

CASES ARGUED AND DETERMINED

IN THE

**APPELLATE COURT**

OF THE

**STATE OF CONNECTICUT**

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DESIGNS FOR HEALTH, INC. *v.* MARK MILLER  
(AC 40708)

Keller, Bright and Pellegrino, Js.

*Syllabus*

The plaintiff sought to recover damages from the defendant for breach of contract in connection with an agreement pursuant to which the defendant agreed to sell certain products provided by the plaintiff. In its complaint, the plaintiff alleged that the defendant, who is a resident of California and maintains his primary place of business there, violated the terms of the agreement and, therefore, was required to pay the plaintiff damages pursuant to a liquidated damages clause in the agreement, which contained a forum selection clause that required litigation arising from the agreement to be resolved by Connecticut courts. The defendant filed a motion to dismiss the action for lack of personal jurisdiction, asserting that the plaintiff could not meet its burden to prove that he had signed the agreement. The defendant attached to his motion an affidavit in which he averred that he never had any contact with Connecticut and never signed, or authorized anyone to sign, any document that might constitute doing business of any kind in Connecticut. The plaintiff filed a memorandum of law in opposition to the motion to dismiss in which it contended that the trial court had personal jurisdiction over the defendant because he had signed the agreement electronically. The plaintiff submitted a number of attachments in support of its opposition that cumulatively asserted that the defendant had signed the agreement electronically. The defendant filed a reply and an attached supplemental affidavit in which he specifically rebutted the plaintiff's contentions. Thereafter, the court conducted a hearing on the motion to dismiss at which it heard the parties' oral arguments. The parties did not request and the court did not hold a full evidentiary hearing but,

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instead, relied on the memoranda and documentary evidence submitted by the parties to resolve the critical factual dispute as to whether the defendant had signed the agreement electronically. The trial court granted the motion to dismiss and rendered judgment thereon, concluding that the plaintiff failed to meet its burden to establish that the court had jurisdiction over the defendant pursuant to the long arm statute (§ 52-59b [a] [1]) applicable to nonresident individuals because it failed to establish that the defendant had signed the agreement electronically. On the plaintiff's appeal to this court, *held* that the trial court improperly granted the defendant's motion to dismiss and concluded that it lacked personal jurisdiction over the defendant: applying the prima facie standard used by the United States Court of Appeals for the Second Circuit in cases involving jurisdictional disputes where the evidentiary record is only partially developed and the parties have not requested a full evidentiary hearing, this court concluded that the plaintiff met its burden to make a prima facie showing that the court had personal jurisdiction over the defendant because the plaintiff submitted evidence, which, if credited by the trier of fact, was sufficient to establish that the defendant electronically had signed the agreement containing the forum selection clause; moreover, because the plaintiff met its threshold burden of making a prima facie showing and the parties did not request and the trial court did not hold a full evidentiary hearing, the trial court was required to deny the defendant's motion to dismiss.

Argued October 9, 2018—officially released January 8, 2019

*Procedural History*

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Scholl, J.*, granted the defendant's motion to dismiss for lack of personal jurisdiction and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed; further proceedings.*

*Stephen J. Curley*, with whom, on the brief, was *Daniel B. Fitzgerald*, for the appellant (plaintiff).

*Jeffrey Hellman*, for the appellee (defendant).

*Opinion*

BRIGHT, J. The plaintiff, Designs for Health, Inc., appeals from the judgment of the trial court granting the motion to dismiss filed by the defendant, Mark

Miller. On appeal, the plaintiff claims that the court improperly concluded that it lacked personal jurisdiction over the defendant because the plaintiff failed to establish that the defendant had signed electronically an agreement in which the parties expressly agreed to submit to the jurisdiction of state and federal courts in Connecticut. We agree with the plaintiff and, accordingly, reverse the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the plaintiff's claim. On September 27, 2016, the plaintiff filed this breach of contract action against the defendant. In the one count complaint, the plaintiff alleged the following relevant facts. The plaintiff, a Florida corporation with offices in Connecticut, "is in the business of producing and selling a professional line of nutraceutical and natural health products . . . to consumers for sale through health care providers . . . ." The defendant, a podiatrist, maintains a primary place of business in California and is a resident of California. On or about June 10, 2016, the plaintiff and the defendant entered into an agreement pursuant to which the defendant agreed to sell products provided by the plaintiff. Between August 17 and September 8, 2016, the defendant violated the agreement when he sold products that he had purchased from the plaintiff on a website that had not been authorized by the plaintiff. As a result of this violation, the defendant is required, pursuant to a liquidated damages clause in the agreement, to pay the plaintiff at least \$53,000. The agreement, which was attached to the complaint, contains a forum selection clause that requires litigation arising from the agreement to be resolved by Connecticut courts.<sup>1</sup>

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<sup>1</sup> The forum selection clause of the agreement provides: "This [a]greement shall be governed in all respects by the substantive laws of the [s]tate of Connecticut without regard to such state's conflict of law principles. [The parties] agree that the sole and exclusive venue and jurisdiction for disputes arising from this [a]greement shall be in the state or federal court located in Hartford [c]ounty, Connecticut, and [the parties] hereby submit to the

On November 3, 2016, the defendant filed a motion to dismiss in which he argued that the court lacked personal jurisdiction over him because the plaintiff could not meet its burden to prove that he had signed the agreement. The defendant attached to his motion, among other things, an affidavit in which he averred that he never had any contact with the state of Connecticut and never signed, or authorized anyone to sign, any document that “might constitute doing business of any kind in Connecticut.” On December 2, 2016, the plaintiff filed a motion for an extension of time to respond to the defendant’s motion so that it could depose the defendant regarding the factual statements made in his affidavit. On January 23, 2017, the court entered a scheduling order that permitted the plaintiff to conduct the defendant’s deposition. On February 22, 2017, the plaintiff took the deposition of the defendant in California.

On March 24, 2017, the plaintiff filed a memorandum of law in opposition to the defendant’s motion to dismiss in which it contended that the court had personal jurisdiction over the defendant because he had signed electronically the agreement that contained the forum selection clause. The plaintiff submitted a number of attachments in support of its opposition that cumulatively asserted that the defendant had signed electronically the agreement, including certain excerpts of the deposition of the defendant, a copy of the agreement, an affidavit of its general counsel, Stephen M. Carruthers, a “DocuSign” certificate of completion, a screenshot of a “GeoMapLookup” search, notice sent by Carruthers to the defendant informing him of his alleged breach of the agreement, documents evincing the service of the defendant, an affidavit of the plaintiff’s independent sales representative, Toni Lyn Davis, as well as a redacted record of her telephone calls, and a series

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jurisdiction of such courts; provided, however, that equitable relief may be sought in any court having proper jurisdiction.”

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of e-mails that purportedly were exchanged between Carruthers and the defendant. On April 7, 2017, the defendant filed a reply that contended that the plaintiff failed to meet its burden to establish personal jurisdiction, and he attached a supplemental affidavit in which he specifically rebutted the contentions made by the plaintiff in support of its opposition.

On May 22, 2017, the court conducted a hearing on the motion to dismiss at which it heard the parties' oral arguments. On May 31, 2017, the court issued a memorandum of decision in which it granted the defendant's motion. Therein, the court noted that, although "due process requires that a trial-like hearing be held" when "issues of fact are necessary to the determination of a court's jurisdiction," the "parties did not request that an evidentiary hearing be held but rel[ied] on evidence they ha[d] submitted by affidavit." (Internal quotation marks omitted.) Accordingly, the court compared the evidence submitted by both parties<sup>2</sup> and concluded that "the plaintiff has failed to meet its burden to establish that this court has jurisdiction over the defendant.

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<sup>2</sup>The court excluded the evidence of the "GeoMapLookup" screenshot and Carruthers' related statements in his affidavit that purportedly demonstrated the physical location of the Internet Protocol address (IP address) used to execute the agreement. The court specifically stated that "[t]he only evidence submitted by the plaintiff to establish that the referenced IP address is the defendant's is inadmissible and irrelevant hearsay in that it is information from a domain which indicates that the IP address can be traced to the vicinity of a town in California which borders the town in which the defendant allegedly maintains a place of business." Generally, although a plaintiff may rely on only evidence that would be admissible at trial to make a prima facie showing; see *Lujan v. Cabana Management, Inc.*, 284 F.R.D. 50, 64 (E.D.N.Y. 2012); *Adams v. Wex*, 56 F. Supp. 2d 227, 229 (D. Conn. 1999); but see *Schmidt v. Martec Industries Corp.*, United States District Court, Docket No. 07-5020 (DRH) (E.D.N.Y. Sept. 3, 2009); we need not consider whether the trial court erred by excluding this evidence because the proximity of the physical location of the IP address is not necessary to our resolution of this appeal. Consequently, assuming, without deciding, that the trial court properly excluded this evidence, we likewise omit this evidence from our consideration.

It has not established that the defendant . . . transacted any business in this state, that is, entered into the agreement which is the subject of this lawsuit, such that the court has jurisdiction over the defendant pursuant to the long arm statute” applicable to nonresident individuals, General Statutes § 52-59b (a) (1).<sup>3</sup> On June 20, 2017, the plaintiff filed a motion to reargue, which was denied summarily by the trial court. This appeal followed. Additional facts will be set forth as necessary.

We begin with our standard of review and relevant legal principles. “[A] challenge to the jurisdiction of the court presents a question of law over which our review is plenary.” (Internal quotation marks omitted.) *Kenny v. Banks*, 289 Conn. 529, 532, 958 A.2d 750 (2008). “When a defendant challenges personal jurisdiction in a motion to dismiss, the court must undertake a two part inquiry to determine the propriety of its exercising such jurisdiction over the defendant. The trial court must first decide whether the applicable state [long arm] statute authorizes the assertion of jurisdiction over the [defendant]. If the statutory requirements [are] met, its second obligation [is] then to decide whether the exercise of jurisdiction over the [defendant] would violate constitutional principles of due process.” (Internal quotation marks omitted.) *Samelko v. Kingstone Ins. Co.*, 329 Conn. 249, 256, 184 A.3d 741 (2018).

“Ordinarily, the defendant has the burden to disprove personal jurisdiction.” *Id.* Nevertheless, “[i]f the defendant challenging the court’s personal jurisdiction is a foreign corporation or a nonresident individual, it is the plaintiff’s burden to prove the court’s jurisdiction.” *Cogswell v. American Transit Ins. Co.*, 282 Conn. 505, 515, 923 A.2d 638 (2007); see *Standard Tallow Corp. v.*

<sup>3</sup> General Statutes § 52-59b (a) provides in relevant part: “[A] court may exercise personal jurisdiction over any nonresident individual . . . who in person or through an agent . . . (1) [t]ransacts any business within the state . . . .”

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*Jowdy*, 190 Conn. 48, 53–54, 459 A.2d 503 (1983). “To do so, the [plaintiff] must produce evidence adequate to establish such jurisdiction.” (Internal quotation marks omitted.) *Samelko v. Kingstone Ins. Co.*, *supra*, 329 Conn. 256.

In the present case, the plaintiff’s sole basis for the court’s exercise of personal jurisdiction over the defendant is that he signed electronically the agreement that contained the forum selection clause. The defendant does not dispute that the court would have personal jurisdiction over him if he had signed the agreement containing the forum selection clause;<sup>4</sup> rather, the defendant maintains that he did not sign the agreement.

In determining whether a plaintiff met its burden to establish personal jurisdiction over a defendant, a trial court “may encounter different situations, depending on the status of the record in the case. . . . [L]ack of . . . jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.” (Internal quotation marks omitted.) *Angersola v. Radiologic Associates of Middletown, P.C.*, 330 Conn. 251, 274, 193 A.3d 520 (2018); see also *Cogswell v. American Transit Ins. Co.*, *supra*, 282 Conn. 516.

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<sup>4</sup>“Unlike subject matter jurisdiction . . . personal jurisdiction may be created through consent or waiver.” (Internal quotation marks omitted.) *Narayan v. Narayan*, 305 Conn. 394, 402, 46 A.3d 90 (2012). “Where an agreement contains a valid and enforceable forum selection clause, it is not necessary to analyze jurisdiction under the state long-arm statutes or federal constitutional due process. . . . Parties may consent to personal jurisdiction through forum-selection clauses in contractual agreements.” (Citation omitted; internal quotation marks omitted.) *Discover Property & Casualty Ins. Co. v. TETCO, Inc.*, 932 F. Supp. 2d 304, 309 (D. Conn. 2013); see *Phoenix Leasing, Inc. v. Kosinski*, 47 Conn. App. 650, 653, 707 A.2d 314 (1998) (“forum selection clauses have generally been found to satisfy the due process concerns targeted by the minimum contacts analysis”).

“When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . .

“[When] the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant’s motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff’s jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint . . . but may rest on the jurisdictional allegations therein.” (Internal quotation marks omitted.) *Angersola v. Radiologic Associates of Middletown, P.C.*, supra, 330 Conn. 274–75; see *Golodner v. Women’s Center of Southeastern Connecticut, Inc.*, 281 Conn. 819, 826–27, 917 A.2d 959 (2007) (trial court should accept all undisputed facts when making personal jurisdiction determination where no evidentiary hearing was requested); *Knipple v. Viking Communications, Ltd.*, 236 Conn. 602, 608–609, 674 A.2d 426 (1996) (same).



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“Finally, [when] a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. . . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding [on the basis of] memoranda and documents submitted by the parties. . . . In such circumstances, the court may also in its discretion choose to postpone resolution of the jurisdictional question until the parties complete further discovery or, if necessary, [until] a full trial on the merits has occurred.” (Citations omitted; internal quotation marks omitted.) *Angersola v. Radiologic Associates of Middletown, P.C.*, supra, 330 Conn. 275–76; see *Kenny v. Banks*, supra, 289 Conn. 533–34 (trial court erred in concluding that it lacked personal jurisdiction over non-resident defendant without first holding evidentiary hearing to resolve factual issues); *Standard Tallow Corp. v. Jowdy*, supra, 190 Conn. 56 (same).

In the present case, the evidence submitted by both parties created a critical factual dispute as to whether the defendant had signed the agreement.<sup>5</sup> The court, notwithstanding the foregoing standard, resolved that critical factual dispute on the basis of only the memoranda and documents submitted by the parties because the “parties did not request that an evidentiary hearing be held but rel[ied] on evidence they ha[d] submitted by affidavit.” Indeed, we readily acknowledge that there

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<sup>5</sup> As outlined previously in this opinion, the plaintiff submitted the agreement containing the forum selection clause and a number of other attachments that purportedly established that the defendant had signed the agreement. The defendant submitted two affidavits in which he categorically denied signing the agreement.

is nothing in the record to indicate that, prior to the court's decision on the motion to dismiss, the parties specifically requested that the court hold an evidentiary hearing, defer resolution to permit further discovery, or postpone deciding that issue until trial.<sup>6</sup>

On appeal, the plaintiff does not argue that the court erred by considering the critical factual dispute on the basis of only the memoranda and documents submitted by the parties; rather, the plaintiff's position is that the court erred when it improperly applied a heightened standard of proof to resolve the critical factual dispute in favor of the defendant. Although it is well established that a plaintiff has the burden to prove the court's personal jurisdiction over a nonresident defendant; see *Standard Tallow Corp. v. Jowdy*, supra, 190 Conn. 51–54; the plaintiff maintains that neither our Supreme Court nor this court has articulated the standard of proof by which a plaintiff must establish personal jurisdiction to defeat a motion to dismiss filed by a nonresident defendant in a circumstance where a trial court decides the motion on the basis of only the documentary evidence submitted by the parties and without a full evidentiary hearing. In the absence of such a rule, the plaintiff advocates that we apply the prima facie standard that is employed by the federal courts and, at

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<sup>6</sup> At the May 22, 2017 hearing on the motion to dismiss, the plaintiff advocated that the issue of whether the defendant signed the agreement is eventually going to have to be determined at trial, however, it did not request that the court specifically delay making that determination until trial and, in fact, argued that it had carried its burden “at the motion to dismiss phase.” Furthermore, in its June 29, 2017 motion to reargue, the plaintiff set forth the following proposition: “[The plaintiff] believes that the court can and should deny [the] defendant’s motion without any additional corroborating information concerning the IP address. However, if the court takes the position that additional information regarding the IP address is essential to deciding the motion, [the plaintiff] would appreciate the opportunity to conduct some additional discovery and subpoena information relating to the IP address.” See footnote 2 of this opinion. This request, however, was made after the court already had decided the motion to dismiss.

times, by our Superior Court,<sup>7</sup> to circumstances as in the present case. We agree with the plaintiff.

We find particularly persuasive the decision of the United States Court of Appeals for the Second Circuit in *Dorchester Financial Securities, Inc. v. Banco BRJ, S.A.*, 722 F.3d 81 (2nd Cir. 2013),<sup>8</sup> which outlined the following federal standard applicable to motions to dismiss for lack of personal jurisdiction: “[I]n deciding a pretrial motion to dismiss for lack of personal jurisdiction a district court has considerable procedural leeway. It may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion. . . . Significantly, however, the showing a plaintiff must make to defeat a defendant’s claim that the court lacks personal jurisdiction over it varies depending on the procedural posture of the litigation. . . . [W]e [have] explained this sliding scale as follows:

“Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith, legally sufficient allegations of

<sup>7</sup> See, e.g., *Tregaskis v. Wine Enthusiast Cos.*, Superior Court, judicial district of Litchfield, Docket No. CV-95-0067373-S (July 21, 1995) (relying on *In re Connecticut Asbestos Litigation*, 677 F. Supp 70, 72 [D. Conn. 1986]); *Noon v. Calley & Currier Co.*, Superior Court, judicial district of Hartford, Docket No. CV-93-521514-S (March 9, 1995) (14 Conn. L. Rptr. 132) (same); *Vitale Fireworks Display Co. v. S. Mantsuna & Co.*, Superior Court, judicial district of Litchfield, Docket No. CV-93-0064860-S (October 31, 1994) (same); but see *Gamlestaden PLC v. Lindholm*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-93-0130058-S (February 28, 1996) (declining to follow prima facie rule).

<sup>8</sup> “[F]ederal rules of civil procedure and the federal court’s interpretations thereon are not binding upon the state courts. . . . Federal case law, particularly decisions of the United States Court of Appeals for the Second Circuit . . . can be persuasive in the absence of state appellate authority . . . .” (Citations omitted; internal quotation marks omitted.) *Duart v. Dept. of Correction*, 116 Conn. App. 758, 765, 977 A.2d 670 (2009), aff’d, 303 Conn. 479, 34 A.3d 343 (2012); *Turner v. Frowein*, 253 Conn. 312, 341, 752 A.2d 955 (2000) (“[d]ecisions of the Second Circuit Court of Appeals, although not binding on us, are particularly persuasive”).

jurisdiction. At that preliminary stage, the plaintiff's prima facie showing may be established solely by allegations. After discovery, the plaintiff's prima facie showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by the trier, would suffice to establish jurisdiction over the defendant. At that point, the prima facie showing must be factually supported.

“Where the jurisdictional issue is in dispute, the plaintiff's averment of jurisdictional facts will normally be met in one of three ways . . . . If the defendant is content to challenge only the sufficiency of the plaintiff's factual allegation . . . the plaintiff need persuade the court only that its factual allegations constitute a prima facie showing of jurisdiction. If the defendant asserts . . . that undisputed facts show the absence of jurisdiction, the court proceeds . . . to determine if undisputed facts exist that warrant the relief sought. If the defendant contests the plaintiff's factual allegations, then a hearing is required, at which the plaintiff must prove the existence of jurisdiction by a preponderance of the evidence.” (Citations omitted; internal quotation marks omitted.) *Id.*, 84–85; see *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981) (“If the court chooses not to conduct a full-blown evidentiary hearing on the motion, the plaintiff need make only a prima facie showing of jurisdiction through its own affidavits and supporting materials. Eventually, of course, the plaintiff must establish jurisdiction by a preponderance of the evidence, either at a pretrial evidentiary hearing or at trial. But until such a hearing is held, a prima facie showing suffices, notwithstanding any controverting presentation by the moving party, to defeat the motion.”).

We are persuaded that the sliding scale standard outlined by the United States Court of Appeals for the Second Circuit in *Dorchester Financial Securities*,

*Inc.*, should be applied to jurisdictional disputes arising before Connecticut courts because it is entirely consistent with Connecticut's existing framework for the resolution of jurisdictional issues. For instance, when a Connecticut trial court decides a jurisdictional issue on the basis of only the complaint, it accepts the plaintiff's jurisdictional allegations as true, essentially determining whether the plaintiff has made a prima facie case for the exercise of jurisdiction. By contrast, when there is a critical factual dispute relating to jurisdiction, or when the question of jurisdiction is intertwined with the resolution of the merits of the case, the trial court, when requested by a party, must defer resolution of the jurisdictional issue until an evidentiary hearing or a trial on the merits has occurred. Because the proof of a fact at the trial on the merits typically must be by a preponderance of the evidence, that necessarily would be the plaintiff's burden to prove the same fact for jurisdictional purposes. Furthermore, it would be futile to hold a trial-like hearing if the burden of proof was less than by a preponderance of the evidence.

