CRAIG UGRIN ET AL. *v.* TOWN OF CHESHIRE ET AL.
(SC 18643)

WILLIAM BAKER ET AL. *v.* TOWN OF CHESHIRE ET AL.
(SC 18644)

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

Argued April 24—officially released October 30, 2012

William F. Gallagher, with whom, on the brief, was *Hugh D. Hughes*, for the appellants (plaintiffs in each case).

Elizabeth J. Stewart, with whom was *Dena M. Castricone*, for the appellee (named defendant).

Opinion

ZARELLA, J. In this consolidated appeal, the plaintiffs in the first action (SC 18643), Craig Ugrin and Samantha Ugrin, and the plaintiffs in the second action (SC 18644), William Baker and Lisa Baker, appeal from the judgment of the trial court in favor of the named defendant, the town of Cheshire (town).[1] The plaintiffs filed virtually identical complaints against the town after a massive sinkhole developed on the Bakers' property less than two months after they purchased it and eleven months after the Ugrins purchased property across the street. The complaints allege that the town failed to disclose information regarding the presence of a discontinued barite mine and a series of sinkholes caused by the mine beneath, and in the vicinity of, the properties prior to their purchase by the plaintiffs. On appeal, the plaintiffs claim that the trial court improperly granted the town's motions to strike counts two and three of their complaints, alleging private nuisance and negligent inspection, respectively, and improperly granted the town's motions for summary judgment on count one of the complaints, alleging negligence for failure to give the plaintiffs notice of the proximity of, and potential hazards posed by, the mine. The town argues that the trial court properly granted the motions. The town also argues that (1) the trial court's decision to strike the private nuisance claims may be affirmed on the alternative ground that the plaintiffs failed to sufficiently allege that the town proximately caused the damages or that the town created the alleged nuisance by some positive act, and (2) the trial court's decision to grant the town's summary judgment motions may be affirmed on the alternative ground that the town had no duty to warn the plaintiffs regarding the allegedly hazardous condition on or near their properties. We reverse in part the judgments of the trial court.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. During the 1800s, several privately owned mining operations for barite and other minerals were established in Cheshire. One of these operations was the William Peck mine, which was active in the northern section of the town from approximately 1866 to 1878. In 1968, a developer applied for and obtained a permit from the town planning commission to develop a residential subdivision that included the properties purchased more than thirty-five years later by the Ugrins at 390 Sheridan Drive and the Bakers at 395 Sheridan Drive. In 1970, the town building inspection department issued certificates of occupancy for 390 and 395 Sheridan Drive.

In 1993, a mine shaft and adit, which is a horizontal mine tunnel adjacent to the shaft, were discovered on a nearby residential subdivision parcel. In light of this discovery, the town hired an engineer, Robert L. Jones, and a geologist, Ronald Hedberg, to conduct a study of

abandoned mines throughout the town to determine where former mines existed and whether there were any public safety conditions that might require remediation. In their report dated September 30, 1993, Jones and Hedberg stated that, on May 17, 1993, work had been completed to backfill and seal the vertical shaft and to collapse and backfill the uppermost adit of the Peck mine. The report concluded that "the area of the former Peck [m]ine . . . could then be developed as a residential subdivision without danger of collapse from the known barite mining, which ended in . . . 1873."

In response to an inquiry by the town environmental planner, Jones and Hedberg supplemented their report with a letter dated November 5, 1993, specifically addressing the plaintiffs' properties. The letter stated that an "adit extends across lot 24 of the [subdivision] and appears to continue along the property line of [390] and [400] Sheridan Drive, across Sheridan Drive, then through the rear of [395] Sheridan Drive." The letter added: "No evidence of [sinkholes], collapse or barite mining spoils was found in the above described areas along the north side of Sheridan Drive. A small [sinkhole] which is currently covered by an above ground swimming pool was reported at the rear of [395], which is on the south side of Sheridan Drive. A portion of Sheridan Drive in the area of [390, 395 and 400] Sheridan [Drive] reportedly collapsed in 1978. This collapse was repaired with reinforced concrete and backfill material. It appears to have remained stable since 1979." The letter concluded by stating that "[w]e believe that this adit and overlying properties are stable at this time."

In 2004, the town solid waste committee held several meetings to discuss the abandoned barite mines and sought the advice of town counsel, John K . Knott, Jr. In a letter dated July 29, 2004, Knott encouraged town officials to make the report by Jones and Hedberg available to the public but advised against placing any information regarding the mines on the land records because he was concerned about potential slander of title claims against the town. Knott instead suggested that the report "could be filed in the [t]own [c]lerk's office (not on the [l]and [r]ecords) and be available for public inspection and copying. A sign could be placed in that office referring to the availability of the report." Knott did not specifically direct, however, that a sign be posted in the clerk's office.

On November 30, 2004, the Ugrins purchased 390 Sheridan Drive. On August 26, 2005, the Bakers purchased 395 Sheridan Drive. On October 15, 2005, a large sinkhole developed in the Bakers' backyard, which the town subsequently ordered the Bakers to remediate. On August 29, 2007, the Bakers filed a nine count complaint against the town and the previous owners of their property. On October 17, 2007, the Ugrins filed a similar

twelve count complaint against the town and the previous owners of their property. Both complaints alleged negligence (count one), creation of a nuisance (count two), failure to make an adequate inspection (count three), violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. (count four), injunctive relief (count five), and class action (count six) against the town. Counts seven through nine of the Bakers' complaint and seven through twelve of the Ugrins' complaint were directed against the other defendants.

