

**X09-HHD-CV-05-4019406-S (CLD)** : **SUPERIOR COURT**  
**CCJEF, et al.** : **COMPLEX LITIGATION**  
 : **DOCKET**  
**v.** : **AT HARTFORD**  
**M. JODI RELL, et al.** : **OCTOBER 13, 2006**

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE**

The plaintiffs in this action seek to vindicate the educational rights of Connecticut school children under Article Eighth, § 1, and Article First, §§ 1 and 20, of the Connecticut Constitution. The defendants' Motion to Strike should be denied on the following grounds:

First, the defendants mischaracterize the plaintiffs' claims to suggest that the plaintiffs are asking this court to create a new constitutional right to equal educational results. The plaintiffs' claim to "suitable and substantially equal educational opportunities" does not require the creation of a new constitutional right, but rather a factual inquiry based on the well-settled fundamental right to education.

Second, Connecticut courts have routinely rejected motions to strike that would, as a matter of law, foreclose judicial inquiry into the contours of the State's constitutional educational obligation.

Third, the defendants' Memorandum in Support of Motion to Strike [hereinafter "Memorandum"] questions as a matter of law issues that require a factual inquiry and are therefore inappropriately raised on a motion to strike.

Fourth, the defendants' assertion that the plaintiffs' claims are nonjusticiable is argued in the defendants' Memorandum but not properly raised in their Motion to Strike. Moreover, contrary to the defendants' selective review of other jurisdictions, the justiciability of the plaintiffs'

claims is strongly supported by both Connecticut precedent and the overwhelming body of out-of-state cases.

For all these reasons, the defendants' Motion to Strike should be denied.

## **I. THE DEFENDANTS MISCHARACTERIZE THE PLAINTIFFS' CLAIMS**

The defendants' Memorandum is premised on a fundamental mischaracterization of the allegations set forth in the plaintiffs' Complaint. The defendants ask this court to disregard the plaintiffs' actual claims and instead to rely upon the defendants' unsubstantiated interpretation of what the plaintiffs really meant. (See, e.g., Defs.' Mem. Supp. Mot. Strike 3 ("While the plaintiffs couch their claims . . . they are in fact claiming . . . .")) The Complaint, in fact, claims that the State violated the plaintiffs' constitutional rights under Article Eighth, § 1, and Article First, §§ 1 and 20, by failing to provide "suitable and substantially equal educational opportunities." (Complaint ¶¶ 160, 163, 166, 170.) The defendants acknowledge this language, then dismiss it as "jargon," substituting their own mischaracterizations in place of plaintiffs' actual claims. (Defs.' Mem. Supp. Mot. Strike 2-3.) The defendants ignore the many allegations throughout the Complaint, in which the plaintiffs repeatedly emphasize that they seek to vindicate their constitutionally protected right to "educational opportunities." (Id. ¶¶ 1, 4, 31, 39, 44-47, 49-51, 53-55, 57, 59, 61, 63, 65-66, 68, 75-80, 82-85, 89, 91-92, 98-100, 106-08, 111-13, 115-17, 135, 140, 142, 147-49, 152, 154-55, 160, 163, 166, 170.)

The defendants instead ask the court to accept the fiction that in pleading "opportunities," the plaintiffs actually mean "results." (Defs.' Mem. Supp. Mot. Strike 3 ("[P]laintiffs ask this court to hold that the Connecticut Constitution guarantees that each student will attain the same results or level of achievement.")) The plaintiffs' Complaint never makes such a claim. In fact, in the places where the Complaint references educational "outcomes," or results, it clearly states that

this information is simply one form of evidence (among many possible forms) of the State's failure to provide "suitable and substantially equal educational opportunities"—not a component of the constitutional duty itself. See Complaint ¶¶ 81-114; infra Part III.

The only authority the defendants cite for this creative reading are paragraphs 44 and 112 in the Complaint, (Defs.' Mem. Supp. Mot. Strike 3), which, like the Complaint as a whole, illustrate that the plaintiffs understand the State's constitutional duty as providing "suitable and substantially equal educational opportunities."

A straightforward reading of the Complaint confirms that the plaintiffs seek to vindicate their existing constitutional right to suitable and substantially equal educational opportunities, not "substantially equal' results." (Defs.' Mem. Supp. Mot. Strike 3.) Given that pleadings should be read in a "broad, flexible, and permissive" manner, Macomber v. Travelers Prop. & Cas. Corp., 261 Conn. 620, 629 (2002), with facts read "in the manner most favorable to sustaining its legal sufficiency," Rizzuto v. Davidson Ladders, Inc., No. 17310, 2006 WL 2727220, at \*2 (Conn. Oct. 3, 2006) (pending publication, copy attached, Exhibit A), the plaintiffs' claims should be construed as they were pled—as a right to suitable and substantially equal educational opportunities. See also Comm'r of Labor v. C.J.M. Servs., Inc., 268 Conn. 283, 292-93 (2004) ("[P]leadings must be construed broadly and realistically, rather than narrowly and technically . . .") (citations and internal quotation marks omitted); Parsons v. United Techs. Corp., 243 Conn. 66, 83 (1997) ("[T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded . . .") (citations and internal quotation marks omitted).

## **II. THE PLAINTIFFS' CLAIMS DO NOT REQUIRE THE CREATION OF A NEW CONSTITUTIONAL RIGHT**

The allegations set forth in the plaintiffs' Complaint do not require the creation of a new constitutional right. When construed as pled, the plaintiffs' claims to "suitable and substantially equal educational opportunities" require nothing more than a fact-based inquiry into the well-established fundamental right to education in Connecticut.

The defendants acknowledge that the right to education is fundamental, and creates an affirmative duty for the State. (Defs.' Mem. Supp. Mot. Strike 7.) Further, Connecticut history and precedent establish that the fundamental right to education is not devoid of substance, but includes the guarantee of proper, or "suitable," educational opportunities for all Connecticut children. At most, the plaintiffs' constitutional claims require further explication of the firmly established and fundamental right to education. The defendants' assertion that Article Eighth, § 1, has no substance or meaning beyond a guarantee of equal resources is without foundation in Connecticut, and cuts against the well-reasoned logic of not only the Connecticut Supreme Court but also every other state court to address the issue.

Therefore, this court should follow the decisions of other Connecticut trial courts that have denied motions to strike when plaintiffs have advanced claims based on the fundamental right found in Article Eighth, § 1.

### **A. The Connecticut Constitution Establishes Both a Fundamental Right to Education and an Affirmative Obligation Upon the State to Secure that Right**

It is undisputed that "in Connecticut, elementary and secondary education is a fundamental right." See Horton v. Meskill (Horton I), 172 Conn. 615, 648 (1977); see also Defs.' Mem. Supp. Mot. Strike 10. Since Horton I, Connecticut courts have reaffirmed the fundamental

nature of that right. See, e.g., Sheff v. O'Neill, 238 Conn. 1, 21 (1996) (“Our Connecticut constitution . . . contains a fundamental right to education...”); New Haven v. State Bd. of Educ., 228 Conn. 699, 707 (1994) (“[T]he state constitutional guarantee of free elementary and secondary education establishes a fundamental right.”).

It is also undisputed that the fundamental right to education in Connecticut imposes an affirmative duty upon the State. Sheff, 238 Conn. at 20 (“[The state] does have an affirmative constitutional obligation with respect to public elementary and secondary education.”). As the defendants concede, the State’s affirmative duty with regard to education stands apart from other constitutional duties of the State. Defs.’ Mem. Supp. Mot. Strike 7; see also Moore v. Ganim, 233 Conn. 557, 595-96 (1995) (“[Article Eighth, § 1] and its counterparts . . . are the only constitutional provisions . . . that impose affirmative obligations on the part of the state to expend public funds to afford benefits to its citizenry.”). The defendants’ discussion of Moore and Savage v. Aronson, 214 Conn. 256 (1990), is inapposite. (Defs.’ Mem. Supp. Mot. Strike 5-8.) While the court in those cases may have been “hesitant to read into the constitution affirmative government obligations,” (id. at 6 (quoting Moore, 233 Conn. at 595)), a judicial inquiry into the realm of education necessarily begins with the assumption of an affirmative duty. (See Defs.’ Mem. Supp. Mot. Strike 7-8 (explaining the right to education has “no analog with respect to housing,” nor any other area).)

The defendants, while acknowledging the fundamental nature of the right to education, nevertheless suggest that the State’s duty extends only to “remove nongovernmentally imposed impediments.” (Defs.’ Mem. Supp. Mot. Strike 10.) But in Sheff, the Court rejected such a narrow reading, holding instead that with regard to education, even “inaction . . . may give rise to liability.” Sheff, 238 Conn. at 19 n.25; see also id. at 17 (“The affirmative constitutional

obligation that we recognized in Horton I and Horton III, and reaffirmed recently in Moore v. Ganim...was not premised on a showing that the legislature played an active role in creating the inequalities that the constitution requires it to redress.”).

### **B. Article Eighth, § 1, Guarantees a Suitable Level of Educational Opportunities**

As early as the seventeenth century, Connecticut acknowledged a substantive right to education that encompasses more than just equal levels of funding. As the court in Horton I noted, “Connecticut has for centuries recognized it as her right and duty to provide for the proper education of the young.” Horton I, 172 Conn. at 647 (citing State v. Huntington Sch. Comm., 82 Conn. 563, 566 (1909)). Even “as early as 1650 . . . the General Assembly . . . adopted a provision that . . . ‘shall sett vp a Grammer Schoole, the masters thereof being able to instruct youths so farr as they may bee fitted for the Vniversity.’” Id. (citing 1 Col. Rec. 555).<sup>1</sup>

The defendants’ contention that the legislative history of Article Eighth, § 1, reflects simply a desire to “enshrine a right to free public schools” (Defs.’ Mem. Supp. Mot. Strike 7 n.6) misreads the repeated emphasis on giving “[c]onstitutional sanctity” to Connecticut’s tradition of “good education.” 3 Proc. Conn. Const. Convention 1039 (1965) (statement of Del. Bernstein). The substantive goals of the 1650 Ludlow Code, on which the Horton I Court relied, also informed the drafters of Article Eighth, § 1. The principal drafter of Connecticut’s education clause stated that the goal was to constitutionalize the existing State duty to provide a substantive level of educational opportunities:

I . . . was surprised to find that Connecticut with its traditional good education had no reference to it in the Constitution. When I use the word “good education” I am quoting, because if I may I would like to quote from the Connecticut code of 1650 which others I believe call the Ludlow Code. Quote “a good education of children is a singular of behoove and benefit to any Commonwealth” so we do have the

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<sup>1</sup> In general, Connecticut courts have a long history of finding a common law right to education. See, e.g., State v. Hine, 59 Conn. 50, 60 (1890).

tradition which goes back to our earliest days of free good public education and we have had good public schools so that this again is not anything revolutionary, it is something which we have, it is which is practically all Constitutions in the States of our nation and Connecticut with its great tradition certainly ought to honor this principle.

Id. at 1039-40. As recently as Moore v. Ganim, a decision the defendants argue is “instructive on the issue of constitutional analysis generally,” (Defs.’ Mem. Supp. Mot. Strike 5), the Court credited Horton I’s reliance on Connecticut’s well-established history of commitment to proper education in informing Article Eighth, § 1. Moore, 233 Conn. at 609.

Nothing in Horton I contradicts the long-standing acknowledgement of a substantive right to education in Connecticut. The defendants misinterpret Horton I to suggest that the constitutional right to education includes only the right to equal funding. This would by implication allow any state educational funding scheme, no matter how insufficient, to be deemed constitutional as long as it avoided inter-district funding disparities. The defendants’ reading suggests that in granting the particular relief requested by the plaintiffs in Horton I, the Court was making a final judgment on the scope of Connecticut’s constitutional obligation. (See Defs.’ Mem. Supp. Mot. Strike 5 (“The Horton cases . . . were, of course, about equalizing the resources available to public school districts.”).) Instead, Horton I, in mandating the reasonably equalized funding that plaintiffs requested, acknowledged that Article Eighth, § 1, includes a substantive level of educational opportunity. Further, the Court referred to General Statutes § 10-4a to define that level as suitable. 172 Conn. at 647 (“The General Assembly has by word, if not by deed, recognized in the enactment of § 10-4a of the General Statutes . . . that it is the concern of the state that ‘each child shall have . . . equal opportunity to receive a suitable program of educational experiences.’” (emphasis added)).

Indeed, a number of Connecticut Supreme Court Justices have declared that Article Eighth, § 1, does indeed include a substantive or qualitative component. Justice Berdon concluded in his concurrence in Sheff that “the education guaranteed in the state constitution must be, at the very least, within the context of its contemporary meaning, an adequate education.” 238 Conn. at 50 (Berdon, J., concurring). Justice Borden, dissenting in Sheff, explained that he could also find “persuasive” a well-pleaded claim that gauged educational opportunity based on factors almost identical to those invoked by plaintiffs in this case. 238 Conn. at 137; see also infra Part III. Justice Loiselle, while disagreeing with the majority’s choice of remedy in Horton I, acknowledged that Article Eighth, § 1, might be violated if the State’s education system was not providing a “meaningful” education as defined by education experts. 172 Conn. at 378-79 (Loiselle, J., dissenting) (“I will concede that when the constitution says free education it must be interpreted in a reasonable way. A town may not herd children in an open field to hear lectures by illiterates. But there is no contention that such situations exist, or that education in Connecticut is not meaningful or does not measure up to standards accepted by knowledgeable leaders in the field of education.”) (emphasis added).

This well-established understanding of the substantive component to the educational right is not, as the defendants suggest, affected by the court’s ruling in Broadley v. Bd. of Educ., 229 Conn. 1 (1994). Broadley, decided two years prior to Sheff, made no conclusion about the contours of the fundamental right to education in Connecticut. In contrast to the plaintiffs here, the plaintiff in Broadley never raised the claim that the Constitution, standing alone, afforded him relief. See id. at 6. Although the plaintiff claimed an entitlement “to receive a program of education specially designed to meet his individual needs as a gifted child” (Defs.’ Mem. Supp. Mot. Strike 9 (quoting Broadley at 4)), the plaintiff’s “constitutional claim [was] based upon the



statutes that establish a program of special education for certain Connecticut schoolchildren.” Broadley, 229 Conn. at 4. Therefore, the court's narrow ruling in Broadley turned not on constitutional inquiry, but on statutory construction. Id. at 6 (“We reject the plaintiff’s argument because it is contrary to the intent and purpose of the statutory scheme.”).

**C. Courts Outside Connecticut Have Uniformly Interpreted The Education Clauses in their State Constitutions to Include a Substantive Component to the Right to Education**

To adopt the defendants’ position that, as a matter of law, Connecticut’s constitutional education clause has no substance beyond a guarantee of equal funds, would not only contradict Connecticut history and precedent, but also place Connecticut at variance with every other state court that has addressed the issue. As the defendants argue, the findings of other jurisdictions may “provide important guidance in this case.” (Defs.’ Mem. Supp. Mot. Strike 12.)

The defendants imply that out-of-state case law weighs against finding a substantive component to education. (Defs.’ Mem. Supp. Mot. Strike 15 (“Much relevant law from sister jurisdictions . . . establishes that . . . state constitutions do not enshrine a right to adequate or suitable education.”).) Yet the sole case cited by defendants in support of this claim, McDaniel v. Thomas, 248 Ga. 632 (1981), actually supports the opposite conclusion. The McDaniel court held that the state constitution explicitly guarantees and adequate education. McDaniel, 248 Ga. at 643-44; see also Consortium for Adequate Sch. Funding in Ga., Inc. v. State, No. 04-91004, slip op. at 8 (Sup. Ga. Oct. 28, 2005) (unpublished opinion, copy attached, Exhibit B) (“[T]he [Georgia] Supreme Court clearly determined that a state duty to provide an adequate education existed.”). The court ultimately rejected the plaintiffs’ claims not because they lacked a cognizable right, but because they failed to present sufficient “evidence to show that existing

state funding for public education deprives students in any particular school district of basic educational opportunities.” McDaniel, 248 Ga. at 644.

At least twenty-five state courts have heard and ruled on “education adequacy” claims.<sup>2</sup> The plaintiffs are unaware of any state supreme court that has held its state constitutional education clause does not contain a substantive or qualitative element. The three states whose constitutional education clauses most closely resemble Connecticut’s—New York, South Carolina, and Oklahoma—have all acknowledged a substantive or qualitative component to the right to education. New York has held that its education clause, N.Y. Const. art. IX, § 1 (mandating “the maintenance and support of a system of free common schools”), requires the provision of a “sound basic education.” Board. of Educ. v. Nyquist, 57 N.Y.2d 27, 48 (1982). This standard was subsequently interpreted to mean that “minimally adequate” educational inputs are constitutionally required. Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 317 (1995). Similarly, the South Carolina Supreme Court has held that a “minimally adequate” education is required by Article XI, § 3, of its constitution, which mandated that: “The General Assembly shall provide for the maintenance and support of a system of free public schools.” Abbeville Sch. Dist. v. State, 335 S.C. 58, 67 (1999). In the process, the court reversed the trial court’s ruling that “the clause contains no qualitative component.” Id. The Oklahoma Supreme

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<sup>2</sup> Ex parte James, 836 So.2d 813 (Ala. 2002); Lake View Sch. Dist. No. 25 v. Huckabee, 351 Ark. 31 (2002); Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So.2d 400 (Fla. 1996); McDaniel v. Thomas, 248 Ga. 632 (1981); Idaho Schs. for Equal Educ. Opportunity v. Evans, 123 Idaho 573 (1993); Lewis v. Spagnolo, 186 Ill.2d 198 (1999); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Bradford v. Md. Board of Educ., No. 94340058/CE189672, slip op. (Cir. Ct. Baltimore City Oct. 18, 1996) (unpublished opinion, copy attached, Exhibit C); Hancock v. Comm’r of Educ., 443 Mass. 428 (2005); Columbia Falls Elem. Sch. Dist. No. 6 v. State, 326 Mont. 304 (2005); Gould v. Orr, 244 Neb. 163 (1993); Claremont Sch. Dist. v. Governor, 138 N.H. 183 (1993); Abbott v. Burke, 149 N.J. 145 (1997); Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307 (1995); Leandro v. State, 346 N.C. 336 (1997); DeRolph v. State, 78 Ohio St.3d 193 (1997); Fair Sch. Finance Council of Okla., Inc. v. State, 746 P.2d 1135 (Okla. 1987); Marrero v. Commonwealth, 559 Pa. 14 (1999); City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995); Abbeville Sch. Dist. v. State, 335 S.C. 58 (1999); West Orange-Cove Consol. Indep. Sch. Dist. v. Neely, 49 Tex. Sup. Ct. J. 119 (2005); Seattle Sch. Dist. No. 1 v. State, 90 Wash.2d 476 (1978); Pauley v. Kelly, 162 W.Va. 672 (1979); Vincent v. Voight, 236 Wis.2d 588 (2000); Campbell Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995). In five of these states the court did not reach a decision on the merits for reasons of justiciability, see, infra, Part IV, n.3.

Court has interpreted its education clause, which states that “[t]he Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated,” Okla. Const. art. XIII, § 1, to require a “basic, adequate education.” Fair Sch. Fin. Council of Okla., Inc. v. State, 746 P.2d 1135, 1149 (Okla. 1987) (ruling for defendants on other grounds).

Connecticut history and precedent, as well as the vast majority of out of state cases, strongly support the plaintiffs’ claim that Connecticut’s constitutional guarantee in Article Eighth, § 1, includes a substantive component. A ruling to the contrary would place Connecticut well outside the mainstream among states that have addressed this legal standard.

**D. Claims Necessitating Further Explication of the Fundamental Right to Education Should Not Be Defeated by a Motion to Strike**

The plaintiffs’ contend that history and precedent firmly establish a substantive right to a suitable level of education in Connecticut. Even if the substantive component of Connecticut’s right to education were not firmly established, the defendants’ Motion to Strike should be denied. No courts in Connecticut has ever ruled as a matter of law that a claim under Article Eighth was not cognizable, nor have the defendants cited a single case to support that proposition. Rather, Connecticut courts have uniformly rejected motions to strike that would, as a matter of law, foreclose judicial inquiry into the contours of the State’s affirmative obligation with respect to education. See, e.g., Sheff v. O’Neill, No. 360977, 1990 WL 284341, at \*5 (Conn. Super. Ct. June 18, 1990) (order denying the defendants’ motion to strike) (“[D]efendants’ argument, in effect, would have the court, at this stage of the case, rule as a matter of law that article eighth, § 1 requires only ‘free education’ and that ‘appropriate’ legislation is [that] ‘. . . which makes education free.’”) (unpublished opinion, copy attached, Exhibit D).

The trial court’s rejection of the State’s motion to strike in Sheff reflected a well-reasoned

belief that the parameters of the State's educational duty must be determined through a fact-based inquiry. Sheff, 1990 WL 284341, at \*5 ("At this stage of the proceedings, the sole question for the court is 'whether the allegations entitle them to make good on their claim that they are being denied [their constitutional rights].'" (citing Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960)). The trial court in Sheff found that the need to examine the facts was particularly important when plaintiffs raise constitutional claims affecting the public interest. Id. at \*6 ("The statutes and rules governing declaratory judgments were not intended to permit the court 'to prejudge matters which might become material in determining the propriety or justice of the relief sought,' and this is particularly true where constitutional claims affecting the public interest are raised.") (citation omitted).

The trial court in Broadley also denied the defendants' motion to strike. While acknowledging that there was "no Connecticut case law in point," Broadley v. Meriden Bd. of Educ., No. 273507, 1990 WL 269168, at \*1 (Conn. Super. Ct. July 20, 1990) (unpublished opinion, copy attached, Exhibit E), the court concluded that the plaintiffs should be afforded an opportunity to present facts in support of their claim, since there had not been a judicial determination foreclosing the legal sufficiency of plaintiffs' claim. Id. ("This court cannot conclude, as a matter of law, that the plaintiffs state no valid cause of action on the face of their complaint.").

The trial courts' approach in Sheff and Broadley strongly suggests that, even if this court were to find that none of the judicial pronouncements on the right to education support the plaintiffs' claims, those claims should still be allowed to proceed.

### **III. THE DEFENDANTS ATTEMPT TO ARGUE QUESTIONS OF FACT IN A MOTION TO STRIKE**

The defendants' Memorandum is premised on at least two disputable factual assertions that are improperly raised on a motion to strike.