Given the consistency of Connecticut practice with Second Circuit jurisprudence in cases with no evidentiary record and those with a full evidentiary record, we also conclude that the Second Circuit's use of the prima facie standard makes sense for cases, such as this, where the evidentiary record is only partially developed and the parties have not requested a full evidentiary hearing. Our Supreme Court repeatedly has cautioned trial courts not to make jurisdictional findings where there are disputed issues of fact until the court has held a full evidentiary hearing "because a court cannot make a critical factual [jurisdictional] finding [on the basis of] memoranda and documents submitted by the parties." (Internal quotation marks omitted.) *Angersola v. Radiologic Associates of Middletown, P.C.*, supra, 330 Conn. 275. Consequently, where, as in

the present case, neither party requests an evidentiary hearing, the court cannot resolve the parties' factual dispute. Instead, the court must determine whether the plaintiff's submissions establish a prima facie case. The prima facie standard ensures that the critical factual dispute remains unresolved until after an evidentiary hearing or trial is held, at which the plaintiff would have the elevated burden of proving the court's personal jurisdiction by a preponderance of the evidence. Accordingly, having concluded that the prima facie standard applies to the present case, we now consider whether the plaintiff met its burden to make a prima facie showing that the court had personal jurisdiction over the defendant.<sup>9</sup>

“[T]o establish a prima facie case, the proponent must submit evidence which, if credited, is sufficient to establish the fact or facts which it is adduced to prove. . . . [T]he evidence offered by the plaintiff is to be taken as true and interpreted in the light most favorable to [the plaintiff], and every reasonable inference is to be drawn in [the plaintiff's] favor.” (Internal quotation marks omitted.) *Schweiger v. Amica Mutual Ins. Co.*, 110 Conn. App. 736, 739, 955 A.2d 1241, cert. denied, 289 Conn. 955, 961 A.2d 421 (2008); see 9 J. Wigmore, *Evidence* (3d Ed. 1940) § 2494 (delineating general principles of prima facie case). Consequently, because the evidence submitted by the defendant tended to establish that the court lacked personal jurisdiction and the

<sup>9</sup> Although the court rendered its judgment without the benefit of this opinion, we need not remand the matter to the trial court for a determination as to whether the plaintiff made a prima facie showing of personal jurisdiction because that issue can be determined as a matter of law on the basis of the record before us. See *Emerick v. Glastonbury*, 145 Conn. App. 122, 131, 74 A.3d 512 (2013) (remand unnecessary where record on appeal sufficient to make determination as matter of law), cert. denied, 311 Conn. 901, 83 A.3d 348 (2014); *Rosenthal v. Bloomfield*, 178 Conn. App. 258, 263, 174 A.3d 839 (2017) (“[w]hether the plaintiff has made out a prima facie case is a question of law” [internal quotation marks omitted]).

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court decided the defendant's motion to dismiss on the basis of only the parties' documentary evidence, "the plaintiff's prima facie showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that [are factually supported, and] if credited by the trier, would suffice to establish jurisdiction over the defendant." (Internal quotation marks omitted.) *Dorchester Financial Securities, Inc. v. Banco BRJ, S.A.*, supra, 722 F.3d 85. This prima facie showing is made notwithstanding any controverting presentation by the defendant. *Id.*, 86; see *Marine Midland Bank, N.A. v. Miller*, supra, 664 F.2d 904.

In the present case, the plaintiff submitted several attachments in support of its opposition to the defendant's motion to dismiss that purportedly established that the defendant signed the agreement. In particular, the plaintiff attached a copy of the alleged agreement that contained the forum selection clause. The agreement provides that it was entered into on June 10, 2016, by the plaintiff and "Mark Miller . . . having an address of 2640B El Camino Real, Carlsbad, CA 92008." The plaintiff's general counsel, Carruthers, attested in his affidavit that the agreement was executed electronically "through a secure portal provided by a third-party known as 'DocuSign' . . . ." The plaintiff submitted a copy of a DocuSign certificate of completion that purportedly established that the defendant electronically signed the agreement on June 10, 2016, using the e-mail address *drmillerorders@gmail.com*. Carruthers further averred that he had engaged in e-mail correspondences concerning the breach of the alleged agreement with the defendant, who was using the e-mail address *drmillerorders@gmail.com*. The plaintiff submitted a printout of these e-mail correspondences, which occurred between December 7 and 9, 2016.

The plaintiff also submitted an affidavit from its independent sales representative, Davis, wherein she attested that on June 22, 2016, twelve days after the agreement allegedly was executed, she received a voice-

mail left by an individual who identified himself as “Dr. Mark Miller.” She further averred that, approximately ten minutes after she attempted to return the call, she received a second call from the same telephone number and that she spoke to an individual “who identified himself as Dr. Mark Miller,” and who “indicated that he desired to open an account to purchase [the plaintiff’s] products for the patients of a group of five . . . health care professionals . . . .” Davis attached to her affidavit a redacted printout of her telephone bill that evinces the “place called,” date, time, number called, and duration of these telephone calls.

The plaintiff additionally submitted certain excerpts of the deposition of the defendant taken on February 22, 2017. Therein, the defendant testified that he operates a mobile podiatry practice and that his “corporate address” is a United Parcel Service store at 2604B El Camino Real, Box No. 311, Carlsbad, California 92008.<sup>10</sup> He further testified that he received at his corporate address a copy of the writ of summons and complaint that stemmed from the present action, which was addressed to 2640B El Camino Real, Carlsbad, California 92008. Further, the defendant stated that he was familiar with DocuSign and that he previously had used it to sign documents. The defendant also testified that his only personal telephone number is the same telephone number identified by Davis and that he had received a telephone call “in late summer [or] early fall” from Davis “about signing up as a distributor.” He further testified that he previously had heard of the plaintiff because it was recommended by one of his patients “last summer,” but he could not recall whether he ever ordered or received products from the plaintiff.

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<sup>10</sup> The defendant’s corporate address, 2604B El Camino Real, Box No. 311, Carlsbad, California 92008, is substantially similar to the defendant’s address listed on the agreement, “2640B El Camino Real, Carlsbad, CA 92008.”



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The circumstances of the present case are strikingly similar to those at issue in *Dorchester Financial Securities, Inc. v. Banco BRJ, S.A.*, supra, 722 F.3d 81. In that case, the plaintiff, a Florida corporation with offices in New York, filed an action alleging that the defendant, a Brazilian bank, was liable for breaching an agreement between the parties concerning an irrevocable letter of credit. *Id.*, 82–83. The defendant moved to dismiss the action on the ground that the court lacked personal jurisdiction over it. *Id.*, 83. In response, the plaintiff filed a memorandum of law and attached, among other things, the agreement that contained a forum selection clause by which the defendant allegedly consented to submit to the jurisdiction of the state of New York. *Id.* In support of its motion to dismiss, the defendant contended that the plaintiff’s attachments were forgeries, and, accordingly, it submitted sworn declarations and supporting documentation that categorically denied the plaintiff’s contentions.<sup>11</sup> *Id.*, 83–84. The District Court granted the motion to dismiss on the basis of the defendant’s “direct, highly specific testimonial evidence” submitted in support of its denials, and the plaintiff appealed therefrom. *Id.*, 84.

The Second Circuit Court of Appeals applied the *prima facie* standard to vacate the District Court’s decision that granted the defendant’s motion to dismiss. *Id.*, 85. The court held that, in the absence of an evidentiary hearing or trial, the defendant’s alleged consent to the forum selection clause contained within the agreement submitted by the plaintiff was sufficient to establish a *prima facie* case of personal jurisdiction. *Id.* The court recognized that “there is plainly reason to question the

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<sup>11</sup> Specifically, the defendant’s evidence tended to show that (1) it had no prior relationship with the plaintiff, (2) it never did business in the United States, and (3) it had never issued financial instruments of the size and nature of the purported letter of credit. The defendant also submitted court documents from Florida and California to show that it had been the victim of similar fraudulent schemes in those states.

authenticity of the . . . agreement, as [the defendant’s] evidence submitted to the district court tends to show that the agreement and the other documents upon which [the plaintiff] relied were forgeries. But in the absence of an evidentiary hearing, it was error for the district court to resolve that factual dispute in [the defendant’s] favor.” *Id.*, 86. It further held that “[t]o be clear, we do not hold that the district court in this case erred in failing to hold an evidentiary hearing, as there is no indication that either party requested one. Nor did the district court err in considering materials outside the pleadings, as we have made clear that a district court may do so . . . . Instead, the district court’s error was, having chosen not to conduct a full-blown evidentiary hearing . . . in resolving the parties’ dispute over the authenticity of [the plaintiff’s] evidence rather than evaluating, whether [the plaintiff] had, through its pleadings and affidavits, made a prima facie showing of personal jurisdiction notwithstanding any controverting presentation by the defendant . . . .” (Citations omitted; internal quotation marks omitted.) *Id.*

The cumulative evidence submitted by the plaintiff in the present case exceeds the evidence the Second Circuit considered to be sufficient to establish a prima facie case in *Dorchester Financial Securities, Inc.*, in which the court stated that it “need look no further” than the agreement that contained the forum selection clause. See *id.*, 85 and n.3. In the present case, the plaintiff submitted an abundance of corroborating evidence to establish that the defendant signed the agreement. Carruthers’ affidavit evinced that the agreement was executed electronically through DocuSign by “Mark Miller,” who has an address of “2640B El Camino Real, Carlsbad, CA 92008.” In his deposition, the defendant testified that he received service stemming from the present case at his corporate address,

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which is sufficiently similar to the address designated on the agreement. The defendant also testified that he was familiar with DocuSign and had used it in the past. The DocuSign certificate of completion evinces that the agreement was signed on June 10, 2016, using the e-mail address `drmillerorders@gmail.com`. That e-mail address is corroborated by the statements in Carruthers' affidavit and the attached series of e-mails, which purportedly demonstrated correspondences regarding the breach of the alleged agreement between Carruthers and `drmillerorders@gmail.com`. Additionally, the defendant agreed at his deposition that he engaged in a telephone conversation with Davis regarding the sale of the plaintiff's products around the time that the agreement allegedly was executed. This admission is substantiated by Davis' affidavit and the printout of her telephone bill that displays the particular details of those telephone calls, which occurred two weeks after the agreement allegedly was executed. Indeed, the defendant conceded that his telephone number was identified accurately by Davis. Finally, the defendant acknowledged his familiarity with the plaintiff and did not affirmatively deny that he ordered or received products from the plaintiff, but, rather, he responded that he *could not recall*.

Applying the foregoing principles to the present case, we conclude that the plaintiff met its burden to make a *prima facie* showing that the court had personal jurisdiction over the defendant because the plaintiff submitted evidence, which, if credited by the trier of fact, was sufficient to establish that the defendant had signed the agreement containing the forum selection clause. Nevertheless, we recognize, as the court did in *Dorchester Financial Securities, Inc.*, that the evidence submitted by the defendant in support of his motion to dismiss plainly calls into question whether the defendant actually signed the alleged agreement. Although a trial court

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properly can consider such documentary evidence in determining whether a critical factual dispute exists, it cannot consider such evidence when determining whether a plaintiff has made a prima facie showing, and, absent a full evidentiary hearing, it cannot utilize this evidence to resolve a critical factual dispute. Thus, because the plaintiff met its threshold burden of making a prima facie showing, and the parties did not request and the court did not hold a full evidentiary hearing, the court was required to deny the defendant's motion to dismiss.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOSEPH  
A. STEPHENSON  
(AC 40250)

Sheldon, Bright and Mihalakos, Js.

*Syllabus*

Convicted of the crimes of burglary in the third degree, attempt to commit tampering with physical evidence and attempt to commit arson in the second degree in connection with a break-in at a courthouse, the defendant appealed to this court. The defendant had two felony charges pending against him and was scheduled to commence jury selection in a trial of those pending charges. Two days before the start of jury selection, a silent alarm was triggered at the courthouse at approximately 11:00 p.m. Upon arrival, the state police discovered, inter alia, a broken window in an interior state's attorney's office, a black duffel bag with six unopened canisters of industrial strength kerosene on the floor of a state's attorney's office and several case files lying in a disorganized pile on the floor near a secretary's desk area. The defendant claimed, inter alia, that the evidence presented at trial was insufficient to support his conviction of each offense as charged by the state, which alleged, as a common essential element of each charge, that the defendant had entered the courthouse with the intent to commit the crime of tampering with physical evidence therein so as to impair the availability of his case files for use against him in the prosecution of the pending felony charges. *Held* that the evidence was insufficient to support the defendant's conviction of the charged offenses; although there was physical

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evidence that directly linked the defendant to the bag containing the kerosene, which supported an inference that the defendant dropped the bag where the police found it, there was no such evidence that placed the defendant in the office where the files were located, as the state presented no evidence at all from which the jury reasonably could have inferred that the defendant entered the courthouse through the broken window of the interior office and went to a filing cabinet in another office and removed the files found on the floor, and although the state argued that the defendant's intent to tamper with physical evidence, necessary to prove him guilty of each charged offense, could be inferred from his handling of the files, the evidence presented, which did not include the names of the disorganized case files or where those files had been stored in the office before the intruder entered, show that the intruder had touched, altered, destroyed, concealed or removed any of the case files, or address any reason why the defendant might have wanted to tamper with his case files, showed only that the defendant entered the courthouse through the broken window, walked through the office, and dropped the duffel bag on the floor; accordingly, in the absence of any evidence that the defendant ever touched case files in the state's attorney's office, or that he did so with the intent to tamper with such files or their contents, the jury reasonably could not have inferred that the defendant had that intent, as required to prove him guilty of each of the three offenses of which he was convicted, and, thus, his conviction could not stand.

Argued September 11, 2018—officially released January 8, 2019

*Procedural History*

Substitute information charging the defendant with the crimes of burglary in the third degree, attempt to commit tampering with physical evidence, and attempt to commit arson in the second degree, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the jury before *White, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Reversed; judgment directed.*

*Vishal K. Garg*, for the appellant (defendant).

*Sarah Hanna*, assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *Michelle Manning*, assistant state's attorney, for the appellee (state).

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*Opinion*

SHELDON, J. The defendant, Joseph A. Stephenson, appeals from the judgment of conviction rendered against him after a jury trial in the Stamford Superior Court on charges of burglary in the third degree in violation of General Statutes § 53a-103, attempt to commit tampering with physical evidence in violation of General Statutes §§ 53a-49 (a) (2) and (Rev. to 2013) 53a-155 (a) (1),<sup>1</sup> and attempt to commit arson in the second degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-112 (a) (1) (B). The defendant claims on appeal that (1) the evidence presented at trial was insufficient to support his conviction on those charges, and thus that he is entitled to the reversal of his conviction and the entry of a judgment of acquittal on each such charge, and (2) the court improperly prevented him from presenting exculpatory testimony from his trial attorney as to a conversation between them two days before his alleged commission of the charged offenses that tended to contradict the state's claim that he had a special motive for committing those offenses. We agree with the defendant that the evidence presented at trial was insufficient to convict him of any of the charged offenses, as the state charged and sought to prove them in this case, and, thus, we conclude that his conviction on those charges must be reversed and this case must be remanded with direction to render a judgment of acquittal thereon. In light of this conclusion, we need not address the defendant's second claim.

The following procedural history and evidence, as presented at trial, are relevant to our resolution of the defendant's claims. On Sunday, March 3, 2013, at approximately 11:00 p.m., the silent alarm at the Norwalk Superior Courthouse was triggered by the breaking of a window in the state's attorney's office on the

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<sup>1</sup> All references in this opinion to § 53a-155 (a) (1) are to the 2013 revision.

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east side of the courthouse.<sup>2</sup> Soon thereafter, Connecticut State Trooper Justin Lund arrived at the courthouse, followed almost immediately by Troopers Darrell Tetreault and Alex Pearston. Upon Tetreault's arrival, he saw Lund standing "right against the building, at the window, with his firearm deployed yelling at somebody in the building." Because, however, Lund was later injured and could not testify at the defendant's trial, no evidence was presented as to what, if anything, he saw or heard through the broken courthouse window at that time.

The troopers promptly established a perimeter around the outside of the courthouse and radioed for the assistance of a canine unit. When a canine unit arrived several minutes later, the troopers followed it inside the courthouse, which they promptly searched for intruders, without success.

The searching officers determined that the broken window was located in an interior office on the east side of the state's attorney's office, which was shared by two assistant state's attorneys, each of whom kept a desk and certain personal effects in the office. Photos of the interior office taken after the break-in showed that a set of blinds that had been hanging in the window through which the intruder entered the building were bent and broken, but still hanging where they were when the intruder came in through them.

Inside the larger state's attorney's office, the troopers found a black duffel bag on the floor near the south end of the corridor running past the doors of the three interior offices on the east side of the larger office,

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<sup>2</sup> Although the state's exhibit 36, which is a diagram of the Norwalk Superior courthouse, bears a notation indicating that the window that was broken was on the north side of the building, all of the other evidence at trial indicates that it was, in fact, located on the east side of the building. We therefore construe the notation on exhibit 36 as an error.

including the middle office where the intruder had broken the window and entered the building. The bag thus lay to the far left of a person entering the larger office through the door of the interior office with the broken window. Inside the duffel bag were six unopened blue canisters of industrial strength kerosene with their tags and UPC strips cut off. The officers swabbed the bag and the six canisters of kerosene for DNA.

Meanwhile, in the “secretary’s desk area” in the northwest corner of the larger state’s attorney’s office, across the room from and to the right of a person entering the larger office from the interior office with the broken window, the troopers found several case files lying in a disorganized pile on the floor, where they appeared to have been dumped, dropped or knocked over. The secretary’s desk area contained two adjacent desks on which telephones, computer monitors, other case files, assorted office equipment and personal memorabilia were arrayed. The desk further to the north, in front of which the pile of files was found, had two partially open drawers on its left side, above which other case files were loosely stacked. To the left of and behind the chair of a person sitting at that desk were two large lateral file cabinets with case files densely packed on open shelves inside them. No evidence was presented as to which case files were found either in the disorganized pile on the floor or in the loose stack on the adjacent desk. Nor, because those case files were never identified, was there any evidence as to where such files had been stored in the office before the intruder entered or whether, if the intruder had moved such files to where they were found from another location in the office, the intruder had touched or disturbed anything in any such location in such a way as to shed light on the object or purpose of his search. None of the case files or any other objects in any locations where they were stored before or found



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after the break-in was dusted for fingerprints or swabbed for DNA.

The troopers also recovered a ball-peen hammer from the vestibule area just inside an exterior door to the courthouse, marked “employee entrance only,” through which it was later determined that the intruder fled from the courthouse after the troopers arrived, and began to search inside it. The troopers also swabbed the hammer for DNA.

During their ensuing investigation, police investigators obtained and reviewed surveillance videos of the outside of the courthouse, which had been taken on the evening of the break-in by cameras installed on the courthouse itself and in a beauty salon to the east of the courthouse. Video footage obtained from those cameras included a sequence in which an “individual . . . dressed all in black, [who] appeared to have a black mask on, [a] black jacket, [and] black pants, and appeared to be carrying a black or dark colored bag . . . approached the side of the courthouse, which is the side that the window was broken on, the side adjacent to the beauty salon.” It also included, in the hour before the foregoing sequence was recorded, several other sequences in which a suspicious vehicle—a light colored SUV with a defective rear brake light and a roof rack on the top, a brush bar on the front, and a tire mounted on the back—could be seen driving slowly past the front of the courthouse and driving in and out of the courthouse parking lot. Finally, it included a short sequence, filmed shortly after the troopers entered the courthouse, in which a person dressed all in black emerged from the east side door of the courthouse and ran away across the parking lot where the suspicious vehicle had been seen before the break-in.

The troopers later identified the make, model and vintage of the suspicious vehicle seen in the surveillance

videos as a Land Rover Freelander manufactured between the years 2002 and 2005. They subsequently determined that the database of the Connecticut Department of Motor Vehicles listed 167 registered vehicles that matched the suspicious vehicle's description. Later, upon narrowing their search to matching vehicles registered to persons living in the Norwalk and Stamford areas, investigators learned that one such vehicle, a 2002 Land Rover Freelander, was registered to Chuck Morrell, the defendant's stepfather. When Morrell was interviewed by the police, he informed them that he had purchased the vehicle for his wife, the defendant's mother, in 2012, and that both the defendant and his mother used the vehicle and were listed as insureds on his automobile insurance policy. When police investigators finally examined Morrell's vehicle several weeks after the break-in, they found that it closely matched the suspicious vehicle seen in the surveillance videos because it not only had aftermarket equipment of the sorts installed on the suspicious vehicle, but it had a defective rear brake light.

In addition to the previously described information, police investigators developed the following additional information concerning the defendant's possible involvement in the courthouse break-in. On March 4, 2013, the day after the break-in, the defendant called the Norwalk public defenders' office to ask if the courthouse would be open that day. The defendant was then scheduled to commence jury selection in the trial of two felony charges then pending against him in Norwalk the following day. The window that had been broken and used to gain access to the courthouse on March 3, 2013, was located in the office of the assistant state's attorney who was responsible for prosecuting the defendant in his upcoming trial.

The state also presented evidence that the defendant, while incarcerated in April, 2013, made certain recorded

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phone calls to his brother Christopher Stephenson, and his mother, in which he discussed the March 3, 2013 break-in. In particular, the defendant's brother told the defendant in one such phone call that Morrell "must have" told the police about the defendant's use of the Freelanders on the evening of the break-in and the defendant stated that the police "must have" seen the vehicle at the courthouse on that evening. The defendant urged his brother to say that he had been in New York at the time of the break-in, and thereafter urged both his brother and his mother not to discuss anything about the break-in with the police.