Thereafter, the town filed motions to strike counts two, three, four, five and six of both complaints.[2] The trial court granted the motions as to counts two, three and four but denied the motions as to counts five and six. The town subsequently filed motions for summary judgment on counts one, five and six of each complaint, which the trial court granted. The court thereupon rendered partial judgments for the town. In April, 2009, the plaintiffs appealed to the Appellate Court from the trial court's judgments. On July 19, 2010, we transferred the appeals to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1 and consolidated them for briefing purposes.

I

We begin with the plaintiffs' claim that the trial court improperly granted the town's motions to strike count two of their respective complaints, sounding in private nuisance, on the ground that they were required to plead the unlawful use of adjacent property. The plaintiffs claim that a private nuisance complaint need not allege control or ownership of adjacent property but must merely allege causation, which the complaints properly did in asserting that the town issued permits and authorized construction on their properties. The town responds that the history of public and private nuisance law recognizes an overlap between the two causes of action, a defendant's use of property historically has been required for both public and private nuisance, Connecticut case law implies that a defendant's use of property is required in private nuisance actions, and a defendant in a private nuisance action must have control of the property through ownership or other means. The town also argues that the trial court's decision to strike the nuisance claims may be affirmed on the alternative ground that the plaintiffs failed to sufficiently allege that the town proximately caused the damages or that the town created the alleged nuisance by a positive act. We conclude that the trial court properly granted the town's motions to strike count two of the plaintiffs' complaints.

The facts in count one of both complaints are incorporated by reference in count two, alleging nuisance. Count one alleges that the plaintiffs purchased their properties on the subject dates, that the sellers knew

that a barite mine shaft or adit was located beneath their properties, that the presence of the mine caused sinkholes or collapses of the ground and street in the vicinity of the properties before they were purchased by the plaintiffs and that the mine caused a massive sinkhole to develop on 395 Sheridan Drive following its purchase by the Bakers. Count one further alleges that the town retained experts to investigate the existence of mines in certain sections of the town, that the experts prepared a report in 1993 disclosing that the main shaft of the Peck mine is located approximately 500 feet from the properties and that one of the shallow adits, approximately twenty-five to thirty feet below grade, likely traversed beneath the properties and residences. In addition, count one alleges that the report disclosed that a series of sinkholes developed along the alignment of the adit in the vicinity of Sheridan Drive, including the street in front of the properties, which collapsed and had to be backfilled twice before the plaintiffs purchased them. Finally, with respect to the harm that the plaintiffs suffered, count one alleges that the "losses suffered by the plaintiffs . . . are due to the negligence and carelessness of the [town]" in variously described ways, such as granting permits and allowing development on the properties, and that these losses consisted of the large sums of money spent to remediate the problem caused by the sinkhole, the diminution in the value of the properties due to the existence of the mine and the risk of further sinkholes, ground collapses and cave-ins.

Count two of the complaints is based on General Statutes § 52-557n (a) (1) (C) and alleges that the town participated in the development of the property in the area of 390 and 395 Sheridan Drive by issuing permits and authorizing construction without warning, or requiring the warning of, developers, property owners, real estate agents and the general public of the existence of the mine report and the risk of ground collapses, cave-ins or sinkholes due to the existence of the mine, mine shafts and adits. Count two also alleges that the presence of construction at 390 and 395 Sheridan Drive and its immediate vicinity over the mine shafts or adits was, and continues to be, a nuisance that the town created or participated in creating.

In its motions to strike count two, the town argued that the plaintiffs had failed to plead the essential elements of nuisance pursuant to § 52-557n (a) (1) (C) because they did not allege proximate cause, that the town was in control of the property that was the source of the purported nuisance, or that the town had created a nuisance by a positive act. The trial court granted the motions to strike count two on the ground that the complaints contained no allegations that the town owned or controlled land that interfered with the plaintiffs' use or enjoyment of their property.

The court initially concluded that the complaint sounded in private rather than public nuisance because the plaintiffs claimed that they had been damaged individually with regard to the use and enjoyment of their properties. In articulating the applicable legal principles, however, the court relied on *State* v. *Tippetts-Abbett-McCarthy-Stratton*, 204 Conn. 177, 183, 527 A.2d 688 (1987), which describes the required elements for a claim of public nuisance. One of the elements is that a defendant's use of land that is the source of the nuisance was unreasonable or unlawful; id.; which the trial court determined requires allegations that the defendant have control over such land, either through ownership or other means. The court noted, however, that count two contained no allegation that the town ever owned or otherwise controlled land the use of which unreasonably interfered with the plaintiffs' use or enjoyment of their property. For that reason, it granted the town's motions to strike count two of the plaintiffs' complaints.

Before addressing the plaintiffs' claims, we set forth the applicable standard of review. "The standard of review in an appeal challenging a trial court's granting of a motion to strike is well established. A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. As a result, our review of the court's ruling is plenary. . . . We take the facts to be those alleged in the [pleading] that has been stricken and we construe the [pleading] in the manner most favorable to sustaining its legal sufficiency." (Internal quotation marks omitted.) *Lestorti* v. *DeLeo*, 298 Conn. 466, 472, 4 A.3d 269 (2010).