First, the defendants' dispute about the definition of educational "inputs" and "outputs" does not go to the legal sufficiency of the plaintiffs' claims. (Defs.' Mem. Supp. Mot. Strike 3 n.3.) Just as in the Horton and Sheff litigation, the assessment of whether the State is failing to provide "suitable and substantially equal educational opportunities" will necessarily involve a highly fact-based inquiry. See Sheff, 1990 WL 284341, at \*5 ("The question of whether or not the state's action or failure to act rises to the level of a constitutional violation goes to the merits of this action . . ."). To aid in this inquiry, the Court in Horton I credited the trials court's identification of a set of factual criteria it viewed as important to evaluating whether the State was meeting its constitutional duty. Horton I, 172 Conn. at 634 ("The criteria for evaluating the 'quality of education' in a town include the following: (a) size of classes; (b) training, experience and background of teaching staff; (c) materials, books and supplies; (d) school philosophy and objectives; (e) type of local control; (f) test scores as measured against ability; (g) degree of motivation and application of the students; (h) course offerings and extracurricular activities."). Based on these criteria, as well as the judgment of educational experts and the State itself, (see Complaint ¶¶ 66-74), the plaintiffs have identified a set of factual indicators relevant to the constitutional inquiry in this case.

Recognizing that the constitutional duty to provide education in Connecticut is to the student, Horton v. Meskill, 187 Conn. 187, 195 (1982) ("The state's duty to provide education is owed to the students, not the municipalities"), the plaintiffs distinguish between those elements that reach the student as educational "inputs" and those elements that are "outputs" of the

educational process. (See Complaint ¶¶ 53, 84-114.) According to the plaintiffs' Complaint, inputs are the educational resources the State provides to the child, including the resources necessary to create a classroom environment where children have opportunities to learn. Outputs are a set of data points that offer evidence about whether the State is meeting its constitutional obligation to provide suitable and substantially equal educational opportunities to Connecticut school children.

The defendants misread Justice Borden's dissent in Sheff as contrary to the plaintiffs' Complaint. (Defs.' Mem. Supp. Mot. Strike 3 n.3 ("Justice Borden's dissent in Sheff . . . consider[s] items such as textbooks, teacher qualification, school supplies, facilities and the like as educational outputs, not inputs . . .").) However, Justice Borden distinguished relevant criteria like "plants and facilities; equipment, supplies, textbooks and libraries; course offerings and curriculum; teaching and professional staff; bilingual education programs; and special needs programs" from what he cited as "outcomes," namely "state mastery test scores, state remedial goals, scholastic aptitude test (SAT) scores and college attendance rates." Sheff, 238 Conn. at 137 (Borden, J., dissenting). This delineation closely tracks the plaintiffs' categorization of the relevant evidence in this case. In addition, Justice Borden credited that all these factors "might well be persuasive" in measuring the "relative quality of educational opportunities" if parties presented appropriate facts. Id.

The plaintiffs nowhere suggest that the constitutional right to education is itself tied to a particular level of results, only that the results (i.e., outputs) flowing from Connecticut's classrooms may provide probative evidence as to the opportunities (i.e., inputs) provided. (See, e.g., Complaint pt. IV ("The State's Failure to Provide Suitable and Substantially Equal Educational Opportunities as Evidenced by Education Outputs").) Where outcomes are woefully

inadequate and unequal, it may raise a presumption that education opportunities were insufficient or disparate. If the defendants seek to dispute this point, the proper place to do so is at trial, where each party will be able to present evidence, including expert testimony, to support its claims.

The defendants raise a second disputable factual issue by challenging whether increased expenditures will improve educational results. (Defs.' Mem. Supp. Mot. Strike. 3 (referring to the correlation between spending and educational achievement as "highly dubious").) Notwithstanding the fact that the plaintiffs argue for increased expenditures only to the extent that they improve educational opportunities, and the fact that the Horton I Court already found that "many of the elements of a quality education require higher per pupil operating expenditures," 172 Conn. at 635, the question of whether spending will improve educational opportunities is itself a factual one, which the parties must proceed to trial to fairly resolve. See Faulkner v. United Techs. Corp., 240 Conn. 576, 588 (1997) ("A motion to strike . . . does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings.") (citations and internal quotation marks omitted).

#### **IV. THE ISSUE OF JUSTICIABILITY IS CONCLUSIVELY RESOLVED IN CONNECTICUT AND SUPPORTED BY CASE LAW IN OTHER JURISDICTIONS**

Although the defendants did not raise the issue of justiciability in their Motion to Strike, they argue in their Memorandum that the plaintiffs' claims in the present case may be nonjusticiable. (Defs.' Mem. Supp. Mot. Strike 12-15.) According to the Connecticut Practice Book, § 10-42, the purpose of a memorandum in support of a motion to strike is to "cit[e] the legal authorities upon which the motion lies." New legal issues that were omitted in the motion

to strike itself should not be allowed in the memorandum in support of that motion. Furthermore, as the defendants suggest (Defs.' Mem. Supp. Mot. Strike 14, n.8), a motion to strike is arguably an improper procedural mechanism by which to raise the issue of justiciability. Therefore, defendants' justiciability argument should not be credited.

Nonetheless, the plaintiffs feel obliged to respond to the defendants' argument, particularly since the defendants failed to discuss of Connecticut case law on justiciability and omitted numerous out-of-state decisions contrary to the defendants' position.

In Horton I, the Court emphasized that when reviewing actions taken by the legislature to meet constitutional obligations to school children, "[i]t is emphatically the province and duty of the judicial department to say what the law is." 172 Conn. at 650-51 (quoting United States v. Nixon, 418 U.S. 683, 703 (1974)). Subsequent Connecticut Supreme Court decisions have universally reaffirmed the appropriateness of exercising judicial authority to ensure legislative statutes in the area of education meet constitutional requirements. See, e.g., Nielsen v. State, 236 Conn. 1, 9-10 (1996) (distinguishing justiciable cases such as Horton I from those that are nonjusticiable, based on the language of Article Eighth, § 1); Pellegrino v. O'Neill, 193 Conn. 670, 683 (1984) (noting that Horton I was "clearly [a case] where a judicial remedy could have been applied"). The strongest language for this proposition is found in Sheff, where the Court emphasized that "[j]ust as the legislature has a constitutional duty to fulfill its affirmative obligation to the children who attend the state's public elementary and secondary schools, so the judiciary has a constitutional duty to review whether the legislature has fulfilled its obligation." 238 Conn. at 15.



Moreover, only five states have determined that constitutional challenges to the adequacy of public school financing systems are nonjusticiable.<sup>3</sup> The defendants cite cases from four of these states (Florida, Rhode Island, Alabama, and Pennsylvania). (Defs.’ Mem. Supp. Mot. Strike 12-15.) A fifth case cited by the defendants, (Defs.’ Mem. Supp. Mot. Strike 15, citing McDaniel v. Thomas, 248 Ga. 632 (1981)), in fact explicitly rejected the argument that “‘the question of how public education can best be funded is nonjusticiable’ and is ‘more suitably handled by other branches of government.’”<sup>4</sup> McDaniel, 248 Ga. at 633. Moreover, the defendants’ discussion on “relevant law from sister jurisdictions” (Defs.’ Mem. Supp. Mot. Strike 15) omits at least sixteen states where courts have found claims of educational adequacy justiciable.<sup>5</sup> McDaniel is instructive as to the national trend on the issue of justiciability:

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<sup>3</sup> Ex parte James, 836 So.2d 813 (Ala. 2002); Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So.2d 400 (Fla. 1996); Comm. for Educ. Rights v. Edgar, 174 Ill.2d 1 (1996); Lewis v. Spagnolo, 186 Ill.2d 198 (1999); Marrero v. Commonwealth, 559 Pa. 14 (1999); City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995).

<sup>4</sup> Indeed, the defendants’ suggestion that the McDaniel Court rejects the plaintiffs’ adequacy claims because of “the lack of judicially manageable standards” or because “the area was one of legislative responsibility” (Defs.’ Mem. Supp. Mot. Strike 15) completely misses the mark. As the Superior Court of Fulton County explains in Consortium for Adequate Sch. Funding in Ga., Inc. v. State, despite these factors, “the Supreme Court [in McDaniel] clearly determined that a state duty to provide an adequate education existed.” No. 04-91004, slip op. at 8 (Sup. Ga. Oct 28, 2005) (unpublished opinion, copy attached, Exhibit D). Of additional relevance to the defendants’ present Motion, Fulton County court also noted that McDaniel supports the conclusion that “the question of whether the state has met its constitutional mandate to provide an adequate education is a factual issue to be decided on an evidentiary record.” Id.

<sup>5</sup> See West Orange-Cove Consol. ISD, 176 S.W.3d at 780-81 & n.183. (finding that the judiciary was not precluded “from determining whether the Legislature has met its constitutional obligation to the people to provide for public education”). See also Lake View Sch. Dist. No. 25 v. Huckabee, 351 Ark. 31, 54 (2002) (“[T]his Court’s refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education.”); Idaho Schs. for Equal Educ. Opportunity v. Evans, 123 Idaho 573, 583 (1993) (“[W]e decline to accept the respondents’ argument that the other branches of government be allowed to interpret the constitution for us. That would be an abject abdication of our role in the American system of government.”); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 213-14 (Ky. 1989) (“To avoid deciding the case because of ‘legislative discretion,’ ‘legislative function,’ etc., would be a denigration of our own constitutional duty. To allow the General Assembly . . . to decide whether its actions are constitutional is literally unthinkable.”); McDuffy v. Sec’y of the Executive Office of Educ., 415 Mass. 545, 611 (1993) (citing Marbury v. Madison for proposition that courts “have the duty . . . to adjudicate a claim that a law and the actions undertaken pursuant to that law conflict with [or fall short of] the requirements of the Constitution. ‘This,’ in the words of Mr. Chief Justice Marshall, ‘is of the very essence of judicial duty.’”) (internal citation omitted); Columbia Falls Elem. Sch. Dist. No. 6 v. State, 326 Mont. 304, 310 (2005) (rejecting Baker v. Carr-based political question argument and concluding that, “[a]s the final guardian and protector of the right to education, it is incumbent upon the court to assure that the system enacted by the Legislature enforces, protects and fulfills the right [to education].”); Claremont Sch. Dist. v. Governor, 138 N.H. 183, 192 (1993) (concluding that constitutional right to adequate education is justiciable and

[An argument for non-justiciability] in our view, misperceives the nature of this dispute. . . . We have been asked to determine whether the existing method of financing public education in this state meets constitutional requirements. Judicial review of legislative enactments is central to our system of constitutional government and deeply rooted in our history. A substantial number of courts have been called upon to decide issues similar to those presented in this case and have not found the difficulties associated therewith to be insurmountable.

248 Ga. at 633 (citations and internal quotations marks omitted). In contrast to the incomplete snapshot of the legal landscape provided by the defendants, the case law of Connecticut and the overwhelming majority of other jurisdictions make it clear that the present case is justiciable.

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that “any citizen” has standing to “enforce the State’s duty” to fulfill this right); Abbott v. Burke, 149 N.J. 145, 168 (1997) (holding that, while deference should be given to legislative content and performance standards, it is still the court’s duty to ensure that these standards, “together with funding measures, comport[ ] with the constitutional guarantee of a thorough and efficient education for all New Jersey school children.”); Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 323 (1995) (“We conclude that a duty [to provide a sound, basic education] exists and that we are responsible for adjudicating the nature of that duty.”); Leandro v. State, 346 N.C. 336, 345 (1997) (rejecting “political question” argument and stating that “[w]hen a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits . . . . Therefore, it is the duty of this Court to address plaintiff-parties’ constitutional challenge to the state’s public education system.”); DeRolph v. State, 78 Ohio St.3d 193, 198 (1997) (holding school finance unconstitutional and stating, “[w]e will not dodge our responsibility by asserting this case involves a nonjusticiable political question . . . and [ ] pass our responsibilities into the lap of the General Assembly.”); Abbeville County Sch. Dist. v. State, 335 S.C. 58, 67 (1999) (holding that because “[i]t is the duty of this Court to interpret and declare the meaning of the Constitution,” the trial court should not have “us[ed] judicial restraint, separation of powers, and the political question doctrine as the bases for declining to decide the meaning of the education clause”); Seattle Sch. Dist. No. 1 v. State, 90 Wash. 2d 476, 496-502 (1978) (stating that a finding of nonjusticiability would be “illogical”); Pauley v. Kelly, 162 W.Va. 672, 690-91 (1979) (after reviewing decisions from other jurisdictions, noting the deference courts give to legislatively promulgated education policies but stating that “these jurisdictions have not hesitated to examine legislative performance of the [constitutional] mandate, and we think properly so, even as they recite that courts are not concerned with the wisdom or policy of the legislation”); Vincent v. Voight, 236 Wis. 2d 588, 590 n.2 (2000) (after noting that Baker v. Carr holds that “a court must decide on a case-by-case inquiry whether a so-called political issue is justiciable,” concluding that “the [school finance] issues presented to us in this case are appropriate for decision by this court in the exercise of our constitutional role”); Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1264 (Wyo. 1995) (rejecting separation of powers argument and stating that “[a]lthough this Court has said the judiciary will not encroach into the legislative field of policy making, as the final authority on constitutional questions the judiciary has the constitutional duty to declare unconstitutional that which transgresses the state constitution.”).

## CONCLUSION

For all the foregoing reasons, and such further reasons as may appear at argument on the matter, the plaintiffs respectfully urge this court to deny the defendants' Motion to Strike.

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**CERTIFICATION**

I hereby certify that a true and accurate copy of the foregoing was mailed, first class postage prepaid, this 13<sup>th</sup> day of October, 2006 to:

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Robert A. Solomon

## **Exhibit A**

**Rizzuto v. Davidson Ladders, Inc., No. 17310,**  
**2006 WL 2727220, \*2 (Conn. Oct. 3, 2006).**

## C

Supreme Court of Connecticut.  
 Leandro RIZZUTO  
 v.  
 DAVIDSON LADDERS, INC., et al.  
 No. 17310.

Argued Dec. 2, 2005.  
 Decided Oct. 3, 2006.

**Background:** Store patron who climbed a ladder while shopping at home improvement store and was injured when the ladder suddenly collapsed brought product liability action against ladder manufacturer and store and also brought claim for intentional spoliation of evidence and claim under Connecticut Unfair Trade Practices Act (CUTPA). The Superior Court, Judicial District of Fairfield, [Doherty, J.](#), rendered judgment in favor of the manufacturer and store, and patron appealed.

**Holdings:** The Supreme Court, [Borden, J.](#), held that:

- (1) patron stated claim for intentional spoliation of evidence;
  - (2) the law recognizes an independent cause of action for intentional spoliation of evidence; and
  - (3) to restore a victim of intentional spoliation of evidence to position he would have been in if the spoliation had not occurred, the plaintiff is entitled to recover the full amount of compensatory damages.
- Affirmed in part; reversed in part and remanded with direction.

[Palmer, J.](#), filed concurring opinion.

[Sullivan, C.J.](#), filed dissenting opinion.

West Headnotes

**[1] Appeal and Error**  **863**  
[30k863 Most Cited Cases](#)

A motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, and as a result, appellate court's review of the trial court's ruling is plenary.

**[2] Appeal and Error**  **919**  
[30k919 Most Cited Cases](#)

When reviewing trial court's grant of motion to strike, appellate courts take the facts to be those alleged in

the complaint that has been stricken and construe the complaint in the manner most favorable to sustaining its legal sufficiency.

**[3] Pleading**  **354**  
[302k354 Most Cited Cases](#)

If facts provable in complaint would support a cause of action, motion to strike must be denied.

**[4] Torts**  **304**  
[379k304 Most Cited Cases](#)

Disruption of a party's case is a critical element of the intentional spoliation of evidence tort.

**[5] Pleading**  **354**  
[302k354 Most Cited Cases](#)

**[5] Torts**  **313**  
[379k313 Most Cited Cases](#)

Whether destruction of ladder would have hindered patron's ability to prevail on his design defect or inadequate warnings claims against ladder manufacturer and store for injuries patron sustained when he climbed ladder in store and was injured when ladder suddenly collapsed was a factual question that could not be resolved on store's and manufacturer's motion to strike, and thus, it was sufficient, at this stage of the proceedings, that patron's complaint alleged that spoliated ladder was "critical evidence" in proof of his product liability claims against manufacturer and store, and therefore patron's complaint sufficiently stated a claim for intentional spoliation of evidence.

**[6] Torts**  **304**  
[379k304 Most Cited Cases](#)

Spoliation of evidence plaintiff is not required to pursue a futile lawsuit to establish a causal nexus between a defendant's alleged spoliation of evidence and the failure of the underlying action.

**[7] Torts**  **306**  
[379k306 Most Cited Cases](#)

Patron's withdrawal of his product liability action against ladder manufacturer and home improvement store for injuries he sustained when he climbed ladder while shopping at store and was injured when ladder suddenly collapsed did not render patron's intentional spoliation of evidence claim against manufacturer and store for destroying ladder legally

(Cite as: 280 Conn. 225, 905 A.2d 1165)

insufficient; patron vigorously pursued both his product liability claim and his intentional spoliation of evidence claim in the same litigation, and he only withdrew his product liability claim after trial court granted store's and manufacturer's motion to strike spoliation claim, and destruction of the ladder, combined with court's grant of motion to strike, left patron with no ability to present evidence to sustain product liability claim.

**[8] Torts**  **304**

[379k304 Most Cited Cases](#)

The tort of intentional spoliation of evidence is necessary to compensate the victims of spoliation and to deter future spoliation when a first party defendant destroys evidence intentionally with the purpose and effect of precluding a plaintiff from fulfilling his burden of production in a pending or impending case.

**[9] Torts**  **306**

[379k306 Most Cited Cases](#)

Patron who climbed a ladder while shopping at home improvement store and was injured when the ladder suddenly collapsed stated claim for intentional spoliation of evidence in that patron alleged that store's and ladder manufacturer's bad faith intentional destruction of the ladder deprived him of the evidence he needed to establish a prima facie case of product liability against them.

**[10] Courts**  **1**

[106k1 Most Cited Cases](#)

**[10] Torts**  **101**

[379k101 Most Cited Cases](#)

Supreme Court has the inherent power to recognize new tort causes of action, whether or not derived from a statutory provision.

**[11] Torts**  **105**

[379k105 Most Cited Cases](#)

Fundamental policy purposes of the tort compensation system are compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct.

**[12] Torts**  **304**

[379k304 Most Cited Cases](#)

Spoliation of evidence tort protects a litigant's interest in bringing a prospective cause of action by compensating the non-spoliating litigant for uninvited interference with the prospective lawsuit resulting from destroyed evidence.

**[13] Evidence**  **78**

[157k78 Most Cited Cases](#)

To be entitled to inference that the destroyed evidence would have been unfavorable to the party that destroyed it, the victim of spoliation must prove that: (1) the spoliation was intentional, in the sense that it was purposeful, and not inadvertent; (2) the destroyed evidence was relevant to the issue or matter for which the party seeks the inference; and (3) he or she acted with due diligence with respect to the spoliated evidence.

**[14] Evidence**  **87**

[157k87 Most Cited Cases](#)

Party suffering from spoliation of evidence cannot build an underlying case on the spoliation inference alone; for an underlying claim to be actionable, the party must also possess some concrete evidence that will support the underlying claim.

**[15] Evidence**  **87**

[157k87 Most Cited Cases](#)

**[15] Judgment**  **185.3(21)**

[228k185.3\(21\) Most Cited Cases](#)

A plaintiff in a product liability action cannot rely solely on the spoliation of evidence inference to withstand a motion for summary judgment or a motion for a directed verdict; he must also have some independent concrete evidence of a product defect.

**[16] Evidence**  **85.1**

[157k85.1 Most Cited Cases](#)

Adverse inference arising from spoliation or destruction of evidence does not supply the place of evidence of material facts or shift the burden of proof.

**[17] Evidence**  **78**

[157k78 Most Cited Cases](#)

Adverse inference arising from spoliation or destruction of evidence cannot be invoked by a victim of spoliation who has been deprived of the concrete evidence necessary to establish a prima facie case.

**[18] Torts**  **304**

[379k304 Most Cited Cases](#)

Existing nontort remedies are insufficient to compensate victims of spoliation of evidence and to deter future spoliation when a first party defendant destroys evidence intentionally with the purpose and

(Cite as: 280 Conn. 225, 905 A.2d 1165)

effect of precluding a plaintiff from fulfilling his burden of production in a pending or impending case, and therefore, the law recognizes an independent cause of action for intentional spoliation of evidence in order to fulfill the public policy goals of the tort compensation system.

**[19] Torts**  **304**  
[379k304 Most Cited Cases](#)

"Intentional spoliation of evidence" is defined as the intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action.

**[20] Torts**  **304**  
[379k304 Most Cited Cases](#)

The tort of "intentional spoliation of evidence" consists of the following essential elements: (1) the defendant's knowledge of a pending or impending civil action involving the plaintiff; (2) the defendant's destruction of evidence; (3) in bad faith, that is, with intent to deprive the plaintiff of his cause of action; (4) the plaintiff's inability to establish a prima facie case without the spoliated evidence; and (5) damages.

**[21] Torts**  **304**  
[379k304 Most Cited Cases](#)

**[21] Torts**  **316**  
[379k316 Most Cited Cases](#)

To establish proximate causation in action for intentional spoliation of evidence, the plaintiff must prove that the defendants' intentional, bad faith destruction of evidence rendered the plaintiff unable to establish a prima facie case in the underlying litigation, and once the plaintiff satisfies this burden, there arises a rebuttable presumption that, but for the fact of the spoliation of evidence, the plaintiff would have recovered in the pending or potential litigation, and defendant may rebut this presumption by producing evidence showing that the plaintiff would not have prevailed in underlying action even if lost or destroyed evidence had been available; the defendant spoliator must overcome the rebuttable presumption or else be liable for damages.

**[22] Damages**  **95**  
[115k95 Most Cited Cases](#)

**[22] Damages**  **103**  
[115k103 Most Cited Cases](#)

**[22] Damages**  **117**

[115k117 Most Cited Cases](#)

Purpose of compensatory damages is to restore an injured party to the position he or she would have been in if the wrong had not been committed.


**[23] Damages**  **115**  
[115k115 Most Cited Cases](#)

To restore a victim of intentional spoliation of evidence to the position he would have been in if the spoliation had not occurred, the plaintiff is entitled to recover the full amount of compensatory damages that he would have received if the underlying action had been pursued successfully; risk of a windfall to plaintiff sufficiently is minimized by requiring plaintiff to prove that the defendant spoliated evidence intentionally with the purpose and effect of precluding plaintiff's ability to establish a prima facie case in the underlying litigation and, further, by permitting defendant to rebut the presumption of liability that arises upon this showing.