Finally, upon testing the DNA swabs taken from the physical evidence discarded by the intruder at the courthouse on the evening of March 3, 2013, personnel from the Connecticut Forensic Science Laboratory determined that each swab contained a mixture of DNA from at least two persons, and that the defendant could not be eliminated as a possible contributor to any such mixture.

In his own defense, the defendant presented testimony from his brother that they were together in New York on the evening of the break-in. In addition, he attempted unsuccessfully to present testimony from his attorney as to a conversation between them on the Friday before the break-in, in which he had voiced his intention to plead guilty to the charges then pending against him in Norwalk rather than to go to trial the following Tuesday. The trial court sustained the state's objection to such testimony on the ground that it was inadmissible hearsay.

On the basis of the foregoing evidence, the state urged the jury to find the defendant guilty of all three offenses with which he was charged: burglary in the third degree in violation of § 53a-103; attempt to commit tampering with physical evidence in violation of §§ 53a-49 (a) (2)

and 53a-155 (a) (1); and attempt to commit arson in the second degree in violation of §§ 53a-49 (a) (2) and 53a-112 (a) (1) (B).<sup>3</sup> The state attempted to prove its case against the defendant under the following, closely intertwined theories of factual and legal liability.

As to the charge of burglary in the third degree, the state claimed that the defendant had entered or remained unlawfully in the courthouse, when it was closed to the public and he had no license or privilege to be there for any lawful purpose, with the intent to commit the crime of tampering with physical evidence therein. Although the state conceded that the defendant had not completed the crime of tampering with physical evidence while he was inside the courthouse, it nonetheless claimed that he had intended to commit that offense within the courthouse by engaging in conduct constituting an attempt to commit that offense therein. On that score, the state further argued that the defendant had broken into the courthouse through the window of the assistant state's attorney who was prosecuting him on two pending felony charges, entered the larger state's attorney's office and gone directly to the file cabinets where the state stored its case files, and in the short time he had there before the state police arrived in response to the silent alarm, begun to rummage through the state's case files in an effort to find and tamper with the contents of his own case files. Claiming that the defendant was desperate to avoid his impending trial, the state argued that the defendant thereby attempted to tamper with his case file by altering, destroying, concealing or removing its contents, and thus to impair the verity or availability of such materials for use against him in his upcoming trial. Finally, as to the charge of attempt to commit arson in

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<sup>3</sup>The defendant initially was charged with criminal mischief in the first degree in violation of General Statutes § 53a-115, rather than attempted tampering with physical evidence.

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the second degree, the state claimed that the defendant had committed that offense by breaking into the Norwalk courthouse as aforesaid, while carrying a duffel bag containing six canisters of industrial strength kerosene, and thereby intentionally taking a substantial step in a course of conduct planned to culminate in the commission of arson in the second degree by starting a fire inside the courthouse, with the intent to destroy or damage the courthouse building, for the purpose of concealing his planned crime of tampering with physical evidence, as described previously.

The state expressly disclaimed any intent to prosecute the defendant for tampering with physical evidence on the theory that he attempted to start a fire inside the courthouse in order to damage or destroy the building, and thus to damage or destroy the contents of his case files or their contents by fire. Instead, it claimed that the defendant planned to start a fire in the courthouse in order to conceal his earlier crime of tampering with physical evidence. Similarly, the state did not allege or seek to prove that the defendant had committed burglary in the third degree by entering or remaining unlawfully in the courthouse with the intent to commit arson in the second degree therein.

Following a jury trial in which the jury was specifically instructed on the charged offenses under the previously-described theories of liability, the defendant was found guilty on all three charges. He later was sentenced on those charges to a total effective sentence of twelve years incarceration followed by eight years of special parole. This appeal followed.

The defendant first claims that the evidence presented at trial was insufficient to support his conviction of any of the three offenses of which his jury found him guilty because such evidence failed to prove a single common essential element of those offenses, as the

state charged and sought to prove them in this case, beyond a reasonable doubt. That common essential element was that, upon entering the Norwalk Superior courthouse on March 3, 2013, the defendant's intent was to tamper with physical evidence. In making this claim, the defendant does not challenge the sufficiency of the state's evidence to prove that he was the intruder who broke into the courthouse on the evening of March 3, 2013. Rather, he claims that neither his proven conduct on that evening, nor any of his words or actions thereafter, afforded the jury any nonspeculative basis for inferring that his intent, upon entering the courthouse on that evening, was to commit the crime of tampering with physical evidence therein.<sup>4</sup>

“In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we *determine* whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . [I]n viewing evidence which could yield contrary inferences, the jury is not barred from drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with

<sup>4</sup>The defendant also argues that, in order to convict him of attempting to tamper with physical evidence, the state was required to prove beyond a reasonable doubt that the documents or materials he attempted to tamper with qualified as “physical evidence” within the meaning of General Statutes § 53a-146 (8), in that they constituted “any article, object, document, record, or other thing of physical substance which is or is about to be produced or used as evidence in an official proceeding.” General Statutes § 53a-146 (8). Because we reverse the defendant's conviction on the ground that the state failed to prove that the defendant intended to tamper with the case files and/or their contents with which he is claimed to have attempted to tamper, we need not address his claim that the state failed to prove that such case files and their contents did not qualify as physical evidence under § 53a-146 (8).

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innocence. The rule is that the jury’s function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical.” (Emphasis added; internal quotation marks omitted.) *State v. Perez*, 147 Conn. App. 53, 64–65, 80 A.3d 103 (2013), *aff’d*, 322 Conn. 118, 139 A.3d 654 (2016). It is axiomatic, however, that in evaluating the sufficiency of the evidence to support a criminal conviction, the only theory of liability upon which the conviction can be sustained is that upon which the case was actually tried, in the sense that it was not only charged in the information, but it was argued by the state and instructed upon by the court. *State v. Carter*, 317 Conn. 845, 853–54, 120 A.3d 1229 (2015).

As a threshold matter, we note that the defendant is correct in asserting that a common essential element of his conviction of all three charges here challenged is that, upon entering the Norwalk Superior courthouse on the evening of March 3, 2013, he had the intent to commit the crime of tampering with physical evidence therein. All three counts of the amended long form information on which he was brought to trial so alleged,<sup>5</sup>

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<sup>5</sup> In its amended long form information dated September 30, 2016, the state charged the defendant as follows:

“[The] State’s Attorney for the Judicial District of Stamford-Norwalk accuses Joseph Stephenson of the crime of burglary in the third degree and charges that in the city of Norwalk, on or about the [third] day of March, 2013, the said defendant . . . did enter and remain unlawfully in a building *with intent to commit the crime of tampering with physical evidence, in violation of . . . [ §§ ] 53a-103 and 53a-155 (a) (1)*. . . .

“And said state’s attorney further accuses the defendant . . . of the crime of attempted tampering with physical evidence, and alleges that, acting with the belief that an official proceeding is pending and about to be instituted, *did an act, which under the circumstances as he believed them to be, was an act which constituted a substantial step in a course of conduct planned to culminate in his commission of the crime of tampering with evidence in violation of . . . [ §§ ] 53a-155 (a) (1) and 53a-49 (a) (2)*. . . .

“And said state’s attorney further accuses the defendant . . . with the crime of attempt at arson in the second degree and alleges that in the city of Norwalk on or about the [third] day of March 2013, the said defendant . . . with intent to destroy and damage a building, did an act, which under

the state's attorney so argued in his closing arguments,<sup>6</sup> and the court so instructed the jury in its final instructions on the law.<sup>7</sup> Accordingly, the state does not dispute this aspect of the defendant's evidentiary sufficiency claims on appeal. Therefore, our sole focus in resolving those claims must be on whether the evidence presented at trial, construed in the light most favorable to sustaining the challenged conviction, was sufficient to prove beyond a reasonable doubt that, when the defendant entered the courthouse on the evening of March 3, 2013, he did so with the intent to commit the offense of tampering with physical evidence therein by some means other than setting fire to the building.<sup>8</sup>

General Statutes § 53a-3 (11) provides that “[a] person acts ‘intentionally’ with respect to a result or to conduct described by a statute defining an offense when

the circumstances as he believed them to be, was an act which constituted a substantial step in a course of conduct planned to culminate in starting a fire and such fire was intended to *conceal the crime of tampering with physical evidence in violation of . . . [§§] 53a-112 (a) (1) (B), 53a-49 (a) (2), and 53a-155 (a) (1).*” (Emphasis added.)

<sup>6</sup> In its closing argument to the jury, the state argued specifically, inter alia, that the evidence “clearly show[ed] . . . what [the defendant's] motive, and what his intentions were, and what that plan really was there to do and that was to tamper with the files, to get to his case or any case, and hinder the prosecution, the prosecution that was going to start in two days.” (Emphasis added.)

<sup>7</sup> The court instructed the jury, inter alia, that to find the defendant guilty of burglary in the third degree, “the state must prove beyond a reasonable doubt that, one, the defendant unlawfully entered a building and, two, that he intended to commit a crime therein, to wit, tampering with physical evidence.” (Emphasis added.)

The court also instructed the jury that: “A person is guilty of arson in the second degree when, with intent to destroy or damage a building, he starts a fire . . . and such fire was intended to conceal some other criminal act, to wit, the crime of tampering with physical evidence.” (Emphasis added.)

<sup>8</sup> As stated herein, the state expressly disavowed any contention that the defendant intended to tamper with evidence by setting it on fire, and consistently argued that the defendant intended to tamper with physical evidence and then to conceal his act of tampering by setting the building on fire.



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his conscious objective is to cause such result or to engage in such conduct . . . .” Section 53a-155 (a) (1), in turn, provides in relevant part: “A person is guilty of tampering with . . . physical evidence if, believing that an official proceeding is pending . . . he . . . [a]lters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such [official] proceeding . . . .”<sup>9</sup> Under the foregoing provisions, a person acts with the intent to commit tampering with physical evidence when, believing that an official proceeding is pending, he engages in conduct with the conscious objective of altering, destroying, concealing or removing any record, document or thing in order to impair its verity or availability for use in that official proceeding. Here, more particularly, the state claimed and sought to prove that the defendant acted with that intent by breaking into the Norwalk Superior courthouse, where he was about to start trial in two pending felony cases, in order to alter, destroy, conceal or remove his case files in those cases or their contents, and thereby impair the verity or availability of such materials for use against him in those prosecutions.

“Intent is a question of fact, the determination of which should stand unless the conclusion drawn by the trier is an unreasonable one. . . . Moreover, the [jury is] not bound to accept as true the defendant’s claim of lack of intent or his explanation of why he lacked intent. . . . Intent may be and usually is inferred from conduct. Of necessity, it must be proved by the statement or acts of the person whose act is being scrutinized and ordinarily it can only be proved by circumstantial evidence.” (Internal quotation marks omitted.) *State v. O’Donnell*, 174 Conn. App. 675, 687–88, 166 A.3d 646,

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<sup>9</sup> Section 53a-155 was amended in 2015 to add that one may be guilty of tampering during a criminal investigation or when a criminal proceeding is about to commence.

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cert. denied, 327 Conn. 956, 172 A.3d 205 (2017). “The use of inferences based on circumstantial evidence is necessary because direct evidence of the accused’s state of mind is rarely available. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct.” (Internal quotation marks omitted.) *State v. Lamantia*, 181 Conn. App. 648, 665, 187 A.3d 513, cert. granted, 330 Conn. 919, A.3d (2018).

The defendant does not dispute that two felony prosecutions, both official proceedings, were pending against him in the Norwalk Superior Court when he allegedly broke into the Norwalk Superior courthouse on the evening of March 3, 2013, or that he lacked knowledge of the pendency of those official proceedings, in which trial was scheduled to begin two days later. Nor, to reiterate, does he argue that the evidence presented at trial was insufficient to prove that he was the intruder who broke into the courthouse on that evening. Instead, he claims that such evidence was insufficient to prove that he then acted with the intent to tamper with physical evidence within the courthouse because the state failed to establish any connection between his proven conduct within the courthouse and any of the files or materials with which he is claimed to have had the intent to tamper. We agree.

Here, the state claims that, on the evening of March 3, 2013, the defendant broke a window in the state’s attorney’s office at the courthouse, climbed through that window into the office of the assistant state’s attorney who was then prosecuting him on two felony charges, walked through that office into the larger state’s attorney’s office where he dropped a duffel bag containing kerosene at the end of the corridor running past it to his left, then “walked all the way around to the [state’s attorneys’] case files” on the other side of

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the larger office, where he “pull[ed] [the] files down onto the floor and [went] through them.” The state further argued to the jury such evidence showed that the defendant’s intent was to tamper with his own case files or their contents before lighting the building on fire because he did not ignite one of the bottles of kerosene and throw it through the broken window, or start a fire immediately upon entering the building. Instead, the state argued, “[the] [f]irst thing he did was drop that bag of kerosene in the hall outside the office, walk all the way around the wall past the secretary’s desk and over to the corner where the criminal files were kept and he started going through them.” On that basis, the state claims that the defendant intended to alter, destroy, conceal or remove either his own case files or something contained within them, then to start a fire within the office to conceal his act of tampering.

The state concedes that no witness saw the defendant engage in any of these acts. Furthermore, although there is physical evidence that directly links the defendant to the bag containing the kerosene, supporting a reasonable inference that the defendant dropped the bag where the police found it, there is no such evidence that puts the defendant in the office where the files were located. Instead, the state argued that the jury could infer that the defendant entered the office, proceeded to the secretary area where the files were located, started to go through them and did so with the intent of tampering with evidence all from the single fact that there was a disorganized pile of files on the floor. We conclude that this single fact was insufficient for the jury to infer that the defendant ever touched any case files in the state’s attorney’s office on March 3, 2013, let alone pulled case files out of any file cabinet or off any desk, shelf or table, or that he went through such files for any purpose, much less that he took any steps to alter, remove, conceal or destroy the files or

their contents as or after he went through them. This is true for four fundamental reasons. To reiterate, no witness saw or heard the intruder doing anything while he was inside the state's attorney's office or any other part of the courthouse. The only person who may possibly have seen or heard the intruder in that time frame was Trooper Lund, who was seen standing by the broken window, and heard yelling at someone inside the building when the other troopers arrived. Lund, however, did not testify because he had been injured in another incident before trial began, and no other witness reported seeing or hearing anyone doing anything inside the building during the break-in. Without such direct testimony, the state was left to prove its claim by circumstantial evidence based upon the intruder's proven conduct during the break-in and thereafter.

Second, although the state expressly theorized that the intruder, upon entering the larger state's attorney's office, dropped his duffel bag of kerosene down a hallway to his left, then circled all the way around the office to his right, where he pulled case files out of lateral file cabinets in that area and rummaged through them, assertedly for the purpose of finding his own case files and tampering with them or their contents, before dumping the pulled out case files in a disorganized pile on the floor, it failed to establish that the intruder ever touched those or any other case files in the office during the break-in. To begin with, no evidence was presented that the files on the floor were not exactly where police investigators found them when the state's attorney's office last closed before the break-in. Although the supervising state's attorney testified that her colleagues generally kept their case files in orderly fashion in the lateral file cabinets in the secretary's desk area, she did not state that they always did so. In fact she testified that they did not always do so, for they sometimes kept their own files with them, particularly when they were

preparing cases for trial. This testimony was confirmed by photographic evidence showing piles of case files lying elsewhere in the office, undermining the state's unsupported contention that the files in the pile on the floor must have been pulled out of the lateral file cabinets and left there by the intruder. Indeed, such photos also showed that the lateral file cabinets were so densely packed with case files, without apparent gaps or irregularities, as to make it unlikely that the large number of files on the floor had been indiscriminately pulled out of there during the break-in.

Third, no list or inventory was ever made of the files on the floor. Therefore, not only was there no evidence that the defendant's case files were among the files found on the floor, but there was no evidence as to where in the office any such files had been stored before the break-in. Armed with such information, the state might reasonably have claimed that the intruder gained access to the files during the break-in and moved them to where the police later found them on the floor. It might also have been able to argue, from the names or numbers on the files or the places where the intruder had searched for and found them, that by selecting files in that manner, the intruder had given evidence as to his purpose in so doing. If, for example, the selected files were in an alphabetical sequence that included the defendant's name, or in a numerical sequence that included the date of the defendant's upcoming trial, such a selection might have supported the inference that the intruder was searching for the defendant's file. Similarly, if he had selected files that were stored in the office of the assistant state's attorney who was prosecuting his cases, such a selection might have supported the inference that he was searching for the defendant's files. In that event, the state might have further supported its claim by lifting fingerprints from or taking DNA swabs of the places where the selected files had

been stored or the files themselves. Without an inventory of the files found on the floor, however, no such logical inference could be argued and no supporting forensic evidence was sought or presented.

Fourth and finally, there is no evidence that the defendant's purpose in going through any case files, if in fact he did so, was to alter, destroy, conceal or remove them or their contents from the state's attorney's office. No evidence was presented that any case file was altered, destroyed, concealed or removed in any way. Nor was evidence presented as to the contents of the case files in the defendant's two pending cases, or of any reason why the defendant might have found it in his interest to tamper with them prior to his trial. Indeed, although the supervising state's attorney testified as to the types of materials that case files often contain, including physical evidence and witness statements, neither she nor any other witness offered evidence as to the contents of the defendant's pending case files, or advanced any reason why the defendant might have believed that it was in his interest to compromise their verity or availability to the state in advance of his impending trial. Nor could the jury have drawn an inference as to the defendant's motive to tamper with his case files from the nature of his pending charges, for those charges were never listed for the jury.

In conclusion, the state presented no evidence at all from which the jury reasonably could have inferred that, during the short period of time between the intruder's breaking of the window and the arrival of the state police on the scene, the defendant entered the building through that window and went directly to the filing cabinet in another office and removed the files that were later discovered on the floor. Although the state argued that the defendant's intent to tamper with physical evidence could be inferred from his "handl[ing]" of those files, the evidence presented showed only that

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the defendant entered the courthouse through the window of the office of two assistant state's attorneys, walked through that office and dropped the duffel bag containing the six bottles of kerosene onto the floor in the corridor running past that office, to the far left of the door leading into the larger state's attorney's office.

In the absence of any evidence that the defendant ever touched case files in the state's attorney's office, much less that he did so with the intent to tamper with such files or their contents, the jury reasonably could not have inferred that the defendant had that intent, as required to prove him guilty of each of the three offenses of which he was convicted. Accordingly, his conviction cannot stand.<sup>10</sup>

The defendant also claims, as previously noted, that the court improperly prevented him from presenting exculpatory testimony from his trial attorney as to a conversation between them two days before his alleged commission of the charged offenses that tended to contradict the state's claim that he had a special motive for committing those offenses. Because we reverse his conviction for the reasons stated previously, we need not address this claim.

The judgment is reversed and the case is remanded with direction to render judgment of acquittal on all three charges against the defendant.

In this opinion the other judges concurred.

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<sup>10</sup> The state has not argued that the defendant should be convicted of any lesser included offenses in the event that we determine that the evidence was insufficient to sustain his conviction. Accordingly, we have no occasion to so order. See *State v. Jahsim T.*, 165 Conn. App. 534, 541, 139 A.3d 816 (2016).

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Hospital Media Network, LLC v. Henderson

HOSPITAL MEDIA NETWORK, LLC v. JAMES G.  
HENDERSON ET AL.  
(AC 40197)

Alvord, Keller and Flynn, Js.

*Syllabus*

The plaintiff sought to recover damages from the defendant H, its former employee, for, inter alia, breach of fiduciary duty. H was employed by the plaintiff as its chief revenue officer until the plaintiff terminated H's employment on September 5, 2013. The plaintiff thereafter brought the present action, claiming, inter alia, that H had a fiduciary relationship with the plaintiff and that H breached his fiduciary duty by working for G Co., a private equity investment firm, to raise capital to acquire C Co., which was involved in the same business sector as the plaintiff, without the plaintiff's permission or knowledge. G Co.'s acquisition of C Co. closed on September 26, 2013, upon which H was paid a \$150,000 finder's fee by either G Co. or C Co., awarded a three year consulting contract with C Co. at \$50,000 annually, and given the opportunity to purchase restricted stock of C Co. After H was defaulted for failure to comply with a discovery order, the trial court granted the plaintiff's motion for judgment on the default. Following a hearing in damages, the trial court awarded damages against H in the amount of \$454,579.76 on the plaintiff's claim of breach of fiduciary duty, which included the entire salary and bonus H received from the plaintiff as a full-time employee in 2013, the finder's fee paid to H by G Co. or C Co., the consulting fees paid to H by C Co. from 2013 to 2016, and the value of the C Co. stock at the time of H's purchase. On H's appeal to this court, *held* that the trial court abused its discretion in ordering a wholesale forfeiture of the salary and bonus paid to H by the plaintiff in 2013, and requiring H to disgorge in full all profits received from C Co. and G Co., as the award of monetary relief was disproportionate to the misconduct at issue and failed to take into account the equities in the case: although the remedies of forfeiture of compensation paid by an employer and disgorgement of amounts received by the employee from third parties are available when an employer has proven a breach of the fiduciary duty of loyalty by the employee, the imposition of those remedies is dependent on the equities of the particular case, and trial court's findings here that H provided significant value to the plaintiff by contributing to the plaintiff's rapid growth, despite his breach of fiduciary duty, and that H did not act with a bad motive or reckless indifference, but rather failed to comprehend or ignored the differences between being an employee and a consultant, should have weighed in favor of a measured forfeiture rather than H's full salary and bonus; moreover, full disgorgement of the benefits conferred on H by C Co. and G Co. was



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improper, as H rendered some of the services for which he was compensated by C Co. and G Co. both prior and subsequent to his full-time employment with the plaintiff, and the commensurate portion of the compensation received in exchange for those services should not have been included in the court's order of disgorgement.

