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The "officially released" date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the "officially released" date appearing in the opinion.

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NICOLE AHERN *v.* BOARD OF EDUCATION OF REGIONAL SCHOOL DISTRICT NUMBER 13 ET AL.
(AC 45249)

Prescott, Clark and Seeley, Js.

Syllabus

The plaintiff, a former high school student, sought damages from the defendant cheerleading coaches, M and B, for injuries that she suffered while attempting a stunt during a cheerleading practice at the high school she attended. The plaintiff's complaint alleged claims of negligence against, inter alia, M, B, and the defendant board of education and the defendant V, the superintendent of schools. The plaintiff also alleged counts of negligence against the defendant town of Middlefield and the defendant P, the high school's cheerleading consultant, but those counts remained pending as they did not seek summary judgment. The plaintiff also alleged that the board was required to indemnify its employees, M, B, V and P, pursuant to statute (§ 10-235). The trial court rendered summary judgment in part in favor of M, B, V, and the board, concluding that the plaintiff's negligence claims were barred by governmental immunity pursuant to statute (§ 52-557n (a) (2) (B)) because the plaintiff failed to establish that the identifiable person-imminent harm exception to governmental immunity applied. On the plaintiff's appeal to this court, *held*:

1. The summary judgment rendered by the trial court with respect to some, but not all, counts of the complaint brought against the board was not an appealable final judgment as to the board and, accordingly, the plaintiff's appeal as to the board was dismissed; even if this court were to assume that the disposition of the negligence counts as to M, B and V implicitly disposed of the corresponding derivative § 10-235 indemnification counts against the board, because the trial court did not dispose of the pending negligence count against P, and because that court did not explicitly address the counts brought against the board pursuant to § 10-235, it could not have implicitly rendered judgment for the board on the indemnification count pertaining to P.

2. The trial court properly rendered summary judgment in favor of V, M, and B on the ground that they are entitled to governmental immunity because there was no genuine issue of material fact that the plaintiff was not subject to imminent and apparent harm; V, M, and B put forth evidence in support of their motion for summary judgment establishing that the alleged dangerous condition, namely, the continued execution of a certain cheerleading stunt after the plaintiff repeatedly had fallen safely and without injury during the same practice while performing that same stunt, did not subject the plaintiff to imminent and apparent harm:

   a. The plaintiff did not demonstrate a genuine issue of material fact that she was subject to imminent and apparent harm because she had fallen several times prior to falling and hitting her head; the repeated failed stunt attempts during the same practice did not tend to establish that continuing to practice the stunt exposed the plaintiff to a high probability of harm, as there was no evidence that she had been injured in these previous attempts, there was no evidence that the bases and back spotter cheerleaders had been unable to catch her when she followed her training and fell backward or that she had hit the mats when she unsuccessfully attempted the stunt and, during her previous failed attempts of the stunt, she had neither fallen forward nor fallen and hit her head.

   b. The plaintiff could not prevail on her claim that there was a genuine issue of material fact that she was subject to imminent and apparent harm because she had asked M and B "for their help" and had indicated to them that she was "getting worried"; the plaintiff's general, vague request for help, which was made after the previous failed attempts that had not resulted in injury, did not tend to establish that it was apparent to M and B that an injury was so likely to occur that they needed to act to prevent it.

   c. The plaintiff did not demonstrate a genuine issue of material fact that

she was subject to imminent and apparent harm because B told the plaintiff that B "knew that was going to happen" immediately before the plaintiff fell and hit her head; although this statement, which was made in reference to one of the plaintiff's previous falls, supported the plaintiff's claim that it was apparent to B that the plaintiff would not successfully complete the stunt and would fall, B's statement did not tend to establish that she knew the plaintiff would fall and not be properly caught or hit her head.

d. The plaintiff did not establish that *Sestito* v. *Groton* (178 Conn. 520) was analogous to the present case and, therefore, established that the harm was imminent and apparent: our Supreme Court has repeatedly stated that *Sestito* is confined to its facts, and this court was not persuaded that the facts in the present case were similar to those in *Sestito*; in the present case, it was undisputed that the plaintiff had always fallen backward into the base and back spotter cheerleaders and, therefore, although M and B witnessed the plaintiff's repeated falls, unlike in *Sestito*, it did not create an "ongoing and escalating scene" in which they failed to intervene to prevent harm to the plaintiff until it was too late.

Argued March 1—officially released May 23, 2023

Procedural History

Action to recover damages for the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Shah*, *J.*, granted in part the motion for summary judgment filed by the named defendant et al. and rendered judgment thereon, from which the plaintiff appealed to this court. *Appeal dismissed in part*; *affirmed*.

Matthew D. Popilowski, for the appellant (plaintiff).

Thomas R. Gerarde, with whom, on the brief, was *Eric E. Gerarde*, for the appellees (named defendant et al.).

Opinion

PRESCOTT, J. The plaintiff, Nicole Ahern, a former student of Coginchaug Regional High School (high school) and a former member of the high school's cheerleading squad, brought this action against the defendants, the Board of Education of Regional School District Number 13 (board); Kathryn Y. Veronesi,[1] the superintendent of Regional School District Number 13; Paula Murphy, the high school's head cheerleading coach; and Marissa Barletta, the high school's assistant cheerleading coach.[2] The plaintiff alleged that, due to the negligence of the defendants and the board, she was injured while attempting a stunt during the high school's cheerleading practice. The plaintiff appeals from the partial summary judgment the trial court rendered in favor of the defendants and the board on the ground that governmental immunity barred certain counts of the action.

