails to exercise its discretion, that failure alone is error." *Meadowbrook Center, Inc.* v. *Buchman*, 169 Conn. App. 527, 534, 151 A.3d 404 (2016), cert. granted on other grounds, 324 Conn. 918, 154 A.3d 1007 (2017); see also *State* v. *Lee*, 229 Conn. 60, 73–74, 640 A.2d 553 (1994) ("[i]n the discretionary realm, it is improper for the trial court to fail to exercise its discretion"). As we have explained, because the trial court failed to take action on the defendant's motion for a judgment of foreclosure by sale on the basis of its incorrect application of § 49-15 (b), we remand the case to the trial court with direction to rule on the motion.

Finally, because the issue may likely arise on remand, we consider the implications of the trial court's finding on January 19, 2016, that approximately $63,000 of

equity existed in the property. Specifically, in light of that finding, the court's order of a judgment of strict foreclosure would appear to give the plaintiff an improper windfall. "Since a mortgage foreclosure is an equitable proceeding, either a forfeiture or a windfall should be avoided if possible." (Internal quotation marks omitted.) *Brann* v. *Savides*, supra, 48 Conn. App. 811–12. Even if the defendant did not have equity in the property herself, our case law is clear that the governing principle is that "a mortgagee is only entitled to the payment of the debt owing him, including such incidental charges as he may add to it . . . ." (Internal quotation marks omitted.) *Fidelity Trust Co.* v. *Irick*, supra, 206 Conn. 489. Accordingly, we have recognized that "when the value of the property substantially exceeds the value of the lien being foreclosed, the trial court abuses its discretion when it refuses to order a foreclosure by sale." (Internal quotation marks omitted.) *Brann* v. *Savides*, supra, 812; see also *Fidelity Trust Co.* v. *Irick*, supra, 491 (court abused discretion in ordering strict foreclosure rather than foreclosure by sale where fair market value exceeded debt).

The judgment is reversed with respect to the order of strict foreclosure and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

THOMAS W. LANE, ZONING ENFORCEMENT OFFICER OF THE TOWN OF CLINTON *v.* JEFFREY S. CASHMAN ET AL.

(AC 38290)

Keller, Prescott and Beach, Js.

Syllabus

The plaintiff zoning enforcement officer of the town of Clinton sought a permanent injunction to prohibit the defendant property owners from

keeping cows on their premises without a permit, and a mandatory injunction to require the defendants to remove a metal corral from the street line setback and to keep any permitted livestock in an appropriate building. The plaintiff previously had issued to the defendants two written orders to discontinue those activities and uses of their property. The parties had discussions after the issuance of the first order to discontinue, and the defendants moved the cows into areas that met the setback requirements, but thereafter moved them back so that they continued to violate that first order to discontinue. The defendants did not appeal to the town Zoning Board of Appeals within fifteen days of the issuance of either order to discontinue, as required by statute (§ 8-7). The defendants filed a counterclaim and two special defenses alleging that the activities at issue were lawful nonconforming farming uses of their property and, thus, that they were entitled to constitutional protection of those uses, which existed prior to the amendment of the town's zoning regulations in 2012 that the plaintiff sought to enforce. The trial court granted the plaintiff's motion to strike the counterclaim and special defenses, concluding that they were legally insufficient because the defendants had failed to exhaust their administrative remedies by appealing to the board. The defendants thereafter filed three special defenses, the first two of which alleged that the activities at issue were lawful nonconforming uses of their property, and the third of which alleged municipal estoppel. In response to a request to revise by the plaintiff, the defendants deleted the first two special defenses, and revised their third special defense to include claims of municipal estoppel and that the defendants' farming activities at their property were lawful pursuant to statute (§ 19a-341). The trial court granted the plaintiff's motion to strike the revised third special defense, concluding that it was improper because it alleged a preexisting nonconforming use, which the court previously had stricken. The trial court also granted three motions that the plaintiff had filed to preclude evidence at trial to challenge the validity of the orders to discontinue, to preclude evidence pertaining to the defense of municipal estoppel, and to preclude evidence that would prove that the farming uses of the property were lawful, nonconforming uses. Following a trial to the court, the trial court rendered judgment for the plaintiff, from which the defendants appealed to this court, claiming that the trial court improperly struck their revised third special defense and improperly granted the plaintiff's motions in limine. *Held*:

1. The defendants could not prevail on their claim that the trial court improperly struck their revised third special defense and thereby prohibited them from demonstrating that they had a legally protected nonconforming right to use their property as a farm: the defendants' constitutional challenge to the plaintiff's activities did not excuse their failure to avail themselves of the administrative appeal process that was available to them, as nothing in the record suggested that the relief sought by the

defendants could not have been obtained by resort to the administrative remedy that they ignored, and the defendants did not demonstrate that the board was unable to grant them any appropriate relief or to determine whether the plaintiff properly found that a nonconforming use did not exist on their property; moreover, the defendants did not present any authority to support their assertion that the question of whether any constitutionally protected nonconforming use of their property existed was beyond the scope of the board and, thus, constituted an exception to the exhaustion doctrine that permitted them to bypass available administrative relief, as the defendants chose not to appeal within the time period set by the board, they had ample opportunity to demonstrate to the board that the farming uses of their property were nonconforming uses and presented no compelling reasons why that issue was not the proper subject of such an appeal, and nothing in the record suggested that the defendants could not have brought a timely appeal before the board while continuing to negotiate with the plaintiff in an effort to resolve the dispute.

2. The defendants' claim that the trial court improperly granted the plaintiff's motions to preclude certain evidence was unavailing, the defendants having failed to adequately analyze how that court's rulings likely affected the result of the trial: the defendants did not refer to any portion of the record for details concerning the excluded evidence or to any proffer they made to the trial court concerning evidence that would have been relevant to understanding their historic use of the premises, as well as the gravity and wilfulness of their zoning violation, they did not point to any zoning regulation to support a determination that their historic use of the premises was lawfully nonconforming, and they did not demonstrate how any excluded evidence would have proven a lack of wilfulness on their part; moreover, the record reflected undisputed facts, such as the defendants' admitted failure to exhaust their administrative remedies and their admitted violation of multiple zoning regulations, that supported the trial court's determination that injunctive relief was warranted.

Argued October 18, 2017—officially released January 30, 2018

Procedural History

Action for a permanent injunction to prohibit the defendants from conducting certain activities in violation of the zoning regulations of the town of Clinton, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the defendants filed a counterclaim; thereafter, the court, *Domnarski*, *J.*, granted the plaintiff's motion to strike; subsequently, the court, *Aurigemma*, *J.*, granted the plaintiff's motion

to strike; thereafter, the plaintiff withdrew the complaint in part; subsequently, the court, *Aurigemma*, *J.*, granted the plaintiff's motion to substitute Eric Knapp as the plaintiff; thereafter, the court, *Aurigemma*, *J.*, granted the plaintiff's motions to preclude certain evidence; subsequently, the matter was tried to the court, *Aurigemma*, *J.*; judgment for the plaintiff, from which the defendants appealed to this court. *Affirmed.*

Edward M. Cassella, for the appellants (defendants).

Sylvia K. Rutkowska, for the appellee (plaintiff).

Opinion

KELLER, J. The defendants, Jeffrey S. Cashman and Patricia Cashman, appeal from the judgment of the trial court rendered in favor of the plaintiff, Eric Knapp, the zoning enforcement officer for the town of Clinton.[1] The plaintiff brought the underlying action against the defendants to enforce orders to discontinue alleged zoning violations occurring at the defendants' property in Clinton. The defendants claim that the court erred in (1) striking their special defenses related to nonconforming uses and (2) granting the plaintiff's motions in limine. We affirm the judgment of the trial court.

In his original complaint dated September 6, 2012, the plaintiff alleged that the defendants, who are the owners of 66 River Road in Clinton, were in violation of several Clinton zoning regulations by virtue of their keeping and raising cows without a permit, constructing a metal corral within fifty feet of the street line and

[1] In 2012, the underlying action was commenced by Thomas W. Lane as zoning enforcement officer for the town of Clinton. On September 23, 2014, prior to the trial, Lane moved to substitute Knapp as the plaintiff in the present action because, on May 1, 2014, Knapp had assumed the position of zoning enforcement officer for Clinton. The court granted the motion. Because Lane and Knapp appear in the same representative capacity and it is not necessary to our analysis to distinguish between them, in this opinion, we will refer to both Lane and Knapp as the plaintiff.

within thirty-five feet of the southeast property line, and utilizing the metal corral as a structure or enclosure in which to keep the cows.[2] The plaintiff alleged that, on January 26, 2012, he issued a warning of violation to the defendants with respect to their keeping of cows on the property without a permit and that, on March 13, 2012, he issued a warning of violation to the defendants with respect to their placement of the metal corral within the minimum setback requirements and the keeping of cows in the metal corral. The plaintiff further alleged that, on April 16, 2012, he issued to the defendants an order to discontinue their uses of the premises that violated the applicable zoning regulations, that the defendants did not file an appeal from the order within fifteen days of the issuance of the order, and that the defendants had failed to comply with the order.[3] In his prayer for relief, the plaintiff sought, inter alia, a permanent injunction prohibiting the defendants from keeping cows on the subject premises without a permit; a mandatory injunction requiring the defendants to remove the metal corral from the street line setback and to keep any permitted livestock in an appropriate

[2] The plaintiff alleged in part: "The defendants' use of the property . . . violates Clinton zoning regulations, sections 24.1.42, which states that the keeping and raising of cows requires a zoning permit from the zoning enforcement officer; 25.1, which states that 'no structure shall extend into any setbacks required by [the zoning] regulations'; 25.10.6, which states that the minimum setback from the street line in a R-80 district is fifty feet; 25.10.8, which states that the minimum setback from the property line or side property in a R-80 district is 35 feet; and 26.1.4, which states that 'all livestock shall be kept in a building, stable or enclosure, not less than the legal setback for the appropriate zone for any abutting residential property.' "

[3] It is undisputed that the order of April 16, 2012, stated, in relevant part: "This violation must be remedied within ten (10) days of receipt of this notice. Failure to correct these violations within the above stated time frame may result in the party being fined $250 per day for each day the violation(s) continues and/or may result in a civil penalty not to exceed $2500 and/or result in legal action to enforce the order and to obtain penalties and fines accruing pursuant to . . . General Statutes § 8-12.

"This order may be appealed to the Zoning Board of Appeals of the Town of Clinton within fifteen days of its receipt."

building, stable, or enclosure; and civil penalties authorized by General Statutes § 8-12 for the defendants' failure to comply with the order to discontinue.

In their answer dated November 5, 2012, the defendants admitted their ownership of the subject premises and, with respect to the remainder of the allegations set forth in the original compliant, either denied the allegations or left the plaintiff to his proof. In a special defense dated November 5, 2012, the defendants alleged in relevant part that "[t]he complained of activities were nonconforming uses that predate the zoning laws the plaintiff is trying to enforce."[4] Also, in a counterclaim dated November 5, 2012, the defendants alleged that the plaintiff, by bringing "these complaints" against them, engaged in "extreme and outrageous" conduct that caused the defendants "extreme emotional distress"; the plaintiff, "[b]y filing these groundless complaints," committed intrusions of a "highly offensive" nature against the defendants; and that the plaintiff had engaged in professional malpractice that caused the defendants to suffer damages. The defendants sought, inter alia, money damages and "[a] court order requiring . . . [the plaintiff] to cease harassing, selective enforcement of the zoning regulations against . . . [the defendants]."

The plaintiff filed a "motion to dismiss and/or strike" with respect to the defendants' counterclaim and special defense. The plaintiff argued that the counterclaim

[4] The special defense stated: "1. The subject property has been classified by the town of Clinton as farmland under Public Act 63-490 since 1990 and is, therefore, a legally nonconforming use of the subject property not subject to zoning laws passed after its classification as farmland under Public Act 63-490.

"2. The complained of activities were nonconforming uses that predate the zoning laws the plaintiff is trying to enforce."

In general terms, No. 63-490 of the 1963 Public Acts, codified in General Statutes § 12-107a et seq., allows certain types of land, including farmland, to be assessed at its use value, rather than at its fair market value, for purposes of local property taxation.

and special defense "merely seek to contest the validity of a zoning order issued pursuant to General Statutes § 8-12, from which the [defendants] did not timely appeal pursuant to General Statutes § 8-7. Their failure to exhaust that administrative remedy leaves this court without subject matter jurisdiction over their special defense and counterclaim." Alternatively, the plaintiff argued that each counterclaim count "[failed] to state a claim upon which relief can be granted under the facts alleged."

Over the defendants' objection, and after hearing argument on the motion, the court, *Domnarski*, *J.*, by order dated May 10, 2013, granted the plaintiff's motion. In striking the special defense, the court reasoned that it was "legally insufficient" because the defendants failed to exhaust their administrative remedies. In dismissing "[a]ll counts of the counterclaim," the court likewise relied on the fact that the defendants had failed to exhaust their administrative remedies, noting that "[i]n the counterclaim counts, the defendants seek a collateral attack on a zoning determination that they did not appeal from." On June 3, 2013, the defendants, pursuant to Practice Book § 6-15, filed a notice of intent to appeal from Judge Domnarski's May 10, 2013 dismissal of their entire counterclaim "until a final judgment rendered in said matter disposes of the case for all purposes and as to all parties."

In the absence of an objection, on July 3, 2013, the plaintiff filed a request for leave to file an amended complaint and an amended complaint for the purpose of incorporating allegations of additional zoning violations at the subject premises. The amended complaint added an additional count to the cause of action. In this second count, the plaintiff sought enforcement with respect to an order to discontinue dated November 15, 2012. In count two, the plaintiff alleged that the defendants engaged in multiple activities on the subject

premises in violation of the Clinton zoning regulations. Specifically, the plaintiff alleged that the defendants "have sold, and continue to sell, firewood and mulch, or otherwise maintain a retail establishment on the premises"; "have brought, and continue to bring, wood, brush, logs, wood chips, branches, and/or leaves onto the site from outside sources to process into firewood and mulch, or otherwise manufacture or process goods, on the premises"; "have participated, and continue to participate, in the wholesale of mulch on the premises"; "have stored, and continue to store, heavy equipment, trucks, and small equipment and machinery associated with businesses being conducted at the site on the premises"; "have stockpiled, and continue to stockpile, wood materials, including wood, wood chips and compost, beyond what is required for personal use on the premises and in contact with vegetation"; "have parked, and continue to park, several commercial vehicles which exceed the maximum vehicle weight limit on the premises"; "have parked, and continue to park, more than one commercial vehicle within the vehicle weight limit on the premises"; "have stockpiled and stored, and continue to stockpile and store, materials and equipment outside on the premises, including mulch, logs, firewood, log splitters, wood chippers, grinders, vehicles, loaders, and light and heavy construction equipment"; "have stored, and continue to store, more than two unregistered vehicles on the premises, including a recreational vehicle, a tractor for a tractor trailer, a dump truck, and an SUV"; "have constructed and maintained, and continue to maintain, a shed on the premises without a permit"; "have kept, and continue to keep, chickens and ducks on the premises without a permit and in excess of a total of ten"; "have conducted, and continue to conduct, a farming operation of raising, keeping and caring for livestock, poultry and ducks on the premises without a permit or special exception";[5] and have

[5] Additionally, the plaintiff alleged that the defendants have caused dust and smoke; "[o]dors, fumes and/or gasses"; have made "[n]oise"; have failed

"kept, and continue to keep, livestock on the premises without any covered watertight container or containment on site for manure."

The plaintiff alleged that all of these activities violated specific zoning regulations, all of which were cited in the complaint; that he issued the defendants a warning of violation on October 18, 2012; that he issued the defendants an order to discontinue on November 15, 2012; that the defendants failed to comply with the order to discontinue; and that the defendants did not file an appeal from the order to discontinue within fifteen days of the issuance of that order.[6] Moreover, the plaintiff alleged that on March 13, 2013, the defendants notified him "that they intended to continue to regrind and sell wood chips from the premises," and that their conduct constituted a wilful failure to comply with the order to discontinue.

In his amended complaint seeking enforcement of both orders to discontinue, the plaintiff sought permanent and mandatory injunctive relief related to the defendants' activities on the premises, civil penalties for the defendants' wilful failure to comply with the orders to discontinue dated April 16, 2012, and November 15, 2012, and further just and equitable relief deemed appropriate by the court.

The defendants filed an answer to the amended complaint dated August 22, 2013. Therein, the defendants

to have proper provisions for the storage of waste; and have stockpiled wood materials in contact with vegetation. Prior to trial, the plaintiff withdrew these parts of the second count of the amended complaint.

[6] It is undisputed that the order of November 15, 2012, stated, in relevant part: "These violations must be remedied within ten (10) days of the receipt of this notice. Failure to correct these violations within the above stated time frame may result in the party being fined $250 per day for each day the violations continue and/or may result in a civil penalty not to exceed $2500 and/or result in legal action to enforce the order and to obtain penalties and fines accruing pursuant to . . . General Statutes § 8-12.

"This order may be appealed to the Zoning Board of Appeals of the Town of Clinton within fifteen days of receipt."

generally denied the substantive allegations in the amended complaint, or left the plaintiff to his proof. Additionally, the defendants raised three special defenses. In the first special defense, the defendants alleged that, to the extent that the plaintiff alleged that they used the subject premises as a farm, such use was a legally permissible nonconforming use of the premises.[7] In the second special defense, the defendants alleged that, to the extent that the plaintiff alleged that they used the premises as a commercial nursery operation, such use was a legally permissible nonconforming use of the premises.[8] In the third special defense, the defendants, claiming that the plaintiff's conduct led them to believe that their activities at the subject premises were legally permissible, alleged a defense of municipal estoppel.

Subsequently, on September 6, 2013, the plaintiff filed a request to revise in which he requested that the defendants delete the first and second special defenses in their entirety and, with respect to the third special defense, state the special defense more particularly. In his request to revise, the plaintiff asserted that the first two special defenses were legally improper because they previously had been stricken by Judge Domnarski. Thereafter, on November 22, 2013, the defendants

[7] The first special defense stated: "1. The various uses described in the plaintiff's amended complaint are uses directly associated with a farm on said premises, which is a specifically permitted use under the zoning regulations of the town of Clinton, which use has been established and operated by the defendants and their predecessors in ownership of said property for a period of at least thirty (30) years.

"2. The above described use of the property predates the present zoning regulations, which require a special permit or a special exception for said use, and hence is a permitted, preexisting, nonconforming use."

[8] The second special defense stated: "1. In addition to the use of said premises as a 'farm,' said premises also had been used by the defendants and their predecessors in title as a commercial nursery operation, and as such, is a legally permitted, preexisting, nonconforming use under the Clinton zoning regulations."

deleted the first and second special defenses in their entirety and repleaded the third special defense.

Following the revision, on December 24, 2013, the plaintiff moved to strike the repleaded third special defense in its entirety on the grounds that it failed to state a claim upon which relief could be granted and was, in part, unresponsive to the request to revise inasmuch as it injected into the special defense a new claim that appeared to challenge the validity of the orders, specifically, that the defendants' use of the subject premises was lawful pursuant to General Statutes § 19a-341.[9] The defendants filed an opposition to the motion to strike the third special defense. After the court, *Aurigemma, J.*, heard argument on the motion, on May 21, 2014, it granted the motion. In granting the motion, the court determined, first, that the defendants had failed

[9] General Statutes § 19a-341 provides in relevant part: "(a) Notwithstanding any general statute or municipal ordinance or regulation pertaining to nuisances to the contrary, no agricultural or farming operation, place, establishment or facility, or any of its appurtenances, or the operation thereof, shall be deemed to constitute a nuisance, either public or private, due to alleged objectionable (1) odor from livestock, manure, fertilizer or feed, (2) noise from livestock or farm equipment used in normal, generally acceptable farming procedures, (3) dust created during plowing or cultivation operations, (4) use of chemicals, provided such chemicals and the method of their application conform to practices approved by the Commissioner of Energy and Environmental Protection or, where applicable, the Commissioner of Public Health, or (5) water pollution from livestock or crop production activities, except the pollution of public or private drinking water supplies, provided such activities conform to acceptable management practices for pollution control approved by the Commissioner of Energy and Environmental Protection; provided such agricultural or farming operation, place, establishment or facility has been in operation for one year or more and has not been substantially changed, and such operation follows generally accepted agricultural practices. Inspection and approval of the agricultural or farming operation, place, establishment or facility by the Commissioner of Agriculture or his designee shall be prima facie evidence that such operation follows generally accepted agricultural practices. . . .

"(c) The provisions of this section shall not apply whenever a nuisance results from negligence or wilful or reckless misconduct in the operation of any such agricultural or farming operation, place, establishment or facility, or any of its appurtenances."

to allege sufficient facts to support a claim of municipal estoppel because they had failed to allege that the plaintiff had induced the defendants to engage in the activities at issue at the subject premises. The court determined, second, that, in their revised answer, the defendants improperly had included revisions that had not been requested by the plaintiff in his request to revise and which were unrelated to the special defense of municipal estoppel.[10] Also, with respect to the addition of paragraph 10 of the revised third special defense, which raised a claim that was based on § 19a-341, the court determined that it was improper because it "alleges preexisting nonconforming use, which has previously been stricken by this court."

Additionally, prior to the commencement of the trial, the plaintiff filed five motions in limine to preclude the defendants from presenting evidence for the purpose of (1) contesting the validity of the orders to discontinue dated April 16, 2012, and November 15, 2012; (2) proving a defense of municipal estoppel or laches; (3) demonstrating that relevant actions or decisions had been undertaken or made by any Clinton individuals or agencies other than the Clinton zoning authority; (4) demonstrating facts related to police reports and "claims of false or illegal entries into the record (specifically the zoning office 'street' file) by the plaintiff as zoning

[10] In revising the third special defense, in which the defendants originally had raised a claim of municipal estoppel, the defendants, inter alia, inserted a new paragraph, numbered as paragraph 10, which provides: "In addition, the defendants claim that their activities on said premises with respect to the mulching operation as a farming activity, together with other farming activities conducted on said premises by them, are protected and permitted under the provisions of [General Statutes § 19a-341]." In his memorandum of law in support of the motion to strike the third special defense, the plaintiff argued that this newly added paragraph should be stricken because it was unresponsive to the request to revise and, in light of the defendants' failure to exhaust their administrative remedies, jurisdictionally improper as a means of demonstrating that the defendants were lawfully using the subject premises.

enforcement officer"; and (5) proving a defense of nonconforming farm use of the subject premises. The defendants objected to these motions. The court expressly granted the first, second, fourth, and fifth of these motions, but a ruling on the third motion, related to evidence concerning other agencies or individuals, does not appear in the record.

Prior to the hearing, the parties entered into a joint stipulation of facts, dated April 28, 2015, as follows:

"(1) The defendants . . . purchased the [subject premises] . . . and are the current owners.

"(2) The premises is located within a R-80 residential zoning district.

"(3) The defendants have kept, and continue to keep, cows on the premises . . . .

"(4) The defendants have constructed a metal corral within fifty feet from the street line and thirty-five feet from the southeast property line. . . .

"(5) On April 16, 2012, the plaintiff issued to the defendants an order to discontinue the keeping of cows within a metal corral, which was constructed and located within the minimum front yard setback for the R-80 zoning district (50 feet) and the minimum side property line setback for the R-80 zoning district (35 feet).

"(6) The defendants did not file an appeal from the order to discontinue to contest its validity within fifteen (15) days after the issuance of said order to discontinue pursuant to . . . General Statutes §§ 8-6 and 8-7 and the rules of the Zoning Board of Appeals of the Town of Clinton [board] . . . establishing a fifteen (15) day appeal period. . . .

"(7) The defendants have sold, and continue to sell, firewood and mulch on the premises.

"(8) On October 18 and November 15, 2012, section 24.1.21 [of the Clinton zoning regulations] stated that retail establishments, as a permitted use, were prohibited in the R-80 district.

"(9) The defendants have brought, and continue to bring, wood, logs and wood chips onto the premises from outside sources to process into firewood and mulch.

"(10) The defendants have participated, and continue to participate, in the wholesale of mulch on the premises.

"(11) On October 18 and November 15, 2012, section 24.1.61 [of the Clinton zoning regulations] stated [that] manufacturing, processing or assembly of goods, as a permitted use, is prohibited in the R-80 district.

"(12) On October 18 and November 15, 2012, section 24.1.62 [of the Clinton zoning regulations] stated [that] warehousing and wholesale businesses, as a permitted use, are prohibited in the R-80 district.

"(13) The defendants have stored, and continue to store, heavy equipment, trucks, small equipment and machinery associated with the business being conducted at the site on the premises.

"(14) The defendants have stockpiled, and continue to stockpile, wood materials, including wood, wood chips and compost.

"(15) On October 18 and November 15, 2012, section 24.1.76 [of the Clinton zoning regulations] stated [that] storage of materials, which is dangerous due to explosion, extreme fire hazard and radioactivity, beyond what is required for person[al] residential use, as a permitted use, is prohibited in the R-80 district.

"(16) The defendants have parked, and continue to park, several vehicles, including two dump trucks, two

mason trucks, a 3500 Dodge pickup and a six wheel tanker truck on the premises.

"(17) On October 18 and November 15, 2012, section 24.1.70 [of the Clinton zoning regulations] stated [that] contractor's businesses, associated building and storage yards, as permitted uses, are prohibited in the R-80 district.