Argued September 18, 2018—officially released January 8, 2019

*Procedural History*

Action to recover damages for, inter alia, breach of fiduciary duty, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendants filed a counterclaim; thereafter, the court, *Hon. A. William Mottolese*, judge trial referee, granted the plaintiff's motion for default against the defendants and for nonsuit on the defendants' counterclaim; subsequently, the court, *Hon. A. William Mottolese*, judge trial referee, granted the plaintiff's motion for judgment on the default and rendered judgment of nonsuit as to the defendants' counterclaim; thereafter, following a hearing in damages, the court, *Hon. Taggart D. Adams*, judge trial referee, rendered judgment for the plaintiff, from which the defendants appealed to this court. *Reversed in part; further proceedings.*

*James G. Henderson*, self-represented, with whom was *Taylor Henderson*, self-represented, the appellants (defendants).

*Gary S. Klein*, with whom was *Liam S. Burke*, for the appellee (plaintiff).

*Opinion*

ALVORD, J. The self-represented defendant, James G. Henderson, appeals from the judgment of the trial court, following a hearing in damages upon default as to liability, awarding the plaintiff, Hospital Media Network, LLC, monetary relief pursuant to the equitable theories of forfeiture and disgorgement in the amount

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of \$454,579.76 on its claim of breach of fiduciary duty.<sup>1</sup> On appeal, the defendant claims that the court's award was improper because the plaintiff failed to prove it suffered any damages. We conclude that the court abused its discretion in ordering a wholesale forfeiture of the defendant's salary and bonus and requiring the defendant to disgorge in full all profits received from third parties, such that the award, in the full amount requested by the plaintiff, was inequitable. Accordingly, we reverse in part the judgment of the court as to the award of damages against James Henderson and remand the case for a new hearing in damages. We otherwise affirm the court's judgment.

The following facts and procedural history are relevant to the resolution of this appeal. In November, 2013, the plaintiff commenced this action alleging that the defendant, its former employee, violated the Connecticut Uniform Trade Secrets Act (CUTSA), General Statutes § 35-50 et seq., committed tortious interference with the plaintiff's business and contractual relations, breached the duty of employee loyalty, breached his fiduciary duty, and usurped corporate opportunities of the plaintiff. The defendant was defaulted, and the trial court held a hearing in damages. After the hearing, the court awarded the plaintiff damages solely on its claim of breach of fiduciary duty,<sup>2</sup> the essential elements of

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<sup>1</sup> The court additionally awarded the plaintiff \$2000 in damages against Taylor Henderson, who was also named as a defendant in this action, and \$21,922.50 in attorney's fees against James Henderson and Taylor Henderson jointly and severally. Although James and Taylor Henderson jointly filed briefing to this court, neither James nor Taylor challenges the judgment against Taylor or the award of attorney's fees. Because the appeal challenges only the judgment against James Henderson, we accordingly refer to James Henderson as the defendant.

<sup>2</sup> Although the plaintiff alleged breach of the duty of employee loyalty separate from its claim of breach of fiduciary duty, it specified in its breach of fiduciary duty count that one such fiduciary duty breached was the duty of loyalty. In its memorandum of decision, the court awarded damages for "breach of fiduciary duty owed to the corporation" and cited case law and secondary sources addressing the fiduciary duty of loyalty. Our Supreme

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which were admitted by virtue of the defendant's default.

With respect to its breach of fiduciary duty count, the plaintiff alleged that it employed the defendant as its chief revenue officer and paid him substantial compensation from January 1 to September 2013. On September 5, 2013, the plaintiff terminated the defendant's employment "for cause for several reasons including, without limitation [the defendant's] actively working for various companies unrelated to [the plaintiff] for his own benefit and without [the plaintiff's] permission or knowledge during regular business hours." Specifically, it alleged that the defendant worked for or on behalf of Generation Partners (Generation), a private equity investment firm, "to raise capital for other digital media companies including but not limited to" Captivate Network Holdings, Inc. (Captivate), and used the plaintiff's computers and infrastructure to conduct business for those other digital media companies without the plaintiff's permission or knowledge. The plaintiff claimed that the defendant played golf on a social basis and otherwise took time off during regular business hours without the plaintiff's permission.

The plaintiff further alleged that the parties had a fiduciary relationship "by virtue of the trust and confidence" the plaintiff placed in the defendant as its chief revenue officer, a senior executive position. Among the duties allegedly owed to the plaintiff were the duty of loyalty, the duty to act in good faith, and the duty to act in the best interest of the plaintiff. The plaintiff asserted that the defendant breached these duties in advancing his own interests to the detriment of the plaintiff. Lastly, the plaintiff alleged that the defendant's

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Court likewise has treated the duty of loyalty as a fiduciary duty in the employment context. See *Wall Systems, Inc. v. Pompa*, 324 Conn. 718, 733, 154 A.3d 989 (2017).

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breach caused it to sustain damages.<sup>3</sup> The plaintiff sought, *inter alia*, compensatory and punitive damages.

The defendant answered and filed an amended counterclaim, alleging breach of contract, wrongful termination, misrepresentation and deceit, and violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a *et seq.* The defendant requested, *inter alia*, compensatory and punitive damages.

The parties engaged in discovery disputes, resulting in an April, 2016 order from the court that the parties “confer face-to-face in an effort to resolve these discovery disputes, bearing in mind that reasonable good faith efforts at compromise are essential to every discovery dispute.” On June 27, 2016, after finding the defendant’s objections to the plaintiff’s discovery requests “intentionally evasive and intended to obstruct the process,” the court ordered full compliance within thirty days. On July 28, 2016, the plaintiff filed a motion for default and nonsuit on the basis that the defendant had failed to comply with the court’s June 27 order. The court granted the motion, finding that the “[p]laintiff is clearly prejudiced by these obstructive tactics and the only appropriate remedy proportionate to the infraction is default.” On September 26, 2016, the court rendered judgment for the plaintiff on its affirmative claims and against the defendant on his counterclaim.

On September 27, 2016, the court held a hearing in damages. The plaintiff presented the testimony of

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<sup>3</sup> Although not necessary to resolving the present appeal from the judgment awarding damages on the plaintiff’s breach of fiduciary duty claim, the essential elements of the plaintiff’s remaining claims were also admitted by virtue of the defendant’s default. Although the court declined to award the plaintiff damages on its remaining claims, the plaintiff has not cross appealed from the court’s refusal to award damages on the claims alleging a violation of CUTSA, tortious interference with the plaintiff’s business and contractual relations, breach of the duty of employee loyalty, and usurpation of corporate opportunities.

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Andrew Hertzmark, an employee of Generation;<sup>4</sup> Christopher Culver, chief executive officer of the plaintiff; Taylor Henderson; and James Henderson. At the conclusion of the hearing, the court requested posttrial briefing, which the parties submitted on October 18, 2016.

On February 15, 2017, the court issued a memorandum of decision. In its memorandum, the court reviewed the evidence presented during the hearing in damages. From 2011 to 2013, the defendant was a consultant to the plaintiff, and the plaintiff compensated the defendant by making payments to his consulting company, St. Ives Development Group. On January 1, 2013, the defendant became a full-time employee and chief revenue officer of the plaintiff. The plaintiff paid him a salary of over \$12,000 per month, totaling \$121,579.84 in 2013, and also paid him a sales target bonus of \$25,000 in May, 2013. That bonus was paid to St. Ives Development Group.<sup>5</sup> Just weeks after becoming a full-time employee of the plaintiff, the defendant communicated with Hertzmark, identifying the plaintiff as a possible investment target for his fund, and included the plaintiff's revenues and possible buy-out price.

In 2013, Hertzmark was working on a potential transaction in which Generation would acquire Captivate from Gannett Company, Inc. (Gannett).<sup>6</sup> Both Captivate

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<sup>4</sup> According to Hertzmark, Generation is a private equity firm that had been interested in investing in the plaintiff at one point in time but decided not to do so in 2011.

<sup>5</sup> Aside from explaining that it paid the bonus through St. Ives Development Group at the defendant's request, the plaintiff's counsel during oral argument before this court had no additional explanation for why, after having made the defendant a full-time employee as of January 1, 2013, it would pay the bonus to the defendant as an independent contractor through his consulting company.

<sup>6</sup> Gannett's point person for the transaction was Douglas Kuckelman, a member of Gannett's corporate development department. The defendant corresponded via e-mail with Kuckelman in late December, 2012, and early 2013.

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and the plaintiff are involved in the same business sector. While Captivate sells advertising space on digital monitors in elevators, the plaintiff sells advertising space on monitors located in hospitals and medical offices. Hertzmark testified that the defendant assisted with the Captivate acquisition, giving a presentation with Hertzmark to Gannett and helping formulate the letter of intent memorializing Generation's proposed purchase of Captivate.<sup>7</sup> In March, 2013, Hertzmark e-mailed the defendant stating that Generation's letter of intent was not shared with the head of Captivate and, therefore, Gannett was surprised to learn that the head of Captivate was aware of plans to install the defendant as the new chief executive officer of Captivate once that business was acquired by Generation.<sup>8</sup> In March and April, 2013, the defendant corresponded with Hertzmark regarding Captivate's attributes as an investment and reviewed due diligence information provided by Captivate from February through April, 2013. He told Hertzmark on July 6, 2013, that he wanted his attorney to review his Captivate employment contract once completed.

The plaintiff terminated the defendant's employment on September 5, 2013, and Generation's acquisition of Captivate from Gannett closed on September 26, 2013. Upon the transaction's closing, the defendant was paid a finder's fee of \$150,000, awarded a consulting contract with Captivate for three years at \$50,000 annually, and given the opportunity to purchase restricted stock of Captivate.<sup>9</sup>

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<sup>7</sup> Although Hertzmark knew that the defendant had a connection with the plaintiff, he maintained that he was not aware that the defendant was employed full-time by the plaintiff in 2013. He further stated that the defendant told him he was a consultant for the plaintiff.

<sup>8</sup> Generation considered the defendant as a potential candidate for chief executive officer of Captivate, and the defendant provided his resume to Generation on May 19, 2013.

<sup>9</sup> Hertzmark did not know whether the \$150,000 finder's fee was paid by Generation or Captivate.

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The court found that “during the events in this case [the defendant] either never comprehended or ignored the different consequences of being a company employee and being a consultant,” referring to the defendant’s testimony in which he described himself as a “consultant employee” of the plaintiff. The court referenced the testimony of Culver, the plaintiff’s chief executive officer, that the plaintiff’s sales increased from \$1.9 million in 2010 to \$6.6 million in 2013. The court additionally noted Culver’s testimony that the plaintiff “held itself out to be the fastest growing company of its kind during this period” and his recognition that the defendant was part of this “terrific growth.” Crediting Culver’s testimony, the court found that “there was a sharp increase in the company’s sales” while the defendant worked for the plaintiff.

Turning to the plaintiff’s claimed damages, the court first found that the plaintiff was not entitled to the defendant’s “compensation from Captivate” on the theory that the defendant usurped a corporate opportunity. Specifically, the court found that the opportunity the defendant took was “employment” at Captivate, which was not an opportunity available to the plaintiff. The court determined, however, that damages were appropriate on the plaintiff’s claim of the breach of fiduciary duty of loyalty, and measured the damages “by the gain to the faithless employee.”<sup>10</sup> The court awarded damages against the defendant in the total amount of \$454,579.76, including \$146,579.84, representing the defendant’s 2013 salary (\$121,579.84) and bonus (\$25,000); \$150,000, representing the finder’s fee paid by Generation or Captivate; \$150,000, representing the

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<sup>10</sup> In its posttrial brief, the plaintiff expressly abandoned its claim for expense reimbursements. Specifically, it no longer sought “damages for [James] Henderson’s 2013 reimbursed expenses totaling \$17,718.33, or Taylor Henderson’s 2012 and 2013 reimbursed expenses totaling \$11,887.90 and \$11,498.10 respectively.”

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consulting fees to be paid by Captivate from 2013 through 2016; and \$7999.92, representing the value of the Captivate stock at the time of purchase.<sup>11</sup>

The court declined to award attorney’s fees under CUTSA, finding that “there was minimal or no misappropriation of trade secrets in this case, and no justifiable basis for awarding fees under that statute.” The court further declined to award attorney’s fees as punitive damages under the common law, on the basis that the defendant “has been penalized severely already by this court’s decision. To add hundreds of thousands of dollars more, would not only be punitive, it would be overkill.” It additionally found that although the defendant’s actions were “uninformed, and even stupid,” his conduct did not meet the common-law standard for awarding attorney’s fees, which, the court observed, requires that the conduct be “outrageous, done with a bad motive, or with reckless indifference.” This appeal followed.

On appeal, the defendant claims that the plaintiff was “unable to offer proof as to any of [its] damages by a preponderance of [the] evidence” and therefore is “not entitled to any award of damages.”

We begin by addressing the effect of the default. The defendant was defaulted for failure to comply with the court’s discovery order, and he concedes that he did not file a notice of intent to present defenses.<sup>12</sup> “[C]ase

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<sup>11</sup> The court additionally awarded attorney’s fees in the amount of \$21,922.50, representing the time the plaintiff’s counsel spent addressing the parties’ discovery disputes. The defendant does not challenge this portion of the award on appeal. See footnote 1 of this opinion.

<sup>12</sup> “After a default, a defendant may still contest liability. Practice Book §§ 17-34, 17-35 and 17-37 delineate a defendant’s right to contest liability in a hearing in damages after default. Unless the defendant provides the plaintiff written notice of any defenses, the defendant is foreclosed from contesting liability. . . . If written notice is furnished to the plaintiff, the defendant may offer evidence contradicting any allegation of the complaint and may challenge the right of the plaintiff to maintain the action or prove any matter of defense. . . . This approximates what the defendant would have been



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law makes clear . . . that once the defendants had been defaulted and had failed to file a notice of intent to present defenses, they, by operation of law, were deemed to have admitted to all the essential elements in the claim and would not be allowed to contest liability at the hearing in damages.” (Internal quotation marks omitted.) *Abbott Terrace Health Center, Inc. v. Parawich*, 120 Conn. App. 78, 85, 990 A.2d 1267 (2010). “A default admits the material facts that constitute a cause of action . . . and entry of default, when appropriately made, conclusively determines the liability of a defendant. . . . If the allegations of the plaintiff’s complaint are sufficient on their face to make out a valid claim for the relief requested, the plaintiff, on the entry of a default against the defendant, need not offer evidence to support those allegations.” (Internal quotation marks omitted.) *Perez v. Carlevaro*, 158 Conn. App. 716, 725, 120 A.3d 1265 (2015); see also *Equity One, Inc. v. Shivers*, 310 Conn. 119, 130 n.9, 74 A.3d 1225 (2013). “Following the entry of a default, all that remains is for the plaintiff to prove the amount of damages to which it is entitled. . . . At a minimum, the plaintiff in such instances is entitled to nominal damages.” (Internal quotation marks omitted.) *Gaynor v. Hi-Tech Homes*, 149 Conn. App. 267, 271, 89 A.3d 373 (2014).

Because of the default entered against the defendant, he is precluded from challenging his liability to the plaintiff under the claims pleaded. “In an action at law,

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able to do if he had filed an answer and special defenses.” (Citations omitted; footnote omitted; internal quotation marks omitted.) *Schwartz v. Milazzo*, 84 Conn. App. 175, 178–79, 852 A.2d 847, cert. denied, 271 Conn. 942, 861 A.2d 515 (2004). “To be timely, notice must be given within the time period provided in Practice Book § 17-35.” *Bank of New York v. National Funding*, 97 Conn. App. 133, 140, 902 A.2d 1073, cert. denied, 280 Conn. 925, 908 A.2d 1087 (2006), and cert. denied sub nom. *Reyad v. Bank of New York*, 549 U.S. 1265, 127 S. Ct. 1493, 167 L. Ed. 2d 229 (2007). Section 17-35 (b) provides that “notice of defenses must be filed within ten days after notice from the clerk to the defendant that a default has been entered.”

the rule is that the entry of a default operates as a confession by the defaulted defendant of the truth of the material facts alleged in the complaint which are essential to entitle the plaintiff to some of the relief prayed. It is not the equivalent of an admission of all of the facts pleaded. The limit of its effect is to preclude the defaulted defendant from making any further defense and to permit the entry of a judgment against him on the theory that he has admitted such of the facts alleged in the complaint as are essential to such a judgment. It does not follow that the plaintiff is entitled to a judgment for the full amount of the relief claimed. *The plaintiff must still prove how much of the judgment prayed for in the complaint he is entitled to receive.*" (Emphasis in original; internal quotation marks omitted.) *Id.*, 271–72.

Throughout his principal and reply briefing and during oral argument before this court, the defendant raises arguments challenging his liability to the plaintiff. Specifically, he argues that the plaintiff waived its claims of breach of the duty of loyalty when hiring the defendant, in that the plaintiff hired him with full knowledge that he would continue to consult for other companies. The central contention expressed in the defendant's reply brief is that the duty of loyalty never applied to his relationship with the plaintiff, and that "[w]here there was no duty of faithfulness, loyalty, or an agency or fiduciary relationship implicit in the parties' agreement, logically there cannot be any breach of it. Without a breach, damages are not available as a matter of fact and law." Such arguments are unavailing given the entry of a default, which operates as an admission by the defendant of the facts alleged in the complaint that are essential to the judgment rendered in favor of the plaintiff on its claim of breach of fiduciary duty.

The defendant is entitled, however, to challenge the determination of monetary relief awarded by the court.

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Our standard of review is as follows. “As a general matter, [t]he trial court has broad discretion in determining whether damages are appropriate. . . . Its decision will not be disturbed on appeal absent a clear abuse of discretion. . . . Our review of the amounts of monetary awards rendered pursuant to various equitable doctrines is similarly deferential.”<sup>13</sup> (Citation omitted; internal quotation marks omitted.) *Wall Systems, Inc. v. Pompa*, 324 Conn. 718, 729, 154 A.3d 989 (2017).

Our Supreme Court, in *Wall Systems, Inc. v. Pompa*, supra, 324 Conn. 732, recently provided guidance on the equitable remedies available to an employer upon proving that an employee has breached his fiduciary duty of loyalty. In *Wall Systems, Inc.*, the defendant worked for the plaintiff building contractor as head of its exterior insulation finish systems division. *Id.*, 722. Without informing the plaintiff, he began working simultaneously for a competitor, performing estimating work for which he earned approximately \$90,000 over the course of five years. *Id.*, 723. The plaintiff also submitted bids for some of the same jobs that the defendant had estimated for its competitor. The defendant additionally accepted kickbacks from a subcontractor in connection with his work for the plaintiff. *Id.*, 724. The plaintiff terminated the defendant’s employment and filed an action alleging that he breached his duty of loyalty to the plaintiff.

After a bench trial, the court awarded damages to the plaintiff arising out of the kickback scheme in the amounts of \$14,400, for jobs on which the defendant had increased the contract price, and \$43,200, representing treble damages as a result of the defendant’s statutory theft. *Id.*, 726. The trial court declined to require the

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<sup>13</sup> Although the determination of whether equitable doctrines are applicable in a particular case is a question of law subject to plenary review; see *Walpole Woodworkers, Inc. v. Manning*, 307 Conn. 582, 588, 57 A.3d 730 (2012); the amount of damages awarded under such doctrines is a question for the trier of fact. *David M. Somers & Associates, P.C. v. Busch*, 283 Conn. 396, 407, 927 A.2d 832 (2007).

defendant to forfeit the compensation he earned from either the plaintiff or its competitor, citing a lack of evidence that the plaintiff had been harmed due to the defendant's working for the competitor, and finding that the defendant had worked for the competitor on his own time. *Id.*, 726–27. On appeal, the plaintiff claimed as a matter of law that the trial court improperly declined to order the defendant to forfeit his earnings from the plaintiff and to require the defendant to disgorge the compensation he received from the competitor. *Id.*, 727–28. Our Supreme Court, recognizing that the remedies of forfeiture and disgorgement are available once an employer has proven breach of the fiduciary duty of loyalty, nevertheless held that the remedies are not mandatory, but “are discretionary ones whose imposition is dependent upon the equities of the case at hand.” *Id.*, 729.

The court in *Wall Systems, Inc.* provided: “The law of restitution and unjust enrichment . . . creates a basis for an [employee’s] liability to [an employer] when the [employee] breaches a fiduciary duty, even when no loss to the employer is shown. 2 Restatement (Third), [Agency] § 8.01 comment (d) (1), p. 258 [(2006)]. More specifically, if an employee realizes a material benefit from a third party in connection with his breach of the duty of loyalty, the employee is subject to liability to deliver the benefit, its proceeds, or its value to the [employer]. *Id.*; see also *id.*, § 8.02, comment (e), p. 285. Accordingly, [a]n employee who breaches the fiduciary duty of loyalty may be required to disgorge any profit or benefit he received as a result of his disloyal activities, regardless of whether the employer has suffered a corresponding loss. . . .