General Statutes § 52-557n (a) (1) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by . . . (C) acts of the political subdivision which constitute the creation or participation in the creation of a nuisance . . . ." Although count two does not specify whether the plaintiffs are claiming a public or private nuisance, the plaintiffs appear to agree with the trial court that their claims sound in private nuisance.

In *Pestey* v. *Cushman*, 259 Conn. 345, 788 A.2d 496 (2002), this court reaffirmed the distinction between a public and private nuisance and, in an effort to clarify the law, explained that "[a] private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. . . . The law of private nuisance springs from the general principle that [i]t is the duty of every person to make a reasonable use of his own property so as to occasion no unnecessary damage or annoyance to his neighbor. . . . The essence of a private nuisance is an interference with the use and enjoyment of land." (Citations omitted; internal quotation marks omitted.) Id., 352.

The court then noted that a long line of public nuisance cases had established that a plaintiff must prove four elements to succeed in a cause of action alleging nuisance, including that (1) the condition complained of had a natural tendency to create danger and inflict injury on person or property, (2) the danger created was a continuing one, (3) the use of the land was unreasonable or unlawful, and (4) the existence of the nuisance was the proximate cause of the plaintiffs' injuries and damages. Id., 355–36. The court further noted that this standard had since been applied without distinction to both public and private nuisance causes of action. Id., 356. The court nonetheless observed that public and private nuisance law have "almost nothing in common" because "[p]ublic nuisance law is concerned with the interference with a public right, and cases in this realm typically involve conduct that allegedly interferes with the public health and safety," whereas "[p]rivate nuisance law . . . is concerned with conduct that interferes with an individual's private right to the use and enjoyment of his or her land." (Internal quotation marks omitted.) Id., 357.

The court in *Pestey* then proceeded to adopt the principles pertaining to private nuisance set forth in § 822 of the Restatement (Second) of Torts and concluded that, "in order to recover damages in a common-law private nuisance cause of action, a plaintiff must show that the defendant's conduct was the proximate cause of an unreasonable interference with the plaintiff's use and enjoyment of his or her property. The interference may be either intentional . . . or the result of the defendant's negligence." (Citation omitted.) Id., 361. "[T]he test of proximate cause is whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries. . . . The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection. . . . This causal connection must be based upon more than conjecture and surmise." (Internal quotation marks omitted.) *Winn* v. *Posades*, 281 Conn. 50, 56–57, 913 A.2d 407 (2007).

Mindful of these principles, we conclude that, to the extent the trial court in the present case determined that the nuisance claims were insufficient because the plaintiffs failed to allege that the town owned or otherwise controlled land the use of which unreasonably interfered with the plaintiffs' use or enjoyment of their property, the trial court improperly granted the motions to strike on that ground.

The town argues that a defendant's use of property historically has been required for both public and private nuisance claims and remains a required element for all nuisance actions. One of the cases on which the town relies, however, involved a public nuisance claim; see *Balaas* v. *Hartford*, 126 Conn. 510, 514, 12 A.2d 765

(1940); and the other two cases, both of which are more than one century old, did not address whether the use of property is a required element in a nuisance action. See *Cadwell* v. *Connecticut Railway & Lighting Co.*, 84 Conn. 450, 458, 80 A. 285 (1911) (concluding that allegations respecting operation of street cars that caused dust, noise and vibrations were insufficient to state cause of action because they lacked requisite degree of certainty and failed to set forth actionable injuries); *Hoadley* v. *M. Seward & Son Co.*, 71 Conn. 640, 646, 42 A. 997 (1899) (concluding that when use of property is unreasonable so as to produce material annoyance, inconvenience, discomfort or injury to neighbor, property owner will be held liable for damage).

More to the point, although we recognize that the defendants in most private nuisance actions to date have owned, controlled or used property from which the alleged nuisance originated and that the court in *Pestey* observed that "[t]he proper focus of a private nuisance claim for damages . . . is whether a defendant's conduct, i.e., his or her use of . . . property, causes an unreasonable interference with the plaintiff's use and enjoyment of his or her property"; *Pestey* v. *Cushman*, supra, 259 Conn. 360; the court did not state that a defendant's use of property is a required element of a private nuisance action. Rather, the court stated that the plaintiff "must show that the defendant's conduct was the proximate cause of an unreasonable interference with the . . . use and enjoyment of [*the plaintiff's*] *property*. The interference may be either intentional . . . or the result of the defendant's negligence." (Citation omitted; emphasis added.) Id., 361.

As previously explained, the court in *Pestey* was guided in part by § 822 of the Restatement (Second) of Torts, which provides that "[f]ailure to recognize that private nuisance has reference to the interest invaded and *not* to the type of conduct that subjects the actor to liability has led to confusion." (Emphasis added.) 4 Restatement (Second), Torts § 822, comment (b) (1979). "An invasion of a person's interest in the private use and enjoyment of land by *any type* of liability-forming conduct is private nuisance. The invasion that subjects a person to liability may be either intentional or unintentional." (Emphasis added.) Id., comment (c). The court also relied on another respected treatise, which states that the requirements for recovery in a private nuisance action are: "(1) [t]he defendant acted with the intent of interfering with the use and enjoyment of the land by those entitled to that use; (2) [t]here was some interference with the use and enjoyment of the land of the kind intended, although the amount and extent of that interference may not have been anticipated or intended; [and] (3) [t]he interference that resulted and the physical harm, if any, from that interference proved to be substantial." W. Prosser & W. Keeton,

Torts (5th Ed. 1984) § 87, p. 622. All of these requirements relate to the land subject to the nuisance and to the nature of the interference, not to whether the conduct giving rise to the interference was connected with the defendant's ownership or control of any land. Accordingly, there is no support for the town's contention that a private nuisance claim must allege that the defendant in any given case owned or controlled the land that gave rise to an interference with the use and enjoyment of the plaintiff's property.