"(18) On October 18 and November 15, 2012, section 26.1.4 (d) (1) stated that parking of commercial vehicles in excess of one and one-half ton gross vehicle weight, as an accessory use, is prohibited in the R-80 district.

"(19) The defendants have stockpiled and stored, and continue to stockpile and store, materials and equipment outside on the premises, including mulch, logs, firewood, a log splitter, wood chippers, vehicles and loaders.

"(20) On October 18 and November 15, 2012, section 26.1.4 (m) [of the Clinton zoning regulations] stated [that] outside storage areas, as an accessory use, shall not extend into the areas required for setbacks from property line or residential district boundary lines; and section 26.1.4 (m) (1) [of the Clinton zoning regulations] stated [that] any permitted outside accessory storage areas shall be enclosed except for necessary access drive, by building and/or fence, walls, embankments or evergreen shrubs or trees so as to screen the storage area[s] from view from any other lot or from any street.

"(21) The defendants have kept, and continue to keep, chickens and ducks on the premises in excess of ten.

"(22) On October 18 and November 15, 2012, section 24.1.43 [of the Clinton zoning regulations] stated that chickens or other poultry, as a permitted use, are not to exceed a total of ten (10) on a lot.

"(23) The defendants have conducted, and continue to conduct, a farming operation of raising, keeping and caring for livestock, poultry and ducks on the premises.

"(24) On November 15, 2012, the plaintiff issued to the defendants an order to discontinue, listing numerous violations of the Clinton zoning regulations with activities on the site . . . .

"(25) The defendants did not file an appeal from the order to discontinue to contest its validity within fifteen (15) days after the issuance of said order to discontinue pursuant to . . . General Statutes §§ 8-6 and 8-7 and rules of the [board] . . . section IV, establishing a fifteen (15) day appeal period. . . .

"(26) On March 13, 2013, the defendants notified the plaintiff that they intended to continue to regrind wood chips and sell wood chips from the premises.

"(27) On March 28, 2013, the plaintiff, through counsel, issued to the defendants a letter advising them that the importation and processing of wood materials is a violation of the acts prohibited under section 24.1.61 of the Clinton zoning regulations and the order to discontinue dated November 15, 2012." (Citations omitted.)

The matter was tried before the court, *Aurigemma*, *J.*, on April 28, 2015. The court heard testimony from Lane, Knapp, and Jeffrey Cashman. Additionally, the parties presented several exhibits. On July 30, 2015, the court issued a memorandum of decision by which it rendered judgment in favor of the plaintiff, thereby enforcing the plaintiff's orders of April 16, 2012, and November 15, 2012. In its memorandum of decision, the court set forth the parties' stipulation of facts. Additionally, the court found that, after the plaintiff issued the April 16, 2012 order, which described the defendants' right to appeal, "the parties had discussions, and

the defendants agreed to move the cows into the areas that met the setback requirements. The defendants did relocate the cows, but only for a short period of time, [before they] moved them back so that they continued to violate the April 16, 2012 order to discontinue.

"On February 1, 2012, the plaintiff issued a warning of violation of sections 7.5, 23.4, 24.1.57 and 4.1.74 of the [Clinton zoning] regulations to the defendants. The warning expressly advised the defendants to '[s]top the manufacturing of wood materials for sale and the stockpiling of wood and debris away from vegetative areas to prevent any possible ignition of the vegetation. Stabilize the site by properly installing erosion controls along all disturbed areas and stockpiles. Stop the import of materials such as logs, wood chips, branches, leaves and other land/tree clearing debris.' After inspection, on February 13, 2012, the plaintiff issued a second warning of violations that was identical to the February 1, 2012 warning. Thereafter, the defendants met with the plaintiff and agreed to reduce and eliminate the mulch piles, eliminate the use of outside mulch and provide a place for the animals outside of the setbacks. The defendants also advised the plaintiff in April, 2012, that they had stopped accepting outside wood and wood chips. Thereafter, the defendants violated their agreements and failed to comply with the February warnings.

"After the plaintiff inspected the premises and found that the defendants had not remedied various violations of the zoning regulations, on October 18, 2012, he issued a notice of violations of numerous sections of the regulations. The notice reminded the defendants of their previous agreements to bring the premises into compliance and expressly advised the defendants that their failure to remedy the violations could lead to further legal action and the imposition of penalties under the Connecticut General Statutes. Thereafter, on November

15, 2012, the plaintiff issued an order to discontinue, listing the numerous violations of the regulations about which the defendants had previously received notice. This order, like the April order, expressly stated that it 'may be appealed to the [board] within fifteen days of its receipt.'

"On March 13, 2013, the defendants' attorney . . . sent a letter to . . . [the attorney] who represented the plaintiff, advising her that since the Department of [Energy and] Environmental Protection did not require [Jeffrey Cashman] to obtain a permit to regrind and sell wood chips, [Jeffrey Cashman] intended to resume regrinding and selling wood chips on the premises. The letter did not explain how the position of the Department of [Energy and] Environmental Protection had any relevance whatsoever to the violation of the Clinton zoning regulations. On March 28, 2013 . . . [another attorney who] also represented the plaintiff, sent a letter to the defendants' attorney . . . advising that accepting wood chips for regrinding and sale would constitute a wilful failure to comply with the November 15, 2012 order to discontinue.

"On November 13, 2013, the defendants petitioned to amend the Clinton zoning regulations to allow a number of the defendants' activities that are the subject of the orders to discontinue, including the mulching operation. The petition to amend was approved with modification on May 12, 2014. However, the defendants have never even attempted to take advantage of the amended regulations and, unbelievably, have not applied to obtain a special permit exception pursuant to the new regulations.

"[Lane] retired as zoning enforcement officer . . . and . . . [Knapp] became the Clinton [zoning enforcement officer] on May 1, 2014. He inspected the premises and found that almost all of the violations mentioned

in the orders to discontinue still existed, including cows in the corral, smoking piles of mulch, and heavy machinery on the premises. [Knapp] testified that [Jeffrey Cashman] has made it clear that he has no intention of complying with the orders at issue. [Jeffrey Cashman's] own testimony made it clear that, essentially, he does not think the zoning regulations should apply to him because he's a farmer.

"The plaintiff has incurred $16,388.50 in attorney's fees and $412.20 in costs related to this action through May 1, 2015. Since the briefs in this case were filed on June 19, 2015, and July 7, 2015, the plaintiff has undoubtedly incurred additional legal expenses in connection therewith.

"The defendants have stipulated to the majority of the allegations in the plaintiff's complaint. They don't deny that they are in violation of the orders to discontinue and the regulations referenced therein. They just don't believe the orders are valid and/or that the orders should apply to them. However, the defendants may not contest the validity of the orders to discontinue in this zoning enforcement action because they failed to appeal those orders."

The court proceeded in its analysis to reject the defendants' argument that the injunctive relief requested by the plaintiff was inequitable. The court, citing relevant case law, observed that the granting of such relief must be compatible with the equities of the case, and went on to determine that equitable considerations weighed in favor of granting the plaintiff relief. The court stated in relevant part: "[T]he fact that a party will suffer irreparable harm as a result of a zoning enforcement injunction does not make the injunction inequitable. . . . In this case . . . the court finds that the equities patently lie with the town. The defendants have blatantly and defiantly violated multiple zoning regulations, failing to even attempt to lessen or erase those

violations by applying for special permits." The court granted the plaintiff injunctive relief with respect to the activities and conditions at the subject premises that were the subject of the plaintiff's orders to discontinue. Moreover, the court ordered the defendants to pay a fine and awarded the plaintiff attorney's fees and costs. This appeal followed. Additional facts will be set forth as necessary.

I

First, the defendants claim that Judge Domnarski and Judge Aurigemma erred in striking one of their special defenses, thereby prohibiting them from demonstrating that they had a legally protected right to use the subject premises as a farm on the ground that such use of their property was a nonconforming use that existed prior to the town's amendment of the zoning regulations in 2012 with respect to farms and livestock. We disagree.

We begin our analysis of this claim by reviewing some of the relevant procedural history set forth previously in this opinion. The record reflects that on May 10, 2013, Judge Domnarski struck the defendants' special defense that was included in their answer dated November 5, 2012, which they had filed in response to the plaintiff's original complaint. This special defense was that the subject property had been classified as farmland under Public Act 63-490 and that the activities described in the April 16, 2012 order to discontinue "were nonconforming uses that predate the zoning laws the plaintiff is trying to enforce." In granting the motion to strike, Judge Domnarski agreed with the plaintiff's arguments and determined that the special defense was "legally insufficient" because the defendants had failed to exhaust their administrative remedies by exercising their right to challenge the validity of the order by appealing it to the board.

After the plaintiff filed an amended complaint, the defendants filed an answer to the amended complaint. As we explained previously, the answer to the amended complaint originally contained three special defenses. The defendants deleted the first two of these special defenses in response to the plaintiff's request to revise. Thus, following its revision by the defendants, the answer set forth only one special defense that included a claim of municipal estoppel and a claim that the defendants' activities at the subject premises were protected pursuant to § 19a-341. In striking this special defense in its entirety, Judge Aurigemma determined that the defendants had failed to allege sufficient facts to demonstrate that the plaintiff had engaged in activities that induced them to engage in the conduct at issue at the subject premises. Additionally, Judge Aurigemma concluded that, insofar as the defendants had revised the special defense to include a claim pursuant to § 19a-341, such revision was legally improper. See footnotes 9 and 10 of this opinion.

In their argument concerning the present claim, the defendants focus solely on whether the court properly precluded them from setting forth their special defense on the basis of farming as a nonconforming use. Specifically, the defendants argue: "Throughout the record of the case, the defendant[s] [have] attempted to provide evidence that shows, unequivocally, that some, if not all, of the 'violations' existed prior to the revision of the zoning regulations on January 1, 2012, and were legal as of right uses on December 31, 2011. The defendants admittedly failed to appeal the [zoning enforcement officer's] orders to the [board]. The trial court should have [nonetheless] . . . allowed the defendants to proceed with their special defenses. Because the defendants' uses were legal nonconforming uses, the defendants were entitled to constitutional protection of those nonconforming uses that were on the property

at the time of the amendment to the zoning regulations." The defendants proceed to argue that they operated a farm on the subject premises prior to January 1, 2012, that the zoning regulations at issue were amended to prohibit some of the defendants' activities on the subject premises on January 1, 2012, and that the plaintiff began enforcement action against the defendants approximately four months later. Additionally, the defendants argue that "[t]he facts are clear that once the town revised the regulations, the plaintiff began immediate enforcement against the defendants. Such behavior is a violation of the defendants' statutory and constitutional rights that are attached to property owners with nonconforming uses and, because of the egregious nature of the enforcement and the unconstitutional nature of the result, the doctrine of exhaustion of administrative remedies should not apply."

Additionally, in framing their claim, the defendants have referred to rulings made by Judge Domnarski *and* Judge Aurigemma. They argue that these rulings "prohibited [them] from raising the special defenses that they had a legal nonconforming right to use the property as a farm . . . ." Turning to the defendants' claim of error as it relates to Judge Aurigemma's ruling, we observe, once again, that, in this appeal, the defendants do not claim that Judge Aurigemma erroneously struck their special defense as it pertained to their claim of municipal estoppel or their reliance on § 19a-341. Instead, the defendants claim is limited to their assertion of a legally protected right to the nonconforming use of the subject premises as a farm. Although the defendants refer to Judge Aurigemma's ruling in their statement of the claim, they do not identify how Judge Aurigemma's ruling on the motion to strike harmed them or why it was erroneous. As counsel for the defendants acknowledged at oral argument before this court,

Judge Aurigemma did not strike a special defense related to such a nonconforming use of the subject premises because, by the time that Judge Aurigemma ruled on the motion to strike, the defendants had deleted their first and second special defenses (related to nonconforming use) in their response to the plaintiff's request to revise. Thus, any claim of error by the defendants that Judge Aurigemma improperly struck their special defenses related to nonconforming use is belied by a simple review of the record. We are unable to review a ruling that was not made.

Thus, we turn to the defendants' claim of error as it relates to Judge Domnarski's ruling striking their special defense that they had a legally protected right to continue to conduct nonconforming farming activities at the subject premises.[11] Before discussing the propriety of that ruling, we address the plaintiff's argument that the defendants voluntarily waived appellate review of Judge Domnarski's ruling because, following that ruling, the plaintiff filed an amended complaint, the defendants filed an answer in response to the plaintiff's amended complaint, and, later, the defendants amended their answer and voluntarily deleted special defenses alleging nonconforming use.[12]

[11] We reiterate that Judge Domnarski struck the special defense set forth in the defendants' answer to the plaintiff's original complaint. This special defense pertained to nonconforming *farming activities* at the subject premises. The defendants did not plead a special defense of nonconforming use related to *commercial nursery activities* at the subject premises until after the plaintiff amended his complaint to seek enforcement of the order to discontinue dated November 15, 2012.

[12] The defendants did not file a reply brief to respond to this waiver argument. At oral argument before this court, the defendants' attorney relied on the fact that the defendants had filed a notice of intent to appeal from Judge Domnarski's ruling dismissing their counterclaim. The defendants' notice of intent to appeal *from Judge Domnarski's dismissal of their counterclaim* does not affect our analysis of the waiver issue concerning the striking of their special defense.

It is well established in our law that "[w]hen an amended pleading is filed, it operates as a waiver of the original pleading. The original pleading drops out of the case and although it remains in the file, it cannot serve as the basis for any future judgment, and previous rulings on the original pleading cannot be made the subject of an appeal." (Internal quotation marks omitted.) *Lund* v. *Milford Hospital, Inc.*, 326 Conn. 846, 850, 168 A.3d 479 (2017); see also *Rockstone Capital, LLC* v. *Sanzo*, 175 Conn. App. 770, 788, 171 A.3d 77 (same), cert. granted on other grounds, 327 Conn. 968, A.3d (2017); *Ed Lally & Associates, Inc.* v. *DSBNC, LLC*, 145 Conn. App. 718, 746, 78 A.3d 148 (same), cert. denied, 310 Conn. 958, 82 A.3d 626 (2013). "When a defendant voluntarily files an amended or substitute answer after a former one has been adjudged insufficient on demurrer, he waives all right to except to the action of the court in sustaining the demurrer to the first answer." *Pettus* v. *Gault*, 81 Conn. 415, 418, 71 A. 509 (1908).

In the present case, following Judge Domnarski's ruling on the motion to strike on May 10, 2013, the defendants did not file an amended or substitute answer in response to the plaintiff's original complaint. Rather, on August 22, 2013, after the plaintiff filed a motion for default for the defendants' failure to file a responsive pleading to the amended complaint, the defendants filed an answer to the plaintiff's July 3, 2013 amended complaint. In their answer to the amended complaint, the defendants included two special defenses of nonconforming use, thereby reasserting the special defense related to farming activities that had been stricken by Judge Domnarski.[13] In his request to revise the answer

[13] Count one of the amended complaint was related to the zoning violations addressed in the order to discontinue dated April 16, 2012. Count two of the amended complaint was related to the zoning violations addressed in the order to discontinue dated November 15, 2012. The special defenses in the answer to the amended complaint were designated as "first," "second," and "third" special defenses and, thus, were not pleaded in accordance with

to the amended complaint, the plaintiff requested that the first and second special defenses be deleted in their entirety as having been "previously alleged" by the defendants in their response to his original complaint and having been "already stricken by Judge Domnarski" on the ground that the defendants failed to exhaust their administrative remedies. Although they had a right to object to any or all of the requested revisions; see Practice Book § 10-37 (b); the defendants did not do so.[14] Instead, they deleted the special defenses, thereby removing those special defenses from the trial court's consideration in adjudicating the merits of the case.

To clarify the narrow waiver issue before us, we reiterate that, presently, the defendants only challenge Judge Domnarski's ruling in striking their special defense related to farming activities on the subject premises. They deleted their special defense related to commercial nursery activities at the subject premises; see footnote 11 of this opinion; and no ruling was made with respect to that special defense. Moreover, they have not appealed from Judge Aurigemma's ruling striking their special defense that was based on municipal estoppel. The plaintiff's waiver argument is somewhat persuasive, for it is based on the defendants' voluntary decision to delete both their special defenses that were based on nonconforming use in response to the plaintiff's request to revise. The defendants, although failing to address the plaintiff's waiver argument by means of a reply brief, nonetheless rely on Judge Domnarski's

Practice Book § 10-51, which provides in relevant part that "[w]here the complaint . . . is for more than one cause of action, set forth in several counts, each separate matter of defense should be preceded by a designation of the cause of action which it is designed to meet, in this manner: *First Defense to First Count*, *Second Defense to First Count*, *First Defense to Second Count*, and so on. . . ." (Emphasis in original.)

[14] At oral argument before this court, the defendants' attorney stated that the defendants' trial counsel deleted the special defenses in recognition of Judge Domnarski's prior ruling.

ruling as a rationale for their failure to object to the request to revise, an undoubtedly futile endeavor that only would have compelled the court to revisit the issue of the validity of their special defenses.[15] We have not discovered any precedent that shares the unique procedural history presented in the present case and, thus, could be considered to be binding authority with respect to the issue. Lacking clearly applicable precedent, we turn to a review of the merits of the claim and conclude that Judge Domnarski's ruling was proper.

It is undisputed that the defendants did not exercise their right to appeal to the board from the plaintiff's April 16, 2012 order to discontinue within fifteen days of the receipt of that order. In moving to dismiss and/or strike the special defense at issue, the plaintiff argued that the court lacked subject matter jurisdiction to consider the special defense because the defendants failed to exhaust their administrative remedies by appealing to board within the time prescribed by the board. See General Statutes § 8-7.

In their written objection to the plaintiff's motion, submitted to the trial court, the defendants argued in relevant part that the exhaustion doctrine did not apply in this case because (1) the special defense was based on a determination that one or more zoning regulations were invalid, specifically, that by virtue of Public Act 63-490, the regulations on which the plaintiff relied are invalid or illegal and did not apply to the subject property, and (2) their special defense was based on the interpretation of a statute, specifically, that it required the court to interpret Public Act 63-490, which, the defendants argued, "exempts them from the zoning regulations of Clinton by making their property a valid

[15] "[T]he law does not require the performance of a futile act." (Internal quotation marks omitted.) *Barber* v. *Jacobs*, 58 Conn. App. 330, 336, 753 A.2d 430, cert. denied, 254 Conn. 920, 759 A.2d 1023 (2000).

nonconforming use that predates the zoning regulations of Clinton" and that "[a] land owner is not required to appeal to an administrative agency where the interpretation of a statute is required." During argument on the motion, the defendants' attorney reiterated that the defendants intended by their special defense to challenge the validity of the zoning regulations "because Public Act 63-490 . . . effectively trumps these zoning enforcement regulations" and that their special defense required the court to interpret Public Act 63-490. The plaintiff reiterated the central premise advanced in his motion, namely, that the special defense at issue raised a garden variety claim of whether the defendants had a nonconforming use and that such issue should have been raised before the board because it was "clearly within [its] purview."

Before this court, the defendants argue that they wanted to demonstrate that some, if not all, of the conditions and activities at issue on the subject property existed prior to the time that the Clinton zoning regulations were revised on January 1, 2012, such that they were legal on December 31, 2011. The defendants argue that farming uses were "lightly regulated" prior to the revisions, but beginning on January 1, 2012, farming uses required a permit. The defendants argue that, as part of proving their special defense, they intended to present evidence to show that they had been operating a farm on the subject premises since 1988 and had constructed the enclosure for cows prior to January 1, 2012, the date when newly enacted regulations prohibiting livestock from being kept within the setback area went into effect. They argue that it was obvious that their farming activities predated the newly enacted regulations and that the plaintiff's conduct, in immediately enforcing the newly enacted zoning regulations with respect to their property was "egregious" because their

activities clearly were legally protected as nonconforming uses. They argue that "[s]uch behavior is a violation of the defendants' statutory and constitutional rights that are attached to property owners with nonconforming uses . . . ."

The defendants argue that the present case falls into one of the narrow exceptions to the exhaustion doctrine. Relying on *Norwich* v. *Norwalk Wilbert Vault Co.*, 208 Conn. 1, 4, 544 A.2d 152 (1988), the defendants argue that they excusably bypassed available administrative relief, specifically, appealing to the board, because "a constitutional question is involved and obtaining relief from the [board] would be futile." In this regard, the defendants argue that the question of whether any constitutionally protected nonconforming uses existed was beyond the scope of review by the board and that "this case presents a constitutional question as to whether the plaintiff can eliminate a constitutionally protected nonconforming right just by the issuance of a cease and desist order that is not appealed." The defendants argue that the exception applies in this case to address what they describe as an "unconstitutional result" of the plaintiff's order. Additionally, the defendants argue that the plaintiff's actions "raised questions as to whether or not the newly enacted regulation[s] [were] invalid. The [board] was not in a position to make a determination as to whether or not the newly enacted regulation[s] [were] invalid, particularly, in [their] enforcement against the defendants." Without citing to any relevant authority, the defendants posit that the issue of whether a nonconforming use existed was simply "beyond the scope of the [board]."

Additionally, relying on *Upjohn Co.* v. *Zoning Board of Appeals*, 224 Conn. 96, 104–105, 616 A.2d 793 (1992), the defendants argue that they properly bypassed administrative relief because the plaintiff's "zoning action [was] so far outside [a] valid exercise of zoning

power that public policy dictates that the aggrieved party be allowed to challenge the zoning authority in court." In this regard, the defendants rely, in part, on the fact that the plaintiff began his enforcement action soon after the zoning regulations were revised and that the order to discontinue had the effect of "eliminat[ing]" their nonconforming right to use the subject property as a farm. At oral argument before this court, the defendants clarified that the timing of the plaintiff's enforcement activities in relation to the revisions to the zoning regulations was sufficient to reflect that the plaintiff's zoning enforcement activities fell so far outside of the lawful or legitimate exercise of zoning power that they should be permitted to challenge the zoning authority in court.

Thus, the arguments raised by the defendants before Judge Domnarski with respect to exceptions to the exhaustion doctrine differ from those, discussed previously, that the defendants currently advance before this court. Before the trial court, the defendants' exhaustion arguments were dominated by a reliance on Public Act 63-490, an enactment to which the defendants do not even refer in their appellate brief. It would be particularly unfair, both to the trial court and to the plaintiff, for this court to overturn the trial court's ruling on the basis of constitutional and public policy arguments that were neither raised before nor addressed by the court.

Even if we were to consider the merits of the arguments on which the defendants currently rely, we would readily conclude that they are not persuasive and, thus, do not afford them a right to bypass the administrative remedies available to them.[16] A motion to strike is the

[16] It suffices to state that, with respect to the exhaustion of administrative remedies issue, we are not persuaded by the defendants' reliance on *Haussherr-Hughes* v. *Redenz*, Superior Court, judicial district of Danbury, Docket No. CV-98-0332716 S (January 11, 2000) (26 Conn. L. Rptr. 256), which we deem to be factually and procedurally distinguishable from the present case.

procedural vehicle whereby a party may challenge the legal sufficiency of a special defense and, in ruling on a motion to strike, the court "must accept as true the facts alleged in the special defenses and construe them in the manner most favorable to sustaining their legal sufficiency." *Barasso* v. *Rear Still Hill Road, LLC*, 64 Conn. App. 9, 13, 779 A.2d 198 (2001). In the present case, the issue raised by the motion to strike concerned the exhaustion doctrine and, thus, the court's subject matter jurisdiction to consider the special defense rather than the legal sufficiency of the special defense. Accordingly, it is appropriate to view and review the ruling as one made in connection with a motion to dismiss. "The standard of review for a court's decision on a motion to dismiss . . . is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the [special defense] in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the [special defense], including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Dorry* v. *Garden*, 313 Conn. 516, 521, 98 A.3d 55 (2014). If the resolution of the jurisdictional issue hinges on relevant facts that are in dispute, the court may hold an evidentiary hearing to

resolve them. Id., 523–24. In the present case, it is of no consequence that the court viewed the motion as it was framed by the parties, as a motion to strike, because the relevant facts were not in dispute in light of the parties' stipulation that the defendants did not pursue an appeal before the board.

The defendants argue that this case falls within an exception to the exhaustion doctrine because a "constitutional question is involved" and "[t]he [board] was not in a position to make a determination as to whether or not the newly enacted regulation was invalid . . . ."

In *Norwich* v. *Norwalk Wilbert Vault Co.*, supra, 208 Conn. 1, precedent on which the defendants expressly rely, our Supreme Court stated: "It is well settled that a jurisdictional prerequisite to seeking relief in a court of law is that all available administrative remedies must have been exhausted. . . . We have held, however, that under limited circumstances, there are exceptions to this principle. One such exception is that where the available relief is inadequate or futile, the administrative process may be bypassed. . . . [E]xhaustion of administrative remedies is generally not required when the challenge is to the constitutionality of the statute or regulation under which the board or agency operates, rather than to the actions of the board or agency. . . . Generally, such challenges have been instituted by a plaintiff in a declaratory judgment action." (Citations omitted; internal quotation marks omitted.) Id., 4–5.