“Additionally, an employer may seek forfeiture of its employee’s compensation. *Cameco, Inc. v. Geddicke*, 157 N.J. 504, 519, 724 A.2d 783 (1999); 2 Restatement (Third), *supra*, § 8.01, comment (d) (2), pp. 258–59. Forfeiture of a disloyal employee’s compensation, like disgorgement of material benefits received from third

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parties, is an equitable rather than a legal remedy. . . . It is derived from a principle of contract law: if the employee breaches the duty of loyalty at the heart of the employment relationship, he or she may be compelled to forego the compensation earned during the period of disloyalty. The remedy is substantially rooted in the notion that compensation during a period in which the employee is disloyal is, in effect, unearned. . . . Forfeiture may be the only available remedy when it is difficult to prove that harm to [the employer] resulted from the [employee's] breach or when the [employee] realizes no profit from the breach. In many cases, forfeiture enables a remedy to be determined at a much lower cost to litigants. Forfeiture may also have a valuable deterrent effect because its availability signals [employees] that some adverse consequence will follow a breach of fiduciary duty. 2 Restatement (Third), *supra*, § 801, comment (d) (2), p. 259 . . . . Notably, however, even in cases in which a court orders forfeiture of compensation, the forfeiture normally is apportioned, that is, it is limited to the period of time during which the employee engaged in disloyal activity.” (Citations omitted; internal quotation marks omitted.) *Id.*, 733–34.

Our Supreme Court made clear that the remedies of forfeiture of compensation and disgorgement of material benefits are discretionary, especially in “cases involving breaches of the duty of loyalty due to their highly fact specific nature.” *Id.*, 736. The court further articulated the following nonexhaustive list of factors a trial court should consider in determining whether to invoke forfeiture and disgorgement: “the employee’s position, duties and degree of responsibility with the employer; the level of compensation that the employee receives from the employer; the frequency, timing and egregiousness of the employee’s disloyal acts; the wilfulness of the disloyal acts; the extent or degree of the

employer's knowledge of the employee's disloyal acts; the effect of the disloyal acts on the value of the employee's properly performed services to the employer; the potential for harm, or actual harm, to the employer's business as a result of the disloyal acts; the degree of planning taken by the employee to undermine the employer; and the adequacy of other available remedies, as herein discussed. . . . The several factors embrace broad considerations which must be weighed together and not mechanically applied. . . . [T]he judicial task is to search for a fair and reasonable solution in light of the relevant considerations . . . and to avoid unjust enrichment to either party. . . . Additionally, when imposing the remedy of forfeiture of compensation, depending on the circumstances, a trial court may in its discretion apply apportionment principles, rather than ordering a wholesale forfeiture that may be disproportionate to the misconduct at issue. . . . Conversely, the court may conclude that all compensation should be forfeited because the employee's unusually egregious or reprehensible conduct pervaded and corrupted the entire [employment] relationship." (Citations omitted; internal quotation marks omitted.) *Id.*, 737–38.

The factors articulated in *Wall Systems, Inc.*, are designed to assist the trial court in reaching “a fair and reasonable solution” and to “avoid unjust enrichment to either party.” *Id.*, 738. Specifically, the court in *Wall Systems, Inc.* noted that in certain circumstances the application of apportionment principles may be more appropriate than “a wholesale forfeiture that may be disproportionate to the misconduct at issue.” *Id.* In the present case, we conclude that the award of monetary relief was disproportionate to the misconduct at issue and failed to take into account the equities of the case at hand.<sup>14</sup>

<sup>14</sup> The self-represented defendant advances a number of arguments for reversal of the court's judgment that have no basis in the court's memorandum of decision or in our case law.

We focus our analysis on the court's award pursuant to the doctrine of forfeiture. The court ordered a wholesale forfeiture of the defendant's salary for the entire duration of his full-time employment with the plaintiff, \$121,579.84, and the entire amount of what the plaintiff itself categorized as the defendant's achieving his "sales target bonus," \$25,000, which it paid to the defendant

He first contends that the court erred in requiring him to repay amounts earned prior to September 5, 2013, arguing that Connecticut law does not permit the forfeiture of past compensation upon finding a breach of duty of loyalty. The defendant maintains that future compensation only may be subject to forfeiture, citing *Dunsmore & Associates, Ltd. v. D'Alessio*, Superior Court, judicial district of New Haven, Docket No. 409906 (January 6, 2000) (26 Conn. L. Rptr. 228), in support of his argument. That superior court case involved claims of breach of contract and breach of the implied covenant of good faith and fair dealing, and thus is both distinguishable and not binding on this court. In contrast, *Wall Systems, Inc. v. Pompa*, supra, 324 Conn. 733–34, provides generally that "[i]f the employee breaches the duty of loyalty at the heart of the employment relationship, he or she may be compelled to forego the compensation earned during the period of disloyalty." (Emphasis added.)

Second, the defendant argues that because the plaintiff prospered during the period of the defendant's employment, the plaintiff cannot show it was damaged by his acts and is not entitled to recover damages for lost profits. Although the court abused its discretion in fashioning its damage award, it did not use lost profits as the measure of damages, and, thus, the defendant's argument is inapposite.

Third, the defendant argues that "[t]he proper measure of damages for breach of covenant not to compete is the nonbreaching party's losses, not the breaching party's gains. . . . Where the judge reversed this standard in his memo on damages, he applied an incorrect standard, which rendered an incorrect award of damages" to the plaintiff. Because this action contains no claim of breach of a covenant not to compete, the defendant's argument and supporting case law is inapplicable.

Fourth, recognizing that no damages were awarded on the plaintiff's count alleging violation of CUTSA, the defendant nevertheless argues, in the event that the plaintiff "may choose to raise [the CUTSA claim] in this appeal," that no recovery under CUTSA is proper. Specifically, he argues, citing *Dunsmore & Associates, Ltd. v. D'Alessio*, supra, 26 Conn. L. Rptr. 228, that the plaintiff is not entitled to recover compensatory damages under § 35-53 because it has failed to prove that it sustained actual loss or that the defendant was unjustly enriched as a result of his misappropriation. He also argues that the plaintiff is not entitled to punitive damages under CUTSA. He further argues that the plaintiff cannot recover damages for tortious interference, on the basis that it has failed to prove a loss suffered by the plaintiff and caused by the defendant's tortious conduct. Because the court awarded no damages under either the CUTSA or tortious interference counts and the plaintiff did not file a cross appeal from the trial court's judgment, we need not address these arguments.

as an independent contractor through his consulting company. Specifically, Culver testified during the hearing in damages that the \$25,000 bonus paid to the defendant in May, 2013, was compensation for “hitting a target of four . . . million in sales for that year.”

Although the court in the present case did not have the benefit of the *Wall Systems, Inc.*, factors at the time it rendered its decision, our Supreme Court noted that the factors had been “gleaned from existing jurisprudence.” *Id.*, 737. The court did, in its memorandum of decision, make factual findings, fully supported by the record and corresponding with the *Wall Systems, Inc.*, factors, but ultimately failed to give proper weight to these findings in fashioning its damages award. Specifically, the trial court expressly recognized the value of the services the defendant provided the plaintiff, finding “a sharp increase in the company’s sales” while the defendant worked for the plaintiff, and concluding that the defendant was part of this “terrific growth.” That finding corresponds with the *Wall Systems, Inc.*, factor prompting consideration of “the effect of the disloyal acts on the value of the employee’s properly performed services to the employer.” The court’s finding, in essence a recognition that the defendant was providing extraordinary value to the plaintiff despite his breach of fiduciary duty, should have weighed in favor of a measured forfeiture, not the defendant’s full salary and bonus.

Indeed, as the court in *Wall Systems, Inc.*, explained, forfeiture as a remedy “is substantially rooted in the notion that compensation during a period in which the employee is disloyal is, in effect, unearned.” *Id.*, 734. In accord with this principle, courts in other states have recognized that an employee may be entitled to retain some portion of his compensation where the breach is minor or the employee has provided value to the employer in the form of services properly rendered. See *Cameco, Inc. v. Gedicke*, *supra*, 157 N.J. 521 (“if



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the employee's breach is minor, involves only a minimal amount of time, or does not harm the employer, the employee may be entitled to all or substantially all of his or her compensation"); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 609, 518 S.E.2d 591 (1999) (noting that "[t]he goal is to avoid the unjust enrichment of either party by examining factors such as . . . the value to the employer of the services properly rendered by the employee").

The 2 Restatement (Third), *supra*, § 8.01 comment (d) (2) also suggests that forfeiture in full is disproportionate under certain circumstances. It provides: "Although forfeiture is generally available as a remedy for breach of fiduciary duty, cases are divided on how absolute a measure to apply. Some cases require forfeiture of all compensation paid or payable over the period of disloyalty, while others permit apportionment over a series of tasks or specified items of work when only some are tainted by the agent's disloyal conduct. The better rule permits the court to consider the specifics of the agent's work and the nature of the agent's breach of duty and to evaluate whether the agent's breach of fiduciary duty tainted all of the agent's work or was confined to discrete transactions for which the agent was entitled to apportioned compensation."

In the present case, the court also made a finding related to the wilfulness of the defendant's actions, another of the *Wall Systems, Inc.*, factors. The court characterized the defendant's actions as "uninformed, and even stupid." By declining to award attorney's fees as punitive damages under the common law on this basis, it is evident that the court rejected any notion that the defendant's conduct was "outrageous, done with a bad motive, or with reckless indifference." The court also found that the defendant had "either never comprehended or ignored the different consequences of being a company employee and being a consultant," referring to the defendant's testimony in which he

described himself as a “consultant employee” of the plaintiff. Despite recognizing that the defendant potentially “never comprehended” the distinction between serving as an employee and a consultant and finding that the defendant’s behavior was “uninformed” rather than done with a bad motive, the court failed to give proper weight to these findings when fashioning its award.

We acknowledge that a trial court “may conclude that all compensation should be forfeited because the employee’s unusually egregious or reprehensible conduct pervaded and corrupted the entire [employment] relationship.” (Internal quotation marks omitted.) *Wall Systems, Inc. v. Pompa*, supra, 324 Conn. 738. The court in *Wall Systems, Inc.*, recognized that “if the compensation received by a disloyal employee is *not* apportioned to particular time periods or items of work, and his or her breach of the duty of loyalty is *wilful and deliberate*, forfeiture of his or her entire compensation may result.” (Emphasis altered.) *Id.*, 734 n.11. In the present case, however, the trial court’s express factual findings reflect an uninformed employee who continued to provide significant value to his employer despite his breach of fiduciary duty. These findings, clearly not in the nature of corrupt or reprehensible behavior, should have weighed in favor of an award of something less than full forfeiture.

We further note briefly that forfeiture was not the sole remedy available to the court, as the court had before it evidence of the benefit the defendant received from third parties Generation and Captivate. Cf. *id.*, 734 (“[f]orfeiture may be the only available remedy when . . . the [employee] realizes no profit from the breach”). The court found those benefits, including the finder’s fee, value of the stock purchased, and the three year consulting agreement, to amount to a total of \$307,992.92, and ordered disgorgement in full. That amount, however, appears to reflect compensation that the defendant had earned for consulting that he per-

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formed both prior to and subsequent to his nine month period of full-time employment with the plaintiff.<sup>15</sup>

To the extent the defendant rendered some of the services for which he was compensated by third parties both prior and subsequent to his full-time employment with the plaintiff, some commensurate portion of the compensation received in exchange for those services cannot be said to have been gained by the defendant's breach and should not have been included in the court's order of disgorgement. See *id.*, 733 (“[a]n employee who breaches the fiduciary duty of loyalty may be required to disgorge any profit or benefit he received *as a result of his disloyal activities*” [emphasis added; internal quotation marks omitted]); *New Hartford v. Connecticut Resources Recovery Authority*, 291 Conn. 433, 460,

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<sup>15</sup> With respect to the finder's fee, although Hertzmark testified that the defendant received \$150,000 for the work he performed in 2013, he acknowledged that “*during the course of several years*, [the defendant] and I have looked at a number of companies, thirty-five, thirty different companies, and ultimately settled in 2013 on Captivate. So . . . what you're hearing about with Captivate was *the tail end of the relationship*.” (Emphasis added.) The arrangement between Hertzmark and the defendant began in 2010 or 2011, and the defendant was uncompensated when the two began to look at potential companies together. It was agreed that if an acquisition closed, the defendant would be paid a finder's fee at that time. For the majority of the term of that relationship, the defendant was not a full-time employee of the plaintiff. Hertzmark testified that even had he known that the defendant was a full-time employee of the plaintiff in 2013, he still would have paid him the “cash compensation regardless of his employment because [the defendant] had made the introduction many years ago.”

Moreover, although Hertzmark testified that the three year, \$150,000 prospective consulting contract was part of the defendant's compensation for working on the Captivate transaction in 2013, he later clarified that the defendant “has been given \$50,000 per year for his work on the transaction *and since the transaction has closed*.” (Emphasis added.) He further testified that “I would say through the work we did together in 2013, we saw that he would be a valuable post-transaction consultant, and so we signed him up to a three year agreement, post closing.” Thus, although he was provided the opportunity to sign the agreement as a consultant on the basis of his work in 2013, he performed the services specified in the agreement and earned the \$50,000 per year subsequent to the termination of his employment with the plaintiff.

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970 A.2d 592 (2009) (explaining that restitutionary remedies are “not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep” [internal quotation marks omitted]); *XL Specialty Ins. Co. v. Carvill America, Inc.*, Superior Court, judicial district of Middlesex, Complex Litigation Docket, Docket No. X04-CV-04-4000148-S (May 31, 2007) (43 Conn. L. Rptr. 536) (“[t]he principal is entitled to any loss resulting from or caused by the breach, and the agent may as well be required to forfeit any profit gained *by the breach*” [emphasis in original]).

“[C]ourts exercising their equitable powers are charged with formulating fair and practical remedies appropriate to the specific dispute. . . . In doing equity, [a] court has the power to adapt equitable remedies to the particular circumstances of each particular case. . . . [E]quitable discretion is not governed by fixed principles and definite rules . . . . Rather, implicit therein is conscientious judgment directed by law and reason and looking to a just result.” (Citations omitted; internal quotation marks omitted.) *Wall Systems, Inc. v. Pompa*, *supra*, 324 Conn. 736. In fashioning its damage award, the court failed to formulate a remedy appropriate to the particular circumstances of this case, in light of its own factual findings which weighed in favor of a measured award. Ultimately, the award of wholesale forfeiture and disgorgement in full failed to take into account the equities of the case at hand and did not achieve a just result.

The judgment is reversed only as to the award of damages against James G. Henderson, and the case is remanded for a new hearing in damages. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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LAUREN WOOD v. THOMAS J.  
RUTHERFORD ET AL.  
(AC 40142)

Sheldon, Elgo and Flynn, Js.

*Syllabus*

The plaintiff patient sought to recover damages from the defendant R, a licensed gynecological oncologist, alleging that R's conduct during a certain postoperative examination constituted battery and the negligent infliction of emotional distress. The plaintiff alleged that she underwent a surgical procedure known as a laser ablation of the vulva that was performed by R, and that he, having subsequently discovered during the postoperative examination that the plaintiff's labia were agglutinated, digitally separated her agglutinated labia without providing her with any warning or notice. R filed a motion to dismiss, claiming that the plaintiff's claims against him were for medical malpractice and, as such, the plaintiff was required by statute (§ 52-190a) to attach to the complaint a certificate of good faith and a written opinion letter of a similar health provider. The trial court found that the claims were for medical malpractice and, thus, granted the motion to dismiss without prejudice to the plaintiff filing a separate action claiming a lack of informed consent. The plaintiff then filed a revised complaint claiming that R had failed to obtain her informed consent before embarking on a course of medical treatment for a complication that he discovered during the postoperative examination. Subsequently, R filed a motion for summary judgment, which the court granted on the ground that R's conduct in separating the plaintiff's agglutinated labia was not a separate procedure or course of treatment giving rise to a duty to obtain informed consent but was, instead, a part of another examination for which R had received the written consent of the plaintiff. On appeal, the plaintiff challenged the trial court's conclusion and, specifically, claimed that although R had obtained her informed consent to perform the laser ablation of her vulva and, as part of that course of treatment, to perform a postoperative examination, a substantial change in circumstances occurred when R discovered a complication during the postoperative examination that required medical intervention, which in turn obligated R to obtain her informed consent before proceeding further. *Held:*

1. The trial court improperly granted R's motion to dismiss the plaintiff's battery and negligent infliction of emotional distress counts due to the plaintiff's noncompliance with § 52-190a: the written opinion letter requirement of § 52-190a did not apply to the plaintiff's battery claim, as our Supreme Court has held that the written opinion letter requirement contained in § 52-190a applies only to claims of medical negligence, and the plaintiff's battery claim, which contained no allegations of negligence

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- on the part of R and did not allege any deviation from the applicable standard of care, was predicated on the alleged lack of informed consent and was, thus, not subject to that requirement; moreover, the plaintiff's negligent infliction of emotional distress count was not a claim of medical negligence subject to the requirements of § 52-190a, as that count lacked any allegation that R departed from the applicable standard of care, and it was, instead, derivative of the plaintiff's battery claim, as it concerned her general theory that R lacked informed consent to digitally separate her agglutinated labia.
2. The trial court improperly rendered summary judgment in favor of R on the plaintiff's revised complaint: when a substantial and material alteration of the risks, anticipated benefits, or alternatives previously disclosed to the patient occurs during a course of medical treatment, the doctrine of informed consent generally requires an additional informed consent discussion between the physician and the patient, and, in the present case, a genuine issue of material fact existed as to whether R's discovery of the plaintiff's medical complication during the postoperative examination constituted a substantial and material change in circumstances, such that R was obligated to disclose the risks, anticipated benefits, and viable alternatives to the plaintiff before embarking on a course of treatment, as a finder of fact could have concluded on the basis of certain statements in the affidavits of the plaintiff and her mother, which alleged that R, after separating the plaintiff's agglutinated labia, informed them that he performed that procedure so that the plaintiff would not have to go to the operating room for surgery, as well as R's admission that severely agglutinated labia may require a surgical procedure and evidence from both parties of the significant pain experienced by the plaintiff, that R discovered the medical complication during his initial examination of the plaintiff and then, without her informed consent, made a unilateral decision to pursue a particular course of treatment, namely, digital separation, when another viable alternative existed; moreover, although a physician's failure to obtain informed consent may be excused in certain circumstances, such as when the patient has authorized the physician to remedy complications that arise during a course of medical treatment, a genuine issue of material fact existed as to whether the plaintiff had authorized R to remedy unforeseen complications that arose, not during her laser ablation procedure but, rather, during the postoperative examination that occurred weeks later, as the plaintiff's signed consent form, when read in the light most favorable to the plaintiff as the nonmoving party, authorized R to take whatever action may be necessary only with respect to unforeseen complications that arose during the laser ablation procedure and did not discuss postoperative care.

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*Procedural History*

Action to recover damages for, inter alia, battery, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Radcliffe, J.*, granted the named defendant's motion to dismiss; thereafter, the court granted the plaintiff's motion to cite in the named defendant as a party defendant and the plaintiff filed an amended complaint; subsequently, the court granted the motion to dismiss filed by the defendant Yale University and rendered judgment thereon; thereafter, the court granted the named defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed; further proceedings.*

*John L. Cesaroni*, with whom was *James R. Miron*, for the appellant (plaintiff).

*Tadhg Dooley*, with whom, on the brief, was *Jeffrey R. Babbitt*, for the appellee (named defendant).

*Opinion*

ELGO, J. This case concerns the conduct of a physician who discovered a complication during a postoperative examination. The plaintiff, Lauren Wood, appeals from the trial court's dismissal of her August 25, 2015 amended complaint, which alleged one count of battery and one count of negligent infliction of emotional distress against the defendant, Thomas J. Rutherford, M.D.<sup>1</sup> The plaintiff claims that the court improperly concluded that those counts sounded in medical malpractice and, thus, required compliance with General

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<sup>1</sup> The operative complaints in the present case also named Yale University as a defendant and alleged negligent supervision on its part. The trial court subsequently granted Yale University's motion to dismiss that claim, and the plaintiff has not appealed from that judgment. Furthermore, Yale University is not a party to this appeal. We therefore refer to Thomas J. Rutherford, M.D., as the defendant in this opinion.

Statutes § 52-190a. The plaintiff also challenges the propriety of the summary judgment rendered by the court on her February 8, 2016 revised complaint, which alleged that the defendant failed to obtain her informed consent before embarking on a course of treatment for a complication discovered during a postoperative examination. We agree with the plaintiff that the court improperly dismissed the battery and negligent infliction of emotional distress counts of her August 25, 2015 amended complaint, as those counts were predicated on an alleged lack of informed consent. We further conclude that a genuine issue of material fact exists as to whether a substantial change in circumstances occurred during the course of medical treatment that necessitated a further informed consent discussion between the parties, rendering summary judgment inappropriate. We, therefore, reverse the judgment of the trial court.