**[24] Torts**  **304**  
[379k304 Most Cited Cases](#)

Parties to a pending or impending civil action have a legal duty to retain evidence relevant to that action under the existing common law and statutory scheme, and thus, the tort of intentional spoliation of evidence does not impose a greater burden to preserve evidence than that which already exists.

**[25] Pleading**  **245(1)**  
[302k245\(1\) Most Cited Cases](#)

**[25] Pleading**  **258(1)**  
[302k258\(1\) Most Cited Cases](#)

Amendments should be made seasonably, and factors to be considered in passing on a motion to amend are the length of the delay, fairness to the opposing parties, and the negligence, if any, of the party offering the amendment.

**[26] Pleading**  **236(2)**  
[302k236\(2\) Most Cited Cases](#)

The motion to amend is addressed to the trial court's discretion which may be exercised to restrain the amendment of pleadings so far as necessary to prevent unreasonable delay of the trial.

**[27] Pleading**  **236(1)**  
[302k236\(1\) Most Cited Cases](#)

Whether to allow an amendment is a matter left to the sound discretion of the trial court.

**[28] Appeal and Error**  **959(1)**



(Cite as: 280 Conn. 225, 905 A.2d 1165)

[30k959\(1\) Most Cited Cases](#)

Appellate court will not disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion, and it is the plaintiff's burden to demonstrate that the trial court clearly abused its discretion in not allowing amendment of complaint.

[\[29\] Pleading](#)  [356](#)

[302k356 Most Cited Cases](#)

The proper procedural vehicle to challenge the legal sufficiency of a proposed pleading is a motion to strike, rather than an objection to a motion to amend. [Practice Book 1998, § 10-39](#).

[\[30\] Pleading](#)  [241](#)

[302k241 Most Cited Cases](#)

Even if a proposed pleading is alleged to be insufficient, a plaintiff should be permitted to file the amended pleading, so that the issues arising under it may be determined in proceedings properly adapted to that end.


[\[31\] Pleading](#)  [251](#)

[302k251 Most Cited Cases](#)

[\[31\] Pleading](#)  [356](#)

[302k356 Most Cited Cases](#)

Trial court abused its discretion by denying patron's request to file amended complaint on ground that the proposed Connecticut Unfair Trade Practices Act (CUTPA) claim against store and ladder manufacturer, for injuries patron sustained in fall from ladder in store, was unsupported by factual allegations; proper procedural vehicle to challenge legal sufficiency of patron's proposed amended complaint was motion to strike, rather than objection to the motion to amend, and even if proposed pleading was alleged to be insufficient, patron should have been permitted to file the amended pleading, so that the issues arising under it could be determined in proceedings properly adapted to that end. [C.G.S.A. § 42-110a](#) et seq.; [Practice Book 1998, § 10-39](#).

[\[32\] Pleading](#)  [258\(1\)](#)

[302k258\(1\) Most Cited Cases](#)

Patron, who was injured in fall from ladder in store, was not entitled to amend his complaint to add Connecticut Unfair Trade Practices Act (CUTPA) claim against store and ladder manufacturer because granting patron's request to file amended complaint would have delayed the trial and prejudiced store and manufacturer. [C.G.S.A. § 42-110a](#) et seq.

**\*\*1168** [Michael L. Oh](#), with whom, on the brief, were [Michael A. Stratton](#), [Joel T. Faxon](#) and [Michael R. Denison](#), New Haven, for the appellant (plaintiff).

**\*\*1169** [John B. Farley](#), with whom were [Bruce H. Raymond](#) and, on the brief, [N. Kane Bennett](#), Hartford, for the appellee (defendant Home Depot USA, Inc.).

[SULLIVAN](#), C.J., and [BORDEN](#), [NORCOTT](#), [PALMER](#) and [VERTEFEUILLE](#), Js. [\[FN\\*\]](#)

[FN\\*](#) The listing of justices reflects their seniority status on this court as of the date of oral argument.

[BORDEN](#), J.

**\*227** The dispositive issue in this appeal [\[FN1\]](#) is whether this state should recognize intentional spoliation of evidence as a cognizable independent tort. We conclude that, under the circumstances alleged in the present case, we should do so.

[FN1](#). The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to [General Statutes § 51-199\(c\)](#) and [Practice Book § 65-1](#).

The record reveals the following relevant facts and procedural history. On December 16, 1996, the plaintiff, Leandro Rizzuto, climbed a ladder manufactured by the named defendant, Davidson Ladders, Inc. (Davidson), [\[FN2\]](#) while shopping at a Home Depot store in Norwalk. The ladder collapsed suddenly and the plaintiff fell to the floor, incurring serious physical injuries. In August, 1997, the plaintiff filed a product liability action against Davidson and the defendant, Home Depot USA, Inc. (Home Depot), alleging, inter alia, that the ladder had been manufactured and designed improperly, and had been sold without proper warnings in violation of [General Statutes § 52-572m](#) et seq. Thereafter, the plaintiff asked the defendants repeatedly to preserve the ladder and to afford him an opportunity to examine the ladder. In 1998, the defendants' expert examined the ladder and concluded that it was not defective. The defendants **\*228** thereafter destroyed the ladder, despite the fact that the plaintiff had never had an opportunity to inspect it.

[FN2](#). On December 1, 2005, the day before oral argument in the present appeal, the plaintiff withdrew his claims against

(Cite as: 280 Conn. 225, 905 A.2d 1165)

Davidson. Accordingly, Davidson is no longer a party to this appeal.

On May 8, 2001, the plaintiff amended his complaint to add a claim for intentional spoliation of evidence. Specifically, the plaintiff alleged that: (1) "[b]y destroying and/or not preserving [the] ladder, the defendants ... intentionally spoliated evidence critical to [the plaintiff's] pending products liability action"; (2) "[t]he plaintiff's case has been damaged to the point where no expert can conclusively establish the mechanism of the defect which caused the plaintiff's injuries"; and (3) "as a result of the spoliation, the plaintiff may not be able to prove his case, and his interest in the [product liability cause] of action ... will forever be lost." The defendants moved to strike the plaintiff's intentional spoliation of evidence claim, contending that no such cause of action exists in this state. The trial court agreed with the defendants and, on March 19, 2003, granted the motion to strike.

Meanwhile, on November 25, 2002, the plaintiff requested permission to file a second amended complaint alleging that Home Depot's "pattern in practice [of] destroy[ing] critical pieces of evidence that are the subject of litigation against it" violates the Connecticut Unfair Trade Practices Act (CUTPA), [General Statutes § 42-110a](#) et seq. The defendants objected, claiming that the proposed amendment was untimely and unsupported by any factual allegations. On March 19, 2003, the \*\*1170 trial court sustained the defendants' objection.

Thereafter, the plaintiff withdrew the product liability claims and moved for judgment in favor of the defendants on the claim of intentional spoliation of evidence. The trial court granted the plaintiff's motion and, on June 2, 2003, rendered judgment in favor of the defendants. This appeal followed.

\*229 The plaintiff claims that the trial court improperly granted the defendants' motion to strike his intentional spoliation of evidence claim on the ground that spoliation of evidence is not a cognizable tort, and improperly sustained the defendants' objection to his request to file a second amended complaint. We agree with the plaintiff's first claim, but disagree with his second claim. Accordingly, we reverse in part and affirm in part the judgment of the trial court.

I

The plaintiff first claims that the trial court improperly granted the defendants' motion to strike his intentional spoliation of evidence claim on the

ground that no such cause of action exists. Home Depot responds that we need not determine whether this state recognizes the tort of intentional spoliation of evidence because the plaintiff's complaint fails to plead all of the essential elements of the tort. Alternatively, Home Depot maintains that this state does not recognize intentional spoliation of evidence as an independent cause of action. We agree with the plaintiff.

[\[1\]\[2\]\[3\]](#) "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 complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency.... Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) [Sullivan v. Lake Compounce Theme Park, Inc.](#), 277 Conn. 113, 117-18, 889 A.2d 810 (2006).

\*230 A

We first address Home Depot's claim that we need not determine whether this state recognizes the tort of intentional spoliation of evidence because, even if such a cause of action exists, the trial court properly struck the plaintiff's spoliation claim. Specifically, Home Depot contends that the destruction of the ladder did not hinder the plaintiff's ability to prevail on his product liability claims, and the plaintiff's voluntary withdrawal of his product liability claims precludes a spoliation claim as a matter of law. We reject these claims.

[\[4\]](#) "Disruption of a party's case is a critical element of the intentional spoliation tort." M.M. Koesel & T.L. Turnbull, *Spoliation of Evidence: Sanctions and Remedies for Destruction of Evidence in Civil Litigation* (2d Ed. 2006), p. 93; see, e.g., [Coleman v. Eddy Potash, Inc.](#), 120 N.M. 645, 649, 905 P.2d 185 (1995), overruled in part on other grounds by [Delgado v. Phelps Dodge Chino, Inc.](#), 131 N.M. 272, 34 P.3d 1148 (2001); [Smith v. Howard Johnson Co.](#), 67 Ohio St.3d 28, 29, 615 N.E.2d 1037 (1993); [Hannah v. Heeter](#), 213 W.Va. 704, 717, 584 S.E.2d 560 (2003). Accordingly, most states that recognize the tort of intentional spoliation of evidence require a plaintiff to establish, inter alia, that "the spoliated evidence was vital to a party's ability to prevail in [a] pending \*\*1171 or potential civil action...." [Hannah](#)

[v. Heeter, supra, at 717, 584 S.E.2d 560.](#)

[5] Home Depot does not dispute that the ladder was vital to the plaintiff's ability to prevail on his claim that the ladder was manufactured defectively. Rather, Home Depot contends that the ladder was not vital to the plaintiff's claims that the ladder was designed defectively or sold without adequate warnings because these claims, Home Depot maintains, could have been proven through the use of exemplars. In support of this argument, Home Depot relies on [\\*231Beers v. Bayliner Marine Corp., 236 Conn. 769, 778, 675 A.2d 829 \(1996\)](#), wherein this court concluded that an "[adverse] inference may not be drawn with respect to a claim based upon design defect when the destruction [of evidence] would not hinder the defense." [FN3] We reject this claim because whether the destruction of the ladder would have hindered the plaintiff's ability to prevail on his design defect or inadequate warnings claims is a factual question that cannot be resolved on a motion to strike. For example, the record in the present case does not reveal whether the parties knew the model of the collapsed ladder, and, if so, whether other exemplars of that model are available, and, if other exemplars are available, whether their condition is substantially similar to the condition of the spoliated ladder. It is sufficient, at this stage of the proceedings, that the plaintiff's complaint alleges that the spoliated ladder was "critical evidence" in the proof of his product liability claims. Accordingly, we conclude that the plaintiff's complaint sufficiently states a claim for intentional spoliation of evidence, assuming that this state recognizes such a cause of action.

[FN3. Home Depot also relies on [Beil v. Lakewood Engineering & Mfg. Co., 15 F.3d 546 \(6th Cir.1994\)](#), and [Columbian Rope Co. v. Todd, 631 N.E.2d 941 \(Ind.App.1994\)](#), in support of this claim. We conclude that Home Depot's reliance on these cases is misplaced because they stand simply for the proposition that a plaintiff may be able to prove the essential elements of a design defect or inadequate warnings claim in the absence of the allegedly defective product. See [Beil v. Lakewood Engineering & Mfg. Co., supra, at 553](#) (district court improperly dismissed plaintiff's product liability claim, *inter alia*, because plaintiff may be able to prove design defect or product defect in absence of spoliated evidence); [Columbian Rope Co. v. Todd, supra, at 944](#) (trial court properly

permitted plaintiff's expert witness to testify as to inadequate warnings on exemplars of spoliated product). We agree that a plaintiff *may* be able to prove such claims without the allegedly defective product, but we cannot conclude, as a matter of law, that a plaintiff *always* will be able to do so.

Home Depot next claims that the trial court properly struck the plaintiff's intentional spoliation of evidence \*232 claim because the plaintiff voluntarily withdrew his product liability action. In support of this claim, Home Depot relies on [Petrik v. Monarch Printing Corp., 150 Ill.App.3d 248, 249, 103 Ill.Dec. 774, 501 N.E.2d 1312 \(1986\)](#), appeal denied, [114 Ill.2d 556, 108 Ill.Dec. 424, 508 N.E.2d 735 \(1987\)](#), in which the plaintiff brought an action for retaliatory discharge against his former employer, Monarch Printing Corporation (Monarch). After the plaintiff lost his retaliatory discharge suit, he filed a claim against Monarch for intentional spoliation of evidence, alleging that Monarch's intentional destruction of evidence hindered his ability to prevail on his retaliatory discharge action. [Id., at 249-51, 103 Ill.Dec. 774, 501 N.E.2d 1312](#). The trial court concluded that intentional spoliation of evidence was not a cognizable tort and dismissed the plaintiff's spoliation claim. [Id., at 250-51, 103 Ill.Dec. 774, 501 N.E.2d 1312](#). On appeal, the Appellate Court of Illinois determined that it need not decide whether Illinois law would recognize a spoliation \*\*1172 tort because the plaintiff had failed to establish "a nexus between the failure of his [underlying] suit and the destruction" of evidence. [Id., at 262, 103 Ill.Dec. 774, 501 N.E.2d 1312](#). Specifically, the court noted in [Petrik](#) that the plaintiff essentially had abandoned his underlying retaliatory discharge action and, as such, concluded that the trial court's "[d]ismissal of [the] plaintiff's retaliatory-discharge suit was caused, in the first instance, by [the] plaintiff's abandonment of that theory of the case, rather than [the] defendant's destruction of any documents that might support that theory." [Id., at 263, 103 Ill.Dec. 774, 501 N.E.2d 1312](#). Recognition of a spoliation tort under such circumstances, the court concluded, "would encourage those hoping to bring spoliation claims to treat the first suit as a 'dry run' and generate only half-hearted efforts in their prosecution." [Id., at 263-64, 103 Ill.Dec. 774, 501 N.E.2d 1312](#); see also [Miller v. Allstate Ins. Co., 650 So.2d 671, 674 \(Fla.App.\)](#) (where viable means exist, party must pursue underlying cause of action prior to, or together with, intentional spoliation of evidence claim), cert. denied, [659 So.2d 1087 \(Fla.1995\)](#).

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\*233 We conclude that Home Depot's reliance on *Petrik* is misplaced. The plaintiff in the present case, unlike the plaintiff in *Petrik*, pursued vigorously both his product liability claims and his intentional spoliation of evidence claim in the same litigation. The plaintiff only withdrew his product liability claims *after* the trial court had granted the defendants' motion to strike. As such, the sufficiency of the plaintiff's complaint, and the propriety of the trial court's ruling, cannot be measured by events that took place subsequent to, and in reliance on, that ruling. Indeed, the plaintiff represents in his brief to this court that he was "forced to withdraw his product liability [claims] against the defendants" because Home Depot's destruction of the ladder, combined with the trial court's grant of the defendants' motion to strike, left the plaintiff "with no ability to present evidence to sustain the product liability claim[s]...." He therefore withdrew the product liability claims and moved for a final judgment from which he could appeal.

[6][7] In any event, we would decline to require a spoliation plaintiff to pursue a futile lawsuit to establish a causal nexus between a defendant's alleged spoliation of evidence and the failure of the underlying action. See *Mayfield v. ACME Barrel Co.*, 258 Ill.App.3d 32, 38, 196 Ill.Dec. 145, 629 N.E.2d 690 (1994) ("no action for spoliation can be brought until after the underlying claim which is dependent upon the missing evidence is lost"); but see *Boyd v. Travelers Ins. Co.*, 166 Ill.2d 188, 198, 209 Ill.Dec. 727, 652 N.E.2d 267 (1995) (plaintiff need not lose underlying action to bring spoliation claim, instead, plaintiff may bring spoliation claim concurrently with underlying action). We agree with those jurisdictions that have concluded that requiring a plaintiff to pursue and to lose the underlying litigation prior to bringing a spoliation claim "is too harsh" and "ignores the plaintiff's interest in securing a reasonable recovery" for the alleged loss of the underlying \*234 action. *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 851 (D.C.1998); see also *Oliver v. Stimson Lumber Co.*, 297 Mont. 336, 350, 993 P.2d 11 (1999) (same). Accordingly, we conclude that the plaintiff's withdrawal of his product liability action did not render his intentional spoliation of evidence claim legally insufficient.

## B

[8][9] We next address whether this state recognizes the tort of intentional spoliation of evidence. As an initial matter, \*\*1173 we note briefly what is not at issue in the present case. The parties do not dispute that a defendant in a pending case has a legal duty to

preserve relevant evidence. [FN4] The parties further do not dispute that "the intentional destruction of evidence should be condemned. Destroying evidence can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action. Destroying evidence can also increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both." *Cedars-Sinai Medical Center v. Superior Court*, 18 Cal.4th 1, 8, 954 P.2d 511, 74 Cal.Rptr.2d 248 (1998). What is at issue in the present case, however, is whether the tort of intentional spoliation of evidence is necessary to compensate the victims of spoliation and to deter future spoliation. We conclude that recognition of the tort is necessary to accomplish these goals when a first party defendant [FN5] \*235 destroys evidence intentionally with the purpose and effect of precluding a plaintiff from fulfilling his burden of production in a pending or impending case. Because the plaintiff in the present case alleges that the defendants' bad faith intentional destruction of the ladder deprived him of the evidence he needed to establish a prima facie case of product liability against the defendants, we conclude that the trial court improperly struck the plaintiff's intentional spoliation of evidence claim.

FN4. See generally *Trevino v. Ortega*, 969 S.W.2d 950, 955 (Tex.1998) (Baker, J., concurring) (exploring scope of parties' common-law duty to preserve evidence relevant to pending litigation).

FN5. "A first party [defendant] spoliator is a party to the underlying action who has destroyed or suppressed evidence relevant to the plaintiff's claims against that party." *Dowdle Butane Gas Co. v. Moore*, 831 So.2d 1124, 1128 (Miss.2002). A third party defendant spoliator, however, "is oftentimes a stranger to the underlying litigation, but ... is alleged to have destroyed evidence relevant to the plaintiff's causes of action against another defendant(s)." *Id.*, at 1128-29; *id.*, at 1129 ("[i]n other words, a third-party spoliator is a party not alleged to have committed the underlying tort as to which the lost or destroyed evidence related" [internal quotation marks omitted]). We express no opinion as to whether this state recognizes a cause of action for third party spoliation of evidence.

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[10] "It cannot be doubted that we have the inherent power to recognize new tort causes of action, whether derived from a statutory provision; see, e.g., Mead v. Burns, 199 Conn. 651, 663, 509 A.2d 11 (1986) (creating damages action under Connecticut Unfair Trade Practices Act for violations of Connecticut Unfair Insurance Practices Act); or rooted in the common law. See, e.g., Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 480, 427 A.2d 385 (1980) (recognizing tort of wrongful discharge); Urban v. Hartford Gas Co., 139 Conn. 301, 307, 93 A.2d 292 (1952) (recognizing torts of intentional and negligent infliction of emotional distress)." Binette v. Sabo, 244 Conn. 23, 33, 710 A.2d 688 (1998).

[11] "[T]he fundamental policy purposes of the tort compensation system [are] compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct.... It is sometimes said that compensation for losses is the primary function of tort law ... [but it] is perhaps more accurate to describe the primary function as one of determining when compensation [is] required.... An equally compelling function of the tort system is the prophylactic \*236 factor of preventing future harm.... The courts are concerned not only with \*\*1174 compensation of the victim, but with admonition of the wrongdoer.... [I]mposing liability for consequential damages often creates significant risks of affecting conduct in ways that are undesirable as a matter of policy. Before imposing such liability, it is incumbent upon us to consider those risks." (Citations omitted; internal quotation marks omitted.) Lodge v. Arett Sales Corp., 246 Conn. 563, 578-79, 717 A.2d 215 (1998).

[12] "The underlying premise for recognition of [the tort of intentional spoliation of evidence] is that a victim of spoliation is entitled to recover compensatory, and possibly punitive, damages for the loss of a prospective lawsuit. The ineffectiveness of judicial sanctions in deterring spoliation prompted, in part, the recognition of this tort.... The spoliation tort protects a litigant's interest in bringing a prospective cause of action by compensat[ing] the non-spoliating litigant for uninvited interference with the prospective lawsuit resulting from destroyed evidence." (Internal quotation marks omitted.) M.M. Koesel & T.L. Turnbull, *supra*, at pp. 84-85; see also Holmes v. Amerex Rent-A-Car, *supra*, 710 A.2d at 849 ("[s]ome remedy ... should be available to those whose expectancy of recovery has been eliminated ... through the [intentional] acts of another"); Hazen v. Anchorage, 718 P.2d 456, 464 (Alaska 1986) ("a

prospective civil action in a product liability case is a valuable probable expectancy that the [c]ourt must protect from the kind of interference alleged herein" [internal quotation marks omitted]).

To determine whether existing nontort remedies are sufficient to compensate victims of intentional spoliation and to deter future spoliation, we first analyze the scope and applicability of these remedies under the facts alleged herein. This court first addressed the effect of intentional spoliation of evidence in a products liability \*237 case in Beers v. Bayliner Marine Corp., *supra*, 236 Conn. at 769, 675 A.2d 829. In Beers, the plaintiffs brought a product liability claim against the defendant for personal injuries sustained while traveling in a motor boat. Id., at 770-71, 675 A.2d 829. Prior to bringing the claim, however, one of the plaintiffs had removed and disposed of the boat's motor. Id., at 772-73, 675 A.2d 829. The defendant moved for summary judgment, claiming that it was unable to defend itself against the plaintiff's product liability claim as a result of the plaintiff's intentional spoliation of evidence. Id., at 773, 675 A.2d 829. The trial court agreed, and rendered summary judgment in favor of the defendant. Id., at 774, 675 A.2d 829.