Although the town insists that the trial court analyzed the nuisance claim properly, it also argued in its motion to strike—and, therefore, claims on appeal as alternative grounds for affirmance of the trial court's decision—that, under *Pestey*, the plaintiffs failed to properly allege that the town's conduct was the proximate cause of unreasonable interference or that the town had created a nuisance by a positive act that would subject it to liability pursuant to § 52-557n (a) (1) (C). The plaintiffs disagree and argue that the trial court did not decide the issue of proximate causation and that raising it as an alternative ground for affirmance of the trial court's decision at this time is prejudicial because they are unable to amend their pleadings. We conclude that there is no prejudice to the plaintiffs because the record establishes that the town issued permits and authorized construction on the properties more than twenty years before publication of the mine report in 1993, and, accordingly, the plaintiffs could not have alleged facts sufficient to survive a motion to strike their nuisance claims. In other words, the town could not have created or participated in creating the alleged nuisance or have warned developers, property owners, real estate agents and the general public of the risks of ground collapses, cave-ins or sinkholes on or near the properties when they issued the permits and authorized construction in 1970[3] because it was not aware of the problem at that time. On the basis of the alternative grounds for affirmance, we conclude that the trial court properly granted the town's motions to strike count two of the plaintiffs' complaints.

II

The plaintiffs next claim that the trial court improperly granted the town's motions to strike count three of their complaints, alleging negligent inspection pursuant to § 52-557n (b) (8), on the ground that the statute does not affirmatively create a cause of action against a municipality. The plaintiffs claim that the statutory provision creates a cause of action for failure to inspect because it provides that a municipality is not liable "unless" certain predicates hold true, and, therefore, use of the term "unless" creates municipal liability when those predicates exist. The town responds that a strict construction of the statute and the legislative history support the trial court's conclusion that the statute does

not create a cause of action. We agree with the plaintiffs and conclude that the trial court improperly granted the town's motions to strike count three of their complaints.[4]

Count three incorporates all of the allegations in counts one and two, and alleges that the town failed to inspect, or that it inadequately inspected, their properties, which contained hazards caused by the mine shafts and adits that required continuous monitoring and inspection. Count three further alleges that the risks associated with the town's failure to inspect or make adequate inspections were known by the town, and, if not known, evidenced a reckless disregard of the public safety, for which the town was liable pursuant to § 52-557n (b) (8).

In its motions to strike count three of the plaintiffs' complaints, the town argued that § 52-557n (b) (8) creates no cause of action because it is limited to defining the circumstances in which there is no municipal liability. The trial court agreed with the town and granted the motions to strike with respect to that count.

We begin our analysis by setting forth the applicable standard of review and the guiding legal principles. "[I]ssues of statutory construction raise questions of law, over which we exercise plenary review. . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Cruz* v. *Montanez*, 294 Conn. 357, 367, 984 A.2d 705 (2009).

Additionally, "[w]hen a statute is in derogation of common law or creates a liability where formerly none existed, it should receive a strict construction and is not to be extended, modified, repealed or enlarged in its scope by the mechanics of [statutory] construction. . . . In determining whether or not a statute abrogates or modifies a common law rule the construction must be strict, and the operation of a statute in derogation of the common law is to be limited to matters clearly brought within its scope." (Internal quotation marks

omitted.) *Spears* v. *Garcia*, 263 Conn. 22, 28, 818 A.2d 37 (2003).

Finally, "[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." General Statutes § 1-1 (a). "If a statute or regulation does not sufficiently define a term, it is appropriate to look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *Wilton Meadows Ltd. Partnership* v. *Coratolo*, 299 Conn. 819, 826, 14 A.3d 982 (2011).

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 . . . . (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 . . . (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or implicitly granted by law." (Emphasis added.) Thus, the statute provides that municipalities shall be liable for harm caused by ministerial acts in subsection (a) (1) (A) but shall not be liable for harm caused by discretionary acts in subsection (a) (2) (B).

Subsection (b) of the statute further 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 . . . (8) failure to make an inspection or making an inadequate or negligent inspection of any property, other than property owned or leased by or leased to such political subdivision, to determine whether the property complies with or violates any law or contains a hazard to health or safety, *unless* the political subdivision had notice of such a violation of law or such a hazard or *unless* such failure to inspect or such inadequate or negligent inspection constitutes a reckless disregard for health or safety under all the relevant circumstances . . . ." (Emphasis added.) General Statutes § 52-557n (b). Because subsection (b) begins with the words "[n]otwithstanding the provisions of subsection (a)," the two parts of the statute are not interdependent, and subsection (b) may be construed without reference to subsection (a). Subsection (b) thus should be generally understood to define various circumstances in which a municipality is not subject to liability.