The operative complaints, the plaintiff's August 25, 2015 amended complaint and her February 8, 2016 revised complaint, contain similar factual allegations. In both, the plaintiff alleged that, at all relevant times, she was a patient of the defendant, a licensed gynecological oncologist. She further alleged that "[o]n April 25, 2014, the plaintiff underwent a surgical procedure known as a CO<sub>2</sub> laser ablation<sup>2</sup> of the vulva [to remove precancerous growths] that was performed by [the defendant] at Yale University Gynecologic Center . . . . On May 14, 2014, upon the advice of [the defendant], the plaintiff returned to Yale University Gynecologic Center for a postoperative examination. During the postoperative examination . . . [the defendant] discovered that the plaintiff's labia [were] agglutinated.<sup>3</sup>

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<sup>2</sup> Ablation is the "[r]emoval of a body part or the destruction of its function, as by a surgical procedure, morbid process, or noxious substance." Stedman's Medical Dictionary (27th Ed. 2000) p. 3.

<sup>3</sup> Agglutination is the "[a]dhesion of the surfaces of a wound." Stedman's Medical Dictionary (27th Ed. 2000) p. 35; see also Webster's Third New



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During the postoperative examination . . . [the defendant], *without any warning or notice to or consent from the plaintiff* . . . forcefully inserted his fingers through the plaintiff's agglutinated labia and into her vagina." (Emphasis added; footnotes added.) The plaintiff further alleged that she sustained injuries as a result thereof, including "scarring and impairment to her vulva and vagina . . . ."

The plaintiff commenced this action in 2015. Her August 25, 2015 amended complaint contained two counts against the defendant that alleged that his conduct during the postoperative examination constituted battery and negligent infliction of emotional distress. In response, the defendant filed a motion to dismiss, in which he argued that "regardless of the caption applied to them by the plaintiff, both of the claims . . . are for medical malpractice. As such, the plaintiff is required by [§] 52-190a<sup>4</sup> to attach to the complaint a

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International Dictionary (2002) p. 41 (defining "agglutinate" as "joined with or as if with glue").

<sup>4</sup> General Statutes § 52-190a provides in relevant part: "(a) No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint, initial pleading or apportionment complaint shall contain a certificate of the attorney or party filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant or for an apportionment complaint against each named apportionment defendant. To show the existence of such good faith, the claimant or the claimant's attorney, and any apportionment complainant or the apportionment complainant's attorney, shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. . . .

"(c) The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action."

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good faith certificate and written opinion letter. The plaintiff's failure to attach these documents is fatal to her claim and mandates that it be dismissed." (Footnote added.)

The court heard argument from the parties on that motion on October 19, 2015, at which the plaintiff's counsel acknowledged that the plaintiff had consented to the postoperative examination on May 14, 2014, but not to the defendant forcefully separating her agglutinated labia without warning or notice to her.<sup>5</sup> The plaintiff's counsel emphasized that, in her complaint, the plaintiff did not "allege that there was a deviation of the standard of care. . . . We don't allege negligence in this case." Counsel then stated that count one of the complaint "is not a negligence case. Count one is a battery case, and the theory of battery as a basis for recovery" against the defendant was his failure to obtain informed consent. Counsel continued: "We don't claim negligence at all. Our claim here is that [the plaintiff] had no knowledge . . . and was not informed . . . and didn't consent to [the defendant] sticking his fingers into her vagina the way he did . . . ." In response, the court stated in relevant part: "[Y]ou certainly have every right to plead that this was a surgical procedure, that there was a lack of informed consent and, as a result of a lack of informed consent, the plaintiff sustained damages . . . . That you can do. You can't transform

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<sup>5</sup> The plaintiff's counsel stated that the plaintiff "consented to [the defendant] examining her vagina. . . . [W]hat she didn't consent to was his jamming his fingers into her vagina forcibly to separate something, and she [had] no knowledge of that procedure, she didn't know that was going to happen, and she . . . didn't consent to that. . . . [S]he will testify that had she known that [her labia were agglutinated], she would have asked for more clarification of what the process was going to entail, whether she could get some sort of pain medication. She had no idea—she consented only to being examined, not to having the [defendant], without any warning, jam his fingers into her vagina. . . . [T]hat's why we [pleaded] it as a battery. There's no consent to what he did to her."

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. . . what amounts to a medical negligence or malpractice claim into a tortious action for purposes of circumventing § 52-190a . . . .” The court then made an express finding that the three factors determinative of whether a negligence claim sounds in medical malpractice<sup>6</sup> all were satisfied. The court thus granted the motion to dismiss “without prejudice to the plaintiff filing a separate action claiming a lack of informed consent . . . .”<sup>7</sup>

Nine days later, the plaintiff requested leave to amend her complaint pursuant to Practice Book § 10-60, which the court granted. The plaintiff thereafter filed an amended complaint claiming that the defendant had failed to obtain her informed consent before embarking on a course of treatment for a complication that he discovered during the postoperative examination. More specifically, the plaintiff alleged in her February 8, 2016

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<sup>6</sup> “The classification of a negligence claim as either medical malpractice or ordinary negligence requires a court to review closely the circumstances under which the alleged negligence occurred. [P]rofessional negligence or malpractice . . . [is] defined as the *failure of one rendering professional services* to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services. . . . Furthermore, malpractice presupposes some *improper conduct in the treatment or operative skill* [or] . . . the failure to exercise requisite medical skill . . . . From those definitions, we conclude that the relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship, and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment.” (Emphasis in original; internal quotation marks omitted.) *Boone v. William W. Backus Hospital*, 272 Conn. 551, 562–63, 864 A.2d 1 (2005).

<sup>7</sup> On November 9, 2015, the plaintiff filed a notice of intent to appeal the ruling of the court granting the motion to dismiss, in which the plaintiff stated that she “seeks to defer the taking of an appeal until a final judgment that disposes of this case for all purposes and as to all parties is rendered.” The defendant did not object to that notice and has raised no claim with respect thereto in this appeal.

revised complaint that the defendant's actions during the postoperative examination "violated his duty to provide the plaintiff with information that a reasonable patient would have found material for making a decision to embark upon the course of treatment performed by [the defendant] in that: (a) [the defendant] failed to inform the plaintiff as to the nature of the procedure he performed because he did not give her any warning or explanation of said procedure; (b) [the defendant] failed to disclose any risks and hazards of the procedure; (c) [the defendant] failed to discuss any alternatives to the procedure he performed where, upon information and belief, other procedures were available; and (d) [the defendant] failed to disclose any anticipated benefits of the procedure he performed." In his answer, the defendant admitted that, while conducting the postoperative examination, he discovered that the plaintiff's labia were agglutinated. He further admitted that "during the postoperative examination, [he] separated the skin of the labia by inserting a finger through the agglutination."<sup>8</sup> The defendant otherwise denied the

<sup>8</sup> To be clear, the plaintiff in the present case does not allege that labial agglutination was a material risk of the laser ablation procedure that the defendant had a duty to disclose prior to performing that procedure, nor has she furnished any affidavits or other proof that would support such a contention. The only evidence in the record before us regarding the risk of labial agglutination is the defendant's uncontroverted statement in his November 4, 2016 affidavit indicating that labial agglutination is a rare complication of the laser ablation procedure. See *Logan v. Greenwich Hospital Assn.*, 191 Conn. 282, 291, 465 A.2d 294 (1983) (duty of informed consent does not require disclosure of "all information which may have some bearing, however remote, upon the patient's decision"); see also *Munn v. Hotchkiss School*, 326 Conn. 540, 605, 165 A.3d 1167 (2017) (*Espinosa, J.*, concurring) ("a physician need not disclose to patients every remote risk potentially associated with a medical procedure but only those deemed sufficiently likely as to be material"); *Pedersen v. Vahidy*, 209 Conn. 510, 523, 552 A.2d 419 (1989) (disclosure generally unnecessary when "the likelihood of such injury is remote"). For that reason, the defendant emphasizes in his appellate brief that the plaintiff "has never alleged, let alone offered evidence, that agglutination is a 'known material risk' of CO<sub>2</sub> laser ablation of the vulva such that [the defendant] had a specific duty to warn her about it before she consented to the original procedure. . . . [I]t has never been the plain-

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substance of the plaintiff's lack of informed consent claim.

On October 3, 2016, the plaintiff filed a certificate of closed pleadings with the trial court, in which she claimed a jury trial. The defendant filed a motion for summary judgment on November 15, 2016, arguing that “[t]here is no triable issue of fact . . . because the incident in question—the separation of agglutinated labia during a postoperative examination of the plaintiff’s vagina—was not a ‘procedure’ requiring consent. Even if it [was], the plaintiff consented to [the defendant] performing the vaginal exam, which necessarily included separating her labia to observe the surgical site.” That motion was accompanied by three exhibits, including the defendant’s November 4, 2016 affidavit and his August 17, 2016 responses to the interrogatories of the plaintiff.

On January 23, 2017, the plaintiff filed an objection to the motion for summary judgment, arguing that the defendant, after discovering the complication during the postoperative examination, “performed an invasive procedure, which constitutes a course of treatment triggering a physician’s duty to inform.” The plaintiff noted that the “cases that find a course of treatment that triggers a physician’s duty to provide informed consent share the fact that they involve the physician providing, or attempting to provide, a therapeutic remedy to the plaintiff. The mechanism of the treatment itself is not important, but rather, the key element is that a medical treatment was provided.” Because the defendant provided a medical treatment to remedy her labial agglutination, the plaintiff argued that he was obligated to

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tiff’s claim that [the defendant] failed to obtain her informed consent to the laser ablation procedure.” On appeal, the plaintiff does not disagree with that statement. Rather, her claim is altogether a different one—namely, that the defendant, after discovering the labial agglutination during the postoperative examination, embarked on a course of treatment to remedy that complication without her consent.

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apprise her of “any material risks or alternatives” prior to embarking on that course of treatment. In support of her assertion that the defendant provided a medical treatment, the plaintiff appended to her objection (1) a copy of her answers to certain interrogatories, (2) affidavits of the plaintiff and her mother, Janice Andersen, and (3) copies of five Superior Court decisions.

The defendant filed a reply to the plaintiff’s objection on February 1, 2017, in which he maintained that the plaintiff’s consent to the laser ablation procedure included her consent to the postoperative examination, as that examination was “not a separate course of therapy from the operation.” The defendant further submitted that “[t]he uncontroverted evidence shows that [he] had to separate the plaintiff’s labia, which were agglutinated, in order to examine the surgical site.” A copy of the plaintiff’s signed consent to the laser ablation procedure was included as an exhibit to that reply.<sup>9</sup>

The court held a hearing on the motion for summary judgment on February 6, 2017, at which the defendant’s counsel contended that the May 14, 2014 postoperative examination did not involve a procedure of any kind. The court then inquired as to whether the plaintiff’s counsel had “any authority that says that this type of thing is a procedure”; counsel responded that there was “nothing in Connecticut that says that this . . . is or is not a course of treatment under the standard [set forth] in *Logan* [*v. Greenwich Hospital Assn.*, 191 Conn. 282, 292, 465 A.2d 294 (1983)].” The plaintiff’s counsel nevertheless argued that, after discovering the labial agglutination, the defendant failed to disclose to the

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<sup>9</sup> In her principal appellate brief, the plaintiff briefly notes her objection to the inclusion of her signed consent form as an exhibit to the defendant’s reply brief. Nonetheless, she raised no objection to that exhibit before the trial court, either in written form or during the February 6, 2017 hearing on the motion for summary judgment, rendering that evidentiary objection unreserved.

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plaintiff the nature of the course of treatment he ultimately undertook to resolve that medical complication. Counsel reminded the court that the affidavits submitted by the plaintiff and Andersen in opposition to the motion for summary judgment both indicated that the defendant told them that he performed the digital separation of the agglutination “to avoid having to go into the operating room” to resolve that complication.<sup>10</sup> Counsel then rhetorically asked what the difference was between a course of treatment in an operating room and a course of treatment in an examination room, before stating: “[T]he take home message is that the form of treatment is not what’s important. It’s that the doctor . . . and the patient embark on a course of treatment, and the patient has to go into it with open eyes, and that just didn’t happen here.” The plaintiff’s counsel concluded his remarks by noting that the defendant “provided a treatment. [The plaintiff’s] labia [were] fused together, and he separated [them]. There certainly is some evidence that [separation] could have been done in an operating room, and maybe it should have. [The plaintiff] deserves to be able to explore that. And certainly if [the defendant] can refute that, that’s fine, but it’s an issue of fact to be decided in this case by the trier of fact . . . .”

When those arguments concluded, the court stated that it “makes a finding that the activities of [the defendant], in examining the surgical site following a surgical procedure which took place three weeks earlier, is not a procedure which would give rise to the duty to inform the plaintiff that a certain portion of the examination of the surgical site might induce pain and [to conclude otherwise] would extend the definition of a surgery

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<sup>10</sup> At oral argument on the motion for summary judgment, the defendant’s counsel conceded that “going into an operating room, of course,” constitutes “a separate course of therapy” for which a medical practitioner must obtain “a separate consent” from the patient.

far afield. Under *Logan* [v. *Greenwich Hospital Assn.*, supra, 191 Conn. 292], informed consent deals with a procedure, an operation or surgery. This was not an operation. It was not surgery. It was not a procedure in and of itself. It was, rather, part of another examination for which the [defendant] received the written consent of the plaintiff. So, the motion for summary judgment is granted.” Accordingly, the court rendered judgment in favor of the defendant, and this appeal followed.

## I

We first consider the plaintiff’s challenge to the dismissal of her August 25, 2015 amended complaint against the defendant. Although that complaint contained counts labeled battery and negligent infliction of emotional distress, the trial court determined that, despite the nomenclature employed by the plaintiff, those counts both sounded in medical malpractice. As a result, the court held that the plaintiff’s failure to comply with the strictures of § 52-190a required dismissal of those counts due to lack of personal jurisdiction. That determination warrants closer scrutiny.

“When a . . . court decides a . . . question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader.” (Internal quotation marks omitted.) *CitiMortgage, Inc.* v. *Gaudio*, 142 Conn. App. 440, 441, 68 A.3d 101, cert. denied, 310 Conn. 902, 75 A.3d 29 (2013); see also *Morgan v. Hartford Hospital*, 301 Conn. 388, 395, 21 A.3d 451 (2011) (“[i]n any consideration of the trial court’s dismissal, we take the facts as alleged in the



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complaint as true”). As our Supreme Court has recognized, the failure to attach a proper written opinion letter pursuant to § 52-190a to a complaint alleging injury due to the medical negligence of a health care provider “implicates personal jurisdiction” and mandates the dismissal of an action. *Morgan v. Hartford Hospital*, supra, 402; see also General Statutes § 52-190a (c) (failure to provide written opinion letter “shall be grounds for the dismissal of the action”). “Our review of a trial court’s ruling on a motion to dismiss pursuant to § 52-190a is plenary.” *Torres v. Carrese*, 149 Conn. App. 596, 608, 90 A.3d 256, cert. denied, 312 Conn. 912, 93 A.3d 595 (2014).

The present case requires us to construe the nature of the causes of action alleged in the plaintiff’s August 25, 2015 amended complaint to determine whether compliance with § 52-190a was necessary.<sup>11</sup> “The interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court’s interpretation of the pleadings therefore is plenary. . . . [W]e long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [we must] construe pleadings broadly and realistically, rather than narrowly and technically. . . . [A] pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension. . . . Although essential allegations may not be supplied by conjecture or remote implication . . . the 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.”

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<sup>11</sup> We emphasize that the question before us in part I of this opinion is a narrow one regarding the applicability of § 52-190a, and not whether the plaintiff’s battery and negligent infliction of emotional distress counts, as pleaded, could survive a motion to strike or a motion for summary judgment.

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(Citations omitted; internal quotation marks omitted.)  
*Grenier v. Commissioner of Transportation*, 306 Conn. 523, 536–37, 51 A.3d 367 (2012).

A

## Battery

We begin with the first count of the August 25, 2015 amended complaint. It alleges in relevant part that, during the postoperative examination, the defendant “without any warning or notice or consent from the plaintiff, intentionally, wantonly and/or forcefully inserted his fingers through the plaintiff’s agglutinated labia and into her vagina.” Count one further alleges that the defendant’s conduct “constituted a battery in that his actions were harmful and/or offensive to the plaintiff” and concludes by alleging a variety of injuries that the plaintiff sustained as the “result of the harmful and/or offensive conduct” of the defendant. In dismissing that count, the court concluded that those allegations constituted a claim of medical negligence on the part of the defendant, which necessitated compliance with § 52-190a. We disagree.

As the plaintiff emphasized at the hearing on the defendant’s motion to dismiss, and as the complaint plainly indicates, her battery claim was predicated on the lack of informed consent. Our Supreme Court has “long recognized the principle that [e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent, commits an assault, for which he is liable in damages.” (Internal quotation marks omitted.) *Godwin v. Danbury Eye Physicians & Surgeons, P.C.*, 254 Conn. 131, 136, 757 A.2d 516 (2000). In *Logan v. Greenwich Hospital Assn.*, supra, 191 Conn. 289, the Supreme Court clarified that a patient can recover on a “theory of battery as a basis for recovery” against a physician

in three limited circumstances: (1) when a physician performs a procedure other than that for which consent was granted; (2) when a physician performs a procedure without obtaining any consent from the patient; and (3) when a physician realizes that the patient does not understand what the procedure entails. This court similarly has observed that “[o]ur courts have long adhered to the principle that the theory of intentional assault or battery is a basis for recovery against a physician who performs surgery without consent.” *Chouinard v. Marjani*, 21 Conn. App. 572, 579, 575 A.2d 238 (1990); see also *Canterbury v. Spence*, 464 F.2d 772, 783 (D.C. Cir.) (“[i]t is the settled rule that therapy not authorized by the patient may amount to . . . a common law battery”), cert. denied, 409 U.S. 1064, 93 S. Ct. 560, 34 L. Ed. 2d 518 (1972); *Schmeltz v. Tracy*, 119 Conn. 492, 495, 177 A. 520 (1935) (“if the lack of consent was established, the removal of the moles [by the physician] was in itself a trespass and had the legal result of an assault”); *Torres v. Carrese*, supra, 149 Conn. App. 621 n.29 (“[l]ack of informed consent is a cause of action separate from a claim of medical negligence”); *Shadrick v. Coker*, 963 S.W.2d 726, 732 (Tenn. 1998) (“the doctrine of lack of informed consent is based upon the tort of battery, not negligence, since the treatment or procedure was performed without having first obtained the patient’s informed consent”).

Count one contains no allegations of negligence on the part of the defendant. It likewise does not allege any deviation from the applicable standard of care.<sup>12</sup>

<sup>12</sup> For that reason, the three part test for ascertaining whether a negligence claim properly is classified as one sounding in medical negligence; see footnote 6 of this opinion; is inapposite. The defendant’s reliance on *Votre v. County Obstetrics & Gynecology Group, P.C.*, 113 Conn. App. 569, 585, 966 A.2d 813, cert. denied, 292 Conn. 911, 973 A.2d 661 (2009), likewise is misplaced. Unlike the present case, the plaintiff’s complaint in *Votre* “included factual allegations that implicated deviation from professional medical standards,” a distinction that this court expressly deemed to be significant. *Id.*, 574. The court in *Votre* further emphasized that “[a]lthough the plaintiff here denominated the claims in her complaint as sounding in

The strictures of § 52-190a, therefore, do not apply to that cause of action. Section 52-190a was enacted “to prevent the filing of frivolous medical malpractice actions.” *Morgan v. Hartford Hospital*, supra, 301 Conn. 398. By its plain language, that statute applies to actions “to recover damages resulting from personal injury or wrongful death . . . whether in tort or in contract, in which it is alleged that such injury or death resulted from the *negligence* of a health care provider . . . .” (Emphasis added.) General Statutes § 52-190a (a). Significantly, our Supreme Court has held that the written opinion letter requirement contained in § 52-190a applies only to claims of medical negligence, which is defined as “the failure to use that degree of care for the protection of another that the ordinarily reasonably careful and prudent [person] would use under like circumstances. . . . It signifies a want of care in the performance of an act, by one having no positive intention to injure the person complaining of it.” (Internal quotation marks omitted.) *Dias v. Grady*, 292 Conn. 350, 354, 972 A.2d 715 (2009); see also *Wilkins v. Connecticut Childbirth & Women’s Center*, 314 Conn. 709, 723 n.4, 104 A.3d 671 (2014) (“§ 52-190a applies only to claims of medical malpractice”); *Dias v. Grady*, supra, 359 (“the phrase ‘medical negligence,’ as used in § 52-190a (a), means breach of the standard of care”).

In *Shortell v. Cavanagh*, 300 Conn. 383, 385, 15 A.3d 1042 (2011), the Supreme Court expressly held that a cause of action against a physician predicated on a lack of informed consent is not subject to the written opinion letter requirement of § 52-190a. The court explained that “[u]nlike a medical malpractice claim, a claim for

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ordinary tort and breach of contract, the factual allegations underlying the claims require proof of the defendants’ deviation from the applicable standard of care of a health care provider . . . .” *Id.*, 580. That is not the case when a cause of action is predicated on a lack of informed consent. *Shortell v. Cavanagh*, 300 Conn. 383, 390–91, 15 A.3d 1042 (2011).

lack of informed consent is determined by a lay standard of materiality, rather than an expert medical standard of care which guides the trier of fact in its determination.” *Id.*, 388; see also *Logan v. Greenwich Hospital Assn.*, *supra*, 191 Conn. 293 (adopting lay standard for informed consent claims). Accordingly, “in an informed consent case, the plaintiff is not required to present the testimony of a similar health care provider regarding the standard of care at trial.” *Shortell v. Cavanagh*, *supra*, 389. The court thus reasoned that “[i]t would not be logical that an opinion from a similar health care provider would be required to commence an action of this nature, when the testimony of a medical expert would not be necessary at trial to prove the standard of care and its breach.” *Id.*, 388. To do so would “frustrate the purpose of using the lay standard for informed consent cases if we were to require a plaintiff in such a case to comply with § 52-190a and attach to the complaint a good faith certificate and written opinion of a similar health care provider.” *Id.*, 391.