[13] On appeal, we concluded that a victim of spoliation is not entitled to summary judgment as a matter of law; id., at 775, 675 A.2d 829; and, accordingly, we reversed the judgment of the trial court. Id., at 781, 675 A.2d 829. Instead, we adopted "the rule of the majority of the jurisdictions that have addressed the issue [of spoliation of evidence] in a civil context, which is that the trier of fact may draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it." Id., at 775, 675 A.2d 829. To be entitled to this inference, the victim of spoliation must prove that: (1) the spoliation was intentional, in the sense that it was purposeful, and not inadvertent; [FN6] (2) the destroyed evidence was relevant \*\*1175 to the issue or matter for which the party seeks the inference; and (3) he or she acted with due diligence with respect to the spoliated evidence. Id., at 777-78, 675 A.2d 829. We emphasized that the adverse inference is permissive, and not mandatory, and that it "does not supply the place of evidence of material facts and does not shift the burden of proof so as to relieve the party upon whom it rests of the necessity of establishing \*238 a prima facie case, although it may turn the scale when the evidence is closely balanced." (Internal quotation marks omitted.) Id., at 779, 675 A.2d 829.

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[FN6](#). We clarified that the spoliator need not have acted with the intent to perpetrate a fraud, and explicitly left "to another day the determination of the appropriate remedy when the spoliator's intent had been to perpetrate a fraud...." [Beers v. Bayliner Marine Corp.](#), *supra*, 236 Conn. at 777 n. 11, 675 A.2d 829.

[\[14\]\[15\]](#) Pursuant to [Beers](#), a party "suffering from spoliation cannot build an underlying case on the spoliation inference alone; for an underlying claim to be actionable, the [party] must also possess some concrete evidence that will support the underlying claim." B.S. Wilhoit, "Spoliation of Evidence: The Viability of Four Emerging Torts," 46 *UCLA L.Rev.* 631, 648 (1998). Thus, a plaintiff in a product liability action cannot rely solely on the spoliation inference to withstand a motion for summary judgment or a motion for a directed verdict; he must also have some independent concrete evidence of a product defect.

[\[16\]\[17\]](#) In the present case, the plaintiff alleges that the defendants' intentional, bad faith destruction of the ladder deprived him of the evidence he needed to establish a prima facie case of product liability against the defendants. [\[FN7\]](#) Assuming this fact to be true, as we must do at \*239 this stage of the proceedings; see, e.g., [Cotto v. United Technologies Corp.](#), 251 Conn. 1, 42, 738 A.2d 623 (1999) ("[b]ecause the present appeal follows from a motion to strike, the facts alleged in the plaintiff's complaint must be taken to be true, and construed in the manner most favorable to the pleader"); the adverse inference in [Beers](#) would not have assisted \*\*1176 the plaintiff in fulfilling his burden of production because it "does not supply the place of evidence of material facts" or "shift the burden of proof..." (Internal quotation marks omitted.) [Beers v. Bayliner Marine Corp.](#), *supra*, 236 Conn. at 779, 675 A.2d 829. Because the [Beers](#) inference cannot be invoked by a victim of spoliation who has been deprived of the concrete evidence necessary to establish a prima facie case, we conclude that it provides an insufficient compensatory and deterrent effect under the present circumstances.

[FN7](#). The plaintiff's complaint does not allege explicitly either that the defendants destroyed the ladder in bad faith, or that the plaintiff was unable to satisfy his burden of production without the ladder. The plaintiff's complaint does allege, however,

that the defendants destroyed the ladder "intentionally" and, as a result, "the plaintiff may not be able to prove his case, and his interest in the [product liability cause] of action ... will forever be lost." Further, in his memorandum in opposition to the defendants' motion to strike, the plaintiff claimed that the defendants had destroyed the ladder in bad faith, and that the plaintiff likely would be unable to make out a prima facie case of product liability without the ladder. Accordingly, construing the complaint broadly and consistent with the general theory pursued in the trial court, we conclude that the complaint sufficiently alleges that the defendants destroyed the ladder in bad faith with the purpose and effect of preventing the plaintiff from establishing a prima facie case of product liability. See, e.g., [Greco v. United Technologies Corp.](#), 277 Conn. 337, 347, 890 A.2d 1269 (2006) ("[I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied.... Thus, we assume the truth of both the specific factual allegations and any facts fairly provable thereunder. In doing so, moreover, we read the allegations broadly ... rather than narrowly." [Internal quotation marks omitted.]); [DiLieto v. County Obstetrics & Gynecology Group, P.C.](#), 265 Conn. 79, 104, 828 A.2d 31 (2003) ("[T]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically.... [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties." [Citation omitted; internal quotation marks omitted.]); see also [Coleman v. Eddy Potash, Inc.](#), *supra*, 120 N.M. at 649-50, 905 P.2d 185 (allegation that defendant "'acted intentionally' and 'such acts were designed to disrupt [the] plaintiff's case' ... together with allegations that establish causation and damages, are sufficient to give notice of the [the plaintiff's spoliation claim] and legally sufficient to state a claim for relief").

We next turn to the efficacy of the judicial sanctions available under our rules of practice for intentional spoliation of evidence. [Practice Book § 13-14](#)

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[FN8] provides \*240 that a party's failure to comply with an order of discovery may result in: (1) the entry of a nonsuit or default judgment; (2) the payment of the opposing party's costs of seeking discovery, including reasonable attorney's fees; (3) "[t]he entry of an order that the matters regarding which the discovery was sought or other designated facts shall be taken to be established for the purposes of the action"; (4) "[t]he entry of an order prohibiting the party who has failed to comply from introducing designated matters in evidence"; and (5) "[i]f the party failing to comply is the plaintiff, the entry of a judgment of dismissal." Like the adverse inference in *Beers*, most of these sanctions are of no use to a plaintiff who is unable to fulfill his or her burden of production as a result of a defendant's intentional spoliation of evidence. Specifically, a judgment of dismissal and an entry of nonsuit are available only if the spoliator is the plaintiff. See [General Statutes § 52-210](#); [FN9] [Practice Book § 13-241 14\(a\)\(5\)](#). Further, the sanctions regarding the introduction of evidence are immaterial if a plaintiff is unable to muster sufficient evidence to present his claim to a fact finder. See [Practice Book § 13-14\(b\)\(3\) and \(4\)](#).

[FN8. Practice Book § 13-14](#) provides: "(a) If any party has failed to answer interrogatories or to answer them fairly, or has intentionally answered them falsely or in a manner calculated to mislead, or has failed to respond to requests for production or for disclosure of the existence and contents of an insurance policy or the limits thereof, or has failed to submit to a physical or mental examination, or has failed to comply with a discovery order made pursuant to Section 13-13, or has failed to comply with the provisions of Section 13-15, or has failed to appear and testify at a deposition duly noticed pursuant to this chapter, or has failed otherwise substantially to comply with any other discovery order made pursuant to Sections 13-6 through 13-11, the judicial authority may, on motion, make such order as the ends of justice require.

"(b) Such orders may include the following:  
"(1) The entry of a nonsuit or default against the party failing to comply;  
"(2) The award to the discovering party of the costs of the motion, including a reasonable attorney's fee;  
"(3) The entry of an order that the matters regarding which the discovery was sought or other designated facts shall be taken to be established for the purposes of the action in

accordance with the claim of the party obtaining the order;

"(4) The entry of an order prohibiting the party who has failed to comply from introducing designated matters in evidence;

"(5) If the party failing to comply is the plaintiff, the entry of a judgment of dismissal.

"(c) The failure to comply as described in this section may not be excused on the ground that the discovery is objectionable unless written objection as authorized by Sections 13-6 through 13-11 has been filed."

[FN9. General Statutes § 52-210](#) provides: "If, on the trial of any issue of fact in a civil action, the plaintiff has produced his evidence and rested his cause, the defendant may move for judgment as in case of nonsuit, and the court may grant such motion, if in its opinion the plaintiff has failed to make out a prima facie case."

Such plaintiffs may, however: (1) request the entry of default judgment; (2) \*\*1177 move for a finding of civil or criminal contempt; [Practice Book § 1-21A](#); [FN10] or (3) seek to recover attorney's fees for the defendant's alleged "dilatatory, bad faith and harassing litigation conduct..." (Internal quotation marks omitted.) [Millbrook Owners Assn., Inc. v. Hamilton Standard](#), 257 Conn. 1, 9-10, 776 A.2d 1115 (2001); see also [CFM of Connecticut, Inc. v. Chowdhury](#), 239 Conn. 375, 393-94, 685 A.2d 1108 (1996), overruled in part on other grounds by [State v. Salmon](#), 250 Conn. 147, 154- 55, 735 A.2d 333 (1999). Moreover, we note that it is a felony to destroy or to tamper with evidence while an official proceeding is pending; see [General Statutes § § 53a-155](#) and [53a-146 \(1\)](#); [FN11] and that an attorney who engages in the intentional \*242 spoliation of evidence may face a wide variety of professional sanctions. See [Practice Book § § 2-37, 2- 44](#); [Rules of Professional Conduct 8.4](#).

[FN10. Practice Book § 1-21A](#) provides: "The violation of any court order qualifies for criminal contempt sanctions. Where, however, the dispute is between private litigants and the purpose for judicial intervention is remedial, then the contempt is civil, and any sanctions imposed by the judicial authority shall be coercive and nonpunitive, including fines, to ensure compliance and compensate the complainant for losses. Where the violation of a court

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order renders the order unenforceable, the judicial authority should consider referral for nonsummary criminal contempt proceedings."

FN11. General Statutes § 53a-155 (a) provides: "A person is guilty of tampering with or fabricating physical evidence if, believing that an official proceeding is pending, or about to be instituted, he: (1) Alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding; or (2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such official proceeding."

General Statutes § 53a-146 (1) provides: "An 'official proceeding' is any proceeding held or which may be held before any legislative, judicial, administrative or other agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner or notary or other person taking evidence in connection with any proceeding."

Although these sanctions provide a limited deterrent effect, with the exception of an entry of default judgment, none of them attempts to compensate the plaintiff for the loss of his underlying civil action. Even the propriety and applicability of an entry of default judgment, however, is questionable under the present circumstances. As we previously explained, this court concluded in Beers that a party's intentional spoliation of evidence does not relieve the spoliation victim of the burden to produce concrete evidence to support his underlying claim. Beers v. Bayliner Marine Corp., *supra*, 236 Conn. at 779, 675 A.2d 829. As such, it would appear to be inconsistent with Beers to conclude that a victim of spoliation is entitled to judgment as a matter of law, despite his inability to satisfy his burden of proof, as a consequence of a defendant's intentional spoliation of evidence. To the extent that a default judgment would be proper, we note that it is a discretionary sanction of last resort and, as such, likely would be available only in the most egregious cases. See, e.g., Marfia v. T.C. Ziraat Bankasi, 100 F.3d 243, 249 (2d Cir.1996) (entry of default judgments is "the most severe sanction which the court may apply" [internal quotation marks omitted]); Evans v. General Motors Corp., 277 Conn. 496, 523-24, 893 A.2d 371 (2006) ("although [entry of a default judgment] is not an

abuse of discretion whe[n] a party shows a deliberate, contumacious or unwarranted disregard for the court's authority ... the court should be reluctant to employ the sanction ... except as a last resort" [internal quotation marks omitted] ). Accordingly, we **\*\*1178** conclude that existing nontort remedies are insufficient to compensate a victim of spoliation who has been deprived completely of his **\*243** underlying civil action as a result of a defendant's intentional, bad faith destruction of evidence.

Moreover, we conclude that these remedies do not adequately deter future intentional, bad faith spoliation of evidence. In a product liability action, the allegedly defective product often is the best if not the only evidence of a product defect. Where the product is in the sole custody or control of the defendant, the possible specter of nontort sanctions may pale in comparison to the costs of a lengthy trial or a substantial award of damages. Indeed, the more defective the product, the stronger the financial incentive to destroy or to dispose of the inculpatory evidence so as to prevent the plaintiff from proving his claim. In other words, under the existing remedies, the more effective the defendant's spoliation conduct, the greater the financial reward.

[18] For the foregoing reasons, we conclude that the existing nontort remedies are insufficient to compensate victims of spoliation and to deter future spoliation when a first party defendant destroys evidence intentionally with the purpose and effect of precluding a plaintiff from fulfilling his burden of production in a pending or impending case. We therefore conclude that recognition of an independent cause of action for intentional spoliation of evidence is necessary to fulfill the public policy goals of the tort compensation system.

[19][20] "In defining the parameters of the tort of intentional spoliation of evidence we look to the several states that currently recognize this tort. Intentional spoliation of evidence is defined as 'the intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action.' " Hannah v. Heeter, *supra*, 213 W.Va. at 716, 584 S.E.2d 560, quoting Coleman v. Eddy Potash, Inc., *supra*, 120 N.M. at 649, 905 P.2d 185. "Although no uniform body of case law has developed regarding the precise contours of this tort, **\*244** most states that have adopted the tort agree that the elements of intentional spoliation consist of: (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of [the] defendant that



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litigation exists or is probable, (3) willful destruction of evidence by [the] defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts." [FN12](#) (Internal \*\*1179 quotation marks omitted.) M.M. Koesel & T.L. Turnbull, *supra*, at pp. 88-89. In light of the consensus among our sister states, we conclude that the tort of intentional spoliation of evidence consists of the following essential elements: (1) the defendant's knowledge of a pending or impending civil action involving the plaintiff; (2) the defendant's destruction of evidence; \*245 (3) in bad faith, that is, with intent to deprive the plaintiff of his cause of action; (4) the plaintiff's inability to establish a prima facie case without the spoliated evidence; and (5) damages.

[FN12](#). See, e.g., [Coleman v. Eddy Potash, Inc., supra, 120 N.M. at 649, 905 P.2d 185](#) ("[1] the existence of a potential lawsuit; [2] the defendant's knowledge of the potential lawsuit; [3] the destruction, mutilation, or significant alteration of potential evidence; [4] intent on part of the defendant to disrupt or defeat the lawsuit; [5] a causal relationship between the act of spoliation and the inability to prove the lawsuit; and [6] damages"); [Smith v. Howard Johnson Co., supra, 67 Ohio St.3d at 29, 615 N.E.2d 1037](#) ("[1] pending or probable litigation involving the plaintiff, [2] knowledge on the part of [the] defendant that litigation exists or is probable, [3] willful destruction of evidence by [the] defendant designed to disrupt the plaintiff's case, [4] disruption of the plaintiff's case, and [5] damages proximately caused by the defendant's acts"); [Hannah v. Heeter, supra, 213 W.Va. at 716, 584 S.E.2d 560](#) ("[1] pending or probable civil litigation, [2] knowledge of the spoliator that the litigation is pending or probable, [3] willful destruction of evidence, [4] intent of the spoliator to interfere with the victim's prospective civil suit, [5] a causal relationship between the evidence and the inability to prove the lawsuit, and [6] damages" [internal quotation marks omitted]); see also [Rosenblit v. Zimmerman, 166 N.J. 391, 406- 407, 766 A.2d 749 \(2001\)](#) (intentional spoliation of evidence actionable under tort of fraudulent concealment, plaintiff must prove: "[1] [t]hat [the] defendant in the fraudulent concealment action had a legal obligation to

disclose evidence in connection with an existing or pending litigation; [2][t]hat the evidence was material to the litigation; [3] [t]hat [the] plaintiff could not reasonably have obtained access to the evidence from another source; [4] [t]hat [the] defendant intentionally withheld, altered or destroyed the evidence with purpose to disrupt the litigation; [5] [t]hat [the] plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence [the] defendant concealed").

Home Depot claims, however, that the tort of intentional spoliation of evidence is unworkable and provides an ineffective remedy. Specifically, Home Depot contends that causation and damages would be difficult to prove because "there will typically be no way of telling what precisely the [spoliated] evidence would have shown and how much it would have weighed in the spoliation victim's favor." [Cedars-Sinai Medical Center v. Superior Court, supra, 18 Cal.4th at 14, 74 Cal.Rptr.2d 248, 954 P.2d 511](#). We agree that this difficulty of proof is "endemic to the tort of spoliation"; (internal quotation marks omitted) [Holmes v. Amerex Rent-A-Car, supra, 710 A.2d at 853](#); but we disagree that it should preclude recognition of the tort. *Id.* The difficulty in determining the harm caused by a defendant's spoliation of evidence is attributable solely to the defendant's intentional bad faith litigation misconduct. If the plaintiff could establish precisely what the spoliated evidence would have shown, the tort would be unnecessary because the plaintiff would possess sufficient evidence to satisfy his burden of production in the underlying litigation. See [id., at 850](#) ("the very purpose of an independent action for spoliation of evidence lies in the inability of the plaintiff to prove proximate causation to the proper degree of certainty required in the underlying suit"). Accordingly, "there would be an inequity in preventing a plaintiff from recovering because of his inability, allegedly caused by the defendant, to prove his underlying case. [T]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." (Internal quotation marks omitted.) *Id.*; see also \*246 [Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, 51 S.Ct. 248, 75 L.Ed. 544 \(1931\)](#) ("Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to

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the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.").

[21] In light of the difficulties of proof inherent in the tort of intentional spoliation **\*\*1180** of evidence, we next clarify the plaintiff's burden of proof with respect to causation and damages. To establish proximate causation, the plaintiff must prove that the defendants' intentional, bad faith destruction of evidence rendered the plaintiff unable to establish a prima facie case in the underlying litigation. [FN13] Cf. **\*247**[Smith v. Atkinson, 771 So.2d 429, 434 Ala.2000](#) ("in order for a plaintiff to show proximate cause, the trier of fact must determine that the lost or destroyed evidence was so important to the plaintiff's claim in the underlying action that without that evidence the claim did not survive or would not have survived a motion for summary judgment"); [Hannah v. Heeter, supra, 213 W.Va. at 714, 584 S.E.2d 560](#) (same). Once the plaintiff satisfies this burden, "there arises a rebuttable presumption that but for the fact of the spoliation of evidence the plaintiff would have recovered in the pending or potential litigation...." [Smith v. Atkinson, supra, at 432-33](#); see also [Hannah v. Heeter, supra, at 717, 584 S.E.2d 560](#) ("[o]nce the [elements of the tort of intentional spoliation of evidence] are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation"); cf. [Welsh v. United States, 844 F.2d 1239, 1248 \(6th Cir.1988\)](#) ("When, as here, a plaintiff is unable to prove an essential element of her case due to the negligent loss or destruction of evidence by an opposing party, and the proof would otherwise be sufficient to survive a directed verdict, it is proper for the trial court to create a rebuttable presumption that establishes the missing elements of the plaintiff's case that could only have been proved by the availability of the missing evidence. The burden thus shifts to the defendant-spoliator to rebut the presumption and disprove the inferred element of [the] plaintiff's prima facie case."). The defendant **\*248** may rebut this presumption by "producing evidence showing that the plaintiff would not have prevailed in the underlying action even if the lost or

destroyed evidence had been available." **\*\*1181** [Smith v. Atkinson, supra, at 435](#). "The [defendant] spoliator must overcome the rebuttable presumption or else be liable for damages." [Hannah v. Heeter, supra, at 717, 584 S.E.2d 560](#).

**FN13.** We decline to require the plaintiff to prove some probability of success in the underlying litigation. We note that the jurisdictions that require such a showing do not also require the plaintiff to establish that the defendant's intentional spoliation of evidence was so egregious that the plaintiff was unable to present his case to the fact finder. See, e.g., [Holmes v. Amerex Rent-A-Car, supra, 710 A.2d at 852](#) ("to demonstrate causation, a plaintiff must demonstrate that [1] the underlying claim was significantly impaired due to the spoliation of evidence; [2] a proximate relationship exists between the projected failure of success in the underlying action and the unavailability of the destroyed evidence; and [3] the underlying lawsuit would enjoy a significant possibility of success if the spoliated evidence were still in existence"); [Boyd v. Travelers Ins. Co., supra, 166 Ill.2d at 196-97 n. 2, 209 Ill.Dec. 727, 652 N.E.2d 267](#) (to establish causation in negligence action for spoliation, plaintiff must prove that "but for the defendant's loss or destruction of the evidence, [the plaintiff] had a reasonable probability of succeeding on the underlying suit"); [Tomas v. Nationwide Mutual Ins. Co., 79 Ohio App.3d 624, 631, 607 N.E.2d 944](#) ("it would be required to be demonstrated that an effort to pursue the separate civil action was unsuccessful because of the absence of the destroyed evidence or possibly, at the very least, that pursuit of such an action was rendered impossible because of the destruction of evidence"), appeal dismissed, [65 Ohio St.3d 1485, 604 N.E.2d 1364 \(1992\)](#). In light of the fact that this state requires the plaintiff to prove a complete inability to litigate his underlying cause of action, it would be impracticable to require the plaintiff to prove a probability of success in that action. Stated another way, because the defendant's intentional spoliation of evidence deprived the plaintiff of sufficient evidence to establish a prima facie case in the underlying litigation, it necessarily deprived the plaintiff of sufficient evidence

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to demonstrate some probability of success in that litigation.

[22][23] We next turn to the proper measure of damages. We acknowledge that, "[t]he most difficult aspect of a spoliation of evidence tort is the calculation of damages." (Internal quotation marks omitted.) *Holmes v. Amerex Rent-A-Car*, *supra*, 710 A.2d at 852. In determining the proper measure of damages, we are guided by the purpose of compensatory damages, which is "to restore an injured party to the position he or she would have been in if the wrong had not been committed." *Kenny v. Civil Service Commission*, 197 Conn. 270, 276, 496 A.2d 956 (1985). To restore a victim of intentional spoliation of evidence to the position he or she would have been in if the spoliation had not occurred, the plaintiff is entitled to recover the full amount of compensatory damages that he or she would have received if the underlying action had been pursued successfully. See *Hannah v. Heeter*, *supra*, 213 W.Va. at 715, 584 S.E.2d 560 (full measure of compensatory damages); *Smith v. Atkinson*, *supra*, 771 So.2d at 437-38 (same); see also *Petrik v. Monarch Printing Corp.*, *supra*, 150 Ill.App.3d at 261, 103 Ill.Dec. 774, 501 N.E.2d 1312 ("[a]ssuming that it is impossible to know what the spoliated evidence would have shown, perhaps the plaintiff should be awarded the full measure of damages that he would have obtained had he won the underlying lawsuit").