In *Stepney, LLC* v. *Fairfield*, 263 Conn. 558, 821 A.2d 725 (2003), our Supreme Court provided additional guidance with respect to this type of issue: "[T]here are recognized exceptions to the exhaustion doctrine, but we have recognized such exceptions only infrequently and only for narrowly defined purposes. . . . One such exception involves a challenge to the constitutionality of the statute or regulation under which an

agency operates, rather than to the actions of the board or agency. . . . [T]he mere allegation of a constitutional violation [however] will not necessarily excuse a [party's] failure to exhaust available administrative remedies . . . . The test is whether the appeal would be futile because the administrative agency . . . lacks the authority to grant adequate relief. . . .

"Moreover . . . [s]imply bringing a constitutional challenge to an agency's actions will not necessarily excuse a failure to follow an available statutory appeal process. . . . [D]irect adjudication even of constitutional claims is not warranted when the relief sought by a litigant might conceivably have been obtained through an alternative [statutory] procedure . . . which [the litigant] has chosen to ignore. . . . [W]e continue to limit any judicial bypass of even colorable constitutional claims to instances of demonstrable futility in pursuing an available administrative remedy." (Citations omitted; internal quotation marks omitted.) Id., 570–71; see also *General Dynamics Corp.* v. *Groton*, 184 Conn. 483, 490, 440 A.2d 185 (1981) (exhaustion doctrine does not apply to questions concerning constitutionality of statute granting administrative agency authority to operate); *Friedson* v. *Westport*, 181 Conn. 230, 233, 435 A.2d 17 (1980) (exhaustion doctrine does not apply to questions related to "very enactment" of regulations at issue).

Looking beyond isolated assertions by which the defendants purport to challenge the validity of the zoning regulations at issue, which are unaccompanied by any legal analysis, a careful review of the substance of the defendants' arguments reveals that the "constitutional question" that they sought to raise by means of their special defense simply was whether the plaintiff's enforcement activities were valid despite the fact that, following the enactment of the revised zoning regulations at issue, they had a constitutionally protected

preexisting use resulting from their activities on the subject premises prior to January 1, 2012. As the defendants acknowledge ultimately, their special defense was meant to challenge "the unconstitutional *result* of the plaintiff's illegal enforcement," but not the constitutionality of the regulations that the plaintiff purported to enforce. (Emphasis added.) The defendants' constitutional challenge to the plaintiff's activities does not excuse their failure to avail themselves of the administrative appeal process that was available to them. Although we recognize that "[a] party need not exhaust an inadequate or futile administrative remedy"; *Conto* v. *Zoning Commission*, 186 Conn. 106, 115, 439 A.2d 441 (1982); the defendants have not demonstrated that the board was unable to fulfill its customary administrative function in the present case by considering the appropriate evidence and determining whether the plaintiff properly determined that a nonconforming use did not exist, a determination made manifest by the issuance of the order to discontinue. Moreover, the defendants have not demonstrated that the board, in fulfilling its customary administrative function, was unable to grant any appropriate relief warranted in the present case with respect to the plaintiff's order to discontinue. Nothing in the record suggests that the relief sought by the defendants could not have been obtained by resort to the administrative remedy that they ignored.

Our Supreme Court has "held that the statutory scheme [which affords a right to appeal from the decision of an administrative officer or agency to the zoning board of appeals] reflects the legislative intent that the issue of what constitutes a nonconforming use should be resolved in the first instance by local officials. . . . [W]hen a party has a statutory right of appeal from the decision of an administrative officer or agency, he may not, instead of appealing, bring an independent action

to test the very issue which the appeal was designed to test. . . . Likewise, the validity of the order may not be contested if zoning officials seek its enforcement after a violator has failed to appeal." (Citations omitted; internal quotation marks omitted.) *Gelinas* v. *West Hartford*, 225 Conn. 575, 595, 626 A.2d 259 (1993).

The rationale in another decision of our Supreme Court applies with equal force to the present case: "Clearly the defendant had a statutory right to appeal the cease and desist order to the zoning board of appeals. The zoning board [of appeals] would in that proceeding determine whether the defendant, in fact, had a nonconforming use. The statutory procedure reflects the legislative intent that such issues be handled in the first instance by local administrative officials in order to provide aggrieved persons with full and adequate administrative relief, and to give the reviewing court the benefit of the local board's judgment. . . . Instead of following this administrative process to establish the legality of his use after the receipt of the order to cease and desist, the defendant elected to await the institution of an action by the town to enforce the order. On the record of this case, we conclude that the trial court properly refused to resolve the issue of the defendant's special defense alleging a nonconforming use, since that issue was one properly for administrative determination in the first instance." (Citation omitted; footnote omitted.) *Greenwich* v. *Kristoff*, 180 Conn. 575, 578–79, 430 A.2d 1294 (1980). Accordingly, the defendants' futility argument is unpersuasive.

As the defendants properly observe, in *Upjohn Co.* v. *Zoning Board of Appeals*, supra, 224 Conn. 104–105, our Supreme Court, in rejecting a collateral attack upon a condition attached to a building application, stated that "there may be exceptional cases in which a previously unchallenged condition was so far outside what could have been regarded as a valid exercise of zoning

power that there could not have been any justified reliance on it, or in which the continued maintenance of a previously unchallenged condition would violate some strong public policy. It may be that in such a case a collateral attack on such a condition should be permitted. We leave that issue to a case that, unlike this case, properly presents it." See also *Gangemi* v. *Zoning Board of Appeals*, 255 Conn. 143, 150, 763 A.2d 1011 (2001) (rejecting claim that exception suggested in *Upjohn Co*. satisfied). The court in *Upjohn Co*. stated: "[W]e have ordinarily recognized that the failure of a party to appeal from the action of a zoning authority renders that action final so that the correctness of that action is no longer subject to review by a court. . . . [This rule rests] in large part, at least in the zoning context, on the need for stability in land use planning and the need for justified reliance by all interested parties—the interested property owner, any interested neighbors and the town—on the decisions of the zoning authorities." (Citations omitted.) *Upjohn Co*. v. *Zoning Board of Appeals*, supra, 102.

In arguing that this precedent permitted them to bypass the administrative remedies available to them, the defendants argue, inter alia, that they were faced with a fifteen day appeal period in which to appeal to the board, that they had complied with the plaintiff's initial orders and had made attempts to persuade the plaintiff that his zoning enforcement activities were unjust and illegal, that such discussions lasted beyond the appeal period, and that the plaintiff's orders had the effect of eliminating their nonconforming use rights with respect to the subject premises. The defendants challenge Judge Domnarski's ruling in striking their special defense, yet the defendants rely on "facts surrounding [their] decision not to appeal the orders" that were presented at the time of the trial, well *after* the

time that Judge Domnarski considered and ruled on the motion to strike.

Having reviewed *Upjohn Co.* and its progeny, we are not persuaded that the facts of the present case are sufficient to meet the "very high standard"; *Torrington* v. *Zoning Commission*, 261 Conn. 759, 769, 806 A.2d 1020 (2002); necessary to satisfy the narrow exception to the exhaustion doctrine on which they rely. Stripped of the defendants' rhetoric, their special defense was a means of demonstrating that a nonconforming use existed. The plaintiff, in issuing the order to discontinue, plainly disagreed with the defendants' position in this regard. That a property owner disagreed with the determination of a zoning enforcement officer hardly presents an extraordinary circumstance. Moreover, the defendants have not presented this court with any authority to support their assertion that "[t]he question of whether any constitutionally protected nonconforming uses [existed] is beyond the scope of the [board]." The defendants, having been apprised of their right to appeal, chose not to appeal within the time period set by the board. If, as they argue, their farming activities obviously were nonconforming uses of the property following January 1, 2012, they had an ample opportunity to demonstrate that fact before the board. They do not present any compelling reasons why the issue was not the proper subject of an appeal before the board or why, despite any ongoing efforts to persuade the plaintiff to rescind his order, they were unable to bring an appeal. Nothing in the record suggests that the defendants could not have brought a timely appeal before the board while simultaneously continuing to negotiate with the plaintiff in an effort to resolve the dispute.

For the foregoing reasons, we conclude that Judge Domnarski's ruling in striking the special defense was proper.

II

Next, we consider the defendants' claim that the court improperly granted three of the plaintiff's motions in limine. We disagree.

As explained previously in this opinion, the plaintiff brought five motions in limine in which he sought to preclude certain evidence. The defendants challenge the court's granting of three of those motions. The first motion pertained to evidence offered for the purpose of challenging the validity of the orders to discontinue dated April 16, 2012, and November 15, 2012. The second motion pertained to evidence offered for the purpose of proving a defense of municipal estoppel or laches. The third motion pertained to evidence offered for the purpose of proving a nonconforming farm use of the subject premises. In his written motions, the plaintiff argued in relevant part that any evidence by which the defendants sought to raise a collateral attack on the orders to discontinue, including any evidence offered to demonstrate that a nonconforming use existed, should be disallowed in light of Judge Domnarski's prior ruling that struck the defendants' special defense, the fact that the defendants had voluntarily withdrawn their special defenses related to nonconforming use in response to his request to revise, and the defendants' failure to appeal the orders to the board. Moreover, the plaintiff argued, in relevant part, that evidence related to the issues of municipal estoppel or laches should be disallowed in light of Judge Aurigemma's prior ruling that struck the defendants' special defense that was related to these issues. Previously in this opinion, we discussed the foregoing procedural history in greater detail.

The defendants filed a written objection to these motions, in which they argued in relevant part: "The

defendants intend to present evidence which will provide the court with the full history of the defendants' use of the property since they acquired the property in 1987. The defendants intend to present evidence concerning the steps that they have taken to improve their property and utilize it in a manner that they believed was consistent with the zoning regulations then in effect. The defendants intend to present evidence of their responses to the orders to discontinue and their obtaining and providing information concerning the nature of their use. . . . All of the evidence that the defendants intend to introduce is relevant to the court's central determination as to whether or not the permanent injunction should be granted." The defendants argued that because the plaintiff has invoked the court's equitable powers by seeking a permanent injunction with respect to the defendants' farming activities on the subject property, the court was obligated to consider the equities of the case and to assess the gravity and wilfulness of the violation and the potential harm to the defendants. The defendants argued: "Although the defendants failed to appeal the orders to discontinue, the court must look to the historic use of the property in ruling on whether the equities will be served in granting this injunction. . . . The evidence that the defendants seek to admit will provide the court with evidence that is necessary for the determination regarding the gravity and wilfulness of the violation as well as the potential harm [to the] defendants. The evidence will include the historic use of the property, the plaintiff's inspections of the property, town regulation of the property and the defendants' responses to the orders to discontinue." (Citation omitted; internal quotation marks omitted.)

Initially, during oral argument on the motions, the defendants' attorney argued in relevant part: "I disagree that we cannot challenge the validity of the orders [to

discontinue] because the court has the ultimate discretion as to whether or not those orders should be upheld and turned into permanent injunctions in favor of the town." The defendants' attorney argued that the evidence at issue, with respect to nonconforming use, was necessary so that the court would have "a full picture" of all of the facts surrounding the orders to discontinue and that such evidence was relevant to the equitable issues before the court in determining whether it should grant the plaintiff permanent injunctive relief. Later, the defendants' attorney appeared to have modified his argument slightly by stating that the defendants did not intend "necessarily" to challenge the validity of the orders to discontinue, but to present evidence that was relevant to a determination of what injunctive relief, if any, was warranted.

During oral argument on the motions, the plaintiff's attorney argued in relevant part that, despite the equitable considerations that were before the court, the defendants' position, that they should be allowed to present evidence in an attempt to demonstrate a nonconforming farm use or to otherwise challenge the validity of the orders to discontinue, would permit them, effectively, to transform the case into the administrative appeal that the defendants chose not to pursue.

With respect to the motions in limine pertaining to evidence of nonconforming use or evidence that otherwise would effectively challenge the validity of the orders to discontinue, the court, *Aurigemma*, *J.*, agreed with the plaintiff's arguments and granted the motions in limine related to such evidence. The court stated that the defendants had not pursued an administrative appeal. With respect to the motion in limine pertaining to the special defense of estoppel or laches, the plaintiff's attorney observed that the court already had stricken the special defense of the defendants to which such evidence would have pertained. The defendants'

attorney acknowledged that the parties already had presented relevant arguments in this regard in the context of the motion to strike that special defense. The court granted the motion.

Presently, the defendants argue that the court's rulings were erroneous because in so ruling the court prohibited them from presenting an equitable defense to the zoning enforcement action. The defendants argue: "In this case, although the defendants failed to appeal the orders to discontinue, the court must look to the historic use of the property in ruling on whether the equities will be served in granting this injunction." They argue: "The evidence that the defendants attempted to admit would have provided the trial court with evidence that was necessary for the determination regarding the gravity and wilfulness of the violation as well as the potential harm to the [defendants]. . . . [T]he evidence will include the historic use of the property, the plaintiff's inspections of the property, town regulation of the property and the defendants' responses to the orders to discontinue." (Internal quotation marks omitted.) Additionally, the defendants argue: "In the present matter, the defendants failed to appeal the cease and desist orders due to their belief that the matters would be amicably resolved. We do not believe that the mere failure to timely appeal the matter is sufficient to have the nonconforming uses extinguished. In reviewing the orders, it does not appear as though [the] plaintiff ever considered the property was a farm or understood that the farm use was permitted without a zoning permit until December 31, 2011." (Internal quotation marks omitted.)

Primarily, the plaintiff argues that the defendants have failed to claim, let alone demonstrate, that the court's rulings were harmful such that the disallowed evidence likely would have affected the result of the trial. Also, the plaintiff argues that the court's rulings

reflected a proper exercise of its discretion because the equitable nature of the proceeding did not limit the court's discretion in the manner claimed by the defendants.

The defendants urge us to review the court's rulings de novo because the court based its evidentiary rulings on its resolution of a question of law, specifically, whether their failure to exhaust their administrative remedies precluded them from presenting "any evidence concerning their historic use of the property or the regulations that had been in effect on December 31, 2011." Also, the defendants argue that the rulings require that we review questions of law, including "whether the defendants were entitled to a constitutional review of the elimination of the nonconforming rights, whether the plaintiff's actions deprived the defendants of constitutionally protected rights and whether this constitutional question presents an exception to the exhaustion of administrative remedies rule." The plaintiff urges us to apply the deferential abuse of discretion standard of review to the claimed errors.

Here, it is apparent that the court determined that the evidence at issue was inadmissible because (1) the defendants failed to exhaust their administrative remedies, (2) Judge Domnarski previously struck the special defense of nonconforming use, and (3) the court previously struck the special defense of equitable estoppel. The defendants urge us to reconsider whether the evidence at issue related to the historic use of the subject property, the zoning regulations in effect on December 31, 2011, and estoppel nonetheless was admissible in the present enforcement action. We note, however, that we already have determined in part I of this opinion that the court properly struck the special defense of farming as a nonconforming use, and the defendants do not challenge Judge Aurigemma's ruling that struck their special defense that was based on estoppel. At no

time did the court strike the voluntarily deleted special defense of operating a commercial nursery as a nonconforming use.

We recognize that the function performed by the court in issuing the challenged evidentiary ruling dictates our scope of review. See *State* v. *Saucier*, 283 Conn. 207, 219, 926 A.2d 633 (2007). Regardless of whether we review the rulings under a plenary standard of review or under an abuse of discretion standard of review, it remains the defendant's burden on appeal to demonstrate that the court's evidentiary rulings were harmful. "[B]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . The harmless error standard in a civil case is whether the improper ruling would likely affect the result. . . . When judging the likely effect of such a trial court ruling, the reviewing court is constrained to make its determination on the basis of the printed record before it. . . . In the absence of a showing that the [excluded] evidence would have affected the final result, its exclusion is harmless." (Internal quotation marks omitted.) *Desrosiers* v. *Henne*, 283 Conn. 361, 366, 926 A.2d 1024 (2007).

As the plaintiff aptly observes, the defendants' brief does not adequately set forth an analysis of how the court's exclusion of evidence affected the final result of the proceeding. Faced with an appellant's failure adequately to brief how a challenged evidentiary ruling was harmful, both this court and our Supreme Court have declined to review a claim of error related to such ruling. See, e.g., *Saint Bernard School of Montville, Inc.* v. *Bank of America*, 312 Conn. 811, 823, 95 A.3d 1063 (2014); *State* v. *Toro*, 172 Conn. App. 810, 813, 162 A.3d 63, cert. denied, 327 Conn. 905, 170 A.3d 2 (2017); *In re James O.*, 160 Conn. App. 506, 526, 127 A.3d 375 (2015), aff'd, 322 Conn. 636, 142 A.3d 1147 (2016).

The consequence of the defendants' failure to analyze the issue of harm adequately is that we are left to speculate with respect to the content and significance of the evidence that was excluded by the court's rulings. The defendants argued before the trial court that they would have presented evidence relevant to an understanding of the historic use of the subject premises, as well as the gravity and wilfulness of the zoning violation.[17] In their brief, the defendants do not draw our attention to any proffer made by them to the trial court and, beyond conclusory statements concerning the existence of a nonconforming use, the record does not clearly describe the content of the evidence that the court excluded.[18]

In their appellate brief, the defendants state in broad terms that the court erroneously excluded evidence concerning "the historic utilization of the property, the previous versions of the regulations under which the defendants acted and the unreasonableness of the plaintiff when considering the history prior to January 1, 2012." Apart from failing to refer us to any portion of the record for details concerning the excluded evidence, the defendants fail to attempt to demonstrate

[17] The defendants also argued that they would have presented evidence concerning the potential harm to them arising from injunctive relief. We observe that, during his testimony before the trial court, Jeffrey Cashman testified with respect to what actions he took in an attempt to address the zoning violations at issue, why he did not bring an administrative appeal, and how the granting of injunctive relief would impact and harm him.

[18] Our review of the trial transcript reveals that the defendants made an offer of proof on two separate occasions. During argument on the plaintiff's motions in limine, the defendants made an offer of proof with respect to certain police report evidence. The defendants, however, do not appeal from the court's ruling on the plaintiff's motion in limine related to this evidence. Later, during Jeffrey Cashman's examination, the defendants attempted to make an offer of proof with respect to an inspection report that was provided to Jeffrey Cashman by the Department of Agriculture to demonstrate that "what he was doing on his property was within generally accepted agricultural practices."

how the excluded evidence was likely to have affected the result—a showing that, on the scant record before us, is not at all self-evident. As the defendants assert, "[e]ven in an action brought by a zoning enforcement officer to require conformity with the zoning regulations, the granting of injunctive relief, which must be compatible with the equities of the case, rests within the trial court's sound discretion. . . . Those equities should take into account the gravity and wilfulness of the violation, as well as the potential harm to the defendants." (Citation omitted.) *Johnson* v. *Murzyn*, 1 Conn. App. 176, 183, 469 A.2d 1227, cert. denied, 192 Conn. 802, 471 A.2d 244 (1984). "This court previously has observed that [t]here is a general principle that a court of equity will balance the equities between the parties in determining what, if any, relief to give. The equities on both sides must be taken into account in considering an appeal to a court's equitable powers. An equity court wisely considers the relative positions of the parties and makes a decree that does substantial justice to all. It is the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. . . . [C]ourts should not intervene unless the need for equitable relief is clear, not remote or speculative. Thus, a court of equity should not grant an award which would be disproportionate in its harm to the defendant and its assistance to the plaintiff." (Internal quotation marks omitted.) *Steroco, Inc.* v. *Szymanski*, 166 Conn. App. 75, 90–91, 140 A.3d 1014 (2016).

At the core of the defendants' claim is their belief that a nonconforming use existed and that the plaintiff unjustly deprived them of such use. General Statutes § 8-2 (a), as amended by Public Acts 2017, No. 17-39, § 1, provides in relevant part that zoning regulations "shall not prohibit the continuance of any nonconforming use, building or structure existing at the time of the

adoption of such regulations. Such regulations shall not provide for the termination of any nonconforming use solely as a result of nonuse for a specified period of time without regard to the intent of the property owner to maintain that use. Such regulations shall not terminate or deem abandoned a nonconforming use, building or structure unless the property owner of such use, building or structure voluntarily discontinues such use, building or structure and such discontinuance is accompanied by an intent to not reestablish such use, building or structure. The demolition or deconstruction of a nonconforming use, building or structure shall not by itself be evidence of such property owner's intent to not reestablish such use, building or structure." A nonconforming use has been defined as "a use or structure [that is] prohibited by the zoning regulations but is permitted because of its existence at the time that the regulations [were] adopted." (Internal quotation marks omitted.) *Stamford* v. *Ten Rugby Street, LLC*, 164 Conn. App. 49, 71, 137 A.3d 781, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016). "A [nonconforming] use is merely an existing use, the continuance of which is authorized by the zoning regulations. . . . Stated another way, it is a use . . . prohibited by the zoning regulations but . . . permitted because of its existence at the time that the regulations [were] adopted. . . . [T]he rule concerning the continuance of a nonconforming use protects the right of a user to continue the same use of the property as it existed before the date of the adoption of the [relevant] zoning regulations." (Internal quotation marks omitted.) *Wiltzius* v. *Zoning Board of Appeals*, 106 Conn. App. 1, 25, 940 A.2d 892, cert. denied, 287 Conn. 906, 907, 950 A.2d 1283, 1284 (2008). "For a use to be considered nonconforming . . . that use must possess two characteristics. First, it must be lawful and second, it must be in existence at the time that the zoning regulation making the use nonconforming was

enacted." (Emphasis omitted; internal quotation marks omitted.) *Cummings* v. *Tripp*, 204 Conn. 67, 91–92, 527 A.2d 230 (1987); see also R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 2:2 p. 28 ("[a] nonconforming use is one that was in existence at the time that the zoning regulation making the use nonconforming was enacted and which was previously lawful"). "The party claiming the benefit of a nonconforming use bears the burden of proving that the nonconforming use is valid." *Connecticut Resources Recovery Authority* v. *Planning & Zoning Commission*, 225 Conn. 731, 744, 626 A.2d 705 (1993).

Although the defendants bear the burden of demonstrating that the exclusion of evidence and, particularly, the exclusion of evidence of a nonconforming use, likely affected the result of the trial, they do not demonstrate how the record justifies that they were prepared to present such evidence to the court. Although they argue that, on and before December 31, 2011, they used the subject property as a farm, they do not point to evidence, or proffered evidence, in the record, or to any applicable zoning regulation in effect prior to January 1, 2012, to support a determination that their historic use of the subject premises was *lawfully* nonconforming. Additionally, by reference to the record, they do not demonstrate how any excluded evidence would have proven a lack of wilfulness on the defendants' part.

Instead, the record reflects the existence of many undisputed facts, all of which tend to support the court's determination that injunctive relief was warranted. Specifically, the facts reflect that the defendants admittedly failed to exhaust their administrative remedies by appealing from either of the orders to discontinue and that they admittedly violated multiple zoning regulations and manifested to the plaintiff an intent to continue activities that violated zoning regulations.[19]

[19] We note that, although the defendants purport to challenge the court's ruling in excluding evidence pertaining to estoppel, they do not adequately

Additionally, in determining that "the equities patently lie with [the plaintiff]," the court found: "The defendants have blatantly and defiantly violated multiple zoning regulations, failing to even attempt to lessen or erase those violations by applying for special permits."

The defendants do not afford this court any basis on which to conclude that the excluded evidence would have tipped the balance of the equities in their favor. For the foregoing reasons, we reject the claim that the court's evidentiary ruling was erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

PAUL FAGAN *v.* CITY OF STAMFORD ET AL. (AC 38836)

Keller, Elgo and Bear, Js.

Syllabus

The plaintiff, who previously had been employed with the defendant city of Stamford as a police officer and was injured while acting within the scope of his employment, appealed to the trial court from the decision of the defendant City of Stamford Policemen's Pension Trust Fund Board awarding him a disability pension in the amount of 50 percent of his annual compensation. At all relevant times, two distinct disability pensions were available to members of the city's police department under the city's charter and the collective bargaining agreement. Under the city charter, the board was authorized to grant a disability pension equal to 50 percent of the member's compensation during the last year of service to members who, without personal fault or misconduct, were incapacitated in the performance of duty. Pursuant to the collective bargaining agreement, the board was authorized to grant a disability pension equal to 75 percent of the member's base pay at the time of application to police officers who suffered a work related injury, but only when at least two out of three independent medical physicians selected by the board concurred that the member had a permanent or

address this issue in their brief, and the record does not contain sufficient facts to warrant any discussion of harm with respect to the exclusion of such evidence.

partial disability of 30 percent or more of any part of his or her body. In the present case, in January, 2013, the board approved a 50 percent disability pension to the plaintiff, pursuant to the charter, after two out of three independent medical physicians selected by the board, including C, assigned total disability ratings below 30 percent. Subsequently, in an April, 2013 letter, C, after noting that the plaintiff had asked him to reevaluate his prior report and to apply the fifth edition of a medical guide used to evaluate permanent impairment instead of the sixth edition of the guide, assigned the plaintiff a new disability rating of 36 percent. Thereafter, the plaintiff requested that the board reconsider his application for a 75 percent disability pension under the collective bargaining agreement because two out of three independent medical examiners concurred that his permanent or partial disability ratings totaled 30 percent or more, which the board denied. The trial court subsequently rendered judgment dismissing the appeal, from which the plaintiff appealed to this court. *Held*:

1. The board did not act arbitrarily, capriciously, or in abuse of its discretion in reaching its January, 2013 decision approving a 50 percent disability pension to the plaintiff pursuant to the city's charter; the record contained substantial evidence to support the board's determination that the plaintiff did not meet the requirements for an enhanced disability pension under the collective bargaining agreement, as the evidence available to the board at the time of its decision indicated that at least two out of three independent medical physicians did not concur that the plaintiff had a permanent or partial disability of 30 percent or more, which was required for the plaintiff to receive an enhanced disability pension.