The plaintiff claims on appeal that the court improperly rendered summary judgment because there are genuine issues of material fact as to whether she was subject to imminent and apparent harm and was an identifiable individual pursuant to the identifiable person-imminent harm exception to governmental immunity. After oral argument, this court ordered the parties to file supplemental briefs addressing whether this appeal should be dismissed, in part, for the lack of a final judgment as to the board because the trial court did not dispose of all of the counts brought against it.

We conclude that (1) the summary judgment rendered with respect to some, but not all, counts of the complaint brought against the board is not an appealable final judgment as to the board, and (2) the court properly rendered summary judgment in favor of Veronesi, Murphy, and Barletta on the ground that they are entitled to governmental immunity because there is no genuine issue of material fact that the plaintiff was not subject to imminent and apparent harm.[3] Accordingly, we dismiss the plaintiff's appeal as it pertains to the board and affirm the court's judgment in favor of Veronesi, Murphy, and Barletta.

The record before the court reveals the following facts, viewed in the light most favorable to the plaintiff as the nonmoving party, and procedural history. The plaintiff was a student at the high school and, from the fall of 2014 through February, 2018, she was also a member of the high school's cheerleading squad. Cheerleading is an extracurricular activity and cheerleading practices are held at 3 p.m. after school hours. The high school's cheerleading squad performs after school hours at sporting events and competitions but also performs for the student body during regular school hours at certain school events.

The high school allowed the plaintiff to receive a

limited number of physical education credits toward her graduation requirements for her participation in certain extracurricular activities. The plaintiff previously had elected to receive these credits for cheerleading. At the time she was injured, she already had completed the required credits.

On February 8, 2018, the plaintiff attended cheerleading practice after regular school hours in the high school gymnasium. Murphy and Barletta were present and supervised the practice. During the practice, the plaintiff and other members of the cheerleading squad were practicing a stunt. The plaintiff was acting as the flyer for the stunt, which meant that the other cheerleaders lifted her into the air. With the assistance of the cheerleaders in the base and back spotter positions, the plaintiff was then lowered back to the ground in a controlled manner after the stunt attempt was either successful or unsuccessful. If the stunt was unsuccessful, the flyer could fall backward but still safely land on her feet with the assistance of the cheerleaders acting as the bases and back spotter.

While practicing the stunt during the February 8, 2018 practice, some of the stunt attempts were unsuccessful, and the plaintiff fell approximately seven times without injury. Following these repeated failed stunt attempts, the plaintiff asked Murphy and Barletta for their "help" with the stunt. In response, they told her to continue practicing it. Barletta also told the plaintiff that she "knew" the plaintiff "was going to fall that last time." Immediately after asking Murphy and Barletta for their help, the plaintiff lost her balance during the next stunt attempt and fell forward. Although she was caught around the waist by the bases and back spotter, she hit her head on the floor mats. As a result of her falling and hitting her head, the plaintiff suffered injuries, including a concussion.

The plaintiff commenced the underlying action on February 4, 2020. The operative amended complaint was filed on May 14, 2020, and contained ten counts. Counts one, two, three, five, seven, and nine sounded in negligence and were brought against the board, the town of Middlefield, Veronesi, Murphy, Barletta, and Nicole Perlini, respectively. In counts four, six, eight, and ten, the plaintiff asserted a claim against the board pursuant to General Statutes § 10-235,[4] which requires the board to indemnify its employees from financial loss and expense arising out of allegedly negligent acts that were made within the scope of their employment.[5] The town and Perlini did not file an appearance with the court, but no default has been entered against them and the counts pertaining to them remain pending.[6]

The defendants and the board filed an answer and special defenses to the operative complaint on June 12, 2020. By way of special defense, they asserted that governmental immunity barred all counts sounding in

negligence brought against them.[7]

On July 1, 2021, the defendants and the board filed a motion for summary judgment on all counts of the plaintiff's operative complaint brought against them. The memorandum of law in support of their motion argued only that "the negligence claims [were] barred by governmental immunity, to which no exception [was] applicable." The motion for summary judgment was accompanied by a memorandum of law submitted with supporting exhibits. In their memorandum of law, the defendants and the board argued that they were entitled to summary judgment because the negligence counts were barred by governmental immunity according to General Statutes § 52-557n[8] and, thus, "there [was] no genuine issue of material fact that the defendants [and the board] [were] entitled to summary judgment as a matter of law as to the entirety of the plaintiff's complaint." Specifically, the defendants and the board argued that their purportedly negligent acts or omissions were discretionary acts relating to their public duty and, thus, they were entitled to governmental immunity according to § 52-557n (a) (2) (B). They further argued that no recognized exception to governmental immunity applied to the present case.

In support of their motion for summary judgment, the defendants and the board attached as exhibits affidavits from Murphy and Barletta. Murphy and Barletta attested that "[a] failed stunt attempt where the flyer unsuccessfully completes the stunt, falls and lands on her feet with the assistance of the base and back [spotter] cheerleaders does not expose the flyer to a risk of imminent harm. . . . On February 8, 2018, only a matter of seconds elapsed between when [the plaintiff's] stunt group was performing the stunt properly and when she lost her balance and began to fall . . . . Prior to February 8, 2018, the cheerleaders, including [the plaintiff], were taught the proper technique on how to fall after a failed stunt attempt, which was to fall backwards into the base and back spotter cheerleaders, and to never fall forward . . . . On February 8, 2018, [the plaintiff] lost her balance and fell forward, with one foot on the mat, she used her hands to brace her fall against the mat, and was caught around the waist by her bases and back spotter, but her head hit the mat . . . . On February 8, 2018, there was no indication that [the plaintiff] would fail to complete a stunt attempt, lose her balance, fall forward, or be injured until the instant she lost her balance and fell. There had been no indication prior to [the plaintiff] losing her balance that she would fall or would be injured . . . . Prior to February 8, 2018, [the plaintiff] and the other members of the cheerleading team had always applied their training and technique to fall backward into the bases and back spotter following a failed stunt attempt . . . . As of February 8, 2018, [the plaintiff] was an accomplished cheerleader and stunt flyer who had suc-

cessfully performed complex stunts as a flyer on numerous occasions, including the stunt she was practicing when she was injured . . . .''