We recognize that various jurisdictions have criticized this measure of damages because "there is the potential that the plaintiff would benefit more in an instance of spoliation than he might have in the underlying\*249 suit." [FN14] (Internal quotation marks omitted.) *Holmes v. Amerex Rent-A-Car*, *supra*, 710 A.2d at 853; *Petrik v. Monarch Printing Corp.*, *supra*, 150 Ill.App.3d at 261, 103 Ill.Dec. 774, 501 N.E.2d 1312. We conclude, however, that the risk of a windfall to the plaintiff sufficiently is minimized by requiring the plaintiff to prove that the defendant spoliated evidence intentionally with the purpose and effect of precluding the plaintiff's ability to establish a prima facie case in the underlying litigation and, further, by permitting the defendant to rebut the presumption of liability that arises upon this showing. Cf. \*\*1182 *Smith v. Atkinson*, *supra*, 771 So.2d at 437-38 ("[b]ecause the approach we adopt today to [third party spoliation of evidence] is distinct from the approaches adopted by other [s]tates, observations [concerning a windfall to the plaintiff] fail to consider the additional protection provided [by] ... the element of a rebuttable presumption that

would shift the burden of proof"); \*250 *Hannah v. Heeter*, *supra*, 213 W.Va. at 715, 584 S.E.2d 560 (adopting full compensatory damages as measure of damages for reasons articulated in *Smith*). To the extent that some risk of a windfall to the plaintiff persists, we conclude that the defendant should bear this risk in light of its egregious litigation misconduct. See *Petrik v. Monarch Printing Corp.*, *supra*, at 261, 103 Ill.Dec. 774, 501 N.E.2d 1312 ("[a]lthough it is true that the plaintiff in a spoliation case would reap a windfall if the underlying suit had no merit, perhaps the intentional destroyer of evidence should bear that risk").

FN14. In *Holmes v. Amerex Rent-A-Car*, *supra*, 710 A.2d at 853, the District of Columbia Court of Appeals concluded that the plaintiff's award of damages should be measured by calculating "the damages that would have been obtained in the underlying lawsuit" and multiplying those damages "by the probability that [the] plaintiff would have won the suit had he had the spoliated evidence." (Internal quotation marks omitted.) The court concluded that "[t]his compromise system would apportion [the] risk between the two parties in an equitable fashion. On the one hand, the plaintiff's interest in recovering the expected but precluded sum is protected because recovery is allowed with lower standards of proof for causation and damages. On the other hand, the defendant's interest in only compensating a plaintiff for actual loss is protected because the recovery will be lessened by the uncertainties involved. Both parties, then, accept some of the risk of windfall or shortage necessitated by the uncertainty inherent in proving this tort." *Id.* The court acknowledged that "[t]he problem with this method is in the difficulty of proving what the spoliated evidence would have demonstrated and the extent to which it would have changed the outcome." (Internal quotation marks omitted.) *Id.* The court concluded, however, that this problem was insufficient "to overcome the overall fairness of the discounted damages approach." *Id.* In light of the limited scope of the tort of intentional spoliation of evidence in this state, we are convinced that the plaintiff's inability to demonstrate what the spoliated evidence would have shown is insuperable and, therefore, that the discounted damages approach is

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unworkable. See footnote 13 of this opinion.

Home Depot next claims that the burdens imposed by the tort of intentional spoliation of evidence outweigh the benefits. Specifically, Home Depot alleges that the tort of intentional spoliation of evidence imposes the following intolerable costs: (1) extraordinary precautions by individuals and businesses to preserve needlessly any evidence that might be relevant to future litigation; (2) meritless spoliation actions clogging the dockets of the courts; (3) where the underlying claim and the spoliation claim are pursued simultaneously, the risk of jury confusion and inconsistency; (4) where the underlying claim and the spoliation claim are pursued separately, the risk of duplicative efforts and potentially inconsistent results. See, e.g., [Cedars-Sinai Medical Center v. Superior Court, supra, 18 Cal.4th at 15, 74 Cal.Rptr.2d 248, 954 P.2d 511](#) (costs imposed by tort of intentional spoliation of evidence outweigh benefits). We recognize that "[i]mposing liability for consequential damages often creates significant risks of affecting conduct in ways that are undesirable as a matter of policy." (Internal quotation marks omitted.) [Lodge v. Arett Sales Corp., supra, 246 Conn. at 579, 717 A.2d 215](#). We are not persuaded, however, that the costs imposed by the tort of intentional spoliation of evidence exceed the benefits.

[24] First, with respect to the preservation of evidence, we note that the parties to a pending or impending civil action already have a legal duty to retain evidence \*251 relevant to that action under our existing common law and statutory scheme. See footnotes 4, 8 and 10 of this opinion and accompanying text. Thus, the tort of intentional spoliation of evidence does not impose a greater burden to preserve evidence than that which already exists. Second, with respect to the risk of meritless spoliation actions, we do not agree with Home Depot that recognition of the tort will result in an uncontrollable influx of frivolous claims. We conclude that the limited scope of the tort, the difficulty of proof inherent in the tort and the safeguards embodied in our rules of practice; see [Rules of Professional Conduct 3.1](#); [\[FN15\]](#) are sufficient to deter the filing of such meritless actions. Lastly, the tort of intentional spoliation of evidence, as defined in this state, poses no risk of jury confusion, \*\*1183 inconsistent verdicts or duplicative litigation because the underlying claim and the tort of intentional spoliation of evidence are mutually exclusive. In other words, a plaintiff who

possesses sufficient evidence to present his underlying claim to the jury necessarily is unable to state a claim for intentional spoliation of evidence, and vice versa. Thus, the risk of jury confusion, inconsistent verdicts or duplicative litigation is eliminated entirely. Accordingly, we conclude that the benefits of the tort of intentional spoliation of evidence, namely, compensating the victims of intentional spoliation and deterring future spoliation, outweigh the minimal burdens imposed by the tort.

[FN15. Rules of Professional Conduct 3.1](#) provides: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established."

For the foregoing reasons, we conclude that this state recognizes the tort of intentional spoliation of evidence. Because the plaintiff's complaint sufficiently states a \*252 claim for intentional spoliation of evidence; see part I A and footnote 7 of this opinion; we conclude that the trial court improperly granted the defendants' motion to strike the plaintiff's intentional spoliation claim.

## II

Lastly, the plaintiff contends that the trial court improperly denied his request to file a second amended complaint alleging that the defendants' intentional destruction of evidence violated CUTPA. Specifically, the plaintiff claims that the trial court abused its discretion when it concluded that the plaintiff's request was untimely and that the proposed amendment was unsupported by factual allegations. Home Depot responds that the trial court properly denied the plaintiff's request in light of the age of the case, the impending trial, the broad new issues being injected into the case and the plaintiff's unreasonable delay in seeking the amendment. We conclude that the trial court improperly considered the legal sufficiency of the plaintiff's proposed CUTPA claim in ruling on the plaintiff's request to file a second amended complaint. We further conclude, however, that the trial court did not abuse its discretion by denying the plaintiff's request on the grounds of timeliness and prejudice to the defendants.

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The following additional procedural history is relevant to our resolution of this claim. On November 25, 2002, the plaintiff filed a request for permission to file a second amended complaint alleging that Home Depot had destroyed evidence as part of a "pattern in practice [of] destroy[ing] critical pieces of evidence that are the subject of litigation against it" in violation of CUTPA. On December 6, 2002, the defendants objected to the plaintiff's request, claiming that the proposed amendment was legally deficient because the plaintiff had failed to allege any facts in support of the CUTPA claim. On February 5, 2003, the defendants filed a supplemental \*253 objection to the plaintiff's request, claiming that the proposed amendment was untimely and would be unduly prejudicial to the defendants.

Thereafter, in February, 2003, the law firms that had represented both defendants jointly withdrew their appearances on the ground of a conflict of interest, [FN16](#) \*\*1184 and both Home Depot and Davidson obtained separate counsel. On February 20, 2003, Home Depot filed a motion to withdraw the December 6, 2002 objection to the plaintiff's request to file an amended complaint, and the February 5, 2003 supplemental objection, both of which had been filed by predecessor counsel. On that same date, Home Depot also filed a new objection to the plaintiff's request, claiming: "(1) the granting of the proposed amendment would unfairly prejudice Home Depot and unnecessarily delay the trial of this matter; (2) any necessity to amend the [c]omplaint at this late date is due solely to [the] plaintiff's own neglect as opposed to any newly discovered facts; (3) the proposed amendment [seeking] to add a new count for violation of [CUTPA] is barred by the applicable statute of limitations or the exclusivity provisions of Connecticut's Product Liability Act; and (4) the proposed amendment seeking to add a new count for CUTPA is legally insufficient."

[FN16](#). Specifically, counsel for the defendants stated that "Home Depot tendered the defense of this matter to Davidson ... and that tender was conditionally accepted.... A condition of the acceptance of the tender was that Davidson ... would not defend and indemnify Home Depot against allegations of independent legal fault on the part of Home Depot. Subsequent developments in this case since that tender of defense was initially accepted require that Home Depot have separate counsel to defend its interests with respect to

Count III [alleging intentional spoliation of evidence] and proposed Count IV [alleging a violation of CUTPA] of the Amended Complaint."

Meanwhile, the trial, which originally had been scheduled for April 30, 2001, but was postponed to February 18, 2002, was continued to March 19, 2003. On January \*254 28, 2003, the defendants moved for a continuance because trial counsel was unavailable. [FN17](#) The plaintiff objected to the motion, and the trial court, *Sheedy, J.*, denied the motion because of the age of the case.

[FN17](#). The record does not reflect the reason for trial counsel's unavailability. Home Depot represents in its brief to this court, however, that "the defendants moved to continue the trial because counsel for both defendants was withdrawing from the case, due to a conflict of interest, and new counsel for both defendants were entering appearances."

On February 24, 2003, the trial court, *Doherty, J.*, heard oral arguments on the defendants' objection to the plaintiff's request to file a second amended complaint. The plaintiff claimed that the proposed amendment was timely because it was filed immediately after he discovered that Home Depot had a pattern and practice of intentionally destroying evidence relevant to pending litigation. [FN18](#) The plaintiff further argued that the defendants would not suffer any undue prejudice because the proposed amendment had been pending since November, 2002. Finally, the plaintiff claimed that if the court concluded that the proposed amendment was untimely, the CUTPA count should be severed from the other issues and tried separately.

[FN18](#). Specifically, the plaintiff stated that "[i]t was not until October of ... 2002 that plaintiff's counsel, and this is my representation on the record, that plaintiff's counsel learned that Home Depot had been accused by many counsel and many different plaintiffs of destroying other pieces of evidence from accidents occurring at the Home Depot facility in Norwalk and other places and that they had just entered into a confidential settlement of a major case involving the destruction of evidence at the ... Norwalk facility."

On March 19, 2003, the date that trial was scheduled

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to commence, the trial court sustained the defendants' objection. The plaintiff moved to reargue his request and, on April 10, 2003, the trial court denied the plaintiff's motion. Thereafter, the trial court rendered judgment in favor of the defendants, and the plaintiff appealed from the judgment of the trial court to the Appellate Court. On November 17, 2003, the plaintiff \*255 moved the Appellate Court to order the trial court to articulate its reasons for sustaining the defendants' objection. The Appellate Court granted the motion and, on December 17, 2004, the trial court issued an articulation, explaining that it had sustained the defendants' objection because the plaintiff's proposed \*\*1185 CUTPA claim was unsupported by factual allegations and was "so untimely as to be unfair and prejudicial to the defendants...." [FN19]

FN19. The trial court stated: "The court sustained the defendants' objection to the proposed amended complaint of November 25, 2002, for the reason that it contained allegations of habitual destruction of evidence by ... Home Depot which were totally unsupported by any facts, as required by law, as set forth in Smith v. Furness, [117 Conn. 97, 99, 166 A. 759 (1933)]. The court also found that regardless of the fact that the request to amend had been pending since November 25, 2002, it was only then coming before the court for consideration virtually on the eve of trial. "The court denied the plaintiff's motion to amend to add a fourth count alleging CUTPA violations because it was 'defective in alleging a conclusion without facts to support it,' and, further, because it was so untimely as to be unfair and prejudicial to the defendants in view of the fact that a jury was about to be selected the day the motion to amend came before the court."

[25][26][27][28] "Our standard of review of the plaintiff's claim is well settled. While our courts have been liberal in permitting amendments ... this liberality has limitations. Amendments should be made seasonably. Factors to be considered in passing on a motion to amend are the length of the delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment.... The motion to amend is addressed to the trial court's discretion which may be exercised to restrain the amendment of pleadings so far as necessary to prevent unreasonable delay of the trial.... Whether to allow an amendment is a matter left to the sound discretion of the trial court. This court will not

disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion.... It is the [plaintiff's] burden in this case to demonstrate that the trial court clearly abused its discretion." \*256 Internal quotation marks omitted.) Dow & Condon, Inc. v. Brookfield Development Corp., 266 Conn. 572, 583-84, 833 A.2d 908 (2003).

[29][30][31] The plaintiff first claims that the trial court improperly denied his request to file a second amended complaint on the ground that the proposed CUTPA claim was unsupported by factual allegations. Specifically, the plaintiff claims that "requests to amend cannot be denied based on the sufficiency of the proposed complaint." We agree. The proper procedural vehicle to challenge the legal sufficiency of a proposed pleading is a motion to strike, rather than an objection to a motion to amend. See Practice Book § 10-39. [FN20] Thus, even if a proposed pleading\*\*1186 is alleged to be insufficient, a "plaintiff should be permitted to file [the amended pleading], so that the issues arising under it may be determined in proceedings properly adapted to that \*257 end." Newman v. Golden, 108 Conn. 676, 680, 144 A. 467 (1929) (trial court improperly denied plaintiff's motion to file substitute pleading on ground that proposed pleading failed to state claim); see also Smith v. Furness, 117 Conn. 97, 100, 166 A. 759 (1933) ("[w]e go no farther ... than to point out that it was error for the trial court to refuse to permit [the amended pleading] to be filed upon the ground that the facts stated in it would not legally constitute a defense"). Accordingly, we conclude that the trial court abused its discretion by denying the plaintiff's request to file an amended complaint on the ground that the proposed CUTPA claim was unsupported by factual allegations.

FN20. Practice Book § 10-39(a) provides: "Whenever any party wishes to contest (1) the legal sufficiency of the allegations of any complaint, counterclaim or cross claim, or of any one or more counts thereof, to state a claim upon which relief can be granted, or (2) the legal sufficiency of any prayer for relief in any such complaint, counterclaim or cross complaint, or (3) the legal sufficiency of any such complaint, counterclaim or cross complaint, or any count thereof, because of the absence of any necessary party or, pursuant to Section 17-56(b), the failure to join or give notice to any interested person, or (4) the joining of two or more causes of action which cannot properly be united in

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one complaint, whether the same be stated in one or more counts, or (5) the legal sufficiency of any answer to any complaint, counterclaim or cross complaint, or any part of that answer including any special defense contained therein, that party may do so by filing a motion to strike the contested pleading or part thereof."

We note that, if the trial court had struck the plaintiff's CUTPA claim pursuant to [Practice Book § 10-39](#), the plaintiff would have been entitled to file a new complaint alleging additional facts in support of his claim. See [Practice Book § 10-44](#) ("[w]ithin fifteen days after the granting of any motion to strike, the party whose pleading has been stricken may file a new pleading"). We need not decide in this appeal whether any further specificity was required of the plaintiff in pleading his CUTPA claim. We point out, however, that, because the trial court simply denied the plaintiff's request to amend, the plaintiff was deprived of the opportunity to replead his CUTPA claim with specificity.

[32] The plaintiff next claims that the trial court improperly denied his request to file an amended complaint on the ground that the proposed amendment was untimely. We are not persuaded. The plaintiff discovered Home Depot's destruction of evidence in 1999, but did not seek to allege a violation of CUTPA until November, 2002, at which point the trial was only four months away. [FN21] The proposed amendment would have injected new and complex legal issues into the litigation concerning the scope and applicability of CUTPA and, moreover, would have required additional discovery concerning Home Depot's alleged "pattern [and] practice" of destroying evidence in other cases. Moreover, the trial date had been continued repeatedly for approximately two years, and the plaintiff himself had objected to any further delays. Because the trial court reasonably could have concluded that granting the plaintiff's \*258 request to file a second amended complaint would have delayed the trial and prejudiced the defendants, [FN22] the trial court did not abuse its discretion by denying the plaintiff's request. [FN23] See [AirKaman, Inc. v. Groppo](#), 221 Conn. 751, 767, 607 A.2d 410 (1992) (trial court did not abuse discretion by denying request to amend complaint where pleadings had been closed, opposing party \*\*1187 had submitted trial brief and claim would require additional discovery), superseded by statute on other grounds as

stated in [Renaissance Management Co. v. Commissioner of Revenue Services](#), 48 Conn.Supp. 221, 838 A.2d 260 (2002), aff'd, 267 Conn. 188, 836 A.2d 1180 (2003); [Connecticut National Bank v. Douglas](#), 221 Conn. 530, 548, 606 A.2d 684 (1992) (trial court did not abuse discretion by denying request to amend that was filed approximately two weeks before trial and "would have added lengthy new allegations of fact and law"); [Beckman v. Jalich Homes, Inc.](#), 190 Conn. 299, 303, 460 A.2d 488 (1983) (trial court did not abuse discretion by denying request to amend that was filed day before trial and would have added new bases of liability).

[FN21.] The plaintiff claims that he could not have asserted a violation of CUTPA prior to November, 2002, because he did not discover Home Depot's pattern and practice of destroying evidence until October of that year. See footnote 18 of this opinion. We reject this claim because the plaintiff did not allege, and the trial court was not compelled to conclude, that the information pertaining to Home Depot's alleged pattern and practice would have been unavailable to the plaintiff prior to October, 2002, if the plaintiff had attempted to seek it.

[FN22.] The plaintiff claims that the trial court improperly considered the defendants' belated claim of prejudice in ruling on the plaintiff's request to file a second amended complaint. We reject this claim because it is well established that prejudice to the opposing party is one of the factors that a trial court should consider in ruling on a motion to file an amended pleading. See, e.g., [Dow & Condon, Inc. v. Brookfield Development Corp.](#), supra, 266 Conn. at 583, 833 A.2d 908 ("[f]actors to be considered in passing on a motion to amend are the length of the delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment" [internal quotation marks omitted]).

[FN23.] Although we affirm the judgment of the trial court denying the plaintiff's request to file a second amended complaint, nothing herein should be construed to preclude the plaintiff from seeking to amend his complaint in the future, given that a trial date no longer is imminent and the trial court must conduct further proceedings on the plaintiff's intentional spoliation of

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evidence claim.

The judgment is reversed with respect to the claim of spoliation of evidence and the case is remanded to \*259 the trial court with direction to deny the motion to strike as to that claim and for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion [NORCOTT](#), [PALMER](#) and [VERTEFEUILLE](#), Js., concurred.

Furthermore, because the plaintiff has alleged intentional *bad faith* spoliation, as opposed to intentional *innocent* spoliation; see, e.g., [Beers v. Bayliner Marine Corp.](#), *supra*, 236 Conn. at 777 and n. 11, 675 A.2d 829; we need not decide whether an allegation of intentional spoliation, unaccompanied by an allegation of bad faith, would suffice.

[PALMER](#), J., concurring.

I join the majority opinion. I write separately simply to note that there is a way to achieve the result that the majority reaches without creating a new tort of intentional spoliation of evidence. That approach would be to extend our holding in [Beers v. Bayliner Marine Corp.](#), 236 Conn. 769, 675 A.2d 829 (1996), to provide that a plaintiff may invoke the [Beers](#) adverse inference to satisfy his or her burden of production upon proof merely that the defendant had destroyed the evidence in bad faith, that is, with intent to deprive the plaintiff of his or her cause of action. Although I believe that such a modification of [Beers](#) would satisfy the concerns addressed by the majority, the plaintiff in the present action has not sought that remedy; indeed, the plaintiff has withdrawn his product liability claims, and, therefore, an extension of [Beers](#) in the manner suggested would not avail the plaintiff. In light of the procedural history of this case, and because I agree with the plaintiff that the currently available remedies for intentional, bad faith spoliation of evidence are inadequate, I join the majority opinion.

[SULLIVAN](#), C.J., dissenting.

I disagree with part I B of the majority opinion, in which the majority concludes that this state should recognize a tort for intentional first party spoliation of evidence when, as a result of the spoliation, the plaintiff is unable to establish a prima facie case in the underlying action. The majority concludes that recognition of this tort is necessary to compensate victims of spoliation and to deter future \*260

spoliation. I would conclude that existing remedies are sufficient to deter and punish acts of spoliation and that it is against public policy to provide compensation for damages when liability cannot be established.

The majority of jurisdictions that have considered whether to recognize a tort for first party spoliation of evidence have concluded that such claims are not cognizable.\*\*1188 [ FN1] The California Supreme Court's analysis in \*261 [Cedars-Sinai Medical Center v. Superior Court](#), 18 Cal.4th 1, 8, 954 P.2d 511, 74 Cal.Rptr.2d 248 (1998), is typical of these cases. The court in that case recognized that the crux of the question before it was "whether a tort remedy for the intentional first party spoliation of evidence would ultimately create social benefits exceeding those created by existing remedies for such conduct, and outweighing any costs and burdens it would impose." *Id.*; see also [Perodeau v. Hartford](#), 259 Conn. 729, 759, 792 A.2d 752 (2002) (balancing social costs against social benefits in considering whether to recognize tort of negligent infliction of emotional distress in ongoing employment context). The court noted that "[t]hree concerns in particular stand out here: the conflict between a tort remedy for intentional first party spoliation and the policy against creating derivative tort remedies for litigation-related misconduct; the strength of existing nontort remedies for spoliation; and the uncertainty of the fact of harm in spoliation cases." [Cedars-Sinai Medical Center v. Superior Court](#), *supra*, at 8, 74 Cal.Rptr.2d 248, 954 P.2d 511.

FN1. See [Christian v. Kenneth Chandler Construction Co.](#), 658 So.2d 408, 413 (Ala.1995); [Goff v. Harold Ives Trucking Co.](#), 342 Ark. 143, 150, 27 S.W.3d 387 (2000); [Cedars-Sinai Medical Center v. Superior Court](#), 18 Cal.4th 1, 17, 954 P.2d 511, 74 Cal.Rptr.2d 248 (1998); [Lucas v. Christiana Skating Center, Ltd.](#), 722 A.2d 1247, 1249-50 (Del.Super.1998); [Martino v. Wal-Mart Stores, Inc.](#), 908 So.2d 342, 347 (Fla.2005); [Gardner v. Blackston](#), 185 Ga.App. 754, 755, 365 S.E.2d 545 (1988); [Gribben v. Wal-Mart Stores, Inc.](#), 824 N.E.2d 349, 355 (Ind.2005); [Meyn v. State](#), 594 N.W.2d 31, 33-34 (Iowa 1999) (refusing to recognize negligent spoliation of evidence as independent tort where spoliation caused by third party and stating in dicta that first party claim also is not cognizable); [Monsanto Co. v. Reed](#), 950 S.W.2d 811, 815 (Ky.1997); [Miller v.](#)



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Montgomery County, 64 Md.App. 202, 214-15, 494 A.2d 761, cert. denied, 304 Md. 299, 498 A.2d 1185 (1985); Fletcher v. Dorchester Mutual Ins. Co., 437 Mass. 544, 553, 773 N.E.2d 420 (2002); Dowdle Butane Gas Co. v. Moore, 831 So.2d 1124, 1135 (Miss.2002); Oliver v. Stimson Lumber Co., 297 Mont. 336, 345, 993 P.2d 11 (1999); Timber Tech Engineered Building Products v. Home Ins. Co., 118 Nev. 630, 632-33, 55 P.3d 952 (2002); Trevino v. Ortega, 969 S.W.2d 950, 951 (Tex.1998); Johnston v. Metropolitan Property & Casualty Ins. Co., 288 Wis.2d 658, 707 N.W.2d 580 (2005).