2. The board did not act arbitrarily, capriciously, or in abuse of its discretion in denying the plaintiff's request for the board to reconsider his application for a 75 percent disability pension under the collective bargaining agreement in light of C's April, 2013 letter, which contained new disability calculations that would satisfy the requirements of the collective bargaining agreement for an enhanced disability pension: given the plain language utilized by C in his April, 2013 letter indicating that, pursuant to the plaintiff's request, he had applied the fifth edition of the guide instead of the sixth edition, the board reasonably could have construed that letter as a supplement to, rather than a replacement for, C's prior report, in which the plaintiff's impairment was calculated under an alternative methodology specifically requested by the plaintiff but not by the board, and the board was well within its discretion in accepting as valid C's prior report that applied the sixth edition of the guide, as neither the charter nor the collective bargaining agreement required application of any particular edition in the independent medical examination process; furthermore, the board's decision to credit C's prior report and to accord little weight to C's later communication in rendering its decision on the plaintiff's disability pension application implicated its

exclusive role as arbiter of credibility and the weight to be afforded to particular evidence, and the board was free, in its discretion, to decline to credit the substance of C's later communication because it was made at the behest of the plaintiff.

Argued October 16, 2017—officially released January 30, 2018

Procedural History

Appeal from the decision of the defendant pension trust fund board awarding the plaintiff a disability pension in the amount of 50 percent of his annual compensation, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Truglia*, *J.*, granted the motion for summary judgment filed by the defendant city of Stamford et al.; thereafter, the matter was tried to the court, *Hon. A. William Mottolese*, judge trial referee; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Paul Fagan, self-represented, the appellant (plaintiff).

Anthony M. Macleod, with whom, on the brief, was *James C. Riley*, for the appellees (defendant Policemen's Pension Trust Fund Board of the City of Stamford et al.).

Opinion

ELGO, J. The self-represented plaintiff, Paul Fagan, a former police officer for the defendant city of Stamford (city), appeals from the judgment of the Superior Court dismissing his appeal from the decision of the defendant Policemen's Pension Trust Fund Board of the city (board) awarding him a disability pension in the amount of 50 percent of his annual compensation.[1] On appeal,

[1] Also named as defendants in the plaintiff's complaint were the city's police department and the individual members of the board—Michael Noto, Michael Merenda, Michael Berkoff, Thomas E. Deegan, and Frank J. Mercede. Approximately thirteen months after that appeal was commenced in the Superior Court, the court rendered summary judgment in favor of the city and the police department. The plaintiff does not contest the propriety of that judgment in this appeal.

the plaintiff contends that the board improperly denied his request for an enhanced disability pension pursuant to the collective bargaining agreement (agreement) between the city and the Stamford Police Association (association). We disagree and, accordingly, affirm the judgment of the Superior Court.[2]

The relevant facts, as gleaned from the amended return of record that was submitted by agreement of the parties, are largely undisputed. In 1971, the city and the association entered into an "Agreement and Declaration of Trust" (trust agreement), which established the city's "Policemen's Pension Trust Fund" (fund). The stated purpose of the fund is to provide "pension and related benefits to [e]mployees, [r]etirees, their families, dependents, or beneficiaries who satisfy the eligibility requirements . . . ." The fund is administered by the board, whose powers and duties are delineated in the trust agreement. Pursuant to article fifth, § 2, thereof, the board is empowered, inter alia, to "[c]onstrue the provisions of this [t]rust [a]greement, and [its] terms" and to "[f]ormulate, adopt, and promulgate any and all rules and regulations necessary or desirable to facilitate the proper administration of the [fund] . . . ." The board's authority to administer the fund also is memorialized in the city charter. See Stamford Charter § C7-10-1 et seq.

At all times relevant to this appeal, two distinct disability pensions were available to members of the city's police department under the city charter and the

[2] In hearing administrative appeals such as the present one, the Superior Court acts as an appellate body. See General Statutes § 4-183 (j); see also *Connecticut Coalition Against Millstone* v. *Connecticut Siting Council*, 286 Conn. 57, 85, 942 A.2d 345 (2008) (noting that Superior Court sits "in an appellate capacity" when reviewing administrative appeal); *Par Developers, Ltd.* v. *Planning & Zoning Commission*, 37 Conn. App. 348, 353, 655 A.2d 1164 (1995) (distinguishing administrative appeals in which Superior Court "reviewed the agency's decision in an appellate capacity").

agreement, respectively. Pursuant to § C7-20-1 of the Stamford Charter, the board is authorized to grant a disability pension "equal to [50 percent] of the member's compensation during the last year of service" upon finding that a member of the police department "in the actual performance of duty and without personal fault or misconduct, shall have become permanently disabled, so as to be incapacitated in the performance of duty."

In addition, the agreement authorizes the board to award an enhanced disability pension, provided certain criteria are met. Relevant to this appeal is paragraph 9 (K) of the agreement, which provides in relevant part: "Active police officers of the Stamford Police Department who suffer a work related illness or injury at any time during their employment as a police officer shall be eligible for the following [d]isability [p]ension benefits, in addition to those currently existing pursuant to the [c]harter of the [city] and [trust agreement]. . . . [2] Such members shall be entitled to a [d]isability [p]ension equal to [75 percent] of his/her base pay at the time of the [a]pplication if at least two out of three independent medical physicians selected by the [board] in accordance with the provisions of [p]aragraph 9 (K) (1) above,[3] concur that same member has a permanent/partial disability of [30 percent] or a combined permanent/partial disability of [30 percent] or more of any part of his/her body, including mental disability, and also at least two out of three of said independent medical physicians concur that said member is unable to meet the physical or mental requirements of an entry level patrolman for the Stamford Police Department." (Footnote added.)

[3] Paragraph 9 (K) (1) of the agreement provides in relevant part that the board "shall select the independent medical examiners from [b]oard [c]ertified [p]hysicians who are specialists in the field which involves the particular physical or mental disability claimed by such member." It is undisputed that the board complied with that mandate in the present case.

Pursuant to its authority under the trust agreement to enact rules and regulations related to the proper administration of the fund, the board promulgated a retirement guide. The retirement guide details the protocols and procedures by which members may retire from the police department. It requires members to submit a letter to both the chief of police and the board that "[m]ust include [the] effective date of retirement and type of retirement." It also requires members who are applying for a disability pension to apprise the board of that request. The retirement guide then explains that "[t]hree [i]ndependent [m]edical [e]xaminations . . . will be arranged for you. These exams must not be with any [d]octor that has seen you in the past. Please review with the [board's office] which [independent medical examination] [d]octors are available for use. . . ." Those independent medical examinations, in turn, are used by the board to determine an applicant's eligibility for a disability pension under the city charter and the agreement.

The plaintiff began his employment with the city's police department in July of 2004. On October 1, 2012, pursuant to the procedures outlined in the retirement guide, the plaintiff sent a letter to the chief of police and the board. That letter stated in relevant part: "I am submitting my notice to retire from the Stamford Police Department after more than eight years of service. I am applying for a disability pension under the [agreement], as I am eligible for the disability benefits listed in the [agreement] in addition to those currently existing pursuant to the charter . . . based on injuries I received in the line of duty. My projected date of retirement at this time is December 7, 2012."[4]

In accordance with both paragraph 9 (K) (1) of the agreement and the retirement guide, three independent

[4] The plaintiff subsequently notified the board of his request to "extend [his] retirement date until January 11, 2013."

medical examinations of the plaintiff were scheduled in October and December of 2012. In the two October, 2012 examinations, the board sent a letter to the physician that stated in relevant part that the board "would like you to perform an [i]ndependent [m]edical [e]xamination on [the plaintiff]. Please do not proceed if this officer has ever been treated by you. Please advise us if that is the case. The specific information we need in your report includes: [1] Your diagnosis and prognosis. [2] Your opinion of the percentage of disability. [3] Your opinion of the permanency of disability. [4] Your opinion of the causation and job relatedness of the condition. [5] Your opinion if the [o]fficer would be unable to meet the physical requirements of an entry level patrolman." (Emphasis in original.) The relevant language in a November, 2012 letter is virtually identical except that it does not require that the physician's report include his opinion as to whether the plaintiff would be unable to meet the physical requirements of an entry level patrolman. It is undisputed that the board did not direct the physicians to use any specific edition of the Guides to the Evaluation of Permanent Impairment (guide),[5] published by the American Medical Association, in preparing their reports. It further is undisputed that, pursuant to the agreement, the physicians were free to utilize whichever edition of the guide that they preferred.[6] As the plaintiff acknowledges in

[5] The return of record contains a documentary presentation prepared by the American Medical Association regarding the sixth edition of the guide. It states in relevant part that "[t]he state of Connecticut allows the use of the [f]ourth, [f]ifth, and [s]ixth editions of the [guide]. However, the Connecticut State Medical Society recommends the use of the most recent edition." The record also contains the minutes of the March 6, 2009 meeting of the Connecticut Workers' Compensation Commission, at which the chairman of that commission "advised that it is Commission policy to encourage but not require the use of the [guide]. Physicians are not limited to a particular edition of the [guide] but are expected to be able to objectively justify the basis for their rating."

[6] The return of record in this case does not include any edition of the guide or any excerpt therefrom.

his principal appellate brief, the agreement "makes no mention of any particular guide to permanent impairment [and] the independent medical examiner may use any guide he/she chooses . . . ."[7]

On October 24, 2012, the plaintiff was examined by Patrick Carolan, a physician with Merritt Orthopaedic Associates, P.C. In his October 25, 2012 report, Carolan assigned a 27 percent disability rating to the plaintiff utilizing the sixth edition of the guide. Carolan further opined that the plaintiff's injuries were causally related to his official duties and that the plaintiff was unable to meet the physical requirements of an entry level patrolman.

On October 31, 2012, the plaintiff was examined by Gary Solomon, a physician with Rehabilitation Consultants, P.C. In his October 31, 2012 report, Solomon assigned a 38 percent disability rating to the plaintiff. Significantly, Solomon did not specify in his report which edition of the guide he utilized in reaching that determination. Rather, he simply indicated that he was "[f]ollowing the [American Medical Association] Guides to the Evaluation of Permanent Impairment . . . ."[8] Like Carolan, Solomon opined that the plaintiff's injuries were causally related to his official duties and that he was unable to meet the physical requirements of an entry level patrolman.

[7] Later in his appellate brief, the plaintiff states that the agreement "essentially leaves the ultimate decision [as to which edition to utilize] to whichever independent medical examiner that the board chooses, and the board is then governed by the [agreement] to follow what the Physician then reports to the board."

[8] In their respective appellate briefs, the parties state that Solomon's report indicates that he utilized the fifth edition of the guide in determining the plaintiff's disability. That report, however, contains no reference to *any* edition of the guide. Moreover, in a May 27, 2013 letter addressed to the president and the vice president of the association, which is contained in the return of record, the plaintiff stated that the reports of the three independent medical examiners that were relied on by the board in reaching their January 8, 2013 decision "all used the sixth edition" of the guide.

On December 14, 2012, the plaintiff was examined by Kevin Plancher, a physician at Plancher Orthopaedics & Sports Medicine.[9] In his subsequent report, Plancher assigned a 13 percent disability rating to the plaintiff utilizing the sixth edition of the guide. Plancher also opined that the plaintiff's injuries were causally related to his official duties.

On January 8, 2013, a regular meeting of the board was convened. At that meeting, the board went into an executive session to discuss three retirements.[10] The minutes of that meeting indicate that, when the executive session concluded, a motion "to approve a 50 percent disability pension, as per the charter, to one officer" was unanimously approved by the board. The board then issued a written resolution dated January 8, 2013, which stated: "Resolved that the [board] hereby grant[s] a [d]isability [p]ension, pursuant to [§] 7-20-1 of the [c]harter of the [city], to: [the plaintiff] who has been a member of the Stamford Police Department for over eight years. [He] will be entitled to a total pension of 50 [percent] of [his] annual salary, or $37,427.35 annually, effective January 11, 2013."[11] That resolution was signed by all five members of the board.

Ten days later, the plaintiff sent a letter to Carolan that lies at the heart of this appeal. In that written

[9] At the time of his examination by Plancher, the plaintiff was thirty-five years old.

[10] Because the board conducted its review of the plaintiff's application for a disability retirement and the corresponding independent medical evaluations in an executive session, the record necessarily lacks evidence of the board's deliberations at that time.

[11] The return of record also contains a "Retirement Worksheet" that the board completed on behalf of the plaintiff on January 9, 2013. That worksheet specifies that the plaintiff was to receive a monthly pension of $3118.95 commencing on January 11, 2013. In its appellate brief, the board notes that the plaintiff at that time began collecting his disability benefits "without objection." The plaintiff did not dispute that contention in either his reply brief or at oral argument before this court.

correspondence, the plaintiff informed Carolan that his October 25, 2012 report was "vastly different from another doctor's opinion of the same injuries." He then explained that, in the "spirit of transparency," he believed that Carolan should know that "Solomon has reached a numerical value of 38 [percent disability] compared to a total of 27 [percent] by [Carolan]."[12] The plaintiff also informed Carolan that he had "applied for a disability pension from the Stamford Police Department and the requirements were a numerical value [of 30 percent] or more . . . and [Carolan] did not reach that numerical requirement based on his ratings not totaling 30 [percent] or more." Accordingly, the plaintiff stated that he had "included [Solomon's] medical report for your review and consideration. If [Carolan] chooses to review the report and make any amendments, as he deems [necessary, it] would be greatly appreciated." The plaintiff at that time also opined that the discrepancy between the disability ratings assigned by Carolan and Solomon "seem[s] to be based on a different schematic or methodology . . . ." The plaintiff then requested that "Carolan consider using the same schematic or methodologies that were used by [Solomon] *to come to a similar numerical value*." (Emphasis added.) Notably, the plaintiff in that letter never referenced the guide or any particular edition thereof.

The plaintiff then stated that Carolan "has every right to amend his report as he determines necessary, in light of this new information he is receiving today, and in the spirit of accuracy and fairness. Any amendments to the medical report would be considered an act that was executed on [Carolan's] own volition and without

[12] Although the plaintiff represented to Carolan that the information contained in his January 18, 2013 letter was communicated in "the spirit of transparency" and "the spirit of accuracy and fairness," he failed to mention in that letter that a third medical examiner had assigned a 13 percent disability rating utilizing the same edition of the guide as Carolan.

duress or influence by any other person. Purposes of this letter were solely for informative reasons. The information provided to [Carolan] was divulged for transparency and accuracy alone. Any amendment/changes or additions to the report can be forwarded to [the plaintiff], his address is listed below. Kindly respond to this request in writing at your earliest convenience. Thank you in advance for anticipated cooperation concerning this matter regarding the disability ratings of retired police officer Paul Fagan." The letter concluded by listing the plaintiff's home address. It is undisputed that the board was not copied on that written communication or informed in any manner that the plaintiff had sent it to Carolan ten days after the board's January 8, 2013 decision on his application for a disability pension.

The return of record is silent as to what transpired over the ensuing months until Carolan mailed a letter to the plaintiff dated April 9, 2013, which was addressed to the board. In that letter, Carolan stated: "I have been requested by [the plaintiff] to [reevaluate] the independent medical report that I had submitted to you on October 25, 2012. In a letter received from [the plaintiff], he asked that I use the [fifth] [e]dition of the [guide]. Previously, I had used the [sixth] [e]dition."[13] Carolan then detailed eight specific changes "in the calculations of the impairment present" in the plaintiff "[w]hen the [fifth] [e]dition is used," which together resulted in a disability rating of 36 percent.[14] Both the plaintiff and

[13] Carolan's reference to the fifth edition of the guide in his April 9, 2013 letter is, in a word, curious. Although he directly attributes that reference to the written request of the plaintiff, we repeat that, in his January 18, 2013 letter to Carolan, the plaintiff made no mention of the guide or any particular edition. To the extent that further communications transpired between Carolan and either the plaintiff or the legal counsel copied on Carolan's April 9, 2013 letter, those communications are not contained in the record before us.

[14] Carolan's April 9, 2013 letter to the board states in full: "I have been requested by [the plaintiff] to [reevaluate] the independent medical report that I had submitted to you on October 25, 2012. In a letter received from [the plaintiff], he asked that I use the [fifth] [e]dition of the [guide]. Previously,

"Attorney William J. Varese" were copied on the bottom of that letter.

The plaintiff then forwarded a copy of Carolan's April 9, 2013 letter to the board under cover dated April 14, 2013. In that correspondence, the plaintiff stated: "I'm writing to inform you that [Carolan] has amended his independent medical exam report regarding my injuries . . . and I am requesting that the [board] reconsider my application for a 75 [percent] disability pension under the [agreement]. Two out of three independent medical examiners [concur] that my permanent/partial disability ratings . . . total 30 [percent] or more."

The board considered the plaintiff's request for reconsideration at its June 12, 2013 meeting. At that time, the board unanimously denied that request. Michael Noto, in his capacity as chairman of the board, sent the plaintiff a letter on June 26, 2013, notifying the plaintiff of that decision. That correspondence stated in relevant part: "[T]he [board] has asked me to confirm to you the [b]oard's decision that you do not qualify for a 75 [percent] disability pension under [p]aragraph 9 (K) (2) of the [agreement]. The [b]oard, by formal vote at its meeting on January 8, 2013, previously granted you a 50 [percent] disability retirement benefit pursuant to [§] C7-20-1 of the [city charter] and found at the same

I had used the [sixth] [e]dition. When the [fifth] [e]dition is used, the following changes occur in the calculation of the impairment present within [the plaintiff's] various body parts:

1. Cervical spine, 18 [percent] of the cervical spine.
2. Lumbar spine, 6 [percent] of the lumbar spine.
3. Right shoulder, 4 [percent] of the right upper extremity.
4. Right elbow, 0 [percent] of the right upper extremity.
5. Right wrist, 2 [percent] of the right upper extremity.
6. Right knee, 2 [percent] of the right lower extremity.
7. Left knee, 2 [percent] of the left lower extremity.
8. Right foot and ankle, 2 [percent] of the right lower extremity.

If there is any further information necessary regarding this matter, please contact me at the above address."

time that you did not meet the criteria for a 75 [percent] disability pension pursuant to [the agreement]. The [b]oard, in reaching that decision, had before it three [i]ndependent [m]edical [e]xamination reports which it accepts as valid reports. Examining physicians may use either the [fourth], [fifth], or [sixth] editions of the [guide], and the [b]oard did not specify or request that any physician who examined you use a particular edition. Consequently, the [b]oard does not believe it is necessary now to ask for a reevaluation of your condition using any specific edition. A motion for such a reevaluation was made at the [b]oard's June 12, 2013 meeting . . . but failed on a unanimous negative vote."

The plaintiff appealed from that decision to the Superior Court, claiming that the board's decision was "arbitrary and capricious, and an abuse of discretion." Following a hearing, the court rendered judgment dismissing the appeal. In so doing, the court determined that the agreement does not permit an applicant for a disability pension, following the submission of three independent medical examination reports to the board, to thereafter petition one of the medical examiners to reevaluate the applicant's disability rating in light of the report of another medical examiner. The court further determined that such communications, particularly when done without notice to the board, compromise the independence of those examinations. As the court noted in its memorandum of decision, the agreement "evinces an unmistakable intent that the parties to the agreement wish to keep the examination process free from any outside influences or biases and have a process that would promote honesty and integrity." It continued: "[T]he element of independence is essential to the process [set forth in paragraph 9 (K) (2) of the agreement]. To permit either the applicant or the board to communicate with an examiner when dissatisfied with a disability rating would invite attempts to exert

improper influence on the decision maker not only by the applicant but perhaps by the board itself if it was unhappy with an examiner's opinion." The court therefore concluded that substantial evidence in the record supported the board's decision not to reconsider its prior disability pension determination. From that judgment, the plaintiff appealed to this court.

Preliminarily, we note the standard applicable to our review of administrative decisions. The board is a creature of municipal enactment and its powers and duties are recognized in both the city charter and the trust agreement. It, therefore, is tantamount to a municipal administrative agency for purposes of appellate review. See *O'Connor* v. *Waterbury*, 286 Conn. 732, 740–41, 945 A.2d 936 (2008). The scope of review of an administrative decision "is very restricted. . . . With regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency. . . .

"The substantial evidence rule governs judicial review of administrative fact-finding . . . . Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . This substantial evidence standard is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review. . . . The burden is on the [plaintiff] to demonstrate that the [agency's] factual conclusions were not supported by the weight of substantial evidence on the whole record. . . .

"Even as to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct

application of the law to the facts found and could reasonably and logically follow from such facts." (Citations omitted; internal quotation marks omitted.) *MacDermid, Inc.* v. *Dept. of Environmental Protection*, 257 Conn. 128, 136–37, 778 A.2d 7 (2001); accord *Ferrier* v. *Personnel & Pension Appeals Board*, 8 Conn. App. 165, 167, 510 A.2d 1385 (1986) (court's function in reviewing decision of municipal pension board "is limited to the examination of the record to determine whether the ultimate decision was factually and legally supported to ensure that the board did not act illegally, arbitrarily or in abuse of its discretion"). "It is fundamental that a plaintiff [bears] the burden of proving that the [municipal board], on the facts before [it], acted contrary to law and in abuse of [its] discretion . . . ." (Internal quotation marks omitted.) *O'Connor* v. *Waterbury*, supra, 286 Conn. 741–42; see also *Fonfara* v. *Reapportionment Commission*, 222 Conn. 166, 177, 610 A.2d 153 (1992) ("well established judicial principles . . . attach a presumption of validity to decisions of authorized public agencies" and burden therefore rests with party challenging agency determination to demonstrate impropriety).

In addition, "[b]ecause the . . . appeal to the [Superior Court was] based solely on the record, the scope of the [Superior Court's] review of the [board's] decision and the scope of our review of that decision are the same. . . . In other words, the [Superior Court's] decision in this administrative appeal is entitled to no deference from this court." (Internal quotation marks omitted.) *Pictometry International Corp.* v. *Freedom of Information Commission*, 307 Conn. 648, 670 n.21, 59 A.3d 172 (2013). In reviewing this administrative appeal, we therefore focus our attention on the propriety of the decisions of the board.

I

BOARD'S JANUARY 8, 2013 DECISION

We first consider the propriety of the board's decision on January 8, 2013, in which it granted the plaintiff a 50 percent disability pension pursuant to § C7-20-1 of the Stamford Charter. In so doing, the board determined that the plaintiff did not meet the requirements for an enhanced disability pension under the agreement.

The record contains substantial evidence to support that determination. When the board met at its January 8, 2013 meeting, it had before it three independent medical examination reports prepared by Carolan, Solomon, and Plancher. Only Solomon's report assigned the plaintiff a disability rating of 30 percent or more; Carolan and Plancher's reports assigned disability ratings of 27 and 13 percent, respectively. That evidence indicated that "at least two out of three independent medical physicians" did not "concur that [the plaintiff] has a permanent/partial disability of [30 percent] or a combined permanent/partial disability of [30 percent] or more," as required by paragraph 9 (K) (2) of the agreement. On that evidence, the board concluded that the plaintiff was eligible for a disability pension pursuant to § C7-20-1 of the charter, but not an enhanced one pursuant to paragraph 9 (K) (2) of the agreement. In light of the substantial evidence in the record, we conclude that the board did not act arbitrarily, capriciously, or in abuse of its discretion in reaching its January 8, 2013 decision. The plaintiff has not suggested otherwise in this administrative appeal.

II

BOARD'S JUNE 12, 2013 DECISION

The plaintiff nevertheless asserts that the board acted arbitrarily, capriciously, and in abuse of its discretion in denying his April 14, 2013 request "that the [board]

reconsider [his] application for a 75 [percent] disability pension under the [agreement].'' He claims that once the board received the April 9, 2013 letter from Carolan containing calculations that resulted in a disability rating of 36 percent, the board was obligated, pursuant to paragraph 9 (K) (2) of the agreement, to discard its prior decision and grant his request for an enhanced disability pension. We disagree.

A

As an initial matter, we note that the plaintiff's position in this administrative appeal is premised on a faulty presumption—that Carolan's April 9, 2013 letter constituted an amendment of his medical opinion on the plaintiff's disability rating intended to supplant that contained in his earlier report of October 25, 2012. The record before us contains no such finding by the board.[15] To the contrary, Noto's June 26, 2013 letter to the plaintiff suggests that the board regarded Carolan's April 9, 2013 letter as merely a submission of alternate calculations under a different methodology.[16] Substantial evidence in the record supports such a determination. In his April 9, 2013 letter to the board, Carolan stated in

[15] The return of record does not contain a transcript or minutes of the board's June 12, 2013 hearing, at which it considered the plaintiff's request for reconsideration.