The plaintiff filed a timely objection to the motion for summary judgment. In her objection, the plaintiff did not dispute that the defendants' and the board's allegedly negligent acts or omissions were in performance of their discretionary public duties and that they were entitled to governmental immunity pursuant to § 52-557n (a) (2) (B) unless an exception applied. The plaintiff argued, however, that a genuine issue of material fact existed as to whether the identifiable person-imminent harm exception to governmental immunity applied in the present case. Specifically, the plaintiff argued that, pursuant to the identifiable person-imminent harm exception, (1) she was subject to imminent harm, (2) she was an identifiable victim, and (3) it was apparent to the defendants and the board that their conduct was likely to subject her to harm.

In support of her objection to the defendants' motion for summary judgment, the plaintiff submitted an excerpt of her deposition testimony: ''I walked over to [Murphy and Barletta] and I begged them for their help because I was getting worried. We kept, you know, crumbling, and my group just wasn't working well together. And the only real response I got was, we knew that was going to happen. You know, you guys aren't . . . getting it down. Like, let's just keep going. And then . . . [Barletta] said she knew it was going to happen . . . . Right before I had fallen and hit my head.'' In her deposition, the plaintiff was asked: ''When you say 'she knew that was going to happen,' what is 'that'?'' The plaintiff explained: ''I had fallen. I just didn't hit my head yet. I kept crumbling and crumbling and the group was getting exhausted, and [Barletta] said she knew that I was going to fall that last time. And this is right before I went back in and ended up falling and hitting my head.''

The defendants and the board filed a reply memorandum in support of their motion for summary judgment and in response to the plaintiff's objection. In their reply memorandum, they argued that no genuine issue of material fact existed as to whether, pursuant to the identifiable person-imminent harm exception, (1) the plaintiff was not subject to imminent harm, (2) she was not an identifiable person and (3) it was not apparent to them that their conduct was likely to subject her to harm.

Attached to the reply memorandum was a portion of the plaintiff's deposition. In her deposition, the plaintiff attested that, during the same practice or event, a stunt could be successful in one attempt and then unsuccessful in the next attempt. In her deposition, the plaintiff also stated that, even if a stunt attempt was unsuccessful, the cheerleaders were trained to control the flyer's

return to the ground so that the flyer landed softly, feetfirst, on the mat.

On January 4, 2022, the court issued a memorandum of decision and rendered summary judgment in favor of the defendants and the board. The court concluded, on the basis of the pleadings and evidence submitted by the parties, that governmental immunity barred the negligence claims against the defendants and the board and that no exception to governmental immunity applied in the present case. The court determined that there was no genuine issue of material fact that the identifiable person-imminent harm exception did not apply in the present case because the evidence before the court could not support a determination that the plaintiff was either an identifiable individual or a member of an identifiable class of foreseeable victims. The court first concluded that the plaintiff was not an identifiable individual because she was "one of several girls participating in cheerleading practice." The court next concluded that the plaintiff was not a member of an identifiable class of foreseeable victims because she was not compelled to attend cheerleading practice. The court's memorandum of decision did not address counts four, six, eight, and ten seeking indemnification pursuant to § 10-235 against the board. This appeal followed.

On appeal, the plaintiff does not challenge the court's conclusions that the defendants and the board were engaged in discretionary public duties and that they are entitled to governmental immunity unless an exception applies. Instead, the plaintiff claims that the court improperly rendered summary judgment because there was a genuine issue of material fact as to whether the identifiable person-imminent harm exception to governmental immunity applied in the present case. The plaintiff argues on appeal that there was a genuine issue of material fact as to all three prongs of the identifiable person-imminent harm exception or, in other words, that (1) she was subject to imminent harm, (2) she was an identifiable individual,[9] and (3) it was apparent to the defendants and the board that their conduct was likely to subject her to harm. We conclude that there was no genuine issue of material fact that the plaintiff was not subject to imminent and apparent harm. Because all three elements must be satisfied to establish the identifiable person-imminent harm exception to governmental immunity; see *Brooks* v. *Powers*, 328 Conn. 256, 266, 178 A.3d 366 (2018); this conclusion is dispositive of the plaintiff's claim on appeal against Veronesi, Murphy, and Barletta and we need not determine whether there was a genuine issue of material fact that the plaintiff was an identifiable victim.[10]

We interpret the court's memorandum of decision as concluding that the defendants and the board were entitled to governmental immunity because there was no genuine issue of material fact that the plaintiff was

not an identifiable individual or a member of an identifiable class of foreseeable victims pursuant to the identifiable person-imminent harm exception to governmental immunity. Therefore, our conclusion that there is no genuine issue of material fact that the plaintiff was not subject to imminent and apparent harm is an alternative ground for affirming the court's judgment.

Ordinarily, we do not review issues that the trial court did not decide. *Grady* v. *Somers*, 294 Conn. 324, 349 n.28, 984 A.2d 684 (2009). We will, however, resolve the plaintiff's claim on an alternative ground for affirmance that is dispositive of the issue when "it is a question of law, the essential facts of which are undisputed, over which our review is plenary . . . and the plaintiff will not be prejudiced or unfairly surprised by our consideration of this issue . . . ." (Citation omitted.) Id., 349–50 n.28. In the present case, our review of the court's rendering of summary judgment is plenary; *Recall Total Information Management, Inc.* v. *Federal Ins. Co.*, 317 Conn. 46, 51, 115 A.3d 458 (2015); and the plaintiff will not be prejudiced or unfairly surprised because she raised the issues of whether the harm was imminent and apparent in her principal appellate brief and argued it before the trial court in her objection to the defendants' summary judgment motion.