A number of courts have concluded that spoliation of evidence is not a cognizable tort per se but may be actionable under other theories. See Boyd v. Travelers Ins. Co., 166 Ill.2d 188, 194, 209 Ill.Dec. 727, 652 N.E.2d 267 (1995) (claim for spoliation of evidence can be stated under existing negligence law); Rosenblit v. Zimmerman, 166 N.J. 391, 406, 766 A.2d 749 (2001) (recognizing intentional spoliation of evidence claim as form of fraudulent concealment); Weigl v. Quincy Specialties Co., 158 Misc.2d 753, 756-57, 601 N.Y.S.2d 774 (1993) (New York does not recognize spoliation of evidence as independent tort, but does recognize common-law action for negligently or intentionally impairing right to bring action against tortfeasor).

A number of courts have recognized first party spoliation of evidence as an independent tort. See Hazen v. Anchorage, 718 P.2d 456, 463 (Alaska 1986); Holmes v. Amerex Rent-A-Car, 180 F.3d 294, 296 (D.C.Cir.1999) (under District of Columbia law, negligent or reckless spoliation of evidence is independent tort); Smith v. Howard Johnson Co., 67 Ohio St.3d 28, 29, 615 N.E.2d 1037 (1993); Hannah v. Heeter, 213 W.Va. 704, 715, 584 S.E.2d 560 (2003) (recognizing intentional spoliation of evidence as independent tort when spoliation done by party to civil action or by third party); see also Coleman v. Eddy Potash, Inc., 120 N.M. 645, 649, 905 P.2d 185 (1995) (recognizing intentional spoliation of evidence claim against third party and not distinguishing between first party and third party claims), overruled on other grounds by Delgado v. Phelps Dodge Chino, Inc., 131 N.M. 272, 34 P.3d 1148

(2001).

After reviewing the cases in which it repeatedly had refused to create new torts to remedy litigation related misconduct; id., at 9, 74 Cal.Rptr.2d 248, 954 P.2d 511; \*\*1189 and the existing nontort remedies for spoliation, including evidentiary inferences, discovery sanctions, procedural sanctions, attorney disciplinary sanctions, and criminal penalties; id., at 11-13, 74 Cal.Rptr.2d 248, 954 P.2d 511; the California court concluded that "existing remedies are generally effective at deterring spoliation." Id., at 13, 74 Cal.Rptr.2d 248, 954 P.2d 511. The court also concluded that "in a substantial proportion of spoliation cases the fact of harm will be irreducibly uncertain." \*262 Id. " It would seem to be sheer guesswork, even presuming that the destroyed evidence went against the spoliator, to calculate what it would have contributed to the plaintiff's success on the merits of the underlying lawsuit.... The lost evidence may have concerned a relevant, but relatively trivial matter. If evidence would not have helped to establish [the] plaintiff's case an award of damages for its destruction would work a windfall for the plaintiff.' " Id., at 14, 74 Cal.Rptr.2d 248, 954 P.2d 511, quoting Petrik v. Monarch Printing Corp., 150 Ill.App.3d 248, 260-61, 103 Ill.Dec. 774, 501 N.E.2d 1312 (1986). Accordingly, the court concluded that, although "the intentional spoliation of evidence by a party to the litigation to which it is relevant is an unqualified wrong ... it is the rare case in which a tort remedy for an intentionally caused harm is not appropriate." Cedars-Sinai Medical Center v. Superior Court, *supra*, 18 Cal.4th at 17, 74 Cal.Rptr.2d 248, 954 P.2d 511.

Like California, Connecticut disfavors derivative torts. [FN2] In addition, in Connecticut, as in California, the \*263 rules of evidence, procedure and attorney conduct and the criminal law provide a wide range of sanctions for spoliation. The majority does not dispute these facts and, indeed, apparently accepts the reasoning of the court in Cedars-Sinai Medical Center as it applies to cases in which the plaintiff is the spoliator or in which the defendant is the spoliator and the plaintiff can establish a prima facie case in the underlying action. The majority concludes, however, that when a plaintiff is unable to meet his burden of production as a result of the defendant's bad faith destruction of evidence, the plaintiff should be able to bring a spoliation action against the defendant. I disagree.

[FN2]. See Larobina v. McDonald, 274 Conn. 394, 408, 876 A.2d 522 (2005) (allowing

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separate abuse of process claim against party to pending litigation "could subject the courts to a flood of ... duplicative claims and effectively chill the vigorous representation of clients by their attorneys"); id., at 409, 876 A.2d 522 (allowing separate civil conspiracy claim arising from alleged misconduct by party to pending litigation would "undermine an orderly and efficient judicial process and would potentially lead to inconsistent verdicts"); id., at 411, 876 A.2d 522 (allowing negligent infliction of emotional distress claim arising from alleged misconduct by party to pending litigation "would subject the courts to a flood of collateral actions arising from aggressive litigation tactics and would effectively chill the vigorous representation of clients by their attorneys"). We also repeatedly have recognized the general public policy against increased litigation. See Perodeau v. Hartford, supra, 259 Conn. at 756-57, 792 A.2d 752; Jaworski v. Kiernan, 241 Conn. 399, 407, 696 A.2d 332 (1997); see also Ward v. Greene, 267 Conn. 539, 558, 839 A.2d 1259 (2004) ("Every injury has ramifying consequences, like the ripples of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree." [Internal quotation marks omitted.] ). In addition, this court, like the California court, repeatedly has recognized the "judicial policy in favor of judicial economy, the stability of former judgments and finality." (Internal quotation marks omitted.) DaCruz v. State Farm Fire & Casualty Co., 268 Conn. 675, 686, 846 A.2d 849 (2004).

As a preliminary matter, I note that there simply is no need to reach this issue in the present case because, contrary to the majority's statement, the plaintiff, Leandro Rizzuto, has not alleged that he was **\*1190** unable to make a prima facie case in his product liability action as the result of the destruction of the ladder by the defendants, Davidson Ladders, Inc., [FN3] and Home Depot, Inc. Rather, the plaintiff alleged in his complaint that his "case has been damaged to the point where no expert can *conclusively* establish the mechanism of the defect which caused the plaintiff's injuries" and, therefore, he "may not be able to prove his case...." [FN4] (Emphasis added.) **\*264** Similarly, in his memorandum in opposition to the defendants' motion

to strike the spoliation claims, the plaintiff did not suggest that he was unable to make out a prima facie case, but argued only that, under Beers v. Bayliner Marine Corp., 236 Conn. 769, 675 A.2d 829 (1996), if a *hypothetical* plaintiff were unable to establish a prima facie case, then that plaintiff would have no remedy. [FN5] It is hardly surprising that the plaintiff failed either to allege or to argue to the trial court that he could not make out a prima facie case because: (1) he has never argued that the tort of first party intentional spoliation should be limited to cases in which the plaintiff cannot meet his burden of production; and (2) no court that I am aware of has imposed such a limitation on the tort. [FN6] **\*\*1191** More importantly, this court and numerous **\*265** other courts have recognized that, in a product liability lawsuit, the destruction of the allegedly defective product does not necessarily prevent the plaintiff from proving his case. See id., at 778, 675 A.2d 829 ("the spoliation of a machine may raise an adverse inference with respect to a claim that that particular machine was defective"); Miller v. Allstate Ins. Co., 650 So.2d 671, 674 (Fla.App.1995) (evidence that product malfunctioned during normal operation constitutes prima facie case that product was defective); see also Beil v. Lakewood Engineering & Mfg. Co., 15 F.3d 546, 553 (6th Cir.1994) (reversing District Court's granting of summary judgment in favor of defendant on ground that plaintiff had destroyed evidence because, in product liability case based on design defect, plaintiff can demonstrate design defect without specific product); **\*266** Columbian Rope Co. v. Todd, 631 N.E.2d 941, 944 (Ind.App.1994) (when plaintiff claimed design defect in rope and then lost rope, testimony of plaintiff's expert witness based on exemplar rope was admissible).

FN3. After the briefs were filed in this appeal, the plaintiff withdrew his claims against Davidson Ladders, Inc., which is no longer a party to this appeal.

FN4. The majority also states that it is required to assume at this stage of the proceedings that the plaintiff's purported factual allegation that he could not make out a prima facie case in the product liability action is true. See Cotto v. United Technologies Corp., 251 Conn. 1, 42, 738 A.2d 623 (1999) (in ruling on motion to strike "the facts alleged in the plaintiff's complaint must be taken to be true"). It is well established, however, that whether the plaintiff has made out a prima facie case is a

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question of law, not of fact. See [DiStefano v. Milardo](#), 276 Conn. 416, 422, 886 A.2d 415 (2005). It is arguable that, if the plaintiff had brought *only* a spoliation action, this court could assume the truth of any allegations made in that action about the underlying action. In the present case, however, the allegations of the underlying action are before us. Assuming the truth of *those* allegations, the plaintiff clearly, as a matter of law, has made out a prima facie case of product liability.

**FN5.** The majority also points out that the plaintiff claimed in its memorandum in opposition to the defendants' motion to strike that "the defendants had destroyed the ladder in bad faith...." The language relied on by the majority states in full: "Moreover, the [c]ourt [in [Beers v. Bayliner Marine Corp.](#), *supra*, 236 Conn. at 777 n. 11, 675 A.2d 829] expressly stated that it was leaving for another day the appropriate remedy where a party destroys evidence in bad faith, as is alleged here." The plaintiff's amended complaint, however, alleged no such thing. I recognize that this court reads pleadings " 'broadly and realistically.' " [DiLieto v. County Obstetrics & Gynecology Group, P.C.](#), 265 Conn. 79, 104, 828 A.2d 31 (2003). "That does not mean, however, that [we are] obligated to read into pleadings factual allegations that simply are not there...." [Pane v. Danbury](#), 267 Conn. 669, 677, 841 A.2d 684 (2004).

**FN6.** The majority relies on [Smith v. Atkinson](#), 771 So.2d 429, 434 (Ala.2000), and [Hannah v. Heeter](#), 213 W.Va. 704, 714, 584 S.E.2d 560 (2003), in support of its conclusion that the plaintiff must be incapable of establishing even a prima facie case in his underlying action in order to bring a claim for first party intentional spoliation of evidence. See [Smith v. Atkinson](#), *supra*, at 434 ("in order for a plaintiff to show proximate cause, the trier of fact must determine that the lost or destroyed evidence was so important to the plaintiff's claim in the underlying action that without that evidence the claim did not survive or would not have survived a motion for summary judgment"); [Hannah v. Heeter](#), *supra*, at 714, 584 S.E.2d 560 (same). I would first note that the portions

of those cases cited by the majority involved third party spoliation actions, in which evidentiary presumptions and rules governing litigation procedure, discovery and attorney conduct provide no deterrence to the destruction of evidence. Accordingly, the arguments for recognizing a tort for third party spoliation of evidence are much stronger than those in favor of recognizing a first party tort.

Second, it is not entirely clear to me that the court in [Smith](#) was limiting spoliation claims to those in which the plaintiff could not establish a prima facie case in the underlying action. Rather, [Smith](#) may be interpreted as concluding only that, if an underlying action cannot survive a motion for summary judgment, then the plaintiff may bring a third party spoliation action. In reaching that conclusion, the court was rejecting the defendant's argument that, in order to bring an action for third party spoliation, the plaintiff first must bring the underlying action and be denied recovery. [Smith v. Atkinson](#), *supra*, 771 So.2d at 434. Thus, it is arguable that the court did *not* conclude that, if the underlying action was capable of surviving a motion for summary judgment, but judgment ultimately was entered against the plaintiff, a third party spoliation action was precluded. See [id.](#) ("[t]he plaintiff can rely upon *either* a copy of a judgment against him in an underlying action *or* upon a showing that, without the lost or destroyed evidence, a summary judgment would have been entered for the defendant in the underlying action" [emphasis added]).

In [Hannah](#), the court relied entirely on [Smith](#) in stating that the plaintiff may rely on either a judgment against him in the underlying action or a showing that, without the lost evidence, summary judgment would have been entered for the defendant in the underlying action. Again, it is not entirely clear that the court in [Hannah](#) was limiting spoliation claims to those in which the plaintiff could not establish a prima facie case in the underlying action. Moreover, the court in [Hannah](#) discusses this requirement in the context of the tort of third party negligent spoliation of evidence and does not restate or refer to this language in the section discussing the tort of first party intentional spoliation of evidence.

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In my view, evidence that the ladder collapsed when the plaintiff stood on it, together with evidence that the defendants intentionally destroyed the ladder, clearly would be sufficient to support an inference under *Beers* that physical examination of the ladder would have been unfavorable to the defendants. See *Beers v. Bayliner Marine Corp.*, supra, 236 Conn. at 775, 675 A.2d 829. It is also possible that the plaintiff could demonstrate that the ladder was defective by using exemplar ladders. It is ironic that, although the majority opinion purportedly is premised on the unfairness to the plaintiff of disallowing a claim for spoliation, the majority not only fails to view the plaintiff's product liability action in the light most favorable to him, but takes precisely the opposite tack. I cannot fathom why the majority is so eager to adopt a new tort for first party intentional spoliation of evidence--in a form that no other jurisdiction in the country has recognized-- that it is willing to distort the record to suggest that the plaintiff in the present case could meet the elements of that tort.

**\*\*1192** Even if this were an appropriate case for this court to consider adopting the tort in the form proposed by the majority, however, I would conclude that we should not do so. First, although the majority purports to rely on this court's decision in *Beers* as mandating the recognition of an independent tort for intentional spoliation, its decision is entirely inconsistent with that case. We stated in *Beers* that the inference that destroyed evidence would have been unfavorable to the spoliator "does not supply the place of evidence of material facts and does not shift the burden of proof so as to relieve the party upon whom it rests of the necessity of establishing \*267 a prima facie case...." [FN7] (Internal quotation marks omitted.) Id., at 779, 675 A.2d 829. The majority now concludes that, because the *Beers* inference is not available when the plaintiff has failed to make out a prima facie case, a plaintiff who cannot do so must receive something much more valuable, namely, the benefit of a *rebuttable presumption* that he would have *prevailed* if not for the destruction of the evidence. The majority attempts to justify this departure from *Beers* by pointing out that we specifically stated in that case that we were leaving "to another day the determination of the appropriate \*268 remedy when the spoliator's intent had been to perpetrate a fraud...." Id., at 777 n. 11, 675 A.2d 829. Nothing in *Beers*, however, remotely suggests that, in direct contradiction to the limitation on the adverse inference that we expressly adopted in that case, and to the well established evidentiary principles and

public policy considerations underlying that limitation, we might in a future case require the trial court to create a rebuttable presumption that the plaintiff would have prevailed if not for the destruction of the evidence when, and only when, the destruction of the evidence prevents the plaintiff from establishing a prima facie case.

FN7. Citing *Doty v. Wheeler*, 120 Conn. 672, 679, 182 A. 468 (1936) (same); *Secondino v. New Haven Gas Co.*, 147 Conn. 672, 675-76, 165 A.2d 598 (1960) (rule that jury can draw adverse inference from party's failure to produce witness does not apply until opposing party has made out prima facie case), overruled on other grounds by *State v. Malave*, 250 Conn. 722, 737 A.2d 442 (1999) (en banc), cert. denied, 528 U.S. 1170, 120 S.Ct. 1195, 145 L.Ed.2d 1099 (2000); *Larsen v. Romeo*, 254 Md. 220, 228, 255 A.2d 387 (1969) (adverse inference does not amount to substantive proof and cannot take place of proof of fact necessary to other party's case); *DiLeo v. Nugent*, 88 Md.App. 59, 71, 592 A.2d 1126 (adverse inference that destroyed evidence would have been unfavorable does not in itself amount to substantive proof that evidence was unfavorable), cert. granted, 325 Md. 18,325 Md. 18, 599 A.2d 90 (1991), appeal dismissed, 327 Md. 627, 612 A.2d 257 (1992); *Burkowske v. Church Hospital Corp.*, 50 Md.App. 515, 523-24, 439 A.2d 40 (1982) (same), overruled on other grounds by *B & K Rentals & Sales Co. v. Universal Leaf Tobacco Co.*, 324 Md. 147, 596 A.2d 640 (1991); *Jakel v. Brockelman Bros., Inc.*, 91 N.H. 453, 455, 21 A.2d 155 (1941) (proof of alleged suppression of evidence cannot take place of proof of facts necessary to recovery); *F.R. Patch Mfg. Co. v. Protection Lodge No. 215, International Assn. of Machinists*, 77 Vt. 294, 329, 60 A. 74 (1905) (inference "does not relieve the other party from introducing evidence tending affirmatively to prove his case so far as he has the burden"); *Jones v. Lamm*, 193 Va. 506, 510-11, 69 S.E.2d 430 (1952) (fact that evidence was destroyed by defendant is not proof of primary negligence of defendant even if it is assumed that such destruction was intentional); *Jagmin v. Simonds Abrasive Co.*, 61 Wis.2d 60, 81, 211 N.W.2d 810 (1973) (where destruction of evidence gives rise to adverse inference,

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inference cannot carry other party's burden of proof); see also C. Tait, Connecticut Evidence (3d Ed. 2001) § 4.3.2 ("[N]egative inferences cannot supply proof of any particular fact. Accordingly, negative inferences do not help a party to establish a prima facie case and can be used only by the trier in weighing the evidence and determining the ultimate burden of persuasion.").

**\*\*1193** The public policy considerations underlying [Beers](#) were explained in [Cedars-Sinai Medical Center](#). In that case, the California court pointed out that, when a plaintiff is unable to present evidence in support of his underlying action, "the fact of harm will be irreducibly uncertain. In such cases, even if the jury infers from the act of spoliation that the spoliated evidence was somehow unfavorable to the spoliator, there will typically be no way of telling what precisely the evidence would have shown and how much it would have weighed in the spoliation victim's favor. Without knowing the content and weight of the spoliated evidence, it would be impossible for the jury to meaningfully assess what role the missing evidence would have played in the determination of the underlying action. The jury could only speculate as to what the nature of the spoliated evidence was and what effect it might have had on the outcome of the underlying litigation." [Cedars-Sinai Medical Center v. Superior Court](#), [supra](#), 18 Cal.4th at 13-14, 74 Cal.Rptr.2d 248, 954 P.2d 511; see also [Goff v. Harold Ives Trucking Co.](#), 342 Ark. 143, 149, 27 S.W.3d 387 (2000) (same); [Gribben v. Wal-Mart Stores, Inc.](#), 824 N.E.2d 349, 354-55 (Ind.2005) (same); [Federated Mutual Ins. Co. v. Litchfield Precision Components, Inc.](#), 456 N.W.2d 434, 439 (Minn.1990) (declining to recognize tort for first party **\*269** spoliation of evidence in absence of evidence that plaintiff would have prevailed in underlying action if evidence had not been destroyed because, not only extent, but also existence of harm was purely speculative). When the plaintiff is unable even to establish a prima facie case, these principles apply all the more strongly.

In support of its conclusion that the irreducible uncertainty of harm does not militate against adopting a tort for first party intentional spoliation of evidence when the plaintiff cannot establish a prima facie case, the majority relies on [Holmes v. Amerex Rent-A-Car](#), 710 A.2d 846, 853 (D.C.1998), and [Story Parchment Co. v. Paterson Parchment Paper Co.](#), 282 U.S. 555, 563, 51 S.Ct. 248, 75 L.Ed. 544 (1931). In [Holmes](#), the court stated that "there would

be an inequity in preventing a plaintiff from recovering because of his inability, allegedly caused by the defendant, to prove his underlying case. [T]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." (Internal quotation marks omitted.) [Holmes v. Amerex Rent-A-Car](#), [supra](#), at 850. In [Story Parchment Co.](#), the court stated that "[w]here the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise." (**\*270** Internal quotation marks omitted.) [Story Parchment Co. v. Paterson Parchment Paper Co.](#), [supra](#), at 563, 51 S.Ct. 248.

In [Story Parchment Co.](#), however, the court specifically found that the evidence at trial supported a finding that the defendant unlawfully had interfered with the plaintiff's business and that the interference had injured the plaintiff. [Id.](#), at 560, 51 S.Ct. 248. Only the amount of damages was uncertain. [Id.](#), at 561, 51 S.Ct. 248. **\*\*1194** In [Holmes](#), the court held that, in order to receive damages, the plaintiff was required to prove at least that it "enjoyed a significant possibility of success" in the underlying claim. [Holmes v. Amerex Rent-A-Car](#), [supra](#), 710 A.2d at 852. In contrast, in the present case, the majority would allow the recovery of damages only in cases where the plaintiff cannot even make a prima facie case of liability in the underlying action. Thus, "the issue [here] is proof of the *existence*, not merely the *extent*, of an injury." (Emphasis added.) [Federated Mutual Ins. Co. v. Litchfield Precision Components, Inc.](#), [supra](#), 456 N.W.2d at 438. Because the reasoning of the court in [Story Parchment Co.](#) does not apply when there is no evidence of causation, I believe that the majority's reliance on that case is entirely misplaced.

The majority may respond, however, that under the version of the tort that it adopts, the plaintiff must prove that the defendant caused an injury because he must establish that the defendant destroyed the

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evidence in bad faith, i.e., with an intent to deprive the plaintiff of his cause of action. This is mere sleight of hand. The majority cannot, simply by conjuring up a new derivative tort in which the element of bad faith substitutes for the element of causation, change the basic fact that any finding of liability and damages without a finding that the injury was in fact caused by the defendant must \*271 be entirely speculative. Bad faith, in and of itself, cannot injure anyone. [\[FN8\]](#)

[\[FN8\]](#). Perhaps more fundamentally, if the plaintiff were able to establish that he had a cause of action that the defendant deliberately destroyed, then he presumably would be able to make a prima facie case in the underlying action and would not be eligible to bring a spoliation claim under the majority's view. Thus, the limitation of the tort to cases where the plaintiff can prove intent to destroy the underlying cause of action would appear to be self-obviating.