[16] We repeat that, in his January 18, 2013 letter to Carolan, the plaintiff represented that he was requesting a reevaluation of his disability rating ''solely for informative reasons.'' In his subsequent letter to the board, Carolan stated that, at the behest of the plaintiff, he was providing a calculation of the plaintiff's impairment pursuant to the fifth edition of the guide. In response, Noto, in his June 26, 2013 letter to the plaintiff, stated in relevant part that ''[e]xamining physicians may use either the [fourth], [fifth], or [sixth] editions of the [guide], and the [b]oard did not specify or request that any physician who examined you use a particular edition. Consequently, the [b]oard does not believe it is necessary now to ask for a reevaluation of your condition using any specific edition.'' The plain inference of that response is that the board considered Carolan's disability calculations under an alternative edition of the guide to be an unnecessary supplement to the administrative record on which it predicated its January 8, 2013 decision.

relevant part: "I have been requested by [the plaintiff] to [reevaluate] the independent medical report that I had submitted to you on October 25, 2012. . . . [The plaintiff] asked that I use the [fifth] [e]dition of the [guide]. . . . When the [fifth] [e]dition is used, the following changes occur in the calculation of the impairment . . . ." Nowhere in that written correspondence does Carolan disavow his earlier medical opinion or otherwise indicate that the calculations contained in the April 9, 2013 letter were intended to supplant that prior opinion. See footnote 14 of this opinion. Given the plain language utilized therein by Carolan, the board reasonably could construe that letter as a supplement to, rather than a replacement for, Carolan's prior report, in which the plaintiff's impairment was calculated under an alternative methodology specifically requested by the plaintiff but not by the board.

Furthermore, the board was not required, under either the terms of the agreement or its own protocols and procedures, to give any weight to the alternative calculations contained in Carolan's April 9, 2013 letter. The plaintiff concedes, as he must, that neither the charter nor the agreement requires application of any particular edition of the guide in the independent medical examination process. As the plaintiff recognizes in his principal appellate brief, "the independent medical examiner may use any guide he/she chooses . . . ."[17] After conducting his examination of the plaintiff on October 24, 2012, Carolan chose to utilize the sixth edition of the guide in preparing his report to the board. Accordingly, the board was well within its discretion in accepting "as valid" that report, a determination that

[17] It bears repeating that, apart from the abstract assertion contained in the plaintiff's January 18, 2013 letter, there is no evidence in the record indicating that Solomon utilized a different edition of the guide or methodology from that employed in Carolan's October 25, 2012 report. See footnote 8 of this opinion.

Noto confirmed in his June 26, 2013 letter to the plaintiff.

B

On a more fundamental level, the board's decision to credit Carolan's October 25, 2012 report in rendering its decision on the plaintiff's disability pension application implicates its exclusive role as arbiter of credibility and the weight to be afforded to particular evidence. As our Supreme Court has observed, "weighing the accuracy and credibility of the evidence" is the province of the administrative agency. *Connecticut Natural Gas Corp.* v. *Public Utilities Control Authority*, 183 Conn. 128, 136, 439 A.2d 282 (1981). Reviewing courts thus "must defer to the agency's assessment of the credibility of the witnesses and to the agency's right to believe or disbelieve the evidence presented by any witness, even an expert, in whole or in part." *Briggs* v. *State Employees Retirement Commission*, 210 Conn. 214, 217, 554 A.2d 292 (1989); see also *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, 320 Conn. 611, 623, 134 A.3d 581 (2016) (reviewing court cannot "substitute its own judgment for that of the administrative agency on the weight of the evidence" [internal quotation marks omitted]); *Tarasovic* v. *Zoning Commission*, 147 Conn. 65, 69, 157 A.2d 103 (1959) ("[i]t is not the function of the court to pass upon the credibility of the evidence heard" by administrative agency).

The board in the present case credited Carolan's October 25, 2012 report in rendering its January 8, 2013 decision on the plaintiff's disability pension application. Noto's June 26, 2013 letter further confirms that the board adhered to that credibility determination even after it was presented with Carolan's subsequent letter offering different calculations of the plaintiff's disability pursuant to an alternative edition of the guide. Although

the record of the board's proceedings on the plaintiff's motion for reconsideration is sparse, Noto's letter suggests that the board accorded little weight to Carolan's supplemental communication, as it indicates that reconsideration of the board's prior decision was not warranted. This appellate tribunal cannot revisit that determination. Id.

Moreover, in making that credibility determination, the board also could consider the undisputed circumstances that gave rise to Carolan's April 9, 2013 letter. As the Superior Court emphasized in its memorandum of decision, the independence of examining physicians is a crucial component of the medical examination process detailed in paragraph 9 (K) (2) of the agreement and the board's retirement guide.[18] In the present case, it is undisputed that, after being notified of the board's January 8, 2013 decision on his disability pension application, the plaintiff unilaterally contacted Carolan without providing any notice to the board and apprised Carolan (1) that a disability rating of "30 percent or more" was required to qualify for the requested disability pension; (2) that Carolan's October 25, 2012 report was "vastly different" from that submitted by Solomon; (3) that Solomon had assigned a 38 percent disability rating to the plaintiff; and (4) that the plaintiff was "requesting that [Carolan] consider using the same schematic or methodologies that were used by [Solomon] to come to a similar numerical value." That correspondence also included a copy of Solomon's medical report "for [Carolan's] review and consideration." By so doing, the plaintiff undermined, if not eviscerated,

[18] For that reason, the retirement guide mandates that an applicant's three independent medical examinations "must not be with any doctor that has seen you in the past." The board's appointment letter to those physicians likewise cautioned: "Please do not proceed if this officer has ever been treated by you." (Emphasis omitted.) In the letters that were sent to Carolan, Solomon, and Plancher, that sentence was underlined for emphasis.

the independence that is integral to the medical examination process outlined in paragraph 9 (K) (2) of the agreement and the retirement guide.[19] Because Carolan's April 9, 2013 communication to the board expressly states that it was made at the behest of the plaintiff, the board was free, in its discretion, to decline to credit the substance of that communication. See *Briggs* v. *State Employees Retirement Commission*, supra, 210 Conn. 217.

Our review of the record reveals substantial evidence on which the board could determine that reconsideration of its January 8, 2013 decision was unwarranted.

[19] In his principal appellate brief, the plaintiff makes much of the use of the term "concur" in paragraph 9 (K) (2) of the agreement, which provides in relevant part that a member of the city's police department is eligible for an enhanced disability pension "if at least two out of three independent medical physicians . . . concur that same member has a permanent/partial disability of [30 percent] or a combined permanent/partial disability of [30 percent] or more . . . ." The plaintiff thus argues that the agreement requires that the three independent medical examiners "must review each other's reports [prior to making] a decision."

It is well established that individual words or clauses of a contract "cannot be construed by taking them out of context and giving them an interpretation apart from the contract of which they are a part." *Levine* v. *Advest, Inc.*, 244 Conn. 732, 753, 714 A.2d 649 (1998); see also Restatement (Second), Contracts § 202, comment (d), p. 88 (1981) ("Meaning is inevitably dependent on context. A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph."). When properly read in the context in which the word "concur" arises in the agreement between the city and the association, the plaintiff's assertion is absurd, as it contravenes the plain intent of those parties in setting forth a mechanism for the independent medical evaluation of a member's physical impairment by three different physicians. See *Welch* v. *Stonybrook Gardens Cooperative, Inc.*, 158 Conn. App. 185, 198, 118 A.3d 675 (courts "will not construe a contract's language in such a way that it would lead to an absurd result"), cert. denied, 318 Conn. 905, 122 A.3d 634 (2015); see also *Foley* v. *Huntington Co.*, 42 Conn. App. 712, 729, 682 A.2d 1026 ("[t]he law is clear that a contract includes not only what is expressly stated therein but also what is necessarily implied from the language used" [internal quotation marks omitted]), cert. denied, 239 Conn. 931, 683 A.2d 397 (1996). The examination process outlined in the agreement and the retirement guide requires separate examinations and reports, and not a group effort by the physicians.

The plaintiff, therefore, has not demonstrated that the board's June 12, 2013 decision was arbitrary, capricious, or an abuse of the board's discretion. We, therefore, conclude that the court properly dismissed the plaintiff's administrative appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* KASON U. ESQUILIN (AC 38762)

Keller, Elgo and Bear, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court revoking his probation and sentencing him to a period of four years incarceration following his arrest on charges of violating certain conditions of his probation, including, inter alia, that he not use or possess drugs or alcohol. At the probation revocation hearing, the state sought to admit testimony from A, a probation officer, regarding the results of drug tests performed on the defendant's urine during his probationary period, and to introduce the reports of such results into evidence as an exhibit. The defendant objected on the grounds that the admission of the reports was an unreliable form of double hearsay and a violation of his right to confrontation because A did not conduct the actual drug testing. The trial court overruled the defendant's objection, ruling that the testimony and the drug tests that were being offered did not constitute unsupported testimonial hearsay. After finding that the defendant had violated the terms of his probation, the court revoked his probation and sentenced him to four years incarceration. Thereafter, the defendant appealed to this court, claiming, for the first time, that the trial court violated his right to due process by admitting the drug test reports into evidence without requiring the state to introduce such results through the testimony of the analysts who performed the actual testing. *Held* that this court declined to review the defendant's unpreserved claim that the trial court violated his right to due process by admitting the reports into evidence, the defendant having failed to provide this court with an adequate record for review of his unpreserved claim pursuant to *State* v. *Golding* (213 Conn. 233); because the defendant did not object at the probation revocation hearing to the admission of the reports of the drug test results on the ground that their admission violated his

right to due process, the state was not given adequate notice of the defendant's due process claim and did not provide the possible reasons for not producing the analysts who had performed the drug tests as witnesses at the probation revocation hearing, and, therefore, this court could not balance the state's interest in not producing the persons who performed the drug tests against the defendant's interest in confronting those persons to determine whether a due process violation occurred.

Argued October 16, 2017—officially released January 30, 2018

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of New London, where the matter was tried to the court, *Williams*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

Steven B. Rasile, assigned counsel, for the appellant (defendant).

David J. Smith, senior assistant state's attorney, with whom, on the brief, was *Michael L. Regan*, state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Kason U. Esquilin, appeals from the judgment of the trial court revoking his probation pursuant to General Statutes § 53a-32 and imposing a four year prison sentence. On appeal, the defendant claims that the court deprived him of his right to due process by admitting into evidence reports of the results of drug tests performed on urine samples collected from the defendant, without requiring the state to introduce such results through the testimony of the analysts who performed the actual testing. We conclude, in accordance with *State* v. *Polanco*, 165 Conn. App. 563, 571, 140 A.3d 230, cert. denied, 322 Conn. 906, 139 A.3d 708 (2016), that this claim was not preserved and that the record is inadequate to review it pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40,

567 A.2d 823 (1989). Accordingly, we affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the defendant's appeal. On April 28, 2008, the defendant was convicted of the underlying offense of the sale of hallucinogens/narcotics in violation of General Statutes § 21a-277 (a). On June 17, 2008, he was sentenced to ten years incarceration, execution suspended after two years, and three years of probation. The defendant was released from incarceration on September 10, 2010, and his probationary period began.

On March 21, 2012, the defendant was convicted of violating his probation pursuant to § 53a-32. He was sentenced to eight years incarceration, execution suspended after two years, and three years of probation. The terms of his probation, in addition to the standard conditions, required as special conditions, that the defendant (1) obey all federal and state laws, (2) not possess weapons, (3) submit to psychological evaluation and treatment, (4) take medications as prescribed, (5) submit to substance abuse evaluation and treatment, (6) not use or possess drugs and alcohol, (7) submit to random urine and alcohol sensor testing, (8) not associate with drug dealers, users, and gang members, (9) secure full time employment, and (10) pass a general education development course. On August 5, 2013, the defendant, after he reviewed the conditions of probation, acknowledged that he understood the conditions and would follow them. On August 27, 2013, the defendant again was released from incarceration and his probationary period commenced.

On January 29, 2014, an arrest warrant for the defendant was issued charging him with a violation of probation on the grounds that the defendant violated the following standard conditions of his probation: (1) "[d]o

not violate any criminal law of the United States, this state or any other state or territory" and (2) "[s]ubmit to any medical and/or psychological examination, urinalysis, alcohol and/or drug testing, and/or counseling sessions required by the [c]ourt or the [p]robation [o]fficer." The defendant also was charged with failing to comply with the following special conditions of his probation: (1) submit to substance abuse evaluation and treatment, (2) do not use or possess drugs or alcohol, (3) submit to random urine and alcohol sensor testing, (4) do not associate with drug dealers, users, or gang members, and (5) obey all federal and state laws. The defendant denied that he committed any violations and a probation revocation hearing was held on April 2, 2015.

After hearing evidence and argument, the court found that the state had proven, by a preponderance of the evidence, that the defendant had violated his probation. The court found,[1] in relevant part: "[Probation] Officer [Robert] Amanti of the Office of Adult Probation spoke with [the defendant] about the conditions of his probation, including his requirement that he successfully complete treatment and remain free of any illicit substance. . . . [The defendant] acknowledged those conditions. . . . [O]n August 15, 2013, the [defendant] was

[1] Both parties have relied on the court's oral ruling of April 2, 2015. The record does not contain a signed transcript of the court's decision, as is required by Practice Book § 64-1 (a), and the defendant did not file a motion pursuant to Practice Book § 64-1 (b) providing notice that the court had not filed a signed transcript of its oral decision. Nor did the defendant take any additional steps to obtain a decision in compliance with Practice Book § 64-1 (a). In some cases in which the requirements of Practice Book § 64-1 (a) have not been followed, this court has declined to review the claims raised on appeal due to the lack of an adequate record. Despite the absence of a signed transcript of the court's oral decision or a written memorandum of decision, however, our ability to review the claims raised on the present appeal is not hampered because we are able to readily identify a sufficiently detailed and concise statement of the court's findings in the transcript of the proceeding. See *State* v. *Brunette*, 92 Conn. App. 440, 446, 886 A.2d 427 (2005), cert. denied, 277 Conn. 902, 891 A.2d 2 (2006).

confronted about his substance abuse. . . . [The defendant] indicated he was proud of getting high[2] and was referred for treatment at [the Southeastern Council on Alcoholism and Drug Dependence (rehabilitation facility)]. . . . [The defendant], while on probation with the previously noted conditions, rendered several dirty urines on at least seven occasions while on probation. One of the urines dated [August 27, 2013,] was positive for [tetrahydrocannabinol (THC)] with a level of 757. The [defendant] did not successfully complete treatment at [the rehabilitation facility] and was unsuccessfully discharged.[3] The court finds that he was then rereferred to [the rehabilitation facility] by probation, and again was unsuccessfully discharged. . . .

"[P]robation elected to continue working with [the defendant] toward its intended goal of rehabilitation and did not submit a warrant for violation of probation, which would be a second violation of probation . . . [probation] continued to work with the [defendant] even after seven positive urines; and that the [defendant] eventually was arrested on [January 20, 2014]. . . . [The defendant's] conduct included grabbing the hair of a pregnant victim, pulling out at least one of her braids. . . . The [defendant] struck this pregnant female in the face with an open hand, causing pain.

[2] Amanti testified at the hearing that the defendant came to the Office of Adult Probation on August 15, 2013, for a scheduled visit. On that date, Amanti testified that the defendant stated that "he was proud of getting high and getting drunk."

[3] Amanti testified at the probation revocation hearing that because of the defendant's use of drugs and alcohol, a probation officer referred the defendant to submit to treatment at the rehabilitation facility. Amanti testified that, despite the defendant's awareness that submitting to treatment at the rehabilitation facility was a condition of his probation, probation officers learned that the defendant did not successfully complete the treatment program at the rehabilitation facility. Moreover, Amanti testified that because of his continued use of marijuana, the defendant was again referred to submit to treatment at the rehabilitation facility. Amanti testified that the defendant failed to complete the treatment program for a second time.

. . .[4] [The defendant] attempted to run away from the police and struggled with those police officers.[5] [The defendant committed the] crimes of breach of peace, assault in the third degree on a pregnant victim, [and] interfering with an officer . . . [and demonstrated an] inability to successfully complete treatment or to remain sober . . . . [Therefore] . . . the state . . . met its burden of proof by a preponderance of the evidence, and [proved that the defendant] violated conditions of his probation for the aforementioned conduct." (Footnotes added.) After the conclusion of the dispositional phase, the court revoked the defendant's probation and sentenced him to four years of incarceration. This appeal followed.

The defendant's sole claim is that the court deprived him of his right to due process by admitting into evidence the reports of the results of drug tests performed on his urine samples without requiring the state to introduce such results through the testimony of the analysts who performed the actual testing.

The following additional facts are relevant to the disposition of this appeal. At the defendant's probation revocation hearing, the state sought to present testimony from Amanti about the results of the drug tests

[4] The defendant's girlfriend, the female to whom the court refers, testified at the probation revocation hearing that, while she was pregnant, the defendant pulled her off a couch by grabbing her by the braids, took her phone, and physically prevented her from leaving their shared apartment and when she did attempt to leave the apartment, the defendant grabbed her by the hair and struck her in the face with an open palm.

[5] Charles Flynn, a New London police officer, testified at the probation revocation hearing about arresting the defendant after he struck his pregnant girlfriend. Flynn testified that as he approached the defendant's apartment building in a marked police car, the defendant ran inside the building when he saw the police arrive. Flynn testified that, after he and another officer searched the building, they found the defendant hiding in an unlit basement. Furthermore, Flynn testified that after the defendant attempted to flee from the officers, the defendant began to fight the officers as they arrested him, jeopardizing the officers' safety.

performed on the defendant's urine and to introduce the reports of such results into evidence as an exhibit. The drug tests were performed on samples of the defendant's urine collected by both probation and the rehabilitation facility between August, 2013, and December, 2013. These samples were sent to out-of-state laboratories to be analyzed and the laboratories would fax reports of the results to the Office of Probation. The analysts who performed the drug tests and authored the reports of the drug tests were not present to testify at the defendant's probation revocation hearing. The identity of these analysts is not explicitly contained in the record, nor is there any indication that the defendant had the opportunity to cross-examine these analysts prior to his probation revocation hearing.

During the state's direct examination of Amanti, the prosecutor asked him about the results of a drug test on one of the defendant's urine samples, collected on August 27, 2013. Before Amanti could answer, defense counsel objected on the basis that the report of the results of that drug test was not in evidence. Defense counsel argued that Amanti testifying about the drug test results was inadmissible because it was an unreliable form of double hearsay and a violation of the defendant's right to confrontation. With respect to the right to confrontation, defense counsel argued that admitting Amanti's testimony concerning the results of the drug test violated the defendant's right to confrontation as explicated by the Supreme Court in *Bullcoming* v. *New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011).[6] The prosecutor responded that *Crawford* v.

[6] In *Bullcoming*, the Supreme Court was presented with the question of "whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." *Bullcoming* v. *New Mexico*, supra, 564 U.S. 652. The Supreme Court held "that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be con-

Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)[7] and its progeny do not apply to probation revocation hearings. In response, defense counsel specified that, on the basis of the reasoning set forth in *Bullcoming*, the results of the drug test were unreliable hearsay without testimony from the person who performed the actual testing and were, thus, inadmissible. Defense counsel never explicitly argued that the admission of the test results violated the defendant's right to due process, which is his sole claim on appeal. The court overruled defense counsel's objection, finding "that the testimony being elicited now and the use of the document is not just a testimonial variety of hearsay that's unsupported. This is a document that the state wishes to reference through the testimony of [Amanti] along the lines of what is clearly admissible under Connecticut law . . . . So the court's going to at this point overrule the objection by the defense . . . ."

After the court ruled that Amanti could testify about the results of the drug test, the state opted to "skip a little ahead and do something a little different" by introducing the reports of the results of the drug tests as an exhibit at the hearing. Defense counsel objected to the admission of the reports as an exhibit, again arguing that pursuant to *Bullcoming*, the reports of the results of the drug test were inadmissible hearsay because Amanti did not conduct the actual testing. The court, overruling the defendant's objections, admitted the reports into evidence. All but one of the reports in the state's exhibit indicated that marijuana was detected in the defendant's urine samples collected

fronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." Id.

[7] In *Crawford*, the Supreme Court stated, in a criminal trial: "Where testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination." *Crawford* v. *Washington*, supra, 541 U.S. 68.

while he was on probation. The prosecutor then asked Amanti whether the defendant's urine samples tested positive for THC, which is an indication of the use of marijuana, and Amanti answered that they did several times.

The state argues that the defendant's due process claim was not preserved because, at the probation revocation hearing, the defendant did not object to the admission of the reports of the results of the drug tests as a violation of his right to due process. As a result, the state argues that the record is inadequate to review the defendant's claim that the admission of the results denied him of his right to due process. In response, the defendant argues that the claim was preserved or, if the claim is unpreserved, it is nonetheless reviewable pursuant to *Golding*. We agree with the state.

We first turn to a brief review of the principles relating to probation and the defendant's rights at a probation revocation hearing. "[P]robation is, first and foremost, a penal alternative to incarceration . . . . [Its] purpose . . . is to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable. . . . [P]robationers . . . do not enjoy the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions. . . . These restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large. . . .

"The success of probation as a correctional tool is in large part tied to the flexibility within which it is permitted to operate. . . . In this regard, modifications

of probation routinely are left to the office of adult probation. When the court imposes probation, a defendant thereby accepts the possibility that the terms of probation may be modified or enlarged in the future pursuant to [General Statutes] § 53a-30. . . . To this end, probation officers shall use all suitable methods to aid and encourage [a probationer] and to bring about improvement in his [or her] conduct and condition. . . .

"The due process clause of the fourteenth amendment to the United States constitution requires that certain minimum procedural safeguards be observed in the process of revoking the conditional liberty created by probation. . . . Among other things, due process entitles a probationer to a final revocation hearing . . . . A revocation proceeding is held to determine whether the goals of rehabilitation thought to be served by probation have faltered, requiring an end to the conditional freedom obtained by a defendant at a sentencing that allowed him or her to serve less than a full sentence. . . . [T]he ultimate question [in the probation process is] whether the probationer is still a good risk . . . . This determination involves the consideration of the goals of probation, including whether the probationer's behavior is inimical to his own rehabilitation, as well as to the safety of the public. . . .

"On the other hand . . . a [probation] revocation proceeding . . . is not a criminal proceeding. . . . It therefore does not require all of the procedural components associated with an adversary criminal proceeding." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Faraday*, 268 Conn. 174, 180–83, 842 A.2d 567 (2004). As such, at a revocation proceeding, the state must prove each alleged violation of probation by a preponderance of the evidence

in accordance with General Statutes § 53a-32[8] and Practice Book § 43-29.[9] Id., 183–84.

[8] General Statues § 53a-32 provides in relevant part: "(a) At any time during the period of probation or conditional discharge, the court or any judge thereof may issue a warrant for the arrest of a defendant for violation of any of the conditions of probation or conditional discharge, or may issue a notice to appear to answer to a charge of such violation, which notice shall be personally served upon the defendant. Any such warrant shall authorize all officers named therein to return the defendant to the custody of the court or to any suitable detention facility designated by the court. . . .

"(c) Upon notification by the probation officer of the arrest of the defendant or upon an arrest by warrant as herein provided, the court shall cause the defendant to be brought before it without unnecessary delay for a hearing on the violation charges. At such hearing the defendant shall be informed of the manner in which such defendant is alleged to have violated the conditions of such defendant's probation or conditional discharge, shall be advised by the court that such defendant has the right to retain counsel and, if indigent, shall be entitled to the services of the public defender, and shall have the right to cross-examine witnesses and to present evidence in such defendant's own behalf. Unless good cause is shown, a charge of violation of any of the conditions of probation or conditional discharge shall be disposed of or scheduled for a hearing not later than one hundred twenty days after the defendant is arraigned on such charge.

"(d) If such violation is established, the court may: (1) Continue the sentence of probation or conditional discharge; (2) modify or enlarge the conditions of probation or conditional discharge; (3) extend the period of probation or conditional discharge, provided the original period with any extensions shall not exceed the periods authorized by section 53a-29; or (4) revoke the sentence of probation or conditional discharge. If such sentence is revoked, the court shall require the defendant to serve the sentence imposed or impose any lesser sentence. Any such lesser sentence may include a term of imprisonment, all or a portion of which may be suspended entirely or after a period set by the court, followed by a period of probation with such conditions as the court may establish. No such revocation shall be ordered, except upon consideration of the whole record and unless such violation is established by the introduction of reliable and probative evidence and by a preponderance of the evidence."

[9] Practice Book § 43-29 provides: "In cases where the revocation of probation is based upon a conviction for a new offense and the defendant is before the court or is being held in custody pursuant to that conviction, the revocation proceeding may be initiated by a motion to the court by a probation officer and a copy thereof shall be delivered personally to the defendant. All other proceedings for revocation of probation shall be initiated by an arrest warrant supported by an affidavit or by testimony under oath showing probable cause to believe that the defendant has violated any of the conditions of the defendant's probation or his or her conditional discharge or by a written notice to appear to answer to the charge of such violation, which notice, signed by a judge of the superior court, shall be personally served

"The due process clause of the fourteenth amendment mandates certain minimum procedural safeguards before that conditional liberty interest [of probation] may be revoked." *State* v. *Polanco*, supra, 165 Conn. App. 570. Among these minimum procedural safeguards is the right to confrontation at a probation revocation hearing. See *Morrissey* v. *Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). With respect to the right to confrontation at a revocation of probation hearing, the Supreme Court has stated that minimum due process requires that the defendant be afforded "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation) . . . ." Id.[10] This court,

upon the defendant by a probation officer and contain a statement of the alleged violation. All proceedings thereafter shall be in accordance with the provisions of Sections 3-6, 3-9 and 37-1 through 38-23. At the revocation hearing, the prosecuting authority and the defendant may offer evidence and cross-examine witnesses. If the defendant admits the violation or the judicial authority finds from the evidence that the defendant committed the violation, the judicial authority may make any disposition authorized by law. The filing of a motion to revoke probation, issuance of an arrest warrant or service of a notice to appear, shall interrupt the period of the sentence as of the date of the filing of the motion, signing of the arrest warrant by the judicial authority or service of the notice to appear, until a final determination as to the revocation has been made by the judicial authority."