In count one of her August 25, 2015 amended complaint, the plaintiff alleges that the defendant committed a battery through his intentional conduct during the postoperative examination by failing to obtain her informed consent prior to digitally separating her agglutinated labia. “[M]edical standards of care are inapplicable” to such claims. *Chouinard v. Marjani*, *supra*, 21 Conn. App. 580; accord *Sherwood v. Danbury Hospital*, 278 Conn. 163, 180, 896 A.2d 777 (2006) (“[u]nlike the traditional action of [medical] negligence, a claim for lack of informed consent focuses not on the level of skill exercised in the performance of the procedure itself but on the adequacy of the explanation given by the physician in obtaining the patient’s consent” [internal quotation marks omitted]). As a result, the written opinion letter requirement of § 52-190a does not

apply to informed consent claims. *Shortell v. Cavanagh*, supra, 300 Conn. 385. The trial court, therefore, improperly dismissed count one due to the plaintiff's failure to append to her complaint a written opinion letter of a similar health care provider.

## B

### Negligent Infliction of Emotional Distress

We next consider the second count of the plaintiff's August 25, 2015 amended complaint. Titled "Negligent Infliction of Emotional Distress against Dr. Rutherford," it reiterates the allegation that, during the postoperative examination, the defendant "without any warning or notice [to] the plaintiff, forcefully inserted his fingers through the plaintiff's agglutinated labia and into her vagina." The count further alleges that "[t]he conduct of [the defendant] . . . created an unreasonable risk of causing, and did in fact cause, the plaintiff emotional distress. The plaintiff's emotional distress was a foreseeable result of the conduct of [the defendant]. The emotional distress . . . was severe enough that it resulted in illness and may result in further illness or bodily harm. The conduct [of the defendant] was the cause of the plaintiff's distress."

As the plaintiff noted in her memorandum of law in opposition to the motion to dismiss, the negligent infliction of emotional distress claim set forth in count two "is not based upon or incident to a claim of medical negligence, but rather, is based upon her claim of battery against the defendant in count one." Although count two does not explicitly reference the term "consent," we are mindful that, in construing a particular cause of action, "[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 . . . ." (Internal quotation marks omitted.) *Perry v. Valerio*, 167 Conn. App. 734, 739–40, 143 A.3d

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1202 (2016). Read broadly and realistically, count two plainly alleges that the plaintiff suffered emotional distress occasioned by the alleged battery perpetrated by the defendant, as detailed in the preceding count of the complaint. Both counts one and two claim that the defendant, without warning or notice to the plaintiff, digitally separated her agglutinated labia. The factual issues of whether warnings and notice were provided to the plaintiff, in turn, both pertain to the issue of informed consent. See, e.g., *Duffy v. Flagg*, 279 Conn. 682, 692, 905 A.2d 15 (2006) (physician must disclose, inter alia, nature of procedure and risks and hazards of procedure to patient “in order to obtain valid informed consent”); *Janusauskas v. Fichman*, 264 Conn. 796, 810, 826 A.2d 1066 (2003) (informed consent requires physician to provide patient with information that reasonable patient would have found material for making decision whether to embark upon contemplated course of treatment). We therefore agree with the plaintiff that both counts one and two advanced claims related to her general theory that there was a lack of informed consent to the defendant’s conduct during the postoperative examination.

Like count one, count two contains no allegations that the defendant deviated from an applicable standard of care. It thus cannot properly be construed under our law as a claim of medical negligence. See *Dias v. Grady*, supra, 292 Conn. 359 (“the phrase ‘medical negligence,’ as used in § 52-190a (a), means breach of the standard of care”). As the trial judge aptly observed in an unrelated case, “[i]n a medical negligence claim, a treating physician must be found to have breached a standard of care applicable to the patient. . . . By contrast, a claim of negligent infliction of emotional distress need not necessarily involve a breach of the applicable standard of care by the treating physician. If the plaintiff’s fear or distress was reasonable, in light of the defendant’s

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conduct, and the defendant should have realized that his conduct created an unreasonable risk of causing distress, there is a basis for liability.” (Citations omitted.) *Brown v. Cusick*, Superior Court, judicial district of Fairfield, Docket No. CV-16-6060283-S (October 2, 2017); see also *Brown v. Njoku*, 170 Conn. App. 329, 331, 154 A.3d 587 (affirming judgment awarding plaintiff \$35,000 in damages following court trial in action for, inter alia, battery and negligent infliction of emotional distress against physician who “inappropriately touched [her] buttocks and breasts”), cert. denied, 326 Conn. 901, 162 A.3d 724 (2017).

Because count two lacks any allegation that the defendant departed from the applicable standard of care, it cannot be deemed a claim of medical negligence subject to the requirements of § 52-190a. Rather, it more properly is construed as one derivative of the plaintiff’s battery claim, for it concerns her general theory that the defendant lacked informed consent to digitally separate her agglutinated labia. For that reason, the court improperly granted the defendant’s motion to dismiss due to noncompliance with § 52-190a.

## II

Normally, our determination that a motion to dismiss was improperly granted would conclude our inquiry. In the present case, however, the court granted the motion to dismiss without prejudice to the plaintiff’s pursuit of an action against the defendant for lack of informed consent. After filing a notice of intent to appeal from that dismissal; see footnote 7 of this opinion; the plaintiff then obtained permission from the court to file an amended pleading, on which the court ultimately rendered summary judgment in favor of the defendant. The plaintiff now challenges the propriety of that determination.



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On appeal, the plaintiff claims that the court improperly concluded, as a matter of law, that she could not prevail in an informed consent action because the defendant's conduct in separating her agglutinated labia was not a separate procedure or course of treatment giving rise to a duty to obtain informed consent. She contends that a substantial change in circumstances occurred when the defendant discovered a complication during the postoperative examination that required medical intervention, which in turn obligated the defendant to obtain her informed consent before proceeding further. The parties agree that this issue is one of first impression in Connecticut. Accordingly, we first review the doctrine of informed consent to determine the proper legal standard by which to measure the plaintiff's claim. We then apply that standard to the facts before us, ever mindful of the procedural posture of this case.

## A

The doctrine of informed consent traces its origins to the common-law notion that an adult “has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages.” (Internal quotation marks omitted.) *Schmeltz v. Tracy*, supra, 119 Conn. 495–96, quoting *Schloendorff v. New York Hospital*, 211 N.Y. 125, 129–30, 105 N.E. 92 (1914) (Cardozo, J.), overruled on other grounds by *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957); see also *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251, 11 S. Ct. 1000, 35 L. Ed. 734 (1891) (“[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law”); *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 717

(D.C. Cir. 2007) (en banc) (courts have long “recognized with universal acquiescence that the free citizen’s first and greatest right, which underlies all others, is the right to the inviolability of his person” [internal quotation marks omitted]), cert. denied, 552 U.S. 1159, 128 S. Ct. 1069, 169 L. Ed. 2d 839 (2008). As the United States Supreme Court has recognized, the “notion of bodily integrity [is] embodied in the requirement that informed consent is generally required for medical treatment.” *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 269, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990).

The doctrine of informed consent attempts to balance the autonomy of the patient with the professional obligations of the physician.<sup>13</sup> In the seminal decision of *Canterbury v. Spence*, supra, 464 F.2d 780, the United States Court of Appeals for the District of Columbia Circuit explained that “[t]rue consent to what happens to one’s self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible.” (Footnotes omitted.) The court continued: “A physician is under a duty to treat his patient skillfully but proficiency in diagnosis and therapy is not the full measure of his

<sup>13</sup> As one court succinctly put it, “[t]he doctor’s primary duty is to do what is best for the patient.” *Watson v. Clutts*, 262 N.C. 153, 159, 136 S.E.2d 617 (1964). For a discussion of the tension that arises when principles of patient autonomy and physician beneficence collide, see P. Walter, “The Doctrine of Informed Consent: To Inform or Not to Inform,” 71 St. John’s L. Rev. 543 (1997).

responsibility. . . . [T]he physician is under an obligation to communicate specific information to the patient when the exigencies of reasonable care call for it. . . . The context in which the duty of risk-disclosure arises is invariably the occasion for decision as to whether a particular treatment procedure is to be undertaken. To the physician, whose training enables a self-satisfying evaluation, the answer may seem clear, but it is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie. To enable the patient to chart his course understandably, some familiarity with the therapeutic alternatives and their hazards becomes essential.” (Footnotes omitted.) *Id.*, 781. For that reason, the court held that “the physician’s overall obligation to the patient [includes the] duty of reasonable disclosure of the choices with respect to proposed therapy and the dangers inherently and potentially involved.” *Id.*, 782. Accordingly, a physician “must seek and secure his patient’s consent before commencing an operation or other course of treatment.”<sup>14</sup> *Id.*

The doctrine of informed consent “is embedded firmly in American jurisprudence, now forming a recognizable basis for physician liability in the [fifty] [s]tates and the District of Columbia.” J. Merz, “On a Decision-Making Paradigm of Medical Informed Consent,” 14 *J. Legal Med.* 231, 231 (1993). In Connecticut, “[i]nformed consent requires a physician to provide the patient with the information which a reasonable patient would have found material for making a decision whether to embark upon a contemplated course of therapy.” (Internal quotation marks omitted.) *Janusauskas v. Fichman*, *supra*,

<sup>14</sup> In *Logan v. Greenwich Hospital Assn.*, *supra*, 191 Conn. 290–93, the seminal Connecticut decision on the doctrine of informed consent, our Supreme Court expressly adopted the reasoning of *Canterbury* in holding that a lay standard of disclosure governs informed consent claims in Connecticut. See also *Downs v. Trias*, 306 Conn. 81, 88–89 n.5, 49 A.3d 180 (2012).

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264 Conn. 810; accord *Canterbury v. Spence*, supra, 464 F.2d 787 (“[a] risk is . . . material when a reasonable person . . . would be likely to attach significance to the risk . . . in deciding whether or not to forego the proposed therapy” [internal quotation marks omitted]). As our Supreme Court held in *Logan v. Greenwich Hospital Assn.*, supra, 191 Conn. 292, “the physician’s disclosure should include: (1) the nature of the procedure, (2) the risks and hazards of the procedure, (3) the alternatives to the procedure, and (4) the anticipated benefits of the procedure.” (Internal quotation marks omitted.)

At the same time, our Supreme Court has emphasized that the doctrine of informed consent “is a limited one” that requires “something less than a full disclosure of all information which may have some bearing, however remote, upon the patient’s decision.”<sup>15</sup> (Internal quotation marks omitted.) *Duffy v. Flagg*, supra, 279 Conn. 692–93; see also *Munn v. Hotchkiss School*, 326 Conn. 540, 605, 165 A.3d 1167 (2017) (*Espinosa, J.*, concurring) (“a physician need not disclose to patients every remote risk potentially associated with a medical procedure but only those deemed sufficiently likely as to be material”); *Pedersen v. Vahidy*, 209 Conn. 510, 523, 552 A.2d 419 (1989) (disclosure generally unnecessary when “the likelihood of such injury is remote”); *Precourt v. Frederick*, 395 Mass. 689, 694–95, 481 N.E.2d 1144 (1985) (“The materiality of information about a potential injury is a function not only of the severity of the injury, but also of the likelihood that it will occur.

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<sup>15</sup> As the Supreme Court of Idaho has observed, “it would be impossible for a healthcare provider to fully apprise his or her patients of every aspect of each procedure. The human body is amazingly complex, and to fully comprehend even the most mundane treatment one must have an advanced understanding of anatomy and physiology. Without some limit on the amount of information that a healthcare provider is obligated to discuss, our healthcare infrastructure would grind to a halt.” *Peckham v. Idaho State Board of Dentistry*, 154 Idaho 846, 853, 303 P.3d 205 (2013).

Regardless of the severity of a potential injury, if the probability that the injury will occur is so small as to be practically nonexistent, then the possibility of that injury occurring cannot be considered a material factor in a rational assessment of whether to engage in the activity that exposes one to the potential injury.”). Furthermore, “there is no need to disclose risks that are likely to be known by the average patient or that are in fact known to the patient usually because of a past experience with the procedure in question.” (Internal quotation marks omitted.) *Logan v. Greenwich Hospital Assn.*, supra, 191 Conn. 292. A physician nonetheless is obligated “to advise a patient of feasible alternatives”; *id.*, 287; even when “some involve more hazard than others.” *Id.*, 295.

Under Connecticut law, application of the doctrine of informed consent is not confined to operations and surgical procedures. Rather, it concerns the physician’s “duty to provide patients with material information concerning a proposed course of treatment.” *Downs v. Trias*, 306 Conn. 81, 89, 49 A.3d 180 (2012); see also *Logan v. Greenwich Hospital Assn.*, supra, 191 Conn. 292–93 (physician obligated to provide patient with information “material for making a decision whether to embark upon a contemplated course of therapy”). A contemplated course of therapy includes—but is not limited to—a particular procedure, operation, or surgery. See *Torres v. Carrese*, supra, 149 Conn. App. 622.<sup>16</sup>

<sup>16</sup> In *Torres*, this court noted that “[o]ur case law regarding the issue of a physician’s obligation to obtain a patient’s informed consent focuses on the decision to embark upon a contemplated course of therapy, *such as* a procedure, operation, or surgery.” (Emphasis added; internal quotation marks omitted.) *Torres v. Carrese*, supra, 149 Conn. App. 622. In *Torres*, the court concluded that a physician who provided prenatal care to a patient, but was not the surgeon who subsequently performed a cesarean section, had no duty to apprise her of the risks involved in that surgical procedure. As the court explained, “[u]nder our law . . . a physician’s obligation to obtain informed consent turns on the performance of a procedure and *not* the intent to perform a procedure.” (Emphasis in original.) *Id.*, 623. “Because the procedure was to be performed in the future and [the physician who

For example, in *Curran v. Kroll*, 303 Conn. 845, 859–60, 37 A.3d 700 (2012), the patient sought medical treatment for menopausal issues. Our Supreme Court held that the failure of the defendant physician to advise the patient of “any symptoms and risks associated” with the birth control medication that the physician had prescribed gave rise to “a cause of action for lack of informed consent.” *Id.*, 858; see also *Johnson v. Rheumatology Associates, P.C.*, Superior Court, judicial district of Hartford, Docket No. CV-12-6031500-S (December 29, 2014) (59 Conn. L. Rptr. 549, 550) (“[o]bviously treatment of a condition by the prescribing of medication is no less a form of treatment than surgery for a condition”). Our Supreme Court likewise has held that the nonsurgical procedure of obtaining a blood transfusion constituted a course of therapy and, thus, properly could give rise to a cause of action for lack of informed consent. *Sherwood v. Danbury Hospital*, *supra*, 278 Conn. 180–82. Accordingly, the doctrine of informed consent applies to a course of medical treatment undertaken by a patient in consultation with a medical practitioner.

## 1

In the present case, the parties do not dispute that the defendant obtained the informed consent of the plaintiff to perform the laser ablation of her vulva on April 25, 2014. Indeed, her consent was memorialized on the signed consent form. The plaintiff further concedes that she consented, as part of that course of treatment, to the May 14, 2014 postoperative examination.<sup>17</sup> The

provided prenatal care] was never in the position to be the operating surgeon, [that physician] had no obligation to obtain informed consent.” *Id.*, 623 n.30. By contrast, the defendant in the present case performed both the laser ablation procedure on April 25, 2014, and the postoperative examination of the plaintiff on May 14, 2014.

<sup>17</sup> At the October 19, 2015 hearing on the defendant’s motion to dismiss, the plaintiff’s counsel acknowledged that the plaintiff had consented to the postoperative examination. The plaintiff’s counsel likewise confirmed at oral argument before this court that the plaintiff was “not contesting [that she consented to] the postoperative examination.”

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plaintiff nonetheless argues that a substantial and material change in circumstances occurred when the defendant discovered the labial agglutination, which obligated the defendant to obtain her informed consent before embarking on a course of treatment therefor.<sup>18</sup> That claim presents an issue of first impression in this state. For his part, the defendant in his appellate brief acknowledges that a “new informed consent” may be required when “a substantial and material change in circumstances” arises during a course of treatment.

The “determination of the proper legal standard in any given case is a question of law subject to our plenary review.” (Internal quotation marks omitted.) *Mirjavadi v. Vakilzadeh*, 310 Conn. 176, 183, 74 A.3d 1278 (2013). In light of the rationale underlying the doctrine of informed consent, as well as persuasive out-of-state authority, we agree with the parties that, when a substantial and material change in circumstances occurs during the course of medical treatment, a duty may arise on the part of the physician to secure the consent of the patient before proceeding further.

The doctrine of informed consent is rooted in the recognition of a patient’s right to bodily autonomy. See *Logan v. Greenwich Hospital Assn.*, supra, 191 Conn. 288 (“[w]e have approved the principle that [e]very human being of adult years and sound mind has a right to determine what shall be done with his own body” [internal quotation marks omitted]). The doctrine further is premised on the precept that “[t]rue consent to what happens to one’s self is the informed exercise of

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<sup>18</sup> We reiterate that the plaintiff has not claimed, at any stage of the proceedings, that labial agglutination was a likely and, hence, material risk that the defendant had a duty to disclose *prior* to performing the laser ablation procedure. See footnote 8 of this opinion. Rather, her claim is that, when that remote risk subsequently materialized, the defendant was obligated to apprise her of all viable treatment alternatives and their attendant risks and benefits before proceeding further.

a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each.” *Canterbury v. Spence*, supra, 464 F.2d 780; see also *Logan v. Greenwich Hospital Assn.*, supra, 295 (physician obligated to advise patient of “all viable alternatives . . . even though some involve more hazard than others”). Accordingly, a physician is required to provide the patient with that information which a reasonable person would deem material in deciding whether to embark upon a particular course of treatment.<sup>19</sup> *Sherwood v. Danbury Hospital*, supra, 278 Conn. 180.

Significantly, our decisions on the doctrine of informed consent do not limit that duty to the actual date that a particular procedure is performed or medical service is rendered. Rather, Connecticut law consistently has delineated that duty as one that applies to a “course of treatment”; see, e.g., *Downs v. Trias*, supra, 306 Conn. 89; or a “course of therapy” undertaken by a patient. See *Logan v. Greenwich Hospital Assn.*, supra, 191 Conn. 293. While a physician’s treatment of a patient sometimes begins and ends in a matter of hours or days, a course of treatment often transpires over a much longer period. See, e.g., *Curran v. Kroll*, supra, 303 Conn. 848 (medical treatment of patient occurred over span of “approximately one month before her death” [internal quotation marks omitted]); *Tetreault v. Eslick*, 271 Conn. 466, 469, 857 A.2d 888 (2004) (physician “planned to continue [the] course of treatment for a period of at least six months”).

As the Supreme Court of Wisconsin has observed, a patient’s consent to treatment is not “categorically

<sup>19</sup> That duty obligates a physician to disclose “(1) the nature of the procedure, (2) the risks and hazards of the procedure, (3) the alternatives to the procedure, and (4) the anticipated benefits of the procedure.” (Internal quotation marks omitted.) *Logan v. Greenwich Hospital Assn.*, supra, 191 Conn. 292.



immutable” once it has been given to a physician. *Schreiber v. Physicians Ins. Co. of Wisconsin*, 223 Wis. 2d 417, 429, 588 N.W.2d 26, cert. denied, 528 U.S. 869, 120 S. Ct. 169, 145 L. Ed. 2d 143 (1999). When a substantial change of circumstances occurs during the course of medical treatment, it “results in an alteration of the universe of options a patient has and alters the agreed upon course of navigation through that universe.”<sup>20</sup> *Id.*, 432. Although a patient previously may have provided informed consent to a particular course of treatment, the Supreme Court of Wisconsin “decline[d] to view the informed consent discussion as a solitary and blanket event, a point on a timeline after which such discussions are no longer needed because they are ‘covered’ by some articulable occurrence in the past. Rather, a substantial change in circumstances . . . requires a new informed consent discussion. . . . To conclude otherwise would allow a solitary informed consent discussion to immunize a physician for any and all subsequent treatment of that patient.” (Citation omitted.) *Id.*, 433–34. The court, thus, concluded that, when a substantial change in circumstances arises, the physician has “a duty to conduct another informed consent discussion and [provide the patient with] her treatment options and . . . the opportunity to choose.”<sup>21</sup> *Id.*, 434.