The majority engages in a similar sleight of hand when it concludes that the plaintiff is entitled to the full amount of his damages. The majority implicitly argues that when a defendant's destruction of evidence prevents the plaintiff from presenting even a prima facie case, the defendant's conduct is so "egregious" that it is fair to place on him the entire risk of the uncertainty of harm. The majority does not allow the tort, however, in all cases where the defendant has engaged in egregious, bad faith conduct, but only in those cases where the plaintiff cannot present a prima facie case. Thus, another defendant could engage in equally egregious conduct and incur no liability whatsoever because, although he did not prevent the plaintiff from establishing a prima facie case, he did prevent the plaintiff from proving his case.

Consider the following examples. Driver A drives his new lawnmower off a cliff and incurs severe injuries. He claims that the steering became inoperable just before the crash, but the manufacturer of the lawnmower destroys the lawnmower in bad faith before trial. Because the jury reasonably could believe A's testimony that the steering malfunctioned, he has a prima facie case of product liability. See [Miller v. Allstate Ins. Co., supra, 650 So.2d at 674](#) (evidence that product malfunctioned during normal operation constitutes prima facie case that product was defective). Without the lawnmower, however, the jury is not convinced that it is \*272 more likely than not that the lawnmower was defective and finds

for the defendant. [\[FN9\]](#) A has *no* recourse against the manufacturer.

[\[FN9\]](#). Under [Beers](#), the jury is not required to draw an adverse inference from the intentional destruction of evidence. See [Beers v. Bayliner Marine Corp., supra, 236 Conn. at 779, 675 A.2d 829](#).

**\*\*1195** Driver B drives his new lawnmower off a cliff and incurs severe injuries. He does not recall what happened just before the crash and the manufacturer destroys the lawnmower in bad faith before trial. B has no prima facie case of liability and, therefore, can seek the *entire amount* of damages from the manufacturer in a spoliation action.

I simply do not understand why the majority believes that, although Driver A is not entitled to receive anything from the spoliator in spite of the fact that the defendant's bad faith destruction of the evidence severely impaired his ability to recover damages, Driver B is entitled to recover the *entire amount* of his damages, even though there is *no* evidence that his injuries were caused by a defective lawnmower. The spoliator's conduct was equally egregious in each instance. If the majority believes that the bad faith destruction of evidence requires a harsher approach to spoliators than this court's approach in [Beers](#), it would make much more sense to create a mandatory rebuttable presumption that the spoliated evidence would have favored the plaintiff in all cases where the defendant destroyed the evidence in bad faith, *except* those in which the plaintiff is unable to establish even a prima facie case of causation. [\[FN10\]](#) I cannot perceive why a plaintiff who has presented \*273 some evidence in support of each element of his underlying claim, but ultimately cannot meet his burden of proof without the destroyed evidence, should be in a worse position than a plaintiff who cannot even meet his burden of production. [\[FN11\]](#)

[\[FN10\]](#). I see no reason to require the jury to find that the plaintiff would have *prevailed* if the defendant had not destroyed the evidence. In my view, a flexible approach, in which the jury can consider the degree of the defendant's bad faith and the importance of the spoliated evidence in determining what weight to give it, would be adequate. I note that this approach, unlike the approach adopted by the majority, might provide some relief to the plaintiff in the present

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case.

[FN11](#). Moreover, it is clear that the majority's new tort will create perverse incentives by encouraging plaintiffs who have weak cases to argue that they have *no* evidence to support their underlying actions. Driver A would have been better off claiming that he could not remember what happened before his accident.

Finally, I would point out that we have not hesitated to require plaintiffs to prove causation in other contexts where a plaintiff's ability to establish liability and damages has been impaired by the defendant's conduct. In legal malpractice actions, the plaintiff is required to prove that "the defendant attorney's professional negligence caused injury to the plaintiff by presenting evidence of what would have happened in the underlying action had the defendant not been negligent. This traditional method of presenting the merits of the underlying action is often called the 'case-within-a-case.' " [Margolin v. Kleban & Samor, P.C., 275 Conn. 765, 775 n. 9, 882 A.2d 653 \(2005\)](#). We do not excuse the plaintiff from making a showing of causation merely because the attorney has made it difficult for the plaintiff to establish what would have happened in the underlying action in the absence of the malpractice, regardless of the nature and severity of the attorney's misconduct.

To the extent that the majority believes that a completely arbitrary damage award is preferable to no award at all when the defendant has engaged in bad faith spoliation, the establishment of a civil fine payable to the spoliation victim would be better left to the legislature. See [Mendillo v. Board of Education, 246 Conn. 456, 486-87, 717 A.2d 1177 \(1998\)](#). There simply is no precedent for allowing a jury to award **\*\*1196** damages for an **\*274** injury when there is no evidence that the defendant caused the injury.

I recognize the unfairness of denying recovery to a plaintiff when, as the possible result of the defendant's wrongful conduct, he cannot establish a prima facie case. The plain fact remains, however, that the causal connection between the plaintiff's inability to recover damages and the defendant's conduct must be irreducibly speculative in such cases. I also recognize that there may be cases where the defendant will prefer the risk of sanctions, a default judgment, contempt penalties, criminal fines and even imprisonment to the risk of a civil judgment

against him. This proves only that human systems of justice will not be perfect until human behavior is perfect. I would conclude that, in our imperfect world, the well-defined costs of allowing claims for first party intentional spoliation of evidence outweigh the speculative benefits. Accordingly, I dissent.

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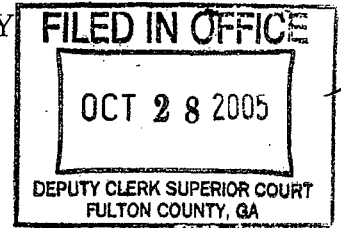
## **Exhibit B**

**Consortium for Adequate School Funding in  
Ga., Inc. v. State, No. 04-91004, slip op., (Sup.  
Ga. Oct 28, 2005).**



**COPY**

IN THE SUPERIOR COURT OF FULTON COUNTY



STATE OF GEORGIA

CONSORTIUM FOR ADEQUATE \*  
 SCHOOL FUNDING IN GEORGIA, INC., \*  
 et al., \*  
 Plaintiffs \*

Civil Action No. 2004CV91004

v. \*  
 \*  
 STATE OF GEORGIA, et al., \*  
 Defendants. \*

**ORDER ON DEFENDANTS' MOTION TO DISMISS**  
**PLAINTIFFS' COMPLAINT**

This matter comes before the Court on Defendants' Motion to Dismiss Plaintiffs' Complaint. After a review of the record and considering the arguments and submissions of counsel, the Court finds as follows:

Plaintiffs, which include an association of public school districts interested in school funding issues ("Consortium Districts"), specified public school districts ("Plaintiff Districts"), as well as individual students who attend school in the Plaintiff Districts ("Plaintiff Students"), brought the present declaratory judgment action attacking the constitutionality of Georgia's system of public school finance.

Count I of the Complaint alleges that the State's system for funding public education violates the rights of Plaintiff Students to obtain an adequate education guaranteed them by the Georgia Constitution. Ga. Const., Art. VIII, Sec. I, Par. I. Plaintiff Districts and Consortium Districts further claim that the State's school funding system has prohibited their board members and officers from fulfilling their constitutional and statutory responsibilities to provide their students with an adequate

education. Plaintiffs allege in Count II that Plaintiff Students and other students in the Plaintiff Districts and Consortium Districts are denied an equal opportunity for an adequate education in violation of the equal protection provision of the Georgia Constitution. Ga. Const., Article I, Section I, Paragraph I.

Defendants, including the State of Georgia, the State Board of Education, the Georgia State School Superintendent and members of the Georgia State Board of Education, seek to dismiss Plaintiffs' complaint, alleging that various threshold procedural issues prevent the Court from hearing this dispute and that Plaintiffs have failed to state a claim upon which relief may be granted.

I. *Threshold Procedural Issues.*

A. Sovereign Immunity

Defendants assert that Plaintiffs' action is barred by the doctrine of sovereign immunity. In IBM v. Evans, 265 Ga. 215, 216 (1995), the Georgia Supreme Court held, "[t]his court has long recognized an exception to sovereign immunity where a party seeks injunctive relief against the state or a public official acting outside the scope of lawful authority." See also In the Interest of A.V.B., 267 Ga. 728 (1997) ("Sovereign immunity does not protect the state when it acts illegally and a party seeks only injunctive relief"). Here, as in IBM, Plaintiffs seek a declaration that the State is acting unlawfully and ask for injunctive relief.

Defendants attempt to distinguish this case from IBM, asserting that, while in form Plaintiffs seek declarative and injunctive relief, in substance the remedy they seek is purely monetary thereby thwarting the "primary purpose of sovereign immunity [which]

is to protect state coffers.” A.V.B. at 728. The Court rejects this distinction. Here, Plaintiffs ask the Court to “[e]njoin Defendants from further executing or implementing Georgia’s school funding system.” At present, this is the only relief that Plaintiffs seek. Accordingly, the Court finds the doctrine of sovereign immunity inapplicable to the case at hand.

### B. Separation of Powers

Defendants assert that the Court is without jurisdiction to hear the present dispute because it would improperly usurp the budgeting powers accorded Georgia’s legislative and executive branches. The Court finds that this issue is controlled adversely to Defendants by McDaniel v. Thomas, 248 Ga. 632 (1981). McDaniel addressed whether Georgia’s former system of school funding passed constitutional muster. As in the present case, the defendants in McDaniel urged that “the question of how public education can best be funded is nonjusticiable and is more suitably handled by other branches of government.” *Id.* at 633, 285 S.E.2d 156 (punctuation omitted). The Georgia Supreme Court expressly rejected this argument, holding that “we would regard our own refusal to adjudicate plaintiffs’ claim of constitutional infringement an abdication of our constitutional duties.” *Id.* citing Board of Educ. Levittown v. Nyquist, 83 A.D.2d 217, 443 N.Y.S.2d 843 (1981). Accordingly, this Court rejects the argument that the “separation of powers” doctrine prevents it from hearing this matter.

### C. Standing

Defendants assert two separate standing challenges. First, Defendants make a general argument that all Plaintiffs lack standing to pursue this matter based upon the absence of a case or controversy. Second, Defendants specifically attack the standing of

Plaintiff Districts and Consortium Districts to bring the equal protection claim. With regard to the general attack, the Georgia Supreme Court has adopted a two-part standing test in Amdahl Corp. v. Georgia Dept. of Admin. Servcs., 260 Ga. 690, 695-696 (1990) based on a test set forth in Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970). “Under the two-fold test, a complainant has standing if the complainant alleges that the challenged action has caused him injury in fact and if the complainant is asserting an interest arguably within the zone of interests to be protected” by the law at issue. Amdahl at 696 (citations and punctuation omitted). This Court finds that Plaintiff Students clearly meet both parts of the Amdahl standing test. Moreover, as entities responsible for the local supervision and administration of the State’s public school system, this Court finds that Plaintiff Districts and Consortium Districts are asserting claims that fall within the “zone of interests” to be protected by the constitutional provisions at issue.<sup>1</sup> *Id.* Whether the Plaintiff Districts and Consortium Districts may properly assert that they have suffered an injury in fact is best addressed with regard to Defendants’ specific standing challenge.

Defendants claim that the Plaintiff Districts and Consortium Districts, as subordinate entities of their respective county governments, do not have the standing to

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<sup>1</sup> Since Amdahl, the U.S. Supreme Court decided Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992), which established a three-part standing test that differs somewhat from Amdahl.

First, the plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of-- the injury has to be fairly ... traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. (cits. and punc. omitted)

It appears that the Georgia appellate courts have yet to address or adopt the Lujan standing test.

pursue an equal protection claim against the State. They cite a long line of authority that provides: “[a] county or municipal corporation, created by the legislature, does not have standing to invoke the equal protection . . . [clause] of the state or federal Constitution in opposition to the will of its creator.” City of Atlanta v. Spence, 242 Ga. 194, 195 (1978).<sup>2</sup>

In response, Plaintiff Districts and Consortium Districts do not contest that they are derivative bodies of the State. See O.C.G.A. § 20-2-50. Rather, they assert that this doctrine does not apply to the facts of this case, relying upon Stewart v. Davidson, 218 Ga. 760 (1963). In Stewart, members of a county board of education and a city board of education petitioned for mandamus against members of the Georgia State Board of Education and the Georgia State School Superintendent to require that they calculate funding due plaintiff school boards under a State law, without giving effect to the last sentence of that law which the plaintiff school boards alleged to be unconstitutional. The effect of the sentence in question was to reduce significantly the monies owed by the State to the plaintiff school boards. The Georgia Supreme Court rejected the defendants’ attack on plaintiffs’ standing. The Court noted that, as the parties responsible for collecting and expending school funds on a local level, the plaintiff school boards were injured by the unconstitutional provision that reduced funding they otherwise were entitled to receive. “It is not a valid argument to contend that since petitioners are public officers of a subordinate unit of the State they can not attack this State law. The only

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<sup>2</sup> However, Spence continues: “[t]his does not mean that the city does not have [standing to raise other constitutional questions . . .]” *Id.* at 196. Accordingly, this line of authority would not, in and of itself, bar the ability of Plaintiff Districts and Consortium Districts to pursue their adequate education claim.

requisite right to make the attack is a showing that it is hurtful to the attacker.” *Id.* at 764.<sup>3</sup>

Based upon the decision in the Stewart case, as well as on the specific facts and circumstances of the present case, the Court finds that Plaintiff Districts and Consortium Districts have standing to challenge the constitutionality of Georgia’s present school funding system.

The Court has reviewed the other threshold procedural issues raised by Defendants with respect to the existence of a “case or controversy,” “insubstantiality,” and “subject matter jurisdiction,” and finds that none of them would bar the Court from hearing this dispute.

## *II. Failure to State a Claim Upon Which Relief Can Be Granted*

Defendants claim that Plaintiffs have failed to state a cognizable cause of action on their two constitutional claims. Georgia law establishes a high standard in order for a claim to be dismissed at the pleading stage pursuant to O.C.G.A § 9-11-12 (b) (6).

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<sup>3</sup> The Court finds the recent decision of the North Carolina Supreme Court to be persuasive on this standing issue. Hoke County Bd. of Educ. v. State, 358 N.C. 605, 599 S.E.2d 365 (2004). Hoke County concerned a similar school funding dispute -- a declaratory judgment action as to whether the state defendants had fulfilled their constitutional obligation to provide North Carolina school children with a “sound, basic education.” The North Carolina high court determined that local school boards were proper parties even though they did not possess the individual constitutional right at issue.

In declaratory actions involving issues of significant public interest, such as those addressing alleged violations of education rights under a state constitution, courts have often broadened both standing . . . parameters to the extent that plaintiffs are permitted to proceed so long as the interest sought to be protected by the complainant is arguably within the “zone of interest” to be protected by the constitutional guaranty in question. *See, e.g. Seattle Sch Dist. V. State*, 90 Wash.2d 476, 490-95, 585 P.2d 71, 80-83 (1978).

Hoke County at 615, 599 S.E. 2d 365 at 376-377 In reaching this decision, the Hoke County court considered the key supervisory and management role played by local school boards. *Id.* at 617, S.E.2d at 377. “As such the school boards clearly held a stake in the trial court’s determination of whether or not the student plaintiffs were being denied their right to an opportunity to a sound basic education.” *Id.* at 617, 599 S.E.2d at 377-378.

A motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof, and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor.

Bakhtiarnejad v. Cox Enters, Inc., 247 Ga. App. 205, 207- 208 (2000). Here, Plaintiffs clearly and specifically allege that the students in the Consortium School Districts and the Plaintiff School Districts are deprived of basic educational opportunities by virtue of the State's school funding system. Thus, for purposes of this motion, the Court must consider these allegations to be true. *Id.*

A. Adequate Education

Plaintiffs contend that the existing system of funding public education violates Article VIII of the Georgia Constitution. Paragraph I of Section I of Article VIII states: “[t]he provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia. Public education for the citizens prior to college or postsecondary level shall be free and shall be provided by taxation . . . .”

Defendants assert that the Court's consideration of this constitutional issue is foreclosed by the Georgia Supreme Court's decision in McDaniel v. Thomas, 248 Ga. 632 (1981). In McDaniel a group of parents, children and school officials who resided in school districts with relatively low property tax bases challenged Georgia's system of school financing as it existed in the late 1970s. One of the challenges asserted by the McDaniel plaintiffs concerned provisions in Georgia's 1976 Constitution outlining the

obligation of the state to provide citizens with an adequate education. The trial court conducted an evidentiary proceeding, made detailed findings of fact and rejected the plaintiffs' adequate education challenge.

On appeal, the Supreme Court noted the difficulty of establishing a "judicially manageable standard for determining whether or not pupils are being provided an adequate education" and determined that "it is primarily the legislative branch of government which must give content to the term adequate." *Id.* at 644. However, the Supreme Court clearly determined that a state duty to provide an adequate education existed. "This court has construed the 'adequate education' provisions of the Georgia Constitution as requiring the state to provide basic education opportunities to its citizens." *Id.* at 645.

While the trial court's decision rejecting the plaintiffs' adequate education claim was ultimately affirmed, the decision was based, not on a lack of duty, but rather on a lack of evidence that the duty had been breached. "In the absence of evidence to show that existing state funding for public education deprives students in any particular school districts of basic educational opportunities, [the] contention that low wealth districts fail to provide an 'adequate education' must be rejected." *Id.*

As reflected in McDaniel, the question of whether the state has met its constitutional mandate to provide an adequate education is a factual issue to be decided on an evidentiary record. At the stage of the proceedings in this case, no evidence of any kind has been introduced. Thus, the Court finds that while McDaniel imposes a high burden on the Plaintiffs to demonstrate a breach of this constitutional mandate, it does not foreclose the Plaintiffs' adequate education claim.



Defendants seek to distinguish the McDaniel Court's language about adequate education by pointing out the differences in Georgia's 1976 Constitution that governed when McDaniel was decided and Georgia's 1983 Constitution that governs today.

McDaniel concerned two separate "adequate education" provisions in Georgia's 1976 Constitution. The first such provision stated:

The provision of an adequate education for the citizens of Georgia shall be a primary obligation of the State of Georgia, the expense of which shall be provided for by taxation.

Ga. Const. of 1976, Art. VIII, Sec. I, Par. I. This provision is extremely similar to the subsequent provision found in the 1983 Constitution and cited above which is our current Constitution. Not only is the language of the two provisions similar, but no substantive change to this provision was intended by the drafters of the 1983 Constitution. Transcript of Meetings, Select Committee on Constitutional Revision, Legislative Overview Committee, Vol. I., June 18, 1981, pp. 14; 19.<sup>4</sup>

The second constitutional provision regarding an adequate education addressed in McDaniel provided:

Freedom from compulsory association at all levels of public education shall be preserved inviolate. The General Assembly shall by taxation provide funds for an adequate education for the citizens of Georgia.

Ga. Const. of 1976, Art. VIII, Sec. VIII, Par. I. As noted in McDaniel, this constitutional amendment was first ratified by the voters in 1962. While this provision was carried over into Georgia's 1976 Constitution, it was eliminated from the 1983 Constitution.

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<sup>4</sup> Previously, the appellate courts have looked to these transcripts when considering the history and / or meaning of a constitutional provision. See Fulton v. Baker, 261 Ga. 710, 711 (1991); Nelms v. Georgian Manor Condo Ass'n, Inc., 253 Ga. 410, 413 (1984).

Defendants argue that without this provision there is no constitutional requirement that the General Assembly, as opposed to the counties, provide any school funding at all.

The parties do not dispute that this provision of the 1976 Constitution was originally adopted as part of a concerted legislative effort to resist public school desegregation by, among other things, providing State funds as tuition grants enabling students to attend private schools. 1961 Ga. Laws 35; 595. The Court finds that the elimination of this provision from the 1983 Constitution was not motivated by a desire to negate the State's constitutional obligation to provide its citizens with an adequate education. *See* Transcript of Meetings, Select Committee on Constitutional Revision, Legislative Overview Committee, *supra*; *see also* Busbee, An Overview of the New Georgia Constitution, 35 Mercer L.R. 1, 12-13 (1984) (“[m]ost importantly, the new education article does not change or diminish the basic obligations of the state to provide ‘an adequate public education’ for the citizens”).

The Court finds that changes in the 1983 Constitution did nothing to alter the State's constitutional mandate, as outlined in McDaniel, to provide an adequate education to its citizens.” McDaniel, 248 Ga. at 645. In light of this mandate and the detailed factual allegations of Plaintiffs' Complaint alleging that this mandate has been breached, this Court must deny the Defendants' motion to dismiss Plaintiffs' adequate education claim at the pleading stage.

#### B. Equal Protection

As with the adequate education claim addressed above, the key Georgia authority on Plaintiffs' equal protection claim is McDaniel. In McDaniel, the Supreme Court rejected an equal protection challenge to Georgia's system of school finance as it existed

at that time. Plaintiffs assert that the present matter presents a different set of facts that distinguish it from McDaniel. This Court disagrees.

The Georgia Supreme Court outlined the equal protection question presented in McDaniel as follows:

This court has construed the ‘adequate education’ provisions of the Georgia Constitution as requiring the state to provide basic educational opportunities to its citizens . . . . The question now presented is whether the state equal protection provisions impose an *additional* obligation on the state to *equalize* educational opportunities.

*Id.* at 645 (emphasis found in original). The Georgia Supreme Court answered in the negative. The Court determined that -- while vital -- education was not a “fundamental right” for the purposes of state equal protection analysis. *Id.* at 646-647. Accordingly, the Court did not apply the “strict scrutiny” test to determine whether educational opportunities must be equalized. Instead, it used the “rational basis” test and looked to see whether the school funding system had a rational and reasonable basis.

The Supreme Court found the State’s funding system was not invidiously discriminatory and, that because the system bore some rational relationship to legitimate state purposes, it did not violate state equal protection even though it was unequal. *Id.* at 648.