[10] We surmise that the defendant by citing to *Crawford* and its progeny is asserting that the due process right to confrontation equates to the sixth amendment right to confrontation at a criminal trial. Whether *Crawford* applies at a probation revocation hearing has not been addressed by a Connecticut appellate court. Although it is not necessary to address this issue in order to resolve this appeal, we observe that, since *Crawford*, an overwhelming majority of federal circuit and state appellate courts that have addressed this issue have concluded that *Crawford* does not apply to a revocation of probation hearing. See, e.g., *United States* v. *Ferguson*, 752 F.3d 613, 619 (4th Cir. 2014) (revocation of parole proceeding "does not involve the Sixth Amendment"); *United States* v. *Lloyd*, 566 F.3d 341, 343 (3d Cir. 2009) ("[the] limited right to confrontation [afforded at a revocation proceeding] stems from the Fifth Amendment's Due Process Clause, not from the Confrontation Clause of the Sixth Amendment"); *United States* v. *Ray*, 530 F.3d 666, 668 (8th Cir. 2008) ("[t]he Sixth Amendment only applies to 'criminal prosecutions,' and a revocation of supervised release is not part of a criminal prosecution"); *United States* v. *Kelley*, 446 F.3d 688, 691 (7th Cir. 2006) ("*Crawford* changed nothing with respect to [probation] revocation hearings" because the "limited confrontation right in revocation proceedings

with guidance from the Second Circuit Court of Appeals and the Federal Rules of Criminal Procedure, previously determined that whether there is good cause for not allowing confrontation should be determined by using a balancing test, which requires the court to balance, "on the one hand, the defendant's interest in confronting the declarant, against, on the other hand, the government's reasons for not producing the witness and the reliability of the proffered hearsay. *United States* v. *Williams*, 443 F.3d 35, 45 (2d Cir. 2006); see also *United*

was explicitly grounded in considerations of due process, not the Sixth Amendment"); *United States* v. *Rondeau*, 430 F.3d 44, 47 (1st Cir. 2005) ("[n]othing in *Crawford* indicates that the Supreme Court intended to extend the Confrontation Clause's reach beyond the criminal prosecution context"); *United States* v. *Hall*, 419 F.3d 980, 985–86 (9th Cir.) ("[w]e . . . see no basis in *Crawford* or elsewhere to extend the Sixth Amendment right of confrontation to supervised release proceedings"), cert. denied, 546 U.S. 1080, 126 S. Ct. 838, 163 L. Ed. 2d 714 (2005); *United States* v. *Kirby*, 418 F.3d 621, 627 (6th Cir. 2005) ("*Crawford* does not apply to revocation of supervised release hearings"); *United States* v. *Aspinall*, 389 F.3d 332, 343 (2d Cir. 2004) ("[n]othing in *Crawford*, which reviewed a criminal trial, purported to alter the standards set by *Morrissey*/[*Gagnon* v. *Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973)] or otherwise suggested that the Confrontation Clause principle enunciated in *Crawford* is applicable to probation revocation proceedings"); *State* v. *Carr*, 167 P.3d 131, 134 (Ariz. App. 2007); *People* v. *Loveall*, 231 P.3d 408, 420 n.18 (Col. 2010) (Eid, J., concurring in part and dissenting in part); *Jenkins* v. *State*, Docket No. 133, 2004, 2004 WL 2743556, *3 (Del. November 23, 2004) (decision without published opinion, 862 A.2d 386 [Del. 2004]); *Peters* v. *State*, 984 So. 2d 1227, 1227 (Fla. 2008), cert. denied, 555 U.S. 1109, 129 S. Ct. 917, 173 L. Ed. 2d 127 (2009); *Ware* v. *State*, 658 S.E.2d 441, 444 (Ga. App. 2008); *State* v. *Rose*, 171 P.3d 253, 258 (Idaho 2007); *Reyes* v. *State*, 868 N.E.2d 438, 440 n.1 (Ind. 2007); *State* v. *Marquis*, 257 P.3d 775, 777 (Kan. 2011); *State* v. *Michael*, 891 So.2d 109, 115 (La. App.) writ denied, 904 So.2d 681 (La. 2005); *Commonwealth* v. *Wilcox*, 841 N.E.2d 1240, 1243 (Mass. 2006); *Blanks* v. *State*, 137 A.3d 1074, 1087 (Md. Spec. App. 2016); *People* v. *Breeding*, 772 N.W.2d 810, 812 (Mich. App.) appeal denied, 773 N.W.2d 261 (Mich. 2009); *State* v. *Johnson*, 842 N.W.2d 63, 73 (Neb. 2014); *People* v. *Brown*, 32 A.D.3d 1222, 1222, 821 N.Y.S.2d 348, appeal denied, 7 N.Y.3d 924, 860 N.E.2d 994, 827 N.Y.S.2d 692 (2006); *Wortham* v. *State*, 188 P.3d 201, 205 (Okla. Crim. App. 2008); *State* v. *Gonzalez*, 157 P.3d 266, 266 (Or. App. 2007); *State* v. *Pompey*, 934 A.2d 210, 214 (R.I. 2007); *State* v. *Pauling*, 639 S.E.2d 680, 682 (S.C. App. 2006); *State* v. *Divan*, 724 N.W.2d 865, 870 (S.D. 2006); *State* v. *Walker*, 307 S.W.3d 260, 265 (Tenn. Crim. App. 2009); *Trevino* v. *State*, 218 S.W.3d 234, 239 (Tex. App. 2007); *Henderson* v. *Commonwealth*, 736 S.E.2d 901, 905 (Va. 2013); *State* v. *Abd-Rahmaan*, 111 P.3d 1157, 1160–61 (Wash. 2005).

States v. *Chin*, 224 F.3d 121, 124 (2d Cir. 2000)." (Internal quotation marks omitted.) *State* v. *Shakir*, 130 Conn. App. 458, 468, 22 A.3d 1285, cert. denied, 302 Conn. 931, 28 A.3d 345 (2011).[11]

This court recently concluded that a claim that a court denied a defendant's right to due process by admitting testimonial hearsay at a probation revocation hearing, without giving the defendant the opportunity to confront the declarant, was not preserved for appeal because the defendant, at the hearing, never argued to the trial court that it was required to conduct the balancing test discussed in *Shakir* to determine whether his right to due process had been violated. See *State* v. *Polanco*, supra, 165 Conn. App. 571. *Polanco* controls our determination as to whether the defendant's claim is preserved in the present case. As the record reveals, in both the defendant's initial objection to the admission of the reports of the drug test results and in the ensuing colloquy between defense counsel and the prosecutor, the defendant never argued that the trial court was required to conduct the balancing test to determine whether the admission of the reports of the drug test results denied him the right to due process. Accordingly, this claim was not preserved for appellate review.

The defendant contends that if his claim is unpreserved, it is nonetheless reviewable pursuant to *State* v. *Golding*, supra, 213 Conn. 239–240. *Golding* review, as modified in *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), allows this court to review an

[11] In *Shakir*, this court observed that the principles in *Morrissey* are codified in the Federal Rules of Criminal Procedure. *State* v. *Shakir*, supra, 130 Conn. App. 467. With respect to the right to confrontation, the Federal Rules mandate that at a probation revocation hearing the defendant should be afforded, "upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear." Fed. R. Crim. P. 32.1 (b) (1) (B) (iii).

unpreserved claim when all of the following conditions are met: "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Polanco*, supra, 165 Conn. App. 572.

The appellate tribunal is free to respond to the defendant's claim by focusing on whichever *Golding* prong is most relevant. *State* v. *Santana*, 313 Conn. 461, 469–70, 97 A.3d 963 (2014). "[T]he inability to meet any one prong requires a determination that the defendant's claim must fail." (Internal quotation marks omitted.) *State* v. *Soto*, 175 Conn. App. 739, 755, 168 A.3d 605, cert. denied, 327 Conn. 970, A. 3d (2017). We conclude that the defendant's claim does not satisfy the first *Golding* prong.

Our Supreme Court discussed the first prong of *Golding* in *State* v. *Brunetti*, 279 Conn. 39, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007), and stated: "[T]he defendant may raise . . . a constitutional claim on appeal, and the appellate tribunal will review it, but only if the trial court record is adequate for appellate review. The reason for this requirement demands no great elaboration: in the absence of a sufficient record, there is no way to know whether a violation of constitutional magnitude in fact has occurred. Thus, as we stated in *Golding*, we will not address an unpreserved constitutional claim [i]f the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred . . . ." (Footnotes omitted; internal quotation marks omitted.) Id., 55–56. Our analysis of whether

the defendant's claim satisfies the first *Golding* prong is guided by our precedent in *Polanco* and *Shakir*. *Polanco* and *Shakir* both held that an unpreserved claim that a court violated a defendant's right to due process by admitting testimonial hearsay at a probation revocation hearing without according the defendant the right to confront the declarant did not satisfy the first *Golding* prong because the defendant did not object to the admission of such hearsay as a violation of the right to due process during the probation revocation hearing. *State* v. *Polanco*, supra, 165 Conn. App. 564–65, 576 (claim that court violated defendant's right to due process at probation revocation hearing by admitting laboratory test results without affording defendant opportunity to confront analyst who performed such tests was not reviewable pursuant to *Golding* because defendant did not object to admission of results as violation of his right to due process); *State* v. *Shakir*, supra, 130 Conn. App. 460, 468 (claim that court violated defendant's right to due process at probation revocation hearing by admitting videotape of social worker's interview with minor complainant without affording defendant opportunity to confront minor complainant was not reviewable pursuant to *Golding* because defendant did not object to admission of videotape as violation of his right to due process).

Polanco and *Shakir* control our resolution of whether the defendant's claim in the present case is reviewable pursuant to *Golding*.[12] Both cases held that

[12] The defendant neither distinguishes the present case from *Shakir* and *Polanco*, nor provides a basis for this court to conclude that those cases were wrongly decided. The defendant asserts that the determination of whether the admission of the reports of the drug test results, without allowing the defendant to confront the analysts who analyzed the defendant's urine, amounted to a violation of the defendant's due process rights only requires this court to make a legal conclusion. Yet, the defendant's argument is not persuasive because the legal conclusion the defendant requests requires the factual underpinnings as to why the analysts who performed the drug tests were not called to testify. Those facts are not contained in the record.

in order for a claim that the admission of testimonial hearsay at a probation revocation hearing, without the opportunity to confront the declarant, is a violation of the right to due process to be reviewable pursuant to *Golding*, there must be an adequate record from the probation revocation hearing that enables the appellate tribunal to balance (1) the defendant's interest in confronting the witness against (2) the government's reasons for not producing the witness and the reliability of the proffered hearsay. *State* v. *Polanco*, supra, 165 Conn. App. 575–76; *State* v. *Shakir*, supra, 130 Conn. App. 468. In order for the record to be adequate, the state must be given notice of the due process claim so that it can present its reasons for not producing the witness. See *State* v. *Polanco*, supra, 575. In both *Shakir* and *Polanco*, the state was not given notice because the defendants did not object to the admission of testimonial hearsay at their probation revocation hearings on the grounds that it was a violation of their right to due process. See *State* v. *Polanco*, supra, 575–76; *State* v. *Shakir*, supra, 462, 468. As a result, the record in each of those cases was inadequate for this court to balance the defendant's interest in confrontation against the state's reasons for not producing the witness and the reliability of the proffered hearsay. *State* v. *Polanco*, supra, 576; *State* v. *Shakir*, supra, 468.

Guided by our precedent, we conclude that the defendant in the present case failed to sustain his burden of providing this court with an adequate record to review his claim of a due process violation. The defendant, at the probation revocation hearing, did not object to the admission of the reports of the drug test results on the basis that the admission of such results violated his right to due process.[13] Therefore, the state was not given

[13] At the probation revocation hearing, defense counsel cited *State* v. *Giovanni P.*, 155 Conn. App. 322, 338 n.14, 110 A. 3d 442, cert. denied, 316 Conn. 909, 111 A.3d 883 (2015), when objecting to the admission of the reports of the drug test results. A footnote in that case states: "When the trial court ruled on the objection [to out-of-court statements], it addressed

adequate notice of the defendant's due process claim and, accordingly, did not provide the possible reasons for not calling the analysts who performed the drug tests. As a result, we are unable to balance the state's interest in not producing the persons who performed the drug tests against the defendant's interest in confronting those persons. Without this basis, we cannot determine whether a violation of due process occurred and, thus, the record is inadequate for *Golding* review of the defendant's claim.

The judgment is affirmed.

In this opinion the other judges concurred.

the defendant's objection as to the credibility of the witness and the reliability of the hearsay statements. Thus, the defendant's claim on appeal that the admission of [the out-of-court declarant's] testimony denied him the right to confront and cross-examine witnesses was not presented to the trial court. We further note that, under *Golding*, the defendant's claim cannot be reviewed because it fails to satisfy the first prong, which requires that the record is adequate to review the alleged claim of error. *State* v. *Golding*, [supra, 213 Conn. 239]. Because the defendant failed to object to the admission of the testimony as a violation of his due process right to cross-examine an adverse witness, the court had no occasion to consider whether there was good cause not to allow confrontation. Therefore, the record is inadequate for review of that claim." (Internal quotation marks omitted.) *State* v. *Giovanni P.*, supra, 155 Conn. App. 338 n.14.

In the present case, during the hearing, defense counsel argued that "had there been an objection to hearsay . . . [in *Giovanni P.*]—it was not lab result hearsay; it was testimony—[the Appellate Court] might have considered the question." Although the defendant does not now argue on appeal that citing to this case preserved his claim or developed an adequate record for review, we observe that at the defendant's probation revocation hearing, defense counsel misconstrued the language in *Giovanni P. Giovanni P.* does not, contrary to what defense counsel suggested, support the contention that objecting to the admission of testimonial hearsay on hearsay grounds alone at a probation revocation hearing creates an adequate record for an appellate tribunal to review a claim that the admission of such testimonial hearsay denies a defendant his due process right to confrontation. Moreover, defense counsel's incorrect interpretation of *Giovanni P.* neither alerted the court that it needed to balance the defendant's due process right to confrontation against the state's interest in not presenting the witness, nor developed an adequate record for appellate review of the defendant's claim pursuant to *Golding*.

VALLEY NATIONAL BANK *v.* PRIVATE TRANSERVE, LLC, ET AL.
(AC 39542)

Prescott, Elgo and Harper, Js.

Syllabus

The plaintiff bank commenced this action seeking to foreclose two mortgages on certain properties owned by the defendant P Co. that secured a revolving promissory note, and to enforce personal guarantees of P Co.'s debts that were executed by the defendants J and T. The trial court denied the defendants' motion to dismiss in which they challenged the plaintiff's standing. Subsequently, the plaintiff withdrew its foreclosure counts and filed an amended complaint seeking to enforce only the personal guarantees. The court granted the plaintiff's motion for summary judgment as to liability only and, following a hearing in damages, rendered judgment in favor of the plaintiff, from which J and T appealed to this court. They claimed, inter alia, that genuine issues of material facts existed regarding the plaintiff's ownership of the debt and that the plaintiff lacked standing. *Held* that the claims of J and T that the plaintiff lacked standing were properly rejected by the trial court, as the record reflected that the plaintiff established through documentary and other evidence that it was the owner of the debt when this action was commenced, and to the extent that J and T, on appeal, relied on certain evidence to support their claim that the plaintiff did not own the debt, that evidence merely cast doubt on whether this action was initiated under the proper corporate name, which was never raised before the trial court, and any such defect was amenable to correction and did not implicate the plaintiff's standing; moreover, the trial court's decision granting the plaintiff permission to file a third amended complaint and its evidentiary rulings at the hearing in damages were discretionary in nature and entitled to deference, and J and T failed to demonstrate that any of those rulings relied on clearly erroneous factual findings or a misapprehension of the law, or that the court otherwise abused its discretion.

Argued November 28, 2017—officially released January 30, 2018

Procedural History

Action, inter alia, to foreclose a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant Geoffrey Minte et al. were defaulted for failure to plead; thereafter,

the court, *Tyma*, *J.*, denied the defendants' motion to dismiss; subsequently, the court, *Hon. Alfred J. Jennings*, judge trial referee, granted the plaintiff's motion for summary judgment as to liability; thereafter, the plaintiff withdrew the counts of the complaint seeking foreclosure; subsequently, following a hearing in damages, the court, *Wenzel*, *J.*, rendered judgment for the plaintiff, from which the defendant John Tartaglia et al. appealed to this court. *Affirmed*.

John Tartaglia, self-represented, with whom, on the brief, was *Linda Tartaglia*, self-represented, the appellants (defendant John Tartaglia et al.).

Andrew M. McPherson, with whom, on the brief, was *William J. Kupinse*, *Jr.*, for the appellee (plaintiff).

Opinion

PER CURIAM. In this action seeking, inter alia, to enforce a personal guarantee of a mortgage note, the defendants John Tartaglia and Linda Tartaglia,[1] against whom summary judgment as to liability only was rendered, appeal following a hearing in damages from the court's award of $967,467.59 in favor of the plaintiff, Valley National Bank. On appeal, the defendants argue that the court improperly (1) denied their motion to dismiss the action, in which they alleged that the plaintiff was not the owner of the debt at the time the action was commenced and, thus, lacked standing to prosecute the action; (2) granted summary judgment as to liability only despite the defendants' insistence that genuine issues of material facts existed regarding the plaintiff's ownership of the debt; (3) permitted the plaintiff to amend the complaint after summary judgment

[1] Geoffrey Minte, Private Transerve, LLC, and Randall Properties, LLC, also are named as defendants in the underlying action, but they did not participate in the present appeal, and, thus, all references to the defendants in this opinion are to the Tartaglias only. The remaining defendants are referred to by name.

despite the defendants' contention that the amendment added a new cause of action; and (4) made several evidentiary rulings against the defendants at the hearing in damages. We are not persuaded by the defendants' claims and, accordingly, affirm the judgment of the court.

The record reveals the following relevant facts and procedural history. The plaintiff commenced the underlying action in January, 2011. The initial complaint contained three counts. The first two counts sought to foreclose mortgages on two multifamily residential properties located in Bridgeport. The mortgages were executed by Private Transerve, LLC, as security for a revolving building promissory note of up to $500,000. The third count sought money damages based upon breach of an unconditional guarantee of the debts of Private Transerve, LLC. The guarantee was executed by the defendants and Geoffrey Minte.

On May 31, 2013, the plaintiff filed a motion for summary judgment as to liability only. The defendants, Minte, and Private Transerve, LLC, filed an opposition. On October 23, 2013, after argument on the motion for summary judgment but prior to the court acting on that motion, the defendants, Minte, and Private Transerve, LLC, filed a motion to dismiss the action, claiming that the plaintiff lacked standing to bring the action, and, thus, the court lacked subject matter jurisdiction. The plaintiff opposed the motion to dismiss.

On August 15, 2014, the court, *Tyma*, *J.*, issued a decision denying the motion to dismiss. The court rejected all arguments that the plaintiff did not own the debt at the time the action was commenced in January, 2011, finding on the basis of the pleadings, affidavits, and other proof in the file that the note and mortgages initially had been assigned from the original lender, PAF Capital, LLC, to The Park Avenue Bank, and then,

in June, 2010, were assigned to the plaintiff by the Federal Deposit Insurance Corporation acting as receiver for The Park Avenue Bank. The court moreover rejected all claims that there were problems affecting the validity of the aforementioned assignments.

On August 17, 2015, the court, *Hon. Alfred J. Jennings*, judge trial referee, issued a decision granting the motion for summary judgment as to liability only on all counts of the complaint. The court again rejected all arguments regarding the plaintiff's lack of standing to prosecute the action, indicating that the original signed note had been presented and reviewed by the court and the defendants at the hearing on the motion for summary judgment. The court concluded that the plaintiff had made "an adequate showing of the prima facie elements of its case for foreclosure and breach of guaranty: ownership of the loan, default of payment, and notice of breach."[2]

During the pendency of the underlying action, the two properties at issue were foreclosed in separate actions brought by Bridgeport's water pollution control authority. In each of those actions, the plaintiff exercised its right to redeem each of the properties on its assigned law day. As a result, the plaintiff acquired title to the properties and rendered moot its own foreclosure

[2] We note that the motion for summary judgment filed by the plaintiff only asked the court for a finding as to liability on the foreclosure counts. Nonetheless, in its decision, the court also granted summary judgment as to liability on the third count based on the personal guarantee. The defendants have not raised this discrepancy as an issue in the present appeal, or argued that the trial court exceeded its authority or otherwise committed reversible error in this regard. Absent extraordinary circumstances not present here, this court limits its review to those claims of error actually raised and adequately briefed by the parties. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 161–64, 84 A.3d 840 (2014); see also id., 164 ("our system is an adversarial one in which the burden ordinarily is on the parties to frame the issues, and the presumption is that issues not raised by the parties are deemed waived").

counts in the present action. Each time the plaintiff acquired a property, it filed an amended complaint removing the related foreclosure count, eventually leaving a single count complaint seeking money damages on the basis of the defendants' breach of the personal guarantee of the debt. The last such amendment was the third amended complaint, to which the defendants objected, arguing, inter alia, that the plaintiff was attempting to correct defects in its prior pleadings or to change the cause of action alleged. The court overruled the defendants' objection and permitted the amendment.

A hearing in damages was held by the court, *Wenzel*, *J.*, on July 26 and August 2, 2016. John Tartaglia appeared as a self-represented party at the hearing. Linda Tartaglia and Minte did not appear. On August 11, 2016, the court issued a memorandum of decision awarding joint and several damages totaling $967,467.59 against the defendants and Minte. This appeal followed.[3]

On appeal, the defendants raise a number of claims, none of which warrants significant discussion. The court's granting of permission to file the third amended complaint and its evidentiary rulings at the hearing in damages were discretionary in nature and are entitled to deferential review. The defendants have failed to demonstrate that any of these rulings relied upon clearly erroneous factual findings or a misapprehension of the law, or that the court otherwise abused its discretion.

As they have argued throughout these proceedings, the defendants continue to maintain that the plaintiff lacked standing to bring this action against them. Most

[3] John Tartaglia, who is not an attorney, initially filed this appeal as a self-represented party, purportedly on his own behalf and on behalf of Linda Tartaglia. Linda Tartaglia subsequently filed a joint appeal consent form in compliance with Practice Book § 61-7 (a) (3). The defendants submitted a joint brief.

of the arguments are identical to those raised in conjunction with both the motion to dismiss and the motion for summary judgment. On the basis of our review of the record provided, as well as the briefs and arguments of the parties, we are convinced that the claims raised before the trial court regarding standing lack merit and were properly rejected by the court for the reasons provided in its memoranda of decision. In short, the record reflects that the plaintiff established through documentary and other evidence that it was the owner of the debt at the time this action was commenced, and it would serve no useful purpose to engage in further discussion.

The defendants attempt to breathe new life into their standing claim on appeal by bringing to our attention certain testimony provided by the plaintiff's agent at the hearing in damages in response to his cross-examination by John Tartaglia. In that testimony, the plaintiff's agent appears to agree with John Tartaglia's suggestion that the debt at issue was owned in 2010 by a corporate entity, VNB New York, Corp., that merged into and became the plaintiff sometime in 2011.[4] The defendants suggest that this response amounted to an admission that the plaintiff did not own the debt when the action was initiated. Rather than truly implicating the plaintiff's standing, however, the defendants' argument seems only to cast doubt on whether the action was initiated under the proper corporate name, an issue never raised to the trial court. If such a defect exists here, which is not entirely clear from the record before us, it was amenable to correction in accordance with General Statutes § 52-109 and Practice Book § 9-20, and does not implicate the plaintiff's status as the owner

[4] We note that the transcript of the August 2, 2016 proceeding indicates that John Tartaglia misstated to the witness that the complaint had been filed in 2010. The record, however, shows that it was filed in February, 2011, shortly after this action was commenced.

of the debt or its standing to prosecute this action. See *NewAlliance Bank* v. *Schaeppi*, 139 Conn. App. 94, 97–98, 54 A.3d 1058 (2012) (distinguishing between challenges implicating proper assignment of note or mortgage between distinct parties and nomenclature problems arising from mergers and corporate name changes), cert. denied, 307 Conn. 948, 60 A.3d 737 (2013).

Having thoroughly reviewed the record and the arguments of the parties, we conclude that the defendants have not met their burden of proving any of the claims raised on appeal.

The judgment is affirmed.

KATE L. DOYLE ET AL. *v.* ASPEN DENTAL OF SOUTHERN CT, PC, ET AL.
(AC 39325)

Sheldon, Keller and Bishop, Js.