The disputed statutory term in § 52-557n (b) (8) is "unless," which is almost universally defined as an exception to another circumstance. See Webster's Third New International Dictionary (2002) (defining "unless" as "under any other circumstance than that: except on the condition that"); American Heritage Dictionary of the English Language (5th Ed. 2011) (defining "unless" as "except on the condition that; except under the circumstances that"); Random House Unabridged Dictionary (2d Ed. 1993) (defining "unless" as "[e]xcept under the circumstances that . . . except"). To the extent this court previously has construed the term, it has done so consistently with the foregoing definitions. See *State* v. *Ray*, 290 Conn. 24, 35, 961 A.2d 947 (2009) (words "unless" or "except" typically connote exception); *State* v. *Anonymous*, 179 Conn. 516, 518–19, 427 A.2d 403 (1980) (word "unless" refers to exception); *State* v. *Nathan*, 138 Conn. 485, 487 n.7, 489, 86 A.2d 322 (1952) (statutory language following word "unless" provides for exceptions to preceding definition of offense).

In the present case, General Statutes § 52-557n (b) (8) provides that a municipality shall not be liable for "fail[ing] to make an inspection or for making an inadequate or negligent inspection of any property" in violation of the law or that poses "a hazard to health or safety, *unless* the [municipality] had notice" of the violation or hazard or "*unless* such failure to inspect or such inadequate or negligent inspection constitutes a reckless disregard for health or safety . . . ." (Emphasis added.) The word "unless" before each of these two exceptions unmistakably sets them apart from the preceding language that otherwise protects municipalities from liability for failure to make an inspection or for making an inadequate inspection because it describes conditions under which there is *no* protection from liability. Accordingly, we conclude that § 52-557n (b) (8) abrogates the traditional common-law doctrine of municipal immunity, now codified by statute, in the two enumerated circumstances.

The town argues that, because § 52-557n (b) begins by providing that, "[n]otwithstanding the provisions of subsection (a) of this section, a [municipality] . . . shall not be liable for damages to person or property" under ten circumstances, of which subdivision (8) is one, the clear meaning of subsection (b) is that, even if there may be liability under subsection (a), there is no liability if the activity falls within any part of subsection (b). We disagree.

"[I]n interpreting a statute, we do not interpret some clauses of a statute in a manner that nullifies other clauses but, rather, read the statute as a whole in order to reconcile all of its parts. . . . Every word and phrase is presumed to have meaning, and we do not construe statutes so as to render certain words and phrases sur-

plusage." (Citation omitted; internal quotation marks omitted.) *Vibert* v. *Board of Education*, 260 Conn. 167, 176, 793 A.2d 1076 (2002). Thus, we conclude that, if we do not interpret the language following the word "unless" in § 52-557n (b) (8) according to its clear meaning as an exception to the general rule that failure to make an inspection or to make an adequate inspection does not give rise to municipal liability, more than one half of the provision will be rendered superfluous.

The town also argues that a statute like § 52-557n that expressly abrogates the common law must be strictly construed and not extended, modified, repealed or enlarged in scope through statutory construction, and that the only reading of the statute in conformance with this principle is that subsection (a) (1) abrogates common-law liability and subsection (b) provides exemptions to that liability. In support of this contention, the town relies on *Martel* v. *Metropolitan District Commission*, 275 Conn. 38, 59, 881 A.2d 194 (2005), *Spears* v. *Garcia*, supra, 263 Conn. 22, and *Elliott* v. *Waterbury*, 245 Conn. 385, 395, 715 A.2d 27 (1998). We are unpersuaded.

Construing the word "unless" as providing for exceptions to the rule described in § 52-557n (b) (8) is in accord with a strict construction of the statute and does not extend, modify or enlarge the statute. Insofar as *Spears* and *Elliott* discuss subsection (b), *Spears* merely observes that "subsection (b) of § 52-557n, which references subsection (a), sets forth many exceptions under which an injured party may not pursue a direct action in negligence against a municipality"; *Spears* v. *Garcia*, supra, 263 Conn. 33; and *Elliott* states that "[s]ubsection (a) sets forth general principles of municipal liability and immunity, while subsection (b) sets forth [ten] specific situations in which both municipalities and their officers are immune from tort liability." (Internal quotation marks omitted.) *Elliott* v. *Waterbury*, supra, 245 Conn. 395. These comments are general in nature, do not interpret specific language or provisions in subsection (b) and, in any event, are dicta.

Martel is a different matter. In that case, the court examined General Statutes § 52-557n (b) (4), which provides that a municipality shall not be liable for injuries incurred as a result of "the condition of an unpaved road, trail or footpath, the purpose of which is to provide access to a recreational or scenic area, *if* the political subdivision has not received notice and has not had a reasonable opportunity to make the condition safe . . . ." (Emphasis added.) The court determined that the word "if" did not create an exception that permitted a cause of action when the political subdivision received notice and had a reasonable opportunity to make the condition safe because subsection (b) provides a list of exceptions to the liability of a municipality established in subsection (a) and thus "functions to limit

. . . rather than expand the legislative abrogation of common-law governmental immunity contained in § 52-557n." *Martel* v. *Metropolitan District Commission*, supra, 275 Conn. 59.