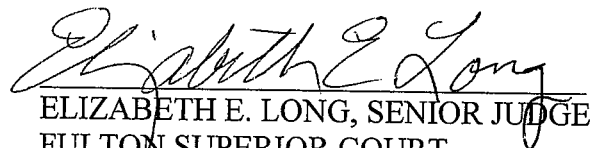
Here, Plaintiffs have contended only that the State’s school funding system fails to provide students with an equal opportunity to obtain an adequate education. To the extent that this contention is merely a restatement of the claim that the State is obligated to provide an adequate education, the Court has already dealt with this contention, confirming the State’s obligation, and denying Defendants’ motion to dismiss that issue

at this point in the proceedings. To the extent that the contention is that the opportunity of every student to obtain an adequate education must be the same, that is, must be equalized, it is inconsistent with the contrary holding of the McDaniel Court. There is no claim by the Plaintiffs that the system is invidiously discriminatory or unrelated to legitimate State purposes. Consequently, McDaniel governs and the Court must grant Defendants' Motion with respect to the equal protection claim.

Conclusion

Based upon the foregoing, it is hereby ordered and adjudged that Defendant's Motion to Dismiss Plaintiffs' Complaint shall be denied as to Plaintiffs' Count I concerning the alleged failure of the State's school funding system to provide children with an adequate education and shall be granted as to Plaintiffs' Count II concerning the alleged denial of equal protection.

SO ORDERED this 25<sup>th</sup> day of October, 2005.

  
ELIZABETH E. LONG, SENIOR JUDGE  
FULTON SUPERIOR COURT  
ATLANTA JUDICIAL CIRCUIT

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## **Exhibit C**

**Bradford v. Maryland State Board of  
Education, No. 94340058/CE189672, slip op.  
(Cir. Ct. Baltimore County Oct. 18, 1994).**

10/18/96

IN THE  
CIRCUIT COURT FOR BALTIMORE CITY

BRADFORD, et al.,

Plaintiffs

v.

MARYLAND STATE BOARD OF  
EDUCATION, et al.,

Defendants

\*  
\*  
\* Case No. 94340058/CE189672

\* \* \* \* \*

BOARD OF SCHOOL COMMISSIONERS  
OF BALTIMORE CITY, et al.,

Plaintiffs

v.

MARYLAND STATE BOARD OF  
EDUCATION, et al.,

Defendants.

\*  
\* Case No. 95258055/CL202151  
\*  
\*

\* \* \* \* \*

ORDER

The Motion of the *Bradford* Plaintiffs for Partial Summary Judgment was heard on October 15, 1996. The Court finds the following:

1. Article VIII of the Maryland Constitution provides that "The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation or otherwise, for their maintenance." The "thorough and efficient" language of Article VIII requires

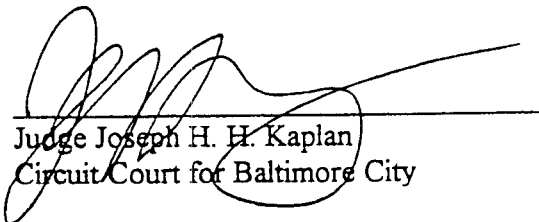
that all students in Maryland's public schools be provided with an education that is adequate when measured by contemporary educational standards.

2. There is no genuine material factual dispute in these cases as to whether the public school children in Baltimore City are being provided with an education that is adequate when measured by contemporary educational standards. This Court finds, based on the evidence submitted by the parties on the partial summary judgment and summary judgment motions in these cases, that the public school children in Baltimore City are not being provided with an education that is adequate when measured by contemporary educational standards.

3. There is a genuine dispute regarding the cause of the inadequate education provided to students in Baltimore City Public Schools and the liability therefor.

IT IS THEREFORE ORDERED that the *Bradford* Plaintiffs Motion for Partial Summary Judgment is granted in part and denied in part.

Entered this 18th day of October, 1996.

  
\_\_\_\_\_  
Judge Joseph H. H. Kaplan  
Circuit Court for Baltimore City



## **Exhibit D**

**Sheff v. O'Neill, No. 360977, 1990 WL  
284341, \*6 (Conn. Super. June 18, 1990).**

UNPUBLISHED OPINION. CHECK COURT  
 RULES BEFORE CITING.

Superior Court of Connecticut, Judicial District of  
 Hartford-New Britain, at  
 Hartford.

Milo SHEFF, et al.

v.

William A. O'NEILL, et al.

**No. 360977.**

June 18, 1990.

*MEMORANDUM OF DECISION ON THE  
 DEFENDANTS' MOTION TO STRIKE*

HAMMER, Judge.

\*1 This declaratory judgment action has been brought by seventeen public school students, including fifteen black, Puerto Rican, and white children who are Hartford residents and who are enrolled in various city schools, and two white children who attend an elementary school in West Hartford. The defendants named in the complaint are the governor, the state board of education and its individual members, the state commissioner of education, the state treasurer and the state comptroller.

The complaint (¶ 30) states that schoolchildren throughout Connecticut, "including the City of Hartford and its adjacent suburban communities, are largely segregated by race and ethnic origin." It alleges (¶¶ 36, 38) that Hartford public schools, because they have such a high proportion of students who are "at risk" of lower educational achievement, "operate at a severe educational disadvantage [which imposes upon them] enormous educational burdens [which have made them unable] to provide educational opportunities that are substantially equal to those received by schoolchildren in the suburban districts."

The plaintiffs also assert (¶ 45) that "[m]easured by the State's own educational standards ..., a majority of Hartford schoolchildren are not currently receiving even a 'minimally adequate education.'" They allege (¶ 50) that "[f]or well over two decades", the state of Connecticut, acting through the defendants and their

predecessors, have been aware of "the separate and unequal pattern of public school districts" in the state and in the greater Hartford metropolitan area, "the strong governmental forces that have created and maintained racially and economically isolated residential communities in the Hartford region; and ... the consequent need for substantial educational changes, within and across school district lines, to end this pattern of isolation and inequality."

The plaintiffs claim (¶ 68) that the defendants "have the legal obligation under Article First, § § 1 and 20, and Article Eighth, § 1 of the Connecticut constitution" to correct these longstanding "educational inequities" in the Hartford school system, and that (¶ 69) they also have the power under the state constitution and state statutes "to carry out their constitutional obligations and to provide the relief to which plaintiffs are entitled." They assert, nevertheless (¶ 70), that neither the Hartford school districts nor the nearby suburban districts "have been directed by defendants to address these inequities jointly, to reconfigure district lines, or to take other steps sufficient to eliminate these educational inequities."

The first count of the complaint (¶¶ 73-75) alleges that "[s]eparate educational systems for minority and non-minority students are inherently unequal [and that because] of the de facto racial and ethnic segregation between Hartford and the suburban districts, the defendants have failed to provide the plaintiffs with an equal opportunity to a free public education as required by Article First, § § 1 and 20, and Article Eighth, § 1, of the Connecticut Constitution ...". The second count (¶¶ 77-78) states that because of "the racial and ethnic segregation that exists between Hartford and the suburban districts, perpetuated by the defendants ... the defendants have discriminated against the plaintiffs" and have failed to provide them with an equal opportunity to a free public education as required by the three state constitutional provisions referred to in the first count.

\*2 The third count (¶ 80) alleges a violation of the same state constitutional guaranties based on the maintenance by the defendants of a public school district in the city of Hartford that is "severely educationally disadvantaged" in comparison to the suburban school districts, that fails to provide its schoolchildren with educational opportunities equal

to those in suburban districts, and that fails to provide a majority of its students with a "minimally adequate education" based on the state's own standards. The fourth count (§ 82) claims that the failure of the defendants to provide Hartford schoolchildren with equal educational opportunities pursuant to state statutes violates their due process rights under article first, §§ 8 and 10, of the state constitution.

The defendants have moved to strike the complaint for failure to state a claim upon which relief can be granted because, first, the plaintiffs' claims are not justiciable; second, unconstitutional state action has not been alleged; third, the plaintiffs have not alleged any causal connection between school district lines and educational performance; and fourth, the existence of school districts which coincide with town boundaries does not violate state constitutional standards.

The purpose of a declaratory judgment action is to secure an adjudication of rights where there is "an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement between the parties ...". Practice Book § 390(b); [Connecticut Association of Health Care Facilities, Inc. v. Worrell, 199 Conn. 609, 613](#). The requirement that there must be a "substantial controversy" or "uncertainty of legal relations" between the parties means that there must be a sufficient practical need for the determination of the question or issue involved and that need must be determined in the light of the particular circumstances in each case. [Kiszkiel v. Gwiazda, 174 Conn. 176, 181](#).

An action for a declaratory judgment is a particularly appropriate vehicle for litigating otherwise justiciable controversies concerning constitutional rights and the constitutionality of state legislative or executive action. [Maloney v. Pac, 183 Conn. 313, 323](#). The advantages of the procedure in determining the constitutionality of the state's system for financing public education under the same state constitutional provisions relied upon by the plaintiffs in this case were fully stated by our Supreme Court in [Horton v. Meskill, 172 Conn. 615, 626-28](#).

A complaint seeking a declaration of the plaintiff's constitutional rights will be stricken on procedural grounds where the rights and jural relations of the parties have been conclusively determined by previous decisions of our Supreme Court and the complaint does not set forth any substantial question or issue which has not been previously determined

and that requires settlement; [Trubek v. Ullman, 147 Conn. 633, 635](#); or where it is apparent from the complaint that the rights of the parties are so clear that there is no uncertainty or dispute as to them. [Hill v. Wright, 128 Conn. 12, 15](#). However, the trial court may not refuse to render a declaratory judgment where all the procedural requirements for that form of relief have been met, and in a case where no factual issues are in dispute, the Supreme Court will itself determine the legal issues, particularly if they are of considerable public importance. [Larke v. Morrissey, 155 Conn. 163, 169](#).

\*3 The defendants' first ground for their motion to strike is that the complaint fails to state a claim upon which relief can be granted because the plaintiffs' causes of action "are predicated on the existence of a judicially enforceable right where no such right exists." The case which they cite in support of this claim is [Pellegrino v. O'Neill, 193 Conn. 670](#), in which a declaratory judgment action seeking to have the financing of the state judicial system declared unconstitutional was dismissed as nonjusticiable because it was a "political question" which could not be adjudicated without violating the principle of separation of powers.

The defendants argue that the plaintiffs "rely primarily" on article eighth, § 1 of the state constitution which provides that "[t]here shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation." They claim that the second sentence of that section is "the kind of 'textually demonstrable constitutional commitment of the issue to a coordinate political department' which is the benchmark for judicial deferral to the legislative process", as stated in [Baker v. Carr, 369 U.S. 186 at 217 \(1962\)](#).

The fact that the legislative branch is given plenary authority over a particular governmental function does not insulate it from judicial review to determine whether it has chosen "a constitutionally permissible means of implementing that power." [Immigration & Naturalization Service v. Chadha, 462 U.S. 919, 940-41 \(1983\)](#). "[T]he legality of claims and conduct is a traditional subject for judicial determination", and such adjudication may not be avoided on the ground of nonjusticiability unless the particular function has been assigned "wholly and indivisibly" to another department of government. [Baker v. Carr, 369 U.S. at 245-46](#) (Douglas, J., concurring).

"Deciding whether a matter has in any measure been

committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation", and is therefore a judicial responsibility. *Baker v. Carr*, 369 U.S. at 211. In making this threshold determination of justiciability, the court must construe the particular constitutional provisions upon which the plaintiff relies in his complaint. See, e.g., *Baker v. Carr*, 369 U.S. 186, 194 n. 15 (1962) (Fourteenth Amendment); *Powell v. McCormack*, 395 U.S. 486, 519 (1969) (Art. I, § 5); *I.N.S. v. Chadha*, 462 U.S. 919, 940 (1983) (Naturalization Clause and Necessary and Proper Clause); *Pellegrino v. O'Neill*, 193 Conn. 670, 681 (Conn. Const. art. V § 2).

The plaintiffs' complaint in this case invokes three separate clauses of the state constitution and asks the court to construe them together. They are, in addition to the education clause (article eighth, § 1), the equality of rights clause, article first, § 1, and the equal protection clause, article first, § 20, which prohibits "segregation or discrimination" in the exercise of civil and political rights.

\*4 The defendants, in asserting their claim of nonjusticiability based only the education clause, are asking the court to find that the plaintiffs are seeking an adjudication of a "political question" because that clause constitutes a "textually demonstrable" constitutional commitment of the plaintiffs' claims to the legislative branch. This court, however, will not, and indeed, cannot, conduct the "delicate exercise in constitutional interpretation" required of it when such an issue is raised, where the defendants' claims are based on a "constitutional text" of their own choosing.

It should also be noted that the plaintiffs in *Horton v. Meskill*, 172 Conn. 615 (*Horton I*) claimed that the then-existing system of financing public education in Connecticut violated the same state constitutional provisions which the plaintiffs rely upon in this case and that the court (Parskey, J.) ruled against the defendants in that case on the issue of justiciability. *Horton v. Meskill*, 31 Conn.Sup. 377, 389. Moreover, *Horton I* held that the statutory financing system of public education was not "appropriate" legislation within the meaning of the applicable state constitutional provisions; 172 Conn. at 649; and that it did not provide "the substantially equal educational opportunity for all Connecticut public school children that the Connecticut constitution requires." *Horton v. Meskill*, 195 Conn. 24, at 27.

The question of justiciability is one of subject matter jurisdiction; *ASL Associates v. Zoning Commission*, 18 Conn.App. 542, 545; and may be raised at any time. *McGee v. Dunnigan*, 138 Conn. 263, 268. In *Pellegrino*, despite the fact that the plurality found that the subject matter of that action was nonjusticiable, the two dissenting members of the Court wrote that in their view "the plaintiffs should not be deprived of the opportunity that was afforded to the plaintiffs in [*Horton I*], to make an evidentiary showing that the legislature has violated the constitution", and cautioned against prejudging the issue of justiciability "in the abstract" without a full hearing on the plaintiffs' claims, however "novel and complex" the constitutional questions might be. *Pellegrino v. O'Neill*, 193 Conn. 670, 689, 692-93 (Peters, J., dissenting).

For the foregoing reasons, the court finds that based upon the factual allegations of the complaint which the court must accept as true for the purposes of this motion, the plaintiffs have stated a justiciable claim because their pleadings present a "substantial question or issue in dispute ... which requires settlement between the parties." Practice Book § 390(b); see *id.* at 690.

The defendants' second ground for their motion to strike, as stated in their brief (p. 22), is that "the plaintiffs' complaint should be stricken because it fails to allege state action which violates the constitution or a failure to satisfy the limited affirmative obligation in article eighth, section 1." They argue (p. 25) that the plaintiffs "are attempting to convert the prohibitions of the State due process and equal protection provisions into vehicles for regulating or mitigating the non-governmental forces which have created the concentration of minority and 'at risk' students in Hartford."

\*5 The defendants acknowledge (p. 27) that article eighth, § 1 "imposes a limited affirmative duty on the State [which] could be enforced ... by alleging only a failure to act." However, they argue that the extent of that duty "is to have a system of free public elementary and secondary schools for the children of this State."

The defendants' argument, in effect, would have the court, at this stage of the case, rule as a matter of law that article eighth, § 1 requires only "free education", and that "appropriate" legislation is, in the words of Justice Loiselle's dissent in *Horton I*, "legislation which makes education free." 172 Conn. at 658

(Loiselle, J., dissenting). It should be noted, however, that Justice Loiselle went on to state that there was no claim made in that case "that education in Connecticut is not meaningful or does not measure up to standards accepted by knowledgeable leaders in the field of education." *Id.* at 659.

The plaintiffs counter the defendants' argument with the claim that when the three constitutional provisions upon which they rely are construed together, they impose an affirmative obligation upon the state to provide all of its public school students with a "substantially equal educational opportunity." They also assert that their complaint sufficiently alleges "that in fact segregated schools deprive children of a substantially equal educational opportunity [and] that racial, ethnic and economic isolation combine to deny them that opportunity."

In testing the sufficiency of a complaint for declaratory relief, the question is not whether the plaintiff is entitled to the declaratory relief he seeks in accordance with the theory he states, but rather, it is whether he is entitled to a declaration of rights at all under the allegations of his complaint. 22A Am.Jur.2d, Declaratory Judgments § 215. At this stage of the proceedings, the sole question for the court is "whether the allegations entitle them to make good on their claim that they are being denied [their constitutional rights]". *Gomillion v. Lightfoot*, 364 U.S. 125 at 341 (1960).

The question of whether or not the state's action or failure to act rises to the level of a constitutional violation goes to the merits of this action because it constitutes a "bona fide and substantial question or issue in dispute ... which requires settlement between the parties ..." by way of the declaratory judgment which the plaintiffs seek. A motion to strike may not be utilized as a device for the determination, as a matter of law in advance of trial, of how that issue should be resolved. See *Hartford Accident & Indemnity Co. v. Williamson*, 153 Conn. 345, 347.

The third ground of the defendants' motion to strike is that the plaintiffs have failed to allege "a sufficient causal connection between school district lines and the injury which they assert." They also cite *Milliken v. Bradley*, 418 U.S. 717 (1984) for the proposition that "[u]nless school district lines were set in the first instance with the intent or expectation that they would bring about some constitutionally significant harm, it cannot be said that a sufficient causal connection exists between the school district lines and that harm to support a constitutional attack

on the lines". Defendants' Brief, p. 33.

\*6 Where a motion is made to strike a declaratory judgment complaint for failure to state a claim upon which relief can be granted, the court is not concerned "with the truth of the allegations, that is, the ability of petitioners to sustain their allegations by proof." *Gomillion v. Lightfoot*, 364 U.S. 339 at 341 (1960). Moreover, state courts in local school desegregation cases are not limited to authority derived from the United States Constitution but, rather, "they are free to interpret the Constitution of the State to impose more stringent restrictions" in the operation of their public school systems. *Bustop, Inc. v. Board of Education*, 439 U.S. 1380, 1382 (Rehnquist, Circuit Justice 1978).

The fourth and final ground for the defendants' motion is that "[t]he plaintiffs do not have a cause of action under the due process or equal protection clauses of the Constitution because the existence of school districts which coincide with municipal boundaries does not create an impermissible classification or impair a fundamental right, and, in any event, there is adequate justification for the State's system of local control over education." They acknowledge in their reply brief (p. 16) that this claim "reach[es] to the heart of the plaintiffs' equal protection claims", but argue (p. 20) that if the allegations of the plaintiffs' complaint, "taken (as they must) with the legislative record which the defendants have called to the Court's attention, cannot sustain a finding that the State has violated the constitution, a trial on the merits will be nothing more than a meaningless exercise."

Where the court is asked only to rule on the sufficiency of the factual allegations of the complaint to justify relief should they be proved at trial, it is inappropriate for the court to consider the constitutional claims stated therein prior to trial. See *United States v. Mississippi*, 380 U.S. 128, 143 (1965). The fact that the defendants argue that the plaintiffs are "bound to lose" on the merits of their constitutional claims in a declaratory judgment action does not change the rule in such actions that "[t]he merits of the constitutional issues presented need not and should not be addressed at this stage of the proceedings." *Tooley v. O'Connell*, 253 N.W.2d 335 at 340 (Wis.1977).

The soundness of the rule that the existence of an actual controversy is all that is required for a litigant to obtain a hearing on his application for a declaratory judgment is reinforced in cases where the

parties disagree as to the factual issues raised in the complaint and "their briefs are replete with contentions respecting the weight to be given those facts in determining their respective rights ...". [Stalnaker v. McCorgary, 223 P.2d 738, 741 \(Kan.1950\).](#) The statutes and rules governing declaratory judgments were not intended to permit the court "to prejudge matters which might become material in determining the propriety or justice of the relief sought", and this is particularly true where constitutional claims affecting the public interest are raised. [Hyde Park Dairies, Inc. v. City of Newton, 209 P.2d 221 at 224 \(Kan.1949\).](#)

\*7 For the foregoing reasons, the defendants' motion to strike the plaintiffs' complaint is denied.

Not Reported in A.2d, 1990 WL 284341  
(Conn.Super.), 1 Conn. L. Rptr. 640

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## **Exhibit E**

**Broadley v. Meriden Boards of Education,**  
**No. 273507, 2006 WL 269168, \*1 (Conn.**  
**Super. July 20, 1990).**

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut, Judicial District of  
New Haven.  
Neil BROADLEY, et al.,  
v.  
MERIDEN BOARD OF EDUCATION, et al.  
**No. 27 35 07.**

July 20, 1990.

*SUPPLEMENTAL MEMORANDUM OF DECISION  
ON MOTIONS TO STRIKE (No. 113 AND No. 115)*

[LICARI](#), Judge.

\*1 The history of this case is set forth in this court's earlier memorandum dated April 17, 1990. Therein the court reserved decision on counts four, five and six pending compliance with Practice Book § 390(d). There has been compliance and the court accepts jurisdiction.

The defendants' motions to strike counts four, five and six are denied. Such denial is in no way an endorsement by this court of the ultimate merits of the claims raised by the plaintiffs. Rather, the court's ruling is simply a recognition of the rule that a motion to strike challenges only the facial legal adequacy of the claims under attack. The complaint here, on its face, is sufficient to withstand such a challenge. This court cannot conclude, as a matter of law, that the plaintiffs state no valid cause of action on the face of their complaint. A motion to strike does not go beyond such inquiry.

The defendants assert that as a matter of law [Article 8, § 1 of the Connecticut Constitution](#) does not create a constitutional right to an individualized level of educational services. There is no Connecticut case law in point. The issue was not addressed in *Horton v. Meskill*, 192 Conn. 617 (1977). The baseline level of constitutionally mandated public education has not yet been fixed in Connecticut.

The plaintiffs also assert a denial of equal protection and of equal rights under the [Connecticut](#)

[Constitution, Article 1, §§ 1 and 20](#). Again, the complaint is facially valid and on a motion to strike the court will not delve below the surface. There is ambiguity sufficient to defeat this motion to strike in the language of Justice House in *Horton v. Meskill*, supra, at p. 645, wherein he stated:

As other courts have recognized, educational equalization cases are "in significant aspects sui generis" and not subject to analysis by accepted conventional tests or the application of mechanical standards.

Thereafter, Justice House continued:

As Mr. Justice Marshall put it in his dissent in Rodriguez (p. 89): "[T]his Court has never suggested that because some 'adequate' level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action. It mandates nothing less than that 'all persons similarly circumstanced shall be treated alike.' Id. pp. 645, 646.

Furthermore, it appears that evidence outside the record, particularly with respect to the equal protection and equal rights claims, may be necessary to decide these issues.

Accordingly, the motions to strike counts four, five and six are denied.

Not Reported in A.2d, 1990 WL 269168 (Conn.Super.)

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