Syllabus

The plaintiff sought to recover damages from the defendant oral surgeon, K, for dental malpractice in connection with an implant procedure performed on the plaintiff by K. The trial court granted K's motion to dismiss on the ground that the plaintiff had failed to provide an opinion letter from a similar health care provider, as required by statute (§§ 52-190a and 52-184c [c]). Specifically, because the plaintiff had attached an opinion letter authored by M, a general dentist, and K was trained as an oral and maxillofacial surgeon and his treatment of the plaintiff fell into the area of oral and maxillofacial surgery, the trial court determined that M's opinion letter was not that of a similar health care provider because M was not board certified in K's specialty. On appeal to this court, the plaintiff claimed that the opinion letter, authored by a general dentist, was sufficient because there was no authentic public record from which she could have discovered or verified that K had training and experience in oral and maxillofacial surgery beyond the information available on the website of the Department of Public Health, which did not indicate that K was a board certified oral and maxillofacial surgeon. *Held* that the trial court properly granted K's motion to dismiss for lack of personal jurisdiction; because it was undisputed that M was

not a board certified specialist trained and experienced in oral and maxillofacial surgery, M was not a similar health care provider as defined in § 52-184c (c) and, thus, the opinion letter attached to the plaintiff's complaint was legally insufficient under § 52-190a (a), and the plaintiff's claim that she could rely solely on the department's website to determine K's credentials was unavailing, as this court previously has rejected a similar claim, the plain language of § 52-190a (a) requires the plaintiff to conduct a reasonable inquiry for a defendant health care provider's credentials, there are other methods, aside from searching the department's website, for ascertaining such credentials, including filing a bill of discovery, and the plaintiff was put on notice of K's credentials by notations in the medical file referring to her treatment by an oral surgeon.

Argued October 17, 2017—officially released January 30, 2018

Procedural History

Action to recover damages for, inter alia, the defendants' alleged dental malpractice, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Wenzel*, *J.*, granted the defendants' motions to dismiss and rendered judgment thereon; thereafter, the court denied the plaintiffs' motion to reargue, and the plaintiffs appealed to this court; subsequently, the appeal was withdrawn as to the named defendant et al. *Affirmed*.

Scott D. Camassar, for the appellants (plaintiffs).

Beverly Knapp Anderson, with whom was *Craig A. Fontaine*, for the appellee (defendant Brandon Kang).

Opinion

BISHOP, J. This appeal arises out of a dental malpractice action brought by the plaintiffs, Kate L. Doyle and Brendan Doyle,[1] against the defendants, Aspen Dental of Southern CT, PC, and Aspen Dental Management, Inc. (Aspen Dental), and Brandon Kang, DDS,[2] in connection

[1] Brendan Doyle's claim for loss of consortium is a derivative claim of Kate L. Doyle's claims. Therefore, we refer in this opinion to Kate L. Doyle as the plaintiff.

[2] On February 17, 2017, the plaintiff withdrew her appeal as to Aspen Dental of Southern CT, PC, and Aspen Dental Management, Inc. Accordingly, references herein to the defendant are to Kang.

with a dental implant procedure performed by Kang. The plaintiff appeals from the judgment rendered by the trial court dismissing her action against the defendant on the basis of her failure to comply with General Statutes § 52-190a (a),[3] which required the plaintiff to attach to her complaint an opinion letter authored by a "similar health care provider," as defined in General Statutes § 52-184c (c).[4] On appeal, the plaintiff argues that the court erred in concluding that the opinion letter written by a general dentist was not authored by a "similar health care provider" and that an opinion letter from an oral and maxillofacial surgeon was required instead. In support of this claim, the plaintiff alleges that she had no method of discovering or verifying that the defendant was an oral and maxillofacial surgeon in addition to being a licensed general dentist because there was no authentic public record from which the plaintiff could have determined that the defendant had training and experience as an oral and maxillofacial

[3] General Statutes § 52-190a (a) provides in relevant part: "No civil action . . . shall be filed to recover damages resulting from personal injury . . . in which it is alleged that such injury . . . resulted from the negligence of a health care provider, unless the attorney or party filing the action . . . has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. . . . To show the existence of such good faith, the claimant or the claimant's attorney. . . shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion."

[4] General Statutes § 52-184c (c) provides: "If the defendant health care provider is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a 'similar health care provider' is one who: (1) [i]s trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty; provided if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a 'similar health care provider.' "

surgeon. We conclude that the court properly determined that because the defendant did, in fact, have training and experience in the specialty of oral and maxillofacial surgery, the opinion letter submitted by the plaintiff was not authored by a "similar health care provider."[5] Accordingly, we affirm the judgment of the trial court.

The plaintiff's complaint, filed on August 19, 2015, contained the following factual allegations, the truth of which the court was required to assume for purposes of deciding the defendant's motion to dismiss. On March 15, 2011, the plaintiff underwent an examination and treatment at Aspen Dental for a broken crown on one of her front teeth. The tooth was removed on March 29, 2011, after which the plaintiff, under sedation, received a dental implant for the missing tooth on July 29, 2011. By December 21, 2012, however, the plaintiff's implant was failing, allegedly because it had been placed at an improper angle. It penetrated the nasal floor, resulting in bone loss along the sides of the implant. The plaintiff alleged that the defendant knew or should have known that the implant was failing, but failed to inform her of this circumstance. On August 4, 2013, the defendant performed a bone grafting procedure. At that time, the defendant informed the plaintiff

[5] The plaintiff additionally claims on appeal that the court erred in concluding that the requirement in § 52-184c (c) to obtain an opinion letter from an oral and maxillofacial surgeon also was triggered because the defendant "held himself out" as an oral and maxillofacial surgeon. Specifically, the plaintiff claims that there was insufficient evidence that the defendant was "held out" as a specialist trained and experienced in oral and maxillofacial surgery at the time of her treatment. Because our resolution of the plaintiff's first claim is dispositive of this appeal, we do not address this claim.

We also do not address the plaintiff's argument on appeal that "dismissal notwithstanding, the plaintiff still has a remedy under the accidental failure of suit statute, General Statutes § 52-592." As the plaintiff's counsel conceded at oral argument, this claim is not one that this court can address on appeal, as the plaintiff has not commenced an action pursuant to § 52-592.

that the implant might have to be removed at a later date.

The plaintiff commenced the present dental malpractice action, alleging medical negligence by the defendant, by complaint dated August 19, 2015. As required by §§ 52-190a and 52-184c, the plaintiff attached to the complaint a certificate of reasonable inquiry by the plaintiff's attorney and an opinion letter prepared by Andrew Mogelof, a general dentist, who the plaintiff claimed to be a "similar health care provider" to the defendant.

On October 27, 2015, the defendant filed a motion to dismiss the action against him for lack of personal jurisdiction on the basis of the plaintiff's failure to provide a proper opinion letter, as required by § 52-190a (a), authored by a similar health care provider, as defined in § 52-184c (c). Specifically, the defendant claimed that "the author of the opinion letter must be a board certified, trained and experienced oral and maxillofacial surgeon because the defendant is trained and experienced in the specialty of oral and maxillofacial surgery and holds himself out as an oral and maxillofacial surgeon. . . . [Because] the [plaintiff] attached an opinion letter authored by a general dentist . . . [she has] failed to comply with . . . [§ 52-190a (a)]." In support of his motion to dismiss, the defendant submitted an affidavit dated October 22, 2015, in which he averred that: "After obtaining my dental degree in 2004, I completed a four year residency program in [o]ral [and] [m]axillofacial [s]urgery, which is one of the dental specialties recognized by the American Dental Association. This four year training certificate program covered the full scope of [o]ral and [m]axillofacial [s]urgery. Rotations included . . . [thirty-six] months on service with [o]ral and [m]axillofacial [s]urgery. . . . At all times while working at Aspen Dental, I represented myself to patients as an oral and maxillofacial surgeon.

. . . All of the treatment that I rendered to [the] plaintiff . . . was in my capacity as an oral and maxillofacial surgeon. The consent form signed by [the] plaintiff was entitled 'Consent for Oral Surgery and Anesthesia.' "

On December 14, 2015, the plaintiff filed a memorandum of law in opposition to the defendant's motion to dismiss. In support of her opposition, the plaintiff attached an affidavit from Mogelof, which stated, in relevant part, that he is "experienced in all of the relevant services provided by . . . [the defendant] in the case of [the plaintiff]." In this affidavit, Mogelof also acknowledged that he is "not trained as an oral and maxillofacial surgeon." Mogelof further stated that "the failure to properly place and treat [the plaintiff's] dental implant was due to a failure to meet the standards of care of basic general surgery and diagnosis, which standards were required to have been met not only by general dentists but also oral surgeons such as [the defendant]."

Oral argument on the defendant's motion to dismiss took place on December 21, 2015. Subsequently, the parties filed supplemental briefs and affidavits on December 31, 2015.[6] Oral argument on the defendant's motion to dismiss continued on January 14, 2016. On May 5, 2016, the court, *Wenzel*, *J.*, granted the defendant's motion to dismiss. In its memorandum of decision, the court held that "there is significant evidence . . . that the treatment afforded to the plaintiff fell into the area of oral and maxillofacial surgery. . . . [The

[6] Attached to the defendant's supplemental memorandum of law in further support of his motion to dismiss was a supplemental affidavit, dated December 18, 2015, in which the defendant stated in relevant part: "Extractions, bone grafting procedures and implant placements are among the procedures that I was trained to perform during my post-graduate residency training program in oral and maxillofacial surgery. Extractions, bone grafting and implant placements are within the scope of practice of oral and maxillofacial surgery."

defendant] began treating the plaintiff immediately after her referral to 'the oral surgeon.' Moreover, the records which detailed the treatment of [the] plaintiff were reviewed and quoted by the opinion author, including this very notation [referencing an oral surgeon]. Of the three criteria which can trigger a specialist level of evaluation, the court finds that the evidence submitted in support of this motion by the [defendant] proves that . . . [1] [the defendant] was in fact trained and experienced in the area of oral surgery and [2] was referred to and held out as an oral surgeon. . . . Accordingly, having determined that . . . the author of the opinion letter submitted was not a similar health care provider having not been board certified in [the defendant's] specialty, the court grants the [defendant's] motion to dismiss."

On May 18, 2016, the plaintiff filed a motion to reargue or reconsider, which the court denied on June 6, 2016. This appeal followed.

On appeal, the plaintiff argues that the court erred in dismissing her malpractice action for her failure to attach to the complaint an opinion letter authored by a board certified specialist in oral and maxillofacial surgery. Specifically, the plaintiff argues that she "met the requirement of [§ 52-190a (a)] because counsel made a good faith inquiry into whether or not there was dental malpractice, and found a 'similar health care provider' in accordance with the [d]efendant's credentials on file with the public health authorities." We are unpersuaded.

We first set forth our standard of review. "The court granted the [defendant's] motion to dismiss for lack of personal jurisdiction on the ground that the . . . opinion letter [attached to the plaintiff's complaint] was not legally sufficient." *Gonzales* v. *Langdon*, 161 Conn. App. 497, 503, 128 A.3d 562 (2015). In reviewing "a challenge

to a ruling on a motion to dismiss. . . [w]hen the facts relevant to an issue are not in dispute, this court's task is limited to a determination of whether, on the basis of those facts, the trial court's conclusions of law are legally and logically correct. . . . Because there is no dispute regarding the basic material facts, this case presents an issue of law, and we exercise plenary review." (Internal quotation marks omitted.) *Helfant* v. *Yale-New Haven Hospital*, 168 Conn. App. 47, 56, 145 A.3d 347 (2016); see also *Torres* v. *Carrese*, 149 Conn. App. 596, 608, 90 A.3d 256 ("[o]ur review of a trial court's ruling on a motion to dismiss pursuant to § 52-190a is plenary"), cert. denied, 312 Conn. 912, 93 A.3d 595 (2014).

"[D]ismissal is the mandatory remedy when a plaintiff fails to file an opinion letter that complies with § 52-190a (a)." *Bennett* v. *New Milford Hospital, Inc.*, 300 Conn. 1, 28, 12 A.3d 865 (2011); see also General Statutes § 52-190a (c) ("[t]he failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action"); *Morgan* v. *Hartford Hospital*, 301 Conn. 388, 401, 21 A.3d 451 (2011) (failure to attach a proper opinion letter constitutes lack of jurisdiction over the person). "Section 52-190a (a) provides in relevant part that, prior to filing a [malpractice] action against a health care provider, the attorney or party filing the action . . . [must make] a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. . . . To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in [§] 52-184c . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion." (Internal quotation marks omitted.) *Gonzales* v. *Langdon*, supra, 161 Conn. App. 504.

"Pursuant to [§ 52-184c], the precise definition of similar health care provider depends on whether the defendant health care provider is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist." (Internal quotation marks omitted.) Id. General Statutes "§ 52-184c (b) establishes the qualifications of a similar health care provider when the defendant is neither board certified nor in some way a specialist, and § 52-184c (c) [establishes] those qualifications when the defendant is board certified, trained and experienced in a medical specialty, or holds himself out as a specialist." (Internal quotation marks omitted.) *Wilkins* v. *Connecticut Childbirth & Women's Center*, 314 Conn. 709, 725, 104 A.3d 671 (2014).

In the present case, it is undisputed that the defendant is trained and experienced in the specialty of oral and maxillofacial surgery. Pursuant to § 52-184c (c), "[i]f the defendant health care provider . . . is trained and experienced in a medical specialty . . . a 'similar health care provider' is one who: (1) [i]s trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty." Thus, to satisfy the requirements of §§ 52-190a (a) and 52-184c (c), the plaintiff was required to obtain an opinion letter from one who was (1) "trained and experienced in" oral and maxillofacial surgery *and* (2) "certified by the appropriate American board in" oral and maxillofacial surgery. See General Statutes §§ 52-190a (a) and 52-184c (c).

The plaintiff attached to her complaint an opinion letter authored by a general dentist. It is undisputed that Mogelof was not board certified in the specialty of oral and maxillofacial surgery. In his affidavit dated November 12, 2015, Mogelof acknowledged that he is "not trained as an oral and maxillofacial surgeon." Thus, although Mogelof claimed to have knowledge of the

procedure performed by the defendant, and the relevant standard of care applicable to that procedure, the possession of such knowledge, alone, is insufficient to meet the credentialing requirements of § 52-184c (c). See *Gonzales* v. *Langdon*, supra, 161 Conn. App. 505 ("Our precedent indicates that under § 52-184c [c], it is not enough that an authoring health care provider has familiarity with or knowledge of the relevant standard of care. . . . A similar health care provider *must be* trained and experienced in the same specialty and certified by the appropriate American board in the same specialty." [Citation omitted; emphasis added; internal quotation marks omitted.]). Given that Mogelof was not trained and experienced, or board certified, in the defendant's specialty of oral and maxillofacial surgery, as required by § 52-184c (c), the opinion letter submitted by the plaintiff was not legally sufficient under § 52-190a (a).

Despite the defendant's training and experience in oral and maxillofacial surgery, the plaintiff maintains that an opinion letter from a general dentist was sufficient in the present case because "there was no authentic public record by which to determine or verify that [the defendant] had training as an oral and maxillofacial surgeon" and she could verify only that the defendant was a licensed general dentist.[7] More specifically, the plaintiff argues that because the defendant's profile on the website of the Department of Public Health (department) did not indicate that he was a board certified

[7] To the extent that the plaintiff suggests that a plaintiff should not need to conduct an inquiry in order to ascertain a defendant health care provider's credentials prior to bringing an action, this may be a worthy issue for our legislature to address, but our role is not to contort legislation and is to apply its clear and unambiguous requirements and limitations. See *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 15–16 ("[g]iven the legislature's specific articulations of who is a similar health care provider under § 52-184c [b] and [c], we have hewn very closely to that language and declined to modify or expand it in any way").

oral and maxillofacial surgeon, she was not required to obtain an opinion letter from a board certified oral and maxillofacial surgeon. In response, the defendant argues that "there is no statutory requirement that the defendant's specialty training be verifiable on the website of a public health authority." We agree with the defendant.

As an initial matter, we reject the plaintiff's reliance on *Gonzales* v. *Langdon*, supra, 161 Conn. App. 497, to support her argument that she could rely solely on the information available on the department's website to determine the defendant's credentials. This court previously has rejected that argument. In *Gonzales*, "[t]he plaintiff argue[d] that she was only required to obtain an opinion letter authored by a board certified dermatologist because that was the only certification that was listed on [the defendant's] profile on the [department's] website." Id., 503. This court disagreed, concluding that the plaintiff had failed to obtain an opinion letter from a similar health care provider. See *Gonzales* v. *Langdon*, supra, 503.

Nevertheless, the plaintiff in the present case claims that this court, in *Gonzales*, described reliance on the department's website as a "good faith effort . . . to attach an opinion letter authored by a similar health care provider." Id., 515. Our review of the case reveals that the plaintiff takes this quote out of context. In *Gonzales*, this court was simply explaining why the situation it confronted, where "the plaintiff made a good faith effort in her original complaint to attach an opinion letter authored by a similar health care provider"; id., 515; by looking at the department's website, differed from the situation in *New England Road, Inc.* v. *Planning & Zoning Commiss*ion, 308 Conn. 180, 189, 61 A.3d 505 (2013), where "the plaintiff failed to comply in any fashion with one or more of the process requirements." (Internal quotation marks omitted.) *Gonzales*

v. *Langdon*, supra, 161 Conn. App. 515. More importantly, the reference to the plaintiff's "good faith effort" in *Gonzales* is found in this court's analysis of whether the trial court in that case improperly denied the plaintiff's request for leave to amend the complaint, not whether the plaintiff's reliance on the department's website rendered the opinion letter legally sufficient in the first place. Id., 509, 515. Accordingly, we find the plaintiff's reliance on *Gonzales* unavailing.[8]

The plaintiff argues that, aside from the department's website, she had no way of verifying the defendant's training in oral and maxillofacial surgery, and she "cannot be expected to match credentials that [she has] no way of discovering and verifying." We disagree.

We first note that the plain language of § 52-190a (a) requires that a plaintiff, prior to filing a medical malpractice action against a health care provider, make "*a reasonable inquiry as permitted by the circumstances* to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant." (Emphasis added.) General Statutes § 52-190a (a). As part of that reasonable inquiry, a plaintiff "shall obtain a written and signed opinion of a similar health care provider, as defined in [§] 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section. . . ." See General Statutes § 52-190a (a). Our legislature

[8] More generally, we also reject the plaintiff's argument that reliance on the information in a defendant health care provider's profile on the department's website is sufficient because such an interpretation would render meaningless the other two potential triggers of the requirements under § 52-184c (c)—trained and experienced in a medical specialty, or held out as a specialist—that our legislature has clearly defined. See *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 15–16. In other words, if we were to agree with the plaintiff, only board certification would trigger the requirements of § 52-184c (c), since it is alleged that only board certification is available on that website.

amended § 52-190a (a) in 2005 to include this requirement that a plaintiff obtain "the written opinion of a similar health care provider that there appears to be evidence of medical negligence . . . [as] part of a comprehensive effort to control significant and continued increases in malpractice insurance premiums by reforming aspects of tort law, the insurance system and the public health regulatory system." (Citations omitted; internal quotation marks omitted.) *Wilkins* v. *Connecticut Childbirth & Women's Center*, supra, 314 Conn. 728. Thus, to the extent that the plaintiff suggests that she should not be expected to conduct a reasonable inquiry for a defendant health care provider's credentials, we disagree because the plain language of § 52-190a (a) requires her to do so.

Further, in focusing her argument solely on information that was available on the department's website, the plaintiff ignores the existence of other methods for ascertaining a defendant health care provider's credentials. She specifically could have asked Aspen Dental or the defendant for the defendant's credentials or resume, a simple request that she does not allege she undertook unsuccessfully in her affidavit in opposition to the defendant's motion to dismiss. Even if the defendant was not forthcoming with the plaintiff's requests for information on the defendant's credentials, the plaintiff could have filed a bill of discovery. See, e.g., *Journal Publishing Co., Inc.* v. *Hartford Courant Co.*, 261 Conn. 673, 680–81, 804 A.2d 823 (2002) ("The bill of discovery is an independent action in equity for discovery, and is designed to obtain evidence for use in an action other than the one in which discovery is sought. . . . As a power to enforce discovery, the bill is within the inherent power of a court of equity . . . [and] is well recognized . . . . [B]ecause a pure bill of discovery is favored in equity, it should be granted unless there is some well founded objection against the

exercise of the court's discretion. . . . To sustain the bill, the petitioner must demonstrate that what he seeks to discover is material and necessary for proof of, or is needed to aid in proof of or in defense of, another action already brought or about to be brought. . . . Although the petitioner must also show that he has no other adequate means of enforcing discovery of the desired material, [t]he availability of other remedies . . . for obtaining information [does] not require the denial of the equitable relief . . . sought." [Internal quotations marks omitted.]). In sum, the department's website is not, as the plaintiff suggests, the only reliable method of obtaining or verifying a defendant health care provider's credentials.

The plaintiff's argument that she had no way of discovering or verifying the defendant's training and experience as an oral and maxillofacial surgeon is further undercut by Mogelof's identification, in his opinion letter, of notations in the medical file referring to the plaintiff's treatment by an "oral surgeon." Even if the plaintiff was unaware up to that point that the defendant had training as an oral and maxillofacial surgeon, she was put on notice once Mogelof identified the references in the medical file to treatment by an "oral surgeon." Moreover, if the plaintiff had become aware of the defect in the opinion letter before the statute of limitations had expired, she could have requested leave to amend the complaint and cured the defect. See *Gonzales* v. *Langdon*, supra, 161 Conn. App. 510 ("if a plaintiff alleging medical malpractice seeks to amend his or her complaint in order to amend the original opinion letter, or to substitute a new opinion letter . . . the trial court . . . has discretion to permit such an amendment if the plaintiff seeks to amend within the applicable statute of limitations but more than thirty days after the return day"). On the basis of the foregoing, we reject the plaintiff's argument that she had no

way of discovering or verifying the defendant's credentials in order to obtain an opinion letter authored by a similar health care provider.

In sum, it is undisputed that the defendant is trained and experienced in oral and maxillofacial surgery. It is also undisputed that Mogelof is not trained and experienced in, or board certified in, the defendant's specialty of oral and maxillofacial surgery. Because Mogelof was not a "similar health care provider" as defined in § 52-184c (c), the opinion letter attached to the plaintiff's complaint was legally insufficient under § 52-190a (a), requiring dismissal of the case. See *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 28; General Statutes § 52-190a (c). Accordingly, the trial court properly granted the defendant's motion to dismiss for lack of personal jurisdiction.

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

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VOL. 179

NORTHEAST FAMILY FEDERAL CREDIT UNION
v. ELIZABETH A. JEAN
(AC 39661)

DiPentima, C. J., and Elgo and Bear, Js.

Argued January 12—officially released January 30, 2018

Defendant's appeal from the Superior Court in the judicial district of Tolland, *Bright*, *J.*; *Cobb*, *J.*

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting a new sale date.

PHH MORTGAGE CORPORATION
v. ADRIAN D. STOCK ET AL.
(AC 38565)

DiPentima, C. J., and Sheldon and Devlin, Js.

Submitted on briefs January 8—officially released January 30, 2018

Named defendant's appeal from the Superior Court in the judicial district of New Haven, *Avallone*, *J.*

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting new law days.

STATE OF CONNECTICUT *v.* ROGELIO FERNANDEZ
(AC 39736)

DiPentima, C. J., and Prescott and Norcott, Js.

Argued January 11—officially released January 30, 2018

Defendant's appeal from the Superior Court in the judicial district of Fairfield, *Devlin*, *J.*

Per Curiam. The judgment is affirmed.

STATE OF CONNECTICUT *v.* JAHMAL FULCHER
(AC 39326)

Lavine, Keller and Harper, Js.

Argued January 11—officially released January 30, 2018

Defendant's appeal from the Superior Court in the judicial district of New Haven, *Clifford*, *J.*

Per Curiam. The judgment is affirmed.

JOSE HEREDIA *v.* COMMISSIONER
OF CORRECTION
(AC 39656)

Alvord, Prescott and Beach, Js.

Argued January 16—officially released January 30, 2018

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Sferrazza*, *J.*

Per Curiam. The appeal is dismissed.

STATE OF CONNECTICUT *v.* JOHN VIVO III
(AC 38757)

Lavine, Keller and Harper, Js.

Argued January 18—officially released January 30, 2018

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Per Curiam. The judgment is affirmed.