We do not agree with the town that, in light of *Martel*, use of the word "if" in subsection (b) (4) and "unless" in subsection (b) (8) is a distinction without a difference. The qualifying language in subsection (b) (4), beginning with the word "if," is intended to assist in defining when a municipality is shielded from liability. Subsection (b) (4) does not describe circumstances in which a municipality is not protected from liability. Lack of protection would have to be inferred, as the plaintiff did in *Martel* when he appeared to argue that a municipality must be liable for injuries incurred as a result of an unsafe condition on a footpath if it had received notice of the dangerous condition and had an opportunity to make the condition safe. See *Martel* v. *Metropolitan District Commission*, supra, 275 Conn. 58–59. We properly rejected this construction of subsection (b) (4) in *Martel*. In contrast, the qualifying language in subsection (b) (8), beginning with the word "unless," describes two specific circumstances in which a municipality is not shielded from liability. No inference is required to conclude that a municipality is not shielded from liability when these circumstances exist. This difference in the use and meaning of "if" and "unless" within the same statute cannot be ignored. Although we agree with *Martel* that § 52-557n (b) is, generally speaking, designed to protect municipalities from liability under the ten enumerated circumstances, the statute is more nuanced than described in previous cases, and we cannot overlook clear language providing for exceptions to the protection otherwise defined in subsection (b) (8).

The disputed language in the present case is similar to the language at issue in *State* v. *Nathan*, supra, 138 Conn. 485. In *Nathan*, the court was asked to construe an obscenity statute, which has since been repealed, providing in relevant part that "[a]ny person who shall buy, sell, advertise, lend, give, offer or show, or have in his possession with intent to sell, lend, give, offer or show, any book, pamphlet, paper or other thing containing obscene, indecent or impure language, or any picture, print, drawing, figure, image or other engraved, printed or written matter of like character, or any article or instrument of indecent or immoral use or purpose, *unless with intent to aid in their suppression or in enforcing the provisions hereof* . . . shall be imprisoned not more than two years or be fined not more than one thousand dollars or both." (Emphasis added.) General Statutes (1949 Rev.) § 8567. After determining that the defendant's conduct fell within the statutory provision, the court took special note of the fact that "[§] 8567 provides for exceptions. In those instances [in which] possession as well as the specific intent has

been established, the possessor is, nevertheless, guilty of no offense under the statute if his further intent is to aid in suppressing the obscene material or in enforcing the provisions of the statute. These exceptions are not a constituent part of the definition of the offense." *State* v. *Nathan*, supra, 489. Use of the word "unless" in the obscenity statute thus created exceptions to the offense defined in that provision. Likewise, we conclude that the word "unless" in subsection (b) (8) creates exceptions to the rule that municipalities are protected from liability in the described circumstances.

The town contends that, even if the language following the word "unless" narrows the scope of exemption from liability under subsection (b) (8), it does not create an independent cause of action. The town argues that any attempt to distinguish subsection (b) (8) as creating a "stand-alone" cause of action would undermine this court's holding in *Martel* and violate our rules of strict construction. We disagree. For the reasons previously discussed, our holding in *Martel* is inapplicable. Moreover, there is no way to conclude that the language following "unless" narrows the scope of the exemptions from liability in subsection (b) (8) without also concluding that a cause of action is permitted when the exceptions apply. Indeed, to conclude otherwise would lead to a bizarre and irrational result. See, e.g., *Dias* v. *Grady*, 292 Conn. 350, 361, 972 A.2d 715 (2009) ("those who promulgate statutes . . . do not intend to promulgate statutes . . . that lead to absurd consequences or bizarre results" [internal quotation marks omitted]). In other words, if the town is *not* shielded from liability in the inspection context when it has notice of a hazardous condition or has engaged in conduct that constitutes reckless disregard of public health and safety, the lack of protection *must* mean that it is subject to liability in those circumstances. Accordingly, we conclude that the plaintiffs are not precluded from bringing a cause of action against the town under § 52-557n (b) (8) and that the trial court improperly granted the town's motions to strike count three of the plaintiffs' complaints.

III

The plaintiffs' final claim is that the trial court improperly granted the town's motions for summary judgment as to count one of their complaints, alleging negligence pursuant to § 52-557n (a) (1) (A), on the ground of governmental immunity. The plaintiffs claim that the town had a ministerial duty to warn them of the hazardous condition beneath their properties, which it failed to exercise, and that the town had sufficient control over the properties to have acquired a legal duty to take corrective measures. The town responds that it had no duty to warn the plaintiffs regarding the mine beneath, or in the vicinity of, their properties, and, in any event, the town is protected by governmental immunity

because any duty was discretionary. We conclude that the trial court properly granted the town's motions for summary judgment with respect to count one of the plaintiffs' complaints.

Count one alleges that the town negligently failed to disclose the information in the mine report and several subsequent reports to the plaintiffs, or anyone acting on their behalf, prior to the plaintiffs' purchase of their properties. Count one specifically alleges that the town improperly (1) failed to follow the instructions of the town counsel to place a notice regarding the hazardous condition and the mine report in the town clerk's office so that the public would be informed of the condition, (2) allowed the development of land at, or in the area of, the plaintiffs' homes without following recommendations in the mine report for remediation, (3) failed to warn the public, including realtors, residents and prospective purchasers, of the existence of the mines, the mine report and all other reports concerning the existence of and dangers posed by the mine, and (4) failed to implement the mine report's recommendations for remediation prior to development of the properties and to advise property owners of the information when construction already had occurred.