<sup>20</sup> As in Connecticut, the duty of informed consent under Wisconsin law is measured by a materiality standard, for which “the touchstone [is whether a] reasonable person in the position of the patient would want to know” of a given risk, benefit, or alternative to a particular course of treatment. *Schreiber v. Physicians Ins. Co. of Wisconsin*, supra, 223 Wis. 2d 427; accord *Janusauskas v. Fichman*, supra, 264 Conn. 810 (informed consent requires physician to provide patient with information that reasonable patient would have found material for making decision whether to embark upon contemplated course of treatment). In *Schreiber*, the court noted that a substantial change in circumstances involves a material alteration of the risks, benefits, or alternatives that accompany a particular treatment. *Schreiber v. Physicians Ins. Co. of Wisconsin*, supra, 428–32.

<sup>21</sup> That conclusion comports with the precept that “[t]he context in which the [physician’s] duty [to disclose] arises is invariably the occasion for decision as to whether a particular treatment procedure is to be undertaken.” *Canterbury v. Spence*, supra, 464 F.2d 781.

The Supreme Court of Colorado likewise has recognized that, when a “previously undisclosed, and substantial risk arises,” a physician may have a “duty [to obtain informed consent that is] based on changed circumstances.” *Gorab v. Zook*, 943 P.2d 423, 430 (Colo. 1997) (en banc).

We find that authority highly persuasive, particularly in light of the underpinnings of the doctrine of informed consent. When consent is provided by a patient in a given case, its scope necessarily is limited to the course of treatment outlined by the medical practitioner, and encompasses only those risks, hazards, alternatives, and anticipated benefits then disclosed. For that reason, when a truly substantial change arises during the course of treatment that meets the standard of materiality under our law,<sup>22</sup> we agree that the medical practitioner generally is obligated to obtain consent from the patient before proceeding further. To conclude otherwise would contravene the fundamental purpose of the doctrine of informed consent.

## 2

At the same time, the circumstances in which substantial changes arise do not always lend themselves to such a dialogue between patient and physician. For that reason, a physician’s duty to secure informed consent is not an absolute one, but rather is contingent on

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<sup>22</sup> “Materiality may be said to be the significance a reasonable person, in what the physician knows or should know is his patient’s position, would attach to the disclosed risk or risks in deciding whether to submit or not to submit to surgery or treatment.” (Internal quotation marks omitted.) *Logan v. Greenwich Hospital Assn.*, supra, 191 Conn. 291. Under Connecticut law, a physician is obligated “to provide the patient with that information which a reasonable patient would have found material for making a decision whether to embark upon a contemplated course of therapy.” *Id.*, 292–93; see also *Duffy v. Flagg*, supra, 279 Conn. 691; *Janusauskas v. Fichman*, supra, 264 Conn. 810; *DeGennaro v. Tandon*, 89 Conn. App. 183, 190, 873 A.2d 191, cert. denied, 274 Conn. 914, 879 A.2d 892 (2005).

the particular context in which it arises. To accommodate the exigencies inherent in the practice of medicine, courts have crafted exceptions to the physician's general duty that excuse the failure to obtain such consent in certain circumstances.<sup>23</sup> See generally A. Meisel, "The 'Exceptions' to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decisionmaking," 1979 Wis. L. Rev. 413 (1979). As the Supreme Court of Iowa recently observed, "a number of situations may be established by the defendant physician as a defense to an informed consent action, constituting exceptions to the duty to disclo[se]. These include: (1) Situations in which complete and candid disclosure might have a detrimental effect on the physical or psychological well-being of the patient;<sup>24</sup> (2) Situations in which a patient is incapable of giving consent by reason of mental disability or infancy; (3) Situations in which an emergency makes it impractical to obtain consent; (4) Situations in which the risk is either known to the patient or is so obvious as to justify a presumption on the part of the physician that the patient has knowledge of the risk; (5) Situations in which the procedure itself is simple and the danger remote and commonly appreciated to be remote; (6) Situations in which the physician does not know of an otherwise material risk and should not have been aware of it in the exercise

<sup>23</sup> Several of the exceptions that are well established in other jurisdictions have not been formally recognized under Connecticut law. Their development in those jurisdictions, therefore, is illuminating. See *Grovenburg v. Rustle Meadow Associates, LLC*, 174 Conn. App. 18, 57, 165 A.3d 193 (2017).

<sup>24</sup> "[T]he so-called 'therapeutic exception'"; *Arato v. Avedon*, 5 Cal. 4th 1172, 1190, 858 P.2d 598, 23 Cal. Rptr. 2d 131 (1993) (en banc); permits "a physician to withhold information where disclosure might jeopardize a course of therapy." *Logan v. Greenwich Hospital Assn.*, supra, 191 Conn. 292; see also *Scott v. Bradford*, 606 P.2d 554, 558 (Okla. 1979) ("where full disclosure would be detrimental to a patient's total care and best interests a physician may withhold such disclosure, for example, where disclosure would alarm an emotionally upset or apprehensive patient" [footnote omitted]).

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of ordinary care.”<sup>25</sup> (Footnote added; internal quotation marks omitted.) *Andersen v. Khanna*, 913 N.W.2d 526, 537 n.4 (Iowa 2018); see also *Holt v. Nelson*, 11 Wn. App. 230, 240–41, 523 P.2d 211 (1974) (enumerating various exceptions).

The emergency exception has been recognized by courts across the country. See *Shine v. Vega*, 429 Mass. 456, 464, 709 N.E.2d 58 (1999) (“[t]he emergency exception to the informed consent doctrine has been widely recognized”); *Miller v. Rhode Island Hospital*, 625 A.2d 778, 784 (R.I. 1993) (“[e]qually as well established as the informed consent doctrine is the exception to it for emergencies”). As the court in *Canterbury* explained, the emergency exception “comes into play when the patient is unconscious or otherwise incapable of consenting, and harm from a failure to treat is imminent and outweighs any harm threatened by the proposed treatment. When a genuine emergency of that sort arises, it is settled that the impracticality of conferring with the patient dispenses with need for it.” *Canterbury v. Spence*, supra, 464 F.2d 788–89. Put simply, “a physician is not required to obtain the patient’s consent in an emergency situation where the patient is in immediate danger.” *Wheeldon v. Madison*, 374 N.W.2d 367, 375 (S.D. 1985). Although our appellate courts have not had occasion to circumscribe the precise parameters of the emergency exception, it applies under our state regulations to medical treatment performed in hospitals throughout Connecticut. See Regs., Conn. State Agencies § 19-13-D3 (d) (8);<sup>26</sup> cf. *In re Cassandra C.*, 316

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<sup>25</sup> Some jurisdictions have enacted statutes codifying such exceptions. See, e.g., Alaska Stat. § 09.55.556 (b) (2012); Del. Code Ann. tit. 18, § 6852 (b) (1974); N.Y. Pub. Health Law § 2805-d (4) (2012); Utah Code Ann. § 78B-3-406 (3) (2012); Wis. Stat. § 448.30 (Supp. 2017); Vt. Stat. Ann. tit. 12, § 1909 (2017).

<sup>26</sup> Section 19-13-D3 (d) (8) provides: “Informed consent. It shall be the responsibility of each hospital to assure that the bylaws or rules and regulations of the medical staff include the requirement that, *except in emergency situations*, the responsible physician shall obtain proper informed consent as a prerequisite to any procedure or treatment for which it is appropriate

Conn. 476, 496–97, 112 A.3d 158 (2015) (“[A]t common law, minors generally were considered to lack the legal capacity to give valid consent to medical treatment or services, and consequently a parent, guardian, or other legally authorized person generally was required to provide the requisite consent. *In the absence of an emergency*, a physician who provided medical care to a minor without such parental or other legally authorized consent could be sued for battery.” [Emphasis added; internal quotation marks omitted.]); *Ranciato v. Schwartz*, Superior Court, judicial district of New Haven, Docket No. CV-11-6023107-S (November 26, 2014) (“in the absence of an emergency a healthcare provider must offer pertinent information to his or her patients” [internal quotation marks omitted]).

Courts also have recognized that a physician’s alleged failure to secure informed consent properly is excused by the existence of a valid waiver on the part of the patient. See, e.g., *Arato v. Avedon*, 5 Cal. 4th 1172, 1189, 858 P.2d 598, 23 Cal. Rptr. 2d 131 (1993) (en banc) (“a patient may validly waive the right to be informed”); *Spar v. Cha*, 907 N.E.2d 974, 983 (Ind. 2009) (“[m]any jurisdictions recognize either by judicial ruling or statute that a patient may waive her right to informed consent”); cf. Utah Code Ann. § 78B-3-406 (3) (2012).<sup>27</sup> For

and provide evidence of consent by a form signed by the patient or a written statement signed by the physician on the patient’s hospital record. The extent of information to be supplied by the physician to the patient shall include the specific procedure or treatment, or both, the reasonably foreseeable risks, and reasonable alternatives for care or treatment.” (Emphasis added.)

<sup>27</sup> Utah’s informed consent statute specifically addresses the issue of patient waiver. It provides in relevant part: “It shall be a defense to any malpractice action against a health care provider based upon alleged failure to obtain informed consent if . . . the patient stated, prior to receiving the health care complained of, that he would accept the health care involved regardless of the risk; or that he did not want to be informed of the matters to which he would be entitled to be informed . . . or . . . the patient or his representative executed a written consent which sets forth the nature and purpose of the intended health care and which contains a declaration that the patient accepts the risk of substantial and serious harm, if any,

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that reason, “[w]hen a patient consents to surgery, acknowledges he or she understands complications may arise, and authorizes the doctor to remedy these complications, it follows that the patient has consented to treatment of those complications whether they occur in the operating room or afterward in the recovery room.” *Hageny v. Bodensteiner*, 316 Wis. 2d 240, 250–51, 762 N.W.2d 452 (App. 2008); see also *Cobbs v. Grant*, 8 Cal. 3d 229, 245, 502 P.2d 1, 104 Cal. Rptr. 505 (1972) (en banc) (“a medical doctor need not make disclosure of risks when the patient requests that he not be so informed”); *Holt v. Nelson*, supra, 11 Wn. App. 241 (“[a] physician need not disclose the hazards of treatment when the patient has requested she not be told about the dangers”). The patient’s ability to relieve a physician of the duty to obtain informed consent during the course of medical treatment is consistent with, and in furtherance of, the right to bodily autonomy. As one commentator aptly noted, “[a] properly obtained waiver is completely in keeping with the values sought to be promoted by informed consent. The patient remains the ultimate decisionmaker, but the content of his decision is shifted from the decisional level to the metadecisional level—from the equivalent of ‘I want this treatment . . .’ to . . . ‘I don’t want to decide; you make the decision as to what should be done.’ Waiver thus permits the patient to be treated without participating in the medical decisionmaking process, or at least without fully participating.” (Footnote omitted.) A. Meisel, supra, 1979 Wis. L. Rev. 459.

In *Logan v. Greenwich Hospital Assn.*, supra, 191 Conn. 292, our Supreme Court acknowledged an additional exception, noting that “there is no need to disclose risks that are likely to be known by the average

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in hopes of obtaining desired beneficial results of health care and which acknowledges that health care providers involved have explained his condition and the proposed health care in a satisfactory manner and that all questions asked about the health care and its attendant risks have been

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patient or that are in fact known to the patient usually because of a past experience with the procedure in question.” (Internal quotation marks omitted.) See also *Ranciato v. Schwartz*, supra, Superior Court, Docket No. CV-11-6023107-S (plaintiff could not prevail on informed consent claim when “she knew of [the] risk due to past experience”); *Crain v. Allison*, 443 A.2d 558, 562 (D.C. 1982) (“a physician need not advise concerning risks of which the patient already has actual knowledge”); *Spar v. Cha*, supra, 907 N.E.2d 984 (physician need not advise of risks known to patient because of past experience with procedure); *Sard v. Hardy*, 281 Md. 432, 445, 379 A.2d 1014 (1977) (“disclosure is not required where the risk is . . . known to the patient”); *Scaria v. St. Paul Fire & Marine Ins. Co.*, 68 Wis. 2d 1, 12–13, 227 N.W.2d 647 (1975) (physician “should not be required to discuss risks that are apparent or known to the patient”). The rationale for that exception is that the patient who is aware of the risks that accompany a particular procedure or course of treatment already is an informed patient.

Application of the doctrine of informed consent, therefore, involves more than simply an examination of the communications, or lack thereof, between physician and patient. It also requires consideration of the context in which the physician’s duty arose. That context is crucial to the determination of whether an exception to that duty is implicated. Moreover, in an action predicated on an alleged lack of informed consent, “[t]he burden of proving an exception to [the] duty” rests with the physician. *Scott v. Bradford*, 606 P.2d 554, 558 (Okla. 1979); see also *Canterbury v. Spence*, supra, 464 F.2d 791 (“[t]he burden of going forward with evidence pertaining to a privilege not to disclose . . . rests properly upon the physician” [footnote omitted]); *Cobbs v. Grant*, supra, 8 Cal. 3d 245 (physician bears “the burden of [proving] justification for failure to disclose”); *Shine*

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answered in a manner satisfactory to the patient or his representative.” Utah Code Ann. § 78B-3-406 (3) (2012).

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v. *Vega*, supra, 429 Mass. 462 (“the [defendant physician and hospital] had the burden of proving that an exception relieved them of tort liability”).

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Accordingly, we conclude that, when a substantial and material alteration of the risks, anticipated benefits, or alternatives previously disclosed to the patient occurs during a course of medical treatment, the doctrine of informed consent generally requires an additional informed consent discussion between physician and patient. When, however, the context of such alteration implicates an exception to the duty to disclose, the law relieves the physician of that obligation. With that analytical framework in mind, we return our attention to the present case.

B

In her revised complaint, the plaintiff alleges a cause of action for lack of informed consent. Distilled to its essence, her claim is that, upon discovering a complication that required medical intervention, the defendant unilaterally proceeded with a course of treatment without obtaining her informed consent. The court subsequently rendered summary judgment in favor of the defendant, concluding that the defendant’s conduct in separating the plaintiff’s agglutinated labia was not a separate procedure or course of treatment giving rise to a duty to obtain informed consent, but rather “was part of another examination for which the [defendant] received the written consent of the plaintiff.” On appeal, the plaintiff challenges the propriety of that determination.

Summary judgment is appropriate when “the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Practice Book § 17-49; *Miller v. United Technologies Corp.*, 233 Conn. 732, 744–45, 660 A.2d 810 (1995).



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A material fact is one “that will make a difference in the result of the case.” (Internal quotation marks omitted.) *Straw Pond Associates, LLC v. Fitzpatrick, Mariano & Santos, P.C.*, 167 Conn. App. 691, 728, 145 A.3d 292, cert. denied, 323 Conn. 930, 150 A.3d 231 (2016). “In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court’s decision to grant [a] motion for summary judgment is plenary.” (Internal quotation marks omitted.) *Todd v. Nationwide Mutual Ins. Co.*, 121 Conn. App. 597, 601–602, 999 A.2d 761, cert. denied, 297 Conn. 929, 998 A.2d 1196 (2010).

The following additional facts, as gleaned from the pleadings, affidavits, and other proof submitted when

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viewed in a light most favorable to the plaintiff; *Martinnelli v. Fusi*, 290 Conn. 347, 350, 963 A.2d 640 (2009); are relevant to the plaintiff's claim. We begin by noting what is not in dispute. Years prior to the medical treatment at issue in this appeal, the defendant performed a laser ablation of the plaintiff's vulva to remove precancerous growths. Prior to performing that procedure on August 25, 2011, the defendant discussed the procedure with the plaintiff and she signed a consent form so indicating. After the procedure concluded, the plaintiff was provided lidocaine gel as a preventative measure to avoid labial agglutination.<sup>28</sup> The defendant at that time cautioned the plaintiff that "she should quit smoking or else she would end up needing the procedure again." Weeks later, the defendant conducted a postoperative examination of the surgical site to ensure that it was healing properly. No complications were discovered during that examination.

When precancerous growths later returned, the plaintiff again consulted with the defendant. The defendant discussed the laser ablation treatment with the plaintiff, who then signed a standardized consent form. That form stated in relevant part that the defendant "has explained to me in a way that I understand: (a) the nature and purpose of the procedure(s); (b) the potential benefits and risks of the procedure(s) including bleeding, infection, accidental injury of other body parts, failure to permanently improve my condition or, death, as well as the potential risks and benefits of the medications that may be administered to me as part of

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<sup>28</sup> Although it is undisputed that the plaintiff was provided lidocaine gel, there is no indication in the record that the defendant ever discussed the risk of labial agglutination with the plaintiff. As the defendant acknowledged in his November 4, 2016 affidavit: "I do not warn patients that their labia might be agglutinated because most do not have agglutinated labia." The plaintiff in this case does not claim that labial agglutination was a material risk that the defendant had a duty to disclose prior to performing the laser ablation procedure. See footnote 8 of this opinion.

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the procedure; and (c) the alternative(s) to the procedure(s) and their potential risks and benefits, including the option of not having the procedure.” The consent form also authorized the defendant “to do whatever may be necessary if there is a complication or unforeseen condition during my procedure.”

The defendant performed a second laser ablation to remove precancerous growths on the plaintiff’s vulva on April 25, 2014. When that procedure concluded, the plaintiff again was provided with lidocaine gel and was advised to schedule a postoperative examination “so that [the defendant] could examine the surgical site and make sure that it was healing properly.” The defendant conducted that examination approximately three weeks later, on May 14, 2014. Four individuals were present at that examination: the plaintiff, the defendant, Andersen, and an unidentified nurse. It is undisputed that the plaintiff consented to the postoperative examination. See footnote 17 of this opinion.

After arriving at the Yale University Gynecologic Center, the plaintiff undressed and placed her legs in stirrups. The defendant began his examination with a visual inspection of the plaintiff and then informed her that “everything looked fine.” The parties disagree as to precisely what happened next.

In her operative complaint, the plaintiff alleged that the defendant discovered the labial agglutination “during” the postoperative examination; the defendant admitted the truth of that allegation in his answer. The plaintiff further alleged that the defendant at that time embarked on a course of treatment for that complication without first obtaining her informed consent. More specifically, the plaintiff alleged that the defendant “forcefully inserted his fingers through [her] agglutinated labia” without informing her of “the nature of the procedure,” its “risks and hazards,” its “anticipated

benefits,” and “any alternatives [when] other procedures were available . . . .”

In his November 4, 2016 affidavit, the defendant described what transpired during the postoperative examination as follows: “I informed [the plaintiff] that I was going to examine her vagina. . . . In order to observe the surgical site, I had to separate [her] labia. As I did so, she yelled in pain. At that moment, I realized that her labia had become agglutinated. I apologized for causing her pain, and I continued with the examination. . . . Agglutination, which is the partial fusing of skin, can occur after laser ablation surgery. It occurs at the surgical site, which in [the plaintiff’s] case, was on the interior of her labia. Because of that location, there was no way for me to know if [her] labia were agglutinated before trying to separate them to examine the surgical site.” He continued: “If labia are agglutinated two weeks after laser surgery, they must be separated. Generally, the agglutination at that point is mild, and it can be done in a split-second using a finger. This is the least intrusive and most effective way of separating agglutinated labia.” In his August 17, 2016 response to the plaintiff’s first set of interrogatories, the defendant stated that although “[m]ore severely agglutinated labia may require a surgical procedure,” the plaintiff’s labia were not agglutinated “to the degree that . . . require[d] treatment or procedure.” The defendant also acknowledged that, “[a]fter discovering that [the plaintiff’s] labia were agglutinated during the examination, I discussed with her that her labia had agglutinated as a result of her laser ablation surgery. . . . I informed her that she had agglutinated labia that required separation. I told her I was sorry that I hurt her by separating her agglutinated labia.” As he did in his affidavit, the defendant stated in his response to interrogatories that he “did not know that [the plaintiff’s] labia were agglutinated until [he] separated them to perform [the] postoperative examination.”

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In opposing the motion for summary judgment, the plaintiff provided a different account of those events. In her sworn affidavit, she stated: “[W]hen the defendant entered the room, he said that he was going to take a look at me, and further stated that everything looked fine. . . . Then, without warning, [he] forcefully inserted his fingers into my vagina, separating an agglutination . . . of my labia, which caused me severe pain. . . . I cried out in pain as a result of the defendant inserting his fingers through the agglutination, and [he] expressed his concern that I may pass out as a result. . . . The defendant stated that he performed this procedure so that I would not have to go to the operating room for surgery.” The plaintiff further stated that the defendant provided “no warning or notice to [her] . . . at any time before” he remedied the labial agglutination. In her affidavit, Andersen likewise averred that the defendant “expressed concern that the plaintiff may pass out as a result of the separation of her agglutinated labia” and then “stated that he performed [the] procedure so that the plaintiff would not have to go to the operating room for surgery.”

Although the defendant claims that he “did not know that [the plaintiff’s] labia were agglutinated until [he] separated them,” the affidavits of the plaintiff and Andersen, read in the light most favorable to the plaintiff as the nonmoving party; see *Brooks v. Powers*, 328 Conn. 256, 259, 178 A.3d 366 (2018); suggest otherwise. Those affidavits allege that the defendant, after separating her agglutinated labia, informed them that he “performed [the] procedure so that the plaintiff would not have to go to the operating room for surgery.”<sup>29</sup> (Emphasis added.) Viewed in a manner most favorable to the plaintiff, the finder of fact could construe that purported

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<sup>29</sup> When used as a conjunction, the word “so” means “in order that” and “for that reason.” See Merriam-Webster’s Collegiate Dictionary (11th Ed. 2003) p. 1182.

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statement, in light