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The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

DISH NETWORK, LLC F/K/A ECHOSTAR SATELLITE, LLC *v.* KEVIN B. SULLIVAN, COMMISSIONER OF REVENUE SERVICES, SC 19800/19801/19802
Judicial District of New Britain

Taxation; Whether Tax Refund Claim Barred Where Taxpayer did not Challenge Audit of Underlying Tax Return; Whether All of Satellite Television Provider's Earnings Subject to § 12-256 Satellite Transmission Business Tax; Whether Plaintiff Entitled to Statutory Interest on Tax Refund. The plaintiff provides television to subscribers in Connecticut by satellite transmission. General Statutes § 12-256 (b) (2) provides that a satellite television provider "shall pay a quarterly tax upon the gross earnings from . . . the transmission to subscribers in this state of video programming by satellite." The plaintiff filed tax returns under § 12-256 (b) (2) for several quarters. It later amended those returns and sought refunds, claiming that the only earnings that were subject to the tax were those attributable to customers' payments for programming and pay-per-view packages. The defendant rejected the plaintiff's refund claims, finding that *all* amounts paid to the plaintiff by subscribers were subject to the tax, including money paid by subscribers for the purchase, rental and installation of satellite equipment, for the plaintiff's digital video recorder (DVR) service, and for subscribers' late payment and other "penalty" fees. The plaintiff appealed the defendant's decision to the trial court. The trial court rejected the defendant's claim that the plaintiff was barred from seeking refunds for some of the tax periods because the plaintiff had not challenged the audits of its tax returns for those periods, and it ruled that the plaintiff was entitled to a refund for taxes it paid on earnings from the sale of equipment, from the installation and maintenance of the equipment, and from customers' subscriptions to its monthly magazine. The court reasoned that those earnings were not "from" the transmission of video programming by satellite as contemplated by § 12-256 (b) (2). The trial court concluded, however, that the plaintiff was not entitled to a refund for taxes it had paid on earnings attributable to subscribers' late payment fees and from its DVR service, finding that those amounts were sufficiently related to transmission and therefore subject to the tax. The defendant appeals, claiming that the trial court wrongly exercised jurisdiction over the plaintiff's claims for refunds for some of the

tax periods where the plaintiff did not contest the defendant's audit determinations for those tax periods. The defendant also claims that the court erred in ruling that the plaintiff was entitled to a refund for earnings attributable to equipment, installation and the monthly magazine, arguing that it is well-established that a gross earnings tax on a business applies to the entirety of the business' earnings and receipts from its operations. The plaintiff cross appeals, claiming that the trial court erred in ruling that its earnings from late payment fees and from its DVR service were taxable under § 12-256 (b) (2). The plaintiff also claims that the trial court erred in denying its claim for General Statutes § 12-268c interest on the $886,845 tax refund ordered by the court.

STATE *v.* CASEY SINCLAIR, SC 19932
Judicial District of Waterbury

Criminal; Whether Appellate Court Properly Determined that any Violation of Defendant's Confrontation Clause Rights was Harmless; Whether Appellate Court Properly Determined that Prosecutorial Impropriety did not Deprive Defendant of a Fair Trial. The defendant was convicted of possession of narcotics with intent to sell by a person who is not drug-dependent after Waterbury police, acting on a tip that a drug deal was going to take place that night in Waterbury, pulled over a Jeep in which the defendant was a passenger and found approximately 10,000 bags of heroin and $12,248 in cash. While the defendant claimed that a friend owned the vehicle, and while the vehicle was not registered in the defendant's name, a police officer testified at trial that drug dealers often use a vehicle they own during a drug transaction, but that they register the vehicle in someone else's name. The police officer then testified, over the defendant's objection, that the Jeep had been inspected at Manny's Auto Repair, a business located next to the defendant's place of business in New York. The defendant appealed his conviction, claiming that the trial court violated his right to confrontation when it admitted into evidence the police officer's testimony that the Jeep was inspected at Manny's Auto Repair. The defendant argued that evidence of the inspection information was inadmissible testimonial hearsay and that the error in admitting the evidence was not harmless because the inspection location was critical evidence linking him to the Jeep. The Appellate Court (173 Conn. App. 1) disagreed and affirmed the defendant's conviction, finding that any error by the trial court in admitting the testimony was harmless beyond a reasonable doubt because the

state presented a significant amount of evidence that supported the charge that the defendant knowingly possessed the narcotics in the vehicle, including the money and the heroin that were recovered from the Jeep, a gas station videotape showing the defendant interacting with a known heroin dealer in the hours before his arrest, and testimony from the defendant's girlfriend concerning a drug transaction that he engaged in that day. The Appellate Court also noted that the defendant's own contradictory testimony was damaging to his case, that his actions during the incident at issue comported with certain common practices used by drug dealers and that, in light of the strength of the state's case, the inspection information would not have tended to influence the jury's judgment. The Appellate Court also rejected the defendant's claim that he was deprived of a fair trial due to prosecutorial misconduct, finding that, while certain remarks by the prosecutor during closing argument were improper, there was no reasonable likelihood that the jury would have returned a different verdict absent the improprieties and because the remarks were not so blatantly egregious as to warrant reversal of the defendant's conviction. The Supreme Court granted the defendant certification to appeal, and it will consider whether the Appellate Court properly determined that (1) any presumed violation of the defendant's confrontation clause rights was harmless beyond a reasonable doubt, and (2) the prosecutor's multiple acts of prosecutorial impropriety did not deprive the defendant of a fair trial.

ERIC THOMAS KELSEY *v.* COMMISSIONER OF CORRECTION, SC 19945

Judicial District of Tolland at Rockville

Habeas; Whether Pleadings in Habeas Action Must Be Closed Before Habeas Court can Entertain Motion that Subsequent Habeas Petition be Summarily Dismissed on Ground that it was not Timely Filed. In 2004, the petitioner was convicted of felony murder and conspiracy to commit robbery. He brought a habeas action challenging his conviction in 2007. The habeas court denied the petitioner's habeas petition, and the petitioner appealed. The Appellate Court dismissed the appeal, and the Supreme Court denied the petitioner certification to appeal the Appellate Court's judgment in July, 2012. The petitioner brought this second habeas action challenging his conviction in March, 2017. The respondent moved that the habeas court order the petitioner to show cause why he should be permitted to proceed despite his delay in filing the subsequent habeas petition.

The respondent pointed to General Statutes § 52-470 (d) (1), which provides that there is a rebuttable presumption that a habeas petitioner does not have good cause excusing his delay in filing a subsequent habeas petition that challenges the same conviction challenged with a prior habeas petition where the petitioner files the subsequent petition more than two years after conclusion of appellate review of the judgment on the prior habeas petition. The respondent argued that this subsequent habeas action was presumptively untimely under § 52-470 (d) (1) because the petitioner filed it more than two years after the Supreme Court denied him certification to appeal the Appellate Court judgment dismissing his appeal from the judgment on his prior habeas petition. The habeas court ruled that the respondent's request was premature because the pleadings were not yet closed. The habeas court ruled that General Statutes § 52-470 (b) (1) clearly and unambiguously requires that the pleadings in a habeas corpus proceeding must be closed before the habeas court can entertain any request for a determination as to whether there is good cause to allow the habeas action to proceed any further. Upon certification by the Chief Justice pursuant to General Statutes § 52-265a that a matter of substantial public interest is at issue, the respondent appeals, arguing that §§ 52-470 (d) and (e) do not require that the pleadings be closed before the habeas court can dismiss a habeas petition on the ground that it was not timely filed.

PATRICK TANNONE *v.* AMICA MUTUAL INSURANCE COMPANY, SC 20020

SANDRA TANNONE *v.* AMICA MUTUAL INSURANCE COMPANY, SC 20021

Judicial District of Danbury

Insurance; Underinsured Motorists; Whether Trial Court Properly Upheld Policy Provision Excluding Underinsured Motorist Coverage for Vehicles Owned by Self-Insurers. The plaintiffs, Patrick and Sandra Tannone, were struck and injured by a rental car owned by Enterprise Rent-A-Car, a self-insured entity. After exhausting the insurance coverage of the car's renter and driver, the plaintiffs brought these actions against their automobile liability insurer, defendant Amica Mutual Insurance Company, seeking underinsured motorist benefits. The actions were consolidated, and the defendant moved for summary judgment on the ground that the plaintiffs were not entitled to underinsured motorist benefits because their policies contained a provision excluding vehicles owned by "self-insurers" from

the definition of "underinsured motor vehicle" for coverage purposes. The trial court agreed and rendered summary judgment in favor of the defendant, ruling that the policy exclusion was valid under Connecticut law and that it barred the plaintiffs' recovery of underinsured motorist benefits. The trial court noted that, in *Orkney* v. *Hanover Ins. Co.*, 248 Conn. 195 (1999), the Supreme Court upheld a policy provision excluding coverage for motor vehicles owned by self-insurers on finding that the provision was authorized by the insurance regulations and that it did not offend the public policy underlying the underinsured motorist statutes of ensuring that an insured be fully compensated because an individual who is injured by virtue of the operation of a self-insured rental car can seek compensation from the car's owner. The trial court rejected the plaintiffs' claim that a 2005 federal law known as the Graves Amendment changed the legal landscape such that the rationale supporting the *Orkney* decision no longer applies. The Graves Amendment provides that a car rental company that rents or leases a vehicle to a person shall not be liable under any state law for harm to persons or property resulting from a renter's or lessee's use of the vehicle. These are the plaintiffs' appeals from the trial court's judgments in favor of the defendant. The plaintiffs claim that the trial court wrongly upheld the policy provision excluding underinsured motorist coverage for vehicles owned for self-insurers where, in light of the Graves Amendment, the plaintiffs are now prohibited from seeking recovery from Enterprise Rent-A-Car for the negligence of its customer.

GREGORY DEMOND et al. *v.* PROJECT SERVICE, LLC, et al.,
SC 20025/20026/20027/20028
Judicial District of Waterbury

Negligence; Whether Operators of Highway Service Plaza had Duty to Protect Motorists Traveling on Highway from Driver who Drank Alcohol at Service Plaza. The plaintiffs brought this action sounding in negligence and public nuisance against the defendants, the operators of a highway service plaza in Montville that is owned by the state of Connecticut. They alleged that they suffered injuries when a drunk driver, Willis Goodale, entered Interstate 395 from the service plaza and caused a series of car crashes. They claimed that the defendants were negligent in allowing Goodale to loiter and drink alcohol at the service plaza in contravention of a contract that the named defendant had with the state, which required the defendants to prevent the consumption of alcohol and loitering at the service

plaza. The defendants argued that they did not owe a legal duty of care to the plaintiffs. The trial court disagreed, finding that the defendants owed a duty to the plaintiffs pursuant to § 324A of the Restatement (Second) of Torts, which provides that a defendant who undertakes to render services to another is liable for the harm suffered by a third person if (a) the defendant's failure to exercise reasonable care increases the risk of such harm, (b) the defendant has undertaken to perform a duty that is owed to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking. The court reasoned that the contract with the state required the defendants to prohibit alcohol consumption and loitering at the service plaza in order to prevent harm to motorists traveling on the adjacent highway. The defendants now appeal from a $4,277,600 judgment in favor of the plaintiffs. They argue that the contract with the state did not impose a legal duty on them to protect motorists traveling on Interstate 395 from drivers who drank alcohol and loitered at the service plaza and that the facts of this case do not fit within any of the three scenarios set forth in § 324A. The defendants also claim that it would violate public policy to impose liability upon service plaza operators for damages caused by a drunk driver who consumed his own alcohol at the service plaza while sitting in his parked car. The plaintiffs have also appealed, arguing that the trial court wrongly reduced their award of damages by the percentage of negligence attributed to a defendant that had settled with the plaintiffs. They maintain that the court should have instead applied the nondelegable duty doctrine to find that the named defendant, as the primary contractor with the state, could not delegate its duty and was liable for the full amount of the plaintiffs' damages notwithstanding any settlement agreement. The plaintiffs also contend that the trial court improperly rendered summary judgment in favor of the defendants on their claim that the defendants created a public nuisance in allowing Goodale to drink alcohol and loiter at the service plaza.

CITY OF HARTFORD *v.* CBV PARKING HARTFORD, LLC, et al., SC 20044
Judicial District of Hartford

Eminent Domain; Whether Trial Court Improperly Applied Doctrine of Assemblage in Valuing Properties; Whether Trial Court Properly Awarded § 37-3c Interest on Judgment of Compensation at Rate of 7.22 Percent. The city of Hartford brought this condemnation action to acquire parcels of land owned by the

defendants on which the defendants operated parking lots. The city sought the land as part of a redevelopment plan that called for the construction of a ballpark, and one of the parcels was surrounded by two lots that the city previously had taken by eminent domain. The city assessed damages in the amount of $1,980,000, and the defendants applied to the trial court for review of the assessment. The trial court ruled that, under the doctrine of assemblage, the fair market value of the properties as of the date of the taking was $4.8 million. The court explained that, in light of the planned ballpark, it was reasonably probable that the defendants' lots would be combined with the two other properties owned by the city into one integrated use, resulting in a higher fair market value. The trial court subsequently awarded the defendants General Statutes § 37-3c interest on its judgment of compensation at a rate of 7.22 percent. The city appeals, arguing that the trial court improperly calculated the fair market value of the defendants' properties as assembled with the two city properties because it omitted from its decision a key element of the assemblage doctrine; that is, that the taken property probably would have been combined with the neighboring property in the absence of the condemnation. The city contends that assemblage does not apply here because the defendants never made any attempt to combine their properties with the adjoining properties. The city also argues that the trial court erred in awarding interest on the judgment of compensation at a rate of 7.22 percent and that, because the trial court did not mention interest or set an interest rate in its judgment of compensation, the court was bound to award interest at the default interest rate provided for in § 37-3c.

SUN VAL, LLC *v.* STATE OF CONNECTICUT, COMMISSIONER OF DEPARTMENT OF TRANSPORTATION

Judicial District of Litchfield

Environment; Whether Trial Court Miscalculated Plaintiff's Damages by Applying Wrong Environmental Regulations in Determining Whether Materials Improperly Dumped on Plaintiff's Property were Contaminated. The plaintiff brought this action against the Department of Transportation (department), claiming that the department negligently authorized its contractor, Hallberg Contracting Corporation (Hallberg), to dump materials from a highway construction project onto the plaintiff's New Milford property. The trial court found that the department was negligent and that the plaintiff was entitled to $29,855.26 in damages—far less than the $1,279,704.03

in damages that the plaintiff had sought. With regard to damages for remediation costs, the court found that 70 percent of the materials that were dumped onto the plaintiff's property could be legally disposed of at a lower level remediation facility, while only 20 percent of the materials would have to be disposed of at a more costly high level remediation facility. The court also rejected the plaintiff's claim that, as a result of the department's negligence, a deal to sell the property for over $2 million fell through. The court reasoned that there were many reasons why the deal failed apart from Hallberg's improper dumping of materials onto the property. The court also found that the plaintiff failed to mitigate its damages when it rejected Hallberg's offer to remove thirty truckloads of the materials from the property. The court determined that the plaintiff could have eliminated virtually all of its damages if it had accepted Hallberg's offer. The plaintiff appeals, claiming that the trial court applied the wrong set of environmental regulations in determining whether the materials dumped on its property were contaminated, which resulted in the trial court's significant miscalculation of the cost of disposing of the materials. The plaintiff also claims that it did not fail to mitigate its damages because it had the right to reject Hallberg's offer. It reasons that it was unfair for the court to expect it to allow Hallberg to reenter its property after it had illegally dumped polluted materials and that Hallberg's proposal contravened the town's zoning regulations. Finally, the plaintiff claims that the trial court improperly rejected its contention that the department's negligence directly led to the cancellation of its contract to sell the property to a bona fide purchaser for over $2 million, which resulted in lost profits in the amount of $1,146,500.

GERIATRICS, INC. *v.* HELEN McGEE et al., SC 20047
Judicial District of New Britain

Fraud; Whether Transfer of Money From Mother to Son While Mother in Nursing Facility a Fraudulent Transfer; Whether Defendant Unjustly Enriched by Transfer. The plaintiff, a nursing home, brought this action against Helen McGee and her son, Stephen McGee, seeking to recover payment for services that it had provided to Helen McGee. The plaintiff alleged that Stephen McGee, while acting under the power of attorney for his mother, transferred his mother's funds to himself while she was a resident of the plaintiff's facility and that those transfers were fraudulent under the Uniform Fraudulent Transfer Act (act). Section 52-552e (a) (1) of the act provides that "[a] transfer made . . . by a debtor is fraudulent as to a

creditor, if the creditor's claim arose before the transfer was made . . . and if the debtor made the transfer . . . [w]ith actual intent to hinder, delay or defraud any creditor of the debtor." Section 52-552b (6) defines "debtor" as "a person who is liable on a claim." The trial court rejected the plaintiff's fraudulent transfer claim and rendered judgment in favor of Stephen McGee, ruling that Helen McGee was the "debtor" within the meaning of § 52-552b (6), and that the act does not apply to "third party transferors" such as Stephen McGee. In trial court also rejected the plaintiff's claim that it was entitled to recover from Stephen McGee under the theory that he had been unjustly enriched by the transfers of money. The court found noted that the evidence showed that Stephen McGee used the money he received from his mother's account to pay her bills and to reimburse himself for expenses he had incurred on his mother's behalf, and it found that the plaintiff failed to prove that Stephen McGee was unjustly enriched at the plaintiff's expense. The plaintiff appeals, claiming that the trial court erred in rendering judgment in favor of Stephen McGee on determining that the Uniform Fraudulent Transfer Act did not apply to the money transfers here and that the plaintiff was not entitled to recover from Stephen McGee under the theory that he had been unjustly enriched.

MARJORIE ASHMORE, ADMINISTRATRIX (ESTATE OF WILLIAM ASHMORE) et al. v. HARTFORD HOSPITAL, SC 20052
Judicial District of Waterbury

Damages; Remittitur; Whether Trial Court Properly Found that Jury's Award of $4.5 Million in Damages for Loss of Consortium not Excessive as a Matter of Law. The plaintiffs brought this medical malpractice action seeking damages from the defendant hospital resulting from the death of William Ashmore. The jury found that the hospital's negligence caused Ashmore's death and awarded his estate $75,321 in economic damages and $1.2 million in noneconomic damages. The jury also found in favor of plaintiff Marjorie Ashmore, William Ashmore's wife, on her loss of consortium claim and awarded her $4.5 million in damages. The hospital filed a motion for remittitur pursuant to General Statutes § 52-228c, claiming that the award of damages for the loss of consortium was excessive as a matter of law because it was nearly four times the amount of the noneconomic damages awarded to William Ashmore's estate to compensate for the loss of his life. Section 52-228c provides that in medical malpractice actions where a jury awards over $1 million in noneconomic damages,

the trial court shall order a remittitur "if the amount of noneconomic damages specified in the verdict is excessive as a matter of law in that it so shocks the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption." The trial court denied the motion for remittitur, finding that the evidence presented provided a basis from which the jury reasonably could conclude that the loss of consortium award was fair, just and reasonable. The trial court noted that there was evidence before the jury that Marjorie and William Ashmore were high school sweethearts who had been happily married for forty-five years, that they had raised three children together, and that they were mutually dependent upon one another for support, affection and companionship. The hospital appeals, claiming the trial court erred in denying its motion for remittitur of the jury's award of loss of consortium damages. The hospital argues that, while appellate precedent holds that a ruling denying a motion to set aside a verdict should be tested under an abuse of discretion standard of review, a trial court's determination that a verdict is not excessive "as a matter of law" should instead be subject to plenary review on appeal. The hospital claims that the award of loss of consortium damages here was excessive as a matter of law because an award of loss of consortium damages in an amount almost four times greater than the noneconomic damages awarded for wrongful death shocks the sense of justice and compels the conclusion that the jury made a mistake or that it was influenced by partiality or corruption.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

John DeMeo
Chief Staff Attorney

NOTICES OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA) SPA 18-F: Changes to Physician Office and Outpatient, Physician Radiology, and Independent Radiology Fee Schedules

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after February 1, 2018, SPA 18-F will amend Attachment 4.19-B of the Medicaid State Plan to make changes on the physician office and outpatient, physician radiology, and independent radiology fee schedules as described below. The physician radiology and independent radiology fee schedules will be revised to ensure the rates for the codes on those fee schedules are consistent with the standard reimbursement methodology of 57.5% of the 2007 Medicare fee schedule if the code was in effect at that time or 57.5% of the applicable year of the Medicare fee schedule coinciding with the initial activation of the procedure code.

This SPA will also incorporate the deletion of select Current Procedure Terminology (CPT) codes from the Physician Office and Outpatient Services fee schedule. Specifically, the following CPT codes are being end-dated or deleted from the physician office and outpatient fee schedule in order to be consistent with Medicaid regulations and coverage policies:

- CPT code 96040 (Genetic counseling, 30 minutes) when billed by a genetic counselor, which is not an enrollable provider type under the HUSKY Health provider network. Any service performed by a genetic counselor is not eligible for HUSKY Health reimbursement because genetic counselors are not categorized as an allied health professional, and they cannot render services under the supervision of a health professional.

- CPT code 97607 (Neg press wnd tx </=50 sq cm, non-durable) and CPT 97608 (Neg press wound tx >50 cm, non-durable) when billed as a professional service when a disposable wound vacuum is used. A disposable wound vacuum is classified as non-durable medical equipment which is not covered under the Connecticut Medical Assistance Program (CMAP). The Healthcare Common Procedure Coding System (HCPCS) codes for disposable wound vacuum will not be added to the durable medical equipment (DME) fee schedule. In order to be consistent, the CPT codes (97607 and 97608) for the professional service attached to the disposable wound vacuum are being deleted from the physician office and outpatient fee schedule since the HCPCS code for the wound vacuum will not be added to this fee schedule.

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download.''

Fiscal Information

DSS estimates that the updates to the physician-radiology and independent radiology fee schedules will increase annual aggregate Medicaid expenditures for independent radiology and physician radiology by approximately $7,800 in State Fiscal Year (SFY) 2018 and $19,200 in SFY 2019.

DSS estimates that the deletion of specified procedure codes from the physician office and outpatient fee schedule will result in a nominal decrease of gross Medicaid expenditures by approximately $1,000 in SFY 2018 and $3,000 in SFY 2019.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: http://www.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 18-F: Changes to Physician Office and Outpatient, Physician Radiology, and Independent Radiology Fee Schedules''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than February 14, 2018.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA) SPA 18-K: Chemical Maintenance Clinic Reimbursement Update

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after February 1, 2018, SPA 18-K will amend Attachment 4.19-B of the Medicaid State Plan to update the reimbursement methodology for chemical maintenance clinics as follows. Previously CMS notified DSS that the provider-specific reimbursement methodology for chemical maintenance clinics needed to be updated in order to comply with federal Medicaid requirements. Based on CMS guidance, this SPA makes various changes as outlined on the SPA pages, including: pro-rating the weekly rate to account for weeks in which services are provided on fewer than seven days in the week, specifying in detail the services that are included in the rate, and providing for specific types of documentation regarding the services that are provided. The SPA also removes references to specific provider locations, establishes provisions for merged clinics and newly licensed clinics, and authorizes payment for take-home doses in compliance with federal guidelines. No changes are being made to the provider-specific weekly rates, although an increase in expendi-

tures is anticipated from one or more new chemical maintenance clinic locations being added.

This SPA is necessary in order to ensure that the reimbursement methodology for chemical maintenance clinics remains in compliance with federal Medicaid requirements.

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate expenditures by approximately $392,000 in State Fiscal Year (SFY) 2018 and $1.3 million in SFY 2019.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS web site at the following link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 18-K: Chemical Maintenance Clinic Reimbursement''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than February 14, 2018.

NOTICES

Notice of Suspension of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on December 28, 2017, in Docket Number HHD-CV-17-6083773, Donald J. McCarthy, Jr. was ordered suspended from the practice of law for a period of five years, commencing on January 31, 2018, or upon such other date when the respondent surrenders himself to federal authorities to commence his two year period of incarceration imposed by the United States Attorney's Office for the District of Connecticut. The respondent shall comply with all the terms and conditions of Practice Book Section 2-53 in the event that he reapplies for reinstatement to the Connecticut Bar following his period of suspension.

David Sheridan
Presiding Judge

Notice of Suspension of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on January 2, 2018, in Docket Number HHD-CV-17-6084134 Musa Sebadduka, juris # 425881, was placed on interim suspension from the practice of law, effective immediately, until further order of the court.

Attorney Anthony D. Collins, juris # 403959, of Wethersfield, CT, is hereby appointed as trustee to take such steps as are necessary to protect the interests of Respondent's clients, to inventory Respondent's files, and to take control of the Respondent's clients' funds accounts. The Respondent shall cooperate with the trustee in this regard.

The Respondent shall not deposit to, or disburse any funds from, his clients' funds accounts until further order of the Court.

The Respondent shall comply with Practice Book Section 2-47B.

The Respondent shall cooperate with an audit of his Webster Bank IOLTA account ending in #7644 to be conducted by the Statewide Grievance Committee to cover an initial period beginning April 1, 2017 through the present date.

The respondent shall comply with all the terms and conditions of Practice Book Section 2-53 in the event that Respondent remains suspended for one year or more.

David Sheridan
Presiding Judge

Notice of Resignation of Attorney

Pursuant to §§ 2-52 and 2-53 of the Connecticut Practice Book, notice is hereby given that on January 19, 2018 in Docket Numbers LLI-CV-17-6016729 and LLI-CV-17-6016035, this court accepted the resignation of Ann E. Fisher (#101409) of New Milford, Connecticut and found that she has knowingly and voluntarily both resigned from the Connecticut Bar and waived the privilege of reapplying.

It is further ordered that Attorney Katherine Webster O'Keefe (#302205) of New Milford, Connecticut is hereby appointed as Trustee to take such steps as are necessary to protect the interest of Respondent's clients, to take possession of all of Respondent's open and closed files, and to take control of all of the Respondent's clients' funds accounts.

By the Court,
Hon. John D. Moore