In its motions for summary judgment, the town argued that it owed no duty to the plaintiffs and that, even if it owed a duty, the town's acts were discretionary, and the town was thusimmune from liability. The trial court agreed. After first determining that the town's actions were discretionary, the court concluded that none of the three identified exceptions to municipal immunity for discretionary acts applied in the present case.[5] Accordingly, the trial court granted the town's motions for summary judgment with respect to count one of the plaintiffs' complaints.

As a preliminary matter, we set forth the applicable standard of review. "Summary judgment shall be rendered forthwith if the pleadings, affidavits and 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. . . . The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. . . . When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record. . . .

"In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary

foundation to demonstrate the existence of a genuine issue of material fact." (Internal quotation marks omitted.) *Wilton Meadows Ltd. Partnership* v. *Coratolo*, supra, 299 Conn. 823.

"The existence of a duty is a question of law . . . ." (Internal quotation marks omitted.) *Pelletier* v. *Sordoni/Skanska Construction Co.*, 286 Conn. 563, 593, 945 A.2d 388 (2008). Similarly, when a party claims that it has no duty because of governmental immunity, "this court has approved the practice of deciding the issue of governmental immunity as a matter of law." (Internal quotation marks omitted.) *Doe* v. *Petersen*, 279 Conn. 607, 613, 903 A.2d 191 (2006).

The statute at issue in this claim is General Statutes § 52-557n, which 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 . . . . (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 . . . (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. . . ."

This court previously has explained that "§ 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. General Statutes § 52-557n (a) (1) (A). . . . [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.

"Municipal officials are immune from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury. . . . In contrast, municipal officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed

manner without the exercise of judgment or discretion. . . . This is because society has no analogous interest in permitting municipal officers to exercise judgment in the performance of ministerial acts." (Citations omitted; internal quotation marks omitted.) *Doe* v. *Petersen*, supra, 279 Conn. 614–15.

In the present case, the plaintiffs claim that the letter by town counsel, Knott, describing the danger posed by the mines operated as a directive giving rise to a ministerial duty to inform property owners and the public of the information in the mine report. We disagree. We first note that the town allowed development of the plaintiffs' properties many years before it learned that mining activity had taken place in the vicinity, and, accordingly, warning of the dangers posed or requiring remediation of the hazardous condition prior to their development was a legal impossibility. Second, although Knott's letter could have formed the basis for a ministerial act; see, e.g., *Violano* v. *Fernandez*, 280 Conn. 310, 323, 907 A.2d 1188 (2006) (ministerial acts are acts required by city charter provision, ordinance, regulation, rule, policy, or other directive); the letter contained no directive of the type required to support a finding that the town had a duty to notify the public or the plaintiffs of the information in the report. The only legal advice contained in the letter was that (1) "the study *should* be kept on file in the appropriate [t]own department offices," (2) "the study [*should*] be consulted whenever any type of development is proposed to take place on any property listed in the study to see if any building code standards or engineering standards should be applied which are applicable to the development proposed to take place at a particular site," (3) "the [b]uilding [o]fficial *should* refer to the report when reviewing applications for building permits," (4) "[t]he [t]own [e]ngineer . . . *should* consult the report when projects are proposed on [t]own property which may be over mines so that proper engineering standards can be applied to the anticipated project," (5) "the [p]lanning office *should* refer to the study to see if a proposed development is on land over the mine areas listed in the report," (6) the filing of some type of official notice "is not authorized by law and *should not* be attempted, as it could subject the [t]own to possible . . . slander of title" claims, (7) "[t]he report *could* be filed in the [t]own [c]lerk's office (not on the [l]and [r]ecords) and be available for public inspection and copying," and (8) "[a] sign *could* be placed in that office referring to the availability of the report." (Emphasis added.) None of these comments constitutes a directive to the town giving rise to a ministerial duty because they all contain the qualifying words "should" or "could," which indicate that the town had discretion to exercise its judgment in deciding whether to follow Knott's advice. See *Doe* v. *Petersen*, supra, 279 Conn. 614–15. Moreover, the plaintiffs fail to iden-

tify any other comment that could be construed as an actual directive to the town that it had no discretion to ignore. The plaintiffs simply assert that the town did nothing.[6] See *Colon* v. *Board of Education*, 60 Conn. App. 178, 181–82, 758 A.2d 900 (plaintiffs did not allege teacher was performing ministerial duty because complaint lacked allegation that teacher was required to perform in proscribed manner and failed to do so), cert. denied, 255 Conn. 908, 763 A.2d 1034 (2000). In addition, the plaintiffs allege none of the applicable exceptions to governmental immunity for discretionary acts. See footnote 5 of this opinion. Accordingly, we conclude that, to the extent the town may have had a duty to inform the plaintiffs and the public regarding the information in the mine reports, the duty was discretionary. The town thus is not liable for its possibly negligent acts or omissions with respect to the reports, and we conclude that the trial court properly granted the town's summary judgment motions with respect to count one of the plaintiffs' complaints.[7]

The judgments are reversed insofar as the trial court granted the town's motions to strike count three of the plaintiffs' complaints and the cases are remanded for further proceedings according to law; the judgments are affirmed in all other respects.

In this opinion ROGERS, C. J., and PALMER and HARPER, Js., concurred.

[1] The plaintiffs in both actions also named as defendants the sellers from whom they purchased their homes. They are Marilyn Gordon, Calcagni Land Sales and Calcagni Real Estate Holdings in the Ugrin action and John Lanzl and Debra Lanzl in the Baker action. The counts against the town have gone to judgment in both actions, but the counts against the other defendants remain pending in the trial court.