We further conclude, for the reasons set forth in part I of this opinion, that the court failed to render a final judgment with respect to the board. Accordingly, we dismiss the plaintiff's appeal as to the board and affirm the court's judgment as to Veronesi, Murphy, and Barletta.

I

Because the finality of the court's judgment implicates the jurisdiction of this court to hear the appeal, we first consider whether the trial court's granting of the motion for summary judgment filed by the defendants and the board constitutes a final judgment with respect to the board. In their supplemental briefs, the parties argue that there is a final judgment with respect to the board because the court's rendering of summary judgment in favor of the defendants and the board on the negligence counts against them implicitly resolved the indemnification counts brought against the board.[11] We conclude that the judgment was not final as it pertained to the board because the court's judgment did not explicitly or implicitly resolve all counts of the complaint brought against the board. Accordingly, we dismiss the plaintiff's appeal as to the partial summary judgment rendered in favor of the board.

We begin by setting forth the relevant legal principles relating to final judgments. "Because our jurisdiction over appeals . . . is prescribed by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering

the merits of the claim. . . . A judgment that disposes of only a part of a complaint is not a final judgment. . . . Our rules of practice, however, set forth certain circumstances under which a party may appeal from a judgment disposing of less than all of the counts of a complaint. Thus, a party may appeal if the partial judgment disposes of all causes of action against a particular party or parties . . . ." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Kelly* v. *New Haven*, 275 Conn. 580, 593–94, 881 A.2d 978 (2005); see Practice Book § 61-3.

"If a party wishes to appeal from a partial judgment rendered against it, barring a limited exception . . . it can do so only if the remaining causes of action or claims for relief are withdrawn or unconditionally abandoned before the appeal is taken.[12]" (Footnote in original.) *Meribear Productions*, *Inc.* v. *Frank*, 328 Conn. 709, 717, 183 A.3d 1164 (2018).

The court's memorandum of decision explicitly disposed of counts one, three, five, and seven, which sounded in negligence and were brought against the defendants and the board. The decision did not dispose of the counts brought against Perlini and the town, as they did not file or join in the motion for summary judgment. Moreover, neither the motion for summary judgment nor the court's decision on it explicitly addressed the counts brought against the board pursuant to § 10-235. Accordingly, the court's rendering of summary judgment disposed of only a part of the complaint.[13] In order for the defendants and the board to have appealed from a final judgment, that judgment must have disposed of all causes of action against them. See *Office Condominium Assn.*, *Inc.* v. *Rompre*, 196 Conn. App. 370, 376, 229 A.3d 1124 (2020). Counts three, five, and seven were the only counts brought against Veronesi, Murphy, and Barletta. Therefore, the judgment was final as it pertained to them because it disposed of all causes of action against them. See Practice Book § 61-3.

The summary judgment rendered by the court did not, however, dispose of all causes of action brought against the board. Although the defendants and the board indicated in their motion that they sought summary judgment on the complaint "in its entirety," the court's memorandum of decision did not address explicitly counts four, six, eight, and ten, which the plaintiff brought against the board pursuant to § 10-235, claiming that the board was required to indemnify Veronesi, Murphy, Barletta, and Perlini.[14] In its memorandum of decision, the court concluded only that the defendants and the board were entitled to governmental immunity as a matter of law because their allegedly negligent acts were discretionary and there was no genuine issue of material fact as to whether the identifiable person-imminent harm exception applied. The defendants and the

board did not refer to the counts brought against the board pursuant to § 10-235 in their motion for summary judgment or state why those counts should also be disposed of as a matter of law in their memorandum of law in support of their motion. Instead, the motion for summary judgment stated that the defendants and the board "are entitled to summary judgment because *the negligence claims* are barred by governmental immunity, to which no exception is applicable in this case." (Emphasis added.)

Even if, as the plaintiff, the defendants, and the board assert, the court's disposition of the negligence counts brought against the defendants and the board implicitly disposed of the corresponding "derivative" § 10-235 counts, we are nonetheless compelled to conclude that the judgment was not final as to the board. Assuming without deciding that counts four, six, and eight, which claimed that the board was required to indemnify Veronesi, Murphy, and Barletta, implicitly were resolved by the court's conclusion that no exception to governmental immunity existed, count ten, which claimed that the board was required to indemnify Perlini, would not be implicitly resolved by that same reasoning. As we have indicated, the negligence count against Perlini remains before the court. Because that count remains pending before the court, it could not have implicitly rendered judgment for the board on the indemnification count pertaining to Perlini.

Accordingly, we conclude that the court's judgment did not dispose of all counts pertaining to the board. Therefore, the partial summary judgment rendered in favor of the defendants and the board was not a final judgment as to the board and the appeal is dismissed as to it. We now turn to the merits of the plaintiff's claims with respect to the defendants.

II

We begin by setting forth the applicable standard for reviewing a trial court's decision to render summary judgment. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evident[iary] foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of

fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Washburne* v. *Madison*, 175 Conn. App. 613, 620, 167 A.3d 1029 (2017), cert. denied, 330 Conn. 971, 200 A.3d 1151 (2019).

Our legal principles pertaining to governmental immunity and the identifiable person-imminent harm exception to governmental immunity are well established. "[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 [that] require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. . . .

"This protection for acts requiring the exercise of judgment or discretion, however, is qualified by what has become known as the identifiable person, imminent harm exception to discretionary act immunity. That exception, which [our Supreme Court has] characterized as very limited . . . applies when the circumstances make it apparent to the [municipal] officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . . By its own terms, this test requires three things: (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. . . . If the [plaintiff] fail[s] to establish any one of the three prongs, this failure will be fatal to [her] claim that [she] come[s] within the imminent harm exception." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Brooks* v. *Powers*, supra, 328 Conn. 264–66.

"In *Haynes* v. *Middletown*, 314 Conn. 303, 101 A.3d 249 (2014), our Supreme Court reexamined and clarified our jurisprudence with respect to the principle of imminent harm. The court overruled in part its prior holding in *Burns* v. *Board of Education*, 228 Conn. 640, 650, 638 A.2d 1 (1994), to the extent that it appeared to narrow the definition of imminent harm to harms arising from dangerous conditions that were temporary in nature. . . . Instead, it reemphasized its earlier interpretation of imminent harm as stated in its decision in *Evon* v. *Andrews*, 211 Conn. 501, 559 A.2d 1131 (1989),

in which it explained that a harm is not imminent if it could have occurred at any future time or not at all . . . and clarified that it was not focused on the duration of the alleged dangerous condition, but on the magnitude of the risk that the condition created. . . . [W]hen the court in *Haynes* spoke of the magnitude of the risk . . . it specifically associated it with the probability that harm would occur, not the foreseeability of the harm. . . . In sum, [our] Supreme Court concluded 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. . . .

"In *Williams* v. *Housing Authority*, [159 Conn. App. 679, 705–706, 124 A.3d 537 (2015), aff'd, 327 Conn. 338, 174 A.3d 137 (2017)] this court construed *Haynes* as setting forth the following four part test with respect to imminent harm. First, the dangerous condition alleged by the plaintiff must be apparent to the municipal defendant. . . . We interpret this to mean that the dangerous condition must not be latent or otherwise undiscoverable by a reasonably objective person in the position and with the knowledge of the defendant. Second, the alleged dangerous condition must be likely to have caused the harm suffered by the plaintiff. A dangerous condition that is unrelated to the cause of the harm is insufficient to satisfy the *Haynes* test. Third, the likelihood of the harm must be sufficient to place upon the municipal defendant a clear and unequivocal duty . . . to alleviate the dangerous condition. The court in *Haynes* tied the duty to prevent the harm to the likelihood that the dangerous condition would cause harm. . . . Thus, we consider a clear and unequivocal duty . . . to be one that arises when the probability that harm will occur from the dangerous condition is high enough to necessitate that the defendant act to alleviate the defect. Finally, the probability that harm will occur must be so high as to require the defendant to act immediately to prevent the harm." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Washburne* v. *Madison*, supra, 175 Conn. App. 629–30.

"[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*, 323 Conn. 548, 589, 148 A.3d 1011 (2016). Furthermore, it is the "*specific* harm

that befell the plaintiff" that must be apparent to satisfy the apparentness prong of the identifiable person-imminent harm exception. (Emphasis in original.) *Brooks* v. *Powers*, supra, 328 Conn. 268 n.8.

"[T]he ultimate determination of whether [governmental] immunity applies is ordinarily a question of law for the court . . . [unless] there are unresolved factual issues material to the applicability of the defense . . . [in which case] resolution of those factual issues is properly left to the jury." (Internal quotation marks omitted.) *Haynes* v. *Middletown*, supra, 314 Conn. 313.

We conclude on the basis of our plenary review of the record that the defendants met their initial burden of establishing the lack of a genuine issue of material fact that the plaintiff was not subject to imminent and apparent harm and, accordingly, that she did not fall within the identifiable person-imminent harm exception to governmental immunity. The evidence the defendants put forth in support of their motion for summary judgment established that the alleged dangerous condition—namely, the continued practice of a stunt after the plaintiff repeatedly had fallen safely and without injury during the same practice while practicing that same stunt—did not subject the plaintiff to a harm that was imminent and apparent.

More specifically, Murphy's and Barletta's affidavits and the excerpts from the plaintiff's deposition, submitted by the defendants in support of summary judgment, tended to show that falling is not that uncommon of a risk during a cheerleading practice. See, e.g., *Maselli* v. *Regional School District No. 10*, 198 Conn. App. 643, 658–59, 235 A.3d 599 (individual was not subject to imminent and apparent harm because getting hit by ball while playing soccer is "not so uncommon of a risk"), cert. denied, 335 Conn. 947, 238 A.3d 19 (2020). According to Murphy and Barletta, an unsuccessful stunt attempt involving a flyer will often involve a fall, but the flyer is trained to utilize a proper technique when they fall so that they are not harmed. Specifically, the plaintiff was trained to fall backward so that the cheerleaders in the positions of the base and back spotter could assist her with her fall by slowing her momentum and helping her land feetfirst on the mats after her stunt attempt. In an excerpt from the plaintiff's deposition, which the defendants attached to their reply memorandum, the plaintiff agreed that, "when you come down to the ground, even if the stunt hasn't gone well, everyone is still trained to control [the flyer's] coming down to the ground so that [the flyer] [does not] hit all the way down to the mats."

Furthermore, the evidence submitted by the defendants supported Murphy's and Barletta's averments that, "[on] February 8, 2018, there was no indication that [the plaintiff] would fail to complete a stunt attempt, lose her balance [and] fall forward . . . ." In

their affidavits, Murphy and Barletta averred that the plaintiff successfully had performed complex stunts in the flyer position previously, including the exact stunt that she had been practicing on February 8, 2018. Prior to the fall that caused her February 8, 2018 injury, Murphy and Barletta averred that the plaintiff had always applied her training and fallen backward so that the base and back spotter cheerleaders could catch her. Accordingly, on the basis of the evidence in the record, the defendants met their initial burden in demonstrating that there was no genuine issue of material fact that the plaintiff was not subject to the imminent and apparent harm of not being properly caught or hitting her head when she fell.

Because the defendants met their initial burden, the plaintiff then needed to present evidence that demonstrated that a genuine issue of material fact existed as to whether she was subject to imminent and apparent harm. On appeal, the plaintiff argues that she met her burden because she put forth evidence that established that (1) she was dropped several times during the practice, (2) immediately before she fell and hit her head she asked Murphy and Barletta for their "help," (3) Barletta said she "knew that was going to happen" before the plaintiff fell and hit her head, and, (4) under the circumstances of the present case, the plaintiff was subject to imminent harm pursuant to our Supreme Court's decision in *Sestito* v. *Groton*, 178 Conn. 520, 423 A.2d 165 (1979). We address the plaintiff's arguments in turn.

A

The plaintiff first argues that there was a genuine issue of material fact that she was subject to imminent and apparent harm because it was undisputed that she had fallen several times prior to falling and hitting her head. The plaintiff alleged that she was "dropped during practice approximately seven times . . . ." In support of her objection to the defendants' motion for summary judgment, she attached portions of her deposition transcript in which she stated that she kept "fall[ing]" and "crumbling . . . ." Therefore, the undisputed facts in the record, viewed in the light most favorable to the plaintiff, tended to establish that Murphy and Barletta had observed several failed stunt attempts, in which the plaintiff was acting as the flyer, during the practice prior to her falling and hitting her head. The repeated failed stunt attempts during the same practice did not tend to establish, however, that continuing to practice the stunt exposed her to a high probability of harm that was apparent to the defendants and necessitated that they act immediately to prevent it.

The plaintiff presented evidence that there had been several failed stunt attempts before she fell and hit her head, but there was no evidence that tended to demonstrate that she had been injured in any of these

previous attempts. She submitted no evidence that the bases and back spotter had been unable to catch her or that she hit the mats when she unsuccessfully attempted the stunt. To the contrary, the undisputed facts averred to in Murphy's and Barletta's affidavits evidenced that, although the plaintiff fell during failed stunt attempts prior to her injury, she followed her training and "[fell] backwards into the bases and back spotter cheerleaders" and that this assistance "should be sufficient to slow [her] momentum . . . ." Therefore, the plaintiff's previous failed attempts of the stunt, in which she had neither fallen forward nor had fallen and hit her head, did not establish a genuine issue of material fact as to whether it was likely that, by continuing to practice the stunt, the plaintiff would be subject to the imminent and apparent harm of not being properly caught or hitting her head. See, e.g., *Washburne* v. *Madison*, supra, 175 Conn. App. 631 (court properly granted summary judgment in favor of defendants because plaintiff failed to present evidence of material fact that probability of injury from allegedly dangerous condition was high enough to require defendants to act to prevent it).

B

The plaintiff next argues that there was a genuine issue of material fact with respect to whether she was subject to an imminent and apparent harm because she had asked Murphy and Barletta " 'for their help' " and had indicated to them that she was " 'getting worried.' "[15] We are not persuaded that the plaintiff's broad request for " 'help,' " made after the previous failed stunt attempts, would tend to establish that it was apparent to the defendants that harm to the plaintiff was imminent.

The plaintiff attested that, after the repeated failed stunt attempts, she "walked over to [Murphy and Barletta], and [she] begged them for their help because [she] was getting worried." In speaking with her coaches, the plaintiff did not specify that she was worried that she would fall and injure herself while executing the stunt, or that the bases and back spotter would not catch her. The plaintiff's expressed worry did not tend to establish that it was apparent to the defendants that an injury was so likely to occur that they needed to act to prevent it. To avoid summary judgment, the plaintiff needed to demonstrate that that there was a genuine issue of material fact as to whether an *injury* was apparent and so likely to occur that the defendants had a clear and unequivocal duty to act immediately to prevent it. See, e.g., *Haynes* v. *Middletown*, supra, 314 Conn. 325 (harm was imminent when dangerous condition was "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" (emphasis added)). The plaintiff's general and vague request for help, which was made after the previous failed attempts that had

not resulted in injury, did not establish that there was a genuine issue of material fact that the plaintiff was subject to imminent and apparent harm.

C

The plaintiff also argues that there was a genuine issue of material fact that she was subject to imminent and apparent harm because Barletta told the plaintiff that Barletta "knew *that* was going to happen," immediately before the plaintiff fell and hit her head. (Emphasis added.) The plaintiff argues on appeal that this statement strongly supports that the harm at issue, namely, the plaintiff not being properly caught or hitting her head, was imminent and apparent to the defendants. We disagree.

In the plaintiff's deposition, a portion of the transcript of which she attached in support of her objection to the defendant's motion for summary judgment, she was asked to clarify what Barletta was referring to when she stated that she "knew that was going to happen . . . ." The plaintiff clarified that Barletta was referring to the *previous* failed stunt attempts in which the plaintiff had fallen. The plaintiff explained: "I kept crumbling and crumbling and the group was getting exhausted, and she knew that I was going to fall that last time. And this is right before I went back in and ended up falling and hitting my head." Although this statement supports the plaintiff's claim that it was apparent to Barletta that the plaintiff would not successfully complete the stunt and would "fall," Barletta's statement did not tend to establish that she knew the plaintiff would fall and not be properly caught or hit her head. As previously discussed, the plaintiff needed to present evidence that would tend to establish that the specific harm was imminent and apparent. The specific harm in this case was not the plaintiff falling backward in the manner in which she was trained so that the bases and back spotter could catch her but, rather, the plaintiff falling forward, not being properly caught, and hitting her head. Accordingly, Barletta's statement, which was made in reference to one of the plaintiff's previous falls, did not establish that there was a genuine issue of material fact that the plaintiff was subject to imminent and apparent harm from continuing to practice the stunt.

D

Finally, the plaintiff argues that *Sestito* v. *Groton*, supra, 178 Conn. 520, is analogous to the present case and, therefore, establishes that the harm was imminent and apparent. In *Sestito*, our Supreme Court determined that a jury reasonably could have found that an on duty police officer watched but did not intervene when a physical altercation involving several intoxicated individuals, one of whom the police officer believed could be armed, took place in a parking lot outside of a bar.

Id., 522–23. The police officer did not attempt to stop the physical altercation until the decedent was shot by one of the other men involved in the altercation. Id., 523. Our Supreme Court held that, given these egregious facts, a jury reasonably could have concluded that that the harm to the decedent was imminent. See id., 528; see also, e.g., *Shore* v. *Stonington*, 187 Conn. 147, 154, 444 A.2d 1379 (1982).

Specifically, the plaintiff argues that the present case is analogous to *Sestito* because the defendants witnessed an "ongoing and escalating scene but failed to intervene until after it was too late." The plaintiff's argument fails for two reasons. First, since its holding in *Sestito*, our Supreme Court repeatedly has stated that *Sestito* is confined to its facts. *Borelli* v. *Renaldi*, 336 Conn. 1, 32, 243 A.3d 1064 (2020); *Edgerton* v. *Clinton*, 311 Conn. 217, 240, 86 A.3d 437 (2014). Second, even if our Supreme Court had not confined *Sestito* to its facts, we are not persuaded that the facts in the present case are similar to those in *Sestito*.

The present case is clearly distinguishable from the egregious facts in *Sestito*. As we discussed previously, the plaintiff's seven previous failed attempts at the stunt, prior to her falling and being injured, did not tend to establish a likelihood that the plaintiff would be harmed by continuing to practice the stunt. It was undisputed in the summary judgment record that the plaintiff had always fallen backward into the base and back spotter cheerleaders. Therefore, Murphy and Barletta witnessing the plaintiff's repeated falls did not create an "ongoing and escalating scene . . . ." The plaintiff put forth no facts that tended to establish that continuing to practice the stunt created a likelihood of harm to her. The plaintiff's mere assertion that the scene was ongoing and escalating, without evidentiary support in the record, is not enough to establish a genuine issue of material fact for purposes of summary judgment. *Cole* v. *New Haven*, 337 Conn. 326, 336, 253 A.3d 476 (2020) ("[m]ere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book [§ 17-45][16]" (footnote added; internal quotation marks omitted)).

In sum, the plaintiff failed to establish that there was a genuine issue of material fact as to whether she was subject to imminent and apparent harm. Accordingly, the court properly concluded that the identifiable person-imminent harm exception to governmental immunity did not apply to the present case and properly rendered summary judgment in favor of Veronesi, Murphy, and Barletta.

The appeal is dismissed as to the board; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

[1] Kathryn Y. Veronesi is also known as Kathryn Y. Serino.

[2] Nicole Perlini, the high school's cheerleading consultant, and the town of Middlefield, the town in which the plaintiff resides, also were named as defendants. Perlini and the town of Middlefield did not appear in the trial court and the matter remains pending as to them. The plaintiff has not moved to default them for failure to appear. Therefore, Perlini and the town of Middlefield did not seek a summary judgment in their favor and they have not participated in this appeal. Furthermore, for the reasons set forth in this opinion, the plaintiff's appeal is dismissed in part as it pertains to the board and all references to the defendants in this opinion are to the individual defendants Veronesi, Murphy, and Barletta only.

[3] Because the plaintiff would need to demonstrate that (1) there was an imminent harm, (2) she was an identifiable victim, and (3) it was apparent to the defendants and the board that their conduct was likely to subject her to that harm; see *Brooks* v. *Powers*, 328 Conn. 256, 266, 178 A.3d 366 (2018); our conclusion that the plaintiff was not subject to an apparent and imminent harm is dispositive of this appeal and we do not reach the issue of whether the plaintiff was an identifiable person pursuant to the identifiable person-imminent harm exception to governmental immunity. See footnote 12 of this opinion.

[4] General Statutes § 10-235 provides in relevant part: "(a) Each board of education shall protect and save harmless any member of such board or any teacher or other employee thereof or any member of its supervisory or administrative staff . . . from financial loss and expense, including legal fees and costs, if any, arising out of any claim, demand, suit or judgment by reason of alleged negligence or other act resulting in accidental bodily injury to or death of any person . . . provided such teacher, member or employee, at the time of the acts resulting in such injury, damage or destruction, was acting in the discharge of his or her duties or within the scope of employment or under the direction of such board of education . . . ."

[5] Veronesi, Murphy, Barletta, and Perlini all were alleged to be employees of the board.

[6] Specifically, the counts sounding in negligence brought against the town and Perlini, counts two and nine, remain unresolved.

[7] By way of special defense, the defendants and the board also asserted that the counts seeking indemnification from the board for its employees' acts failed to state a claim upon which relief could be granted and could not be brought properly by the plaintiff.

[8] General Statutes § 52-557n provides in relevant part: "(a) (1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (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; and (C) acts of the political subdivision which constitute the creation or participation in the creation of a nuisance; provided, no cause of action shall be maintained for damages resulting from injury to any person or property by means of a defective road or bridge except pursuant to section 13a-149. (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct; or (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. . . ."

[9] "The identifiable person-imminent harm exception applies to narrowly defined classes of foreseeable victims as well as identifiable individuals. . . . Thus far, the only identifiable class of foreseeable victims that we have recognized for these purposes is that of schoolchildren attending public schools during school hours." (Citations omitted; internal quotation marks omitted.) *Cotto* v. *Board of Education*, 294 Conn. 265, 274, 984 A.2d 58 (2009). "[S]choolchildren who are statutorily compelled to attend school, during school hours on school days, can be an identifiable class of victims." (Emphasis omitted; internal quotation marks omitted.) *Durrant* v. *Board of Education*, 284 Conn. 91, 102, 931 A.2d 859 (2007). "An individual may be identifiable for purposes of the exception to qualified governmental immunity if the harm occurs within a limited temporal and geographical zone, involving a temporary condition." (Internal quotation marks omitted.) *Cotto* v. *Board of Education*, supra, 275–76.

The plaintiff does not argue in her principal appellate brief that she was a member of a foreseeable class of victims. The plaintiff argues on appeal

only that she was an identifiable individual. Furthermore, the plaintiff's counsel conceded at oral argument before this court that the plaintiff had already received all of the required physical education credits and, therefore, she was not compelled to be at the cheerleading practice.

[10] During oral argument before this court, counsel for the defendants and the board stated that our case law is unclear as to whether an individual always must be compelled to be at a location in order to invoke the identifiable person-imminent harm exception to governmental immunity. To invoke the identifiable person-imminent harm exception, typically an individual must be identifiable either as a member of a narrowly defined class of foreseeable victims or as a specifically identifiable individual. See *Cotto* v. *Board of Education*, supra, 294 Conn. 274. Compulsion is clearly required for an individual to be classified as a member of an identifiable class of foreseeable victims. It is less clear whether an individual must be compelled to be at the location where and when the injury occurred to be classified as an identifiable individual. Furthermore, counsel for the defendants and the board conceded that there were "facts" to support that the plaintiff was a specific, identifiable individual, despite the concession by the plaintiff's counsel that the plaintiff was not compelled to be at the cheerleading practice.

We note that "whether the plaintiff was compelled to be at the location where the injury occurred remains a paramount consideration in determining whether the plaintiff was an identifiable person or member of a foreseeable class of victims." (Internal quotation marks omitted.) *Strycharz* v. *Cady*, 323 Conn. 548, 575–76, 148 A.3d 1011 (2016). The compulsion requirement, however, is not without contention: "At least three members of our Supreme Court recently have observed that the court's application of the identifiable person-imminent harm exception, particularly with respect to the identifiable person prong of the exception, may be doctrinally flawed, unduly restrictive, and/or ripe for revisiting in an appropriate future case. See *Borelli* v. *Renaldi*, [336 Conn. 1, 59–60 n.20, 243 A.3d 1064 (2020)] (*Robinson*, *C. J.*, concurring); id., 67 (*D'Auria*, *J.*, concurring); id., 67–113, 146–54 (*Ecker*, *J.*, dissenting)." *Buehler* v. *Newtown*, 206 Conn. App. 472, 488 n.14, 262 A.3d 170 (2021). Because we do not reach the issue of whether the plaintiff was an identifiable individual subject to imminent harm, we need not determine whether the "facts" to which counsel for the defendants and the board referred created a genuine issue of material fact as to whether the plaintiff was an identifiable individual despite the plaintiff not being compelled to be at the cheerleading practice.

[11] On April 5, 2023, after oral argument before this court, we ordered the parties, sua sponte, to file supplemental briefs addressing "whether this appeal should be dismissed, in part, for a lack of a final judgment as to [the board], because the trial court's memorandum of decision did not dispose of all causes of action brought against [the board], in particular counts four, six, eight, and ten asserting claims against [the board] pursuant to . . . § 10-235." The parties filed their supplemental briefs on April 25 and 26, 2023.

[12] "Practice Book § 61-4 (a), setting forth the exception to that rule, provides that when partial summary judgment has been granted upon fewer than all of the causes of action against a party, '[s]uch a judgment shall be considered an appealable final judgment only if the trial court makes a written determination that the issues resolved by the judgment are of such significance to the determination of the outcome of the case that the delay incident to the appeal would be justified, and the chief justice or chief judge of the court having appellate jurisdiction concurs.' (Emphasis omitted.)." *Meribear Productions*, *Inc.* v. *Frank*, 328 Conn. 709, 717–18 n.5, 183 A.3d 1164 (2018).

[13] There is nothing in the record to indicate that the plaintiff withdrew her indemnification counts against the board or the counts against the town and Perlini, or that these counts were unconditionally abandoned. See, e.g., *Tunick* v. *Tunick*, 201 Conn. App. 512, 523, 242 A.3d 1011 (2020), cert. denied, 336 Conn. 910, 244 A.3d 561 (2021).

[14] We note that "§ 10-235 does not create a direct cause of action allowing a person allegedly injured by a negligent employee of a board of education to sue the board directly." (Internal quotation marks omitted.) *Costa* v. *Board of Education*, 175 Conn. App. 402, 405 n.2, 167 A.3d 1152, cert. denied, 327 Conn. 961, 172 A.3d 801 (2017).

[15] Specifically, the plaintiff told the coaches that she was "getting worried" because she kept "crumbling" and that she and the other cheerleaders were not "working well together."

[16] Practice Book § 17-45 provides in relevant part: "(a) A motion for sum-

mary judgment shall be supported by appropriate documents, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and other supporting documents. . . .”