[2] The town moved to strike the second, third, fourth, fifth and sixth counts of the Bakers' complaint on October 26, 2007, and the same numbered counts of the Ugrins' complaint on February 13, 2008. The trial court decided the Bakers' motion on April 24, 2008. The court subsequently decided the Ugrins' motion on May 5, 2008, for the reasons described in the court's prior memorandum of decision on the motion to strike the Bakers' complaint.

[3] We also reject the plaintiffs' claim regarding applicability of the principle that there is continuing liability for substantial participation in the creation of harmful, physical conditions; see 4 Restatement (Second), supra, § 834, comment (e); because there is no claim of continuing liability in count two of the plaintiffs' complaints. See Practice Book § 60-5 (reviewing court "shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial"). The only claim that the plaintiffs raise in count two of their complaints is that the town created or participated in creating a nuisance when it issued permits and authorized construction without warning the public of the existence of the mine report and the risk of ground collapses, cave-ins or sinkholes on or in the area of the properties. Accordingly, we decline to review this claim.

[4] We do not address the sufficiency of the allegations because the plaintiffs failed to raise a sufficiency claim on appeal.

[5] In *Doe* v. *Petersen*, 279 Conn. 607, 903 A.2d 191 (2006), we described these exceptions as follows: "We have identified three exceptions to discretionary act immunity. Each of these exceptions represents a situation in which the public official's duty to act is [so] clear and unequivocal that the policy rationale underlying discretionary act immunity—to encourage municipal officers to exercise judgment—has no force. . . . First, liability may be imposed for a discretionary act when the alleged conduct involves malice, wantonness or intent to injure. . . . Second, liability may be imposed for a discretionary act when a statute provides for a cause of action against a municipality or municipal official for failure to enforce certain

laws. . . . Third, liability may be imposed 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 . . . .'' (Citations omitted; internal quotation marks omitted.) Id., 615–16.

[6] The dissent argues that a memorandum dated November 9, 2004, from the town manager, Michael Milone, to various town officials, operated as a directive giving rise to a ministerial duty to warn the public regarding the risks posed by the mines. In his memorandum, Milone stated that he had been directed by the town council and its solid waste committee to ensure that each of their respective offices maintained as comprehensive a file as possible on the barite mines and that the files be made available to anyone from the public who wished to know more about the history of the mines in the town. The memorandum also described certain documents being transmitted to each department, noted that there were mining leases and maps of the referenced sites on file in the planning department that were too expensive to duplicate and include in the files of the other departments, and advised that the other departments should "make the public aware of these additional pieces of information.'' It is this last sentence on making the public aware of the mining leases and maps that the dissent contends is the source of the town's ministerial duty to warn the public. We disagree.

On appeal, the *exclusive* basis for the plaintiffs' claim that there was a directive creating a ministerial duty to act was Knott's letter to the solid waste committee stating that the town could post a sign in the town clerk's office referring to the availability of the mine report. The parties raised this same claim in the trial court. Neither party mentioned Milone's memorandum in their briefs and arguments before that court or in their briefs to this court except in connection with the town's contention that it had made the mine report available to the public in various town offices. Accordingly, the dissent's reliance on the Milone memorandum is misplaced, and, to the extent the dissent argues that "it is proper to look to the entire record before the trial court when deciding the motion for summary judgment''; footnote 1 of the concurring and dissenting opinion; it fails to recognize that we may examine the entire record *only* in the context of a claim that is properly before this court. See, e.g., *State* v. *Saucier*, 238 Conn. 207, 223, 926 A.2d 633 (2007) (claim not raised on appeal deemed abandoned); see also *Grimm* v. *Grimm*, 276 Conn. 377, 393, 886 A.2d 391 (2005) ("[a]n unmentioned claim is, by definition, inadequately briefed, and one that is 'generally . . . considered abandoned' "), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006).

Moreover, even if Milone's memorandum had been the basis for the plaintiffs' claim, Milone made clear in his affidavit dated July 29, 2008, which was submitted in connection with the town's motions for summary judgment, that the only directive he gave to the other town officials was "to maintain copies of the reports described in the memorandum in their departments and to make sure that those documents were available to the public.'' Milone further explained in the memorandum itself that what he meant by making the documents and reports available to the public was making them available to "anyone making an inquiry . . . .'' Furthermore, the language on which the dissent relies, namely, that the departments should "make the public aware of these additional pieces of information,'' directly follows the memorandum's reference to the maps and mining leases, and clearly refers to making the leases and maps available to the public *in addition to* the other information in the department files. The dissent, however, disregards this explanatory language and relies instead on a single sentence taken out of context. Accordingly, there is no basis for the dissent's conclusion that Milone's memorandum created a ministerial duty to warn the public of the information in the mine reports beyond that of maintaining the reports in the department files.

[7] The plaintiffs also claim that the town had control over the property such that it gave rise to a legal duty because it ordered the Bakers to remediate the problem caused by the sinkhole and issued a building permit for the property and a certificate of occupancy more than thirty-five years earlier. We disagree. As the trial court correctly observed, if the town was entitled to municipal immunity, it would owe no duty of care to the plaintiffs. Thus, in light of our conclusion that any duty the town might have owed to the plaintiffs was discretionary, it cannot be held liable for its possibly negligent acts or omissions. Accordingly, the plaintiffs' claim has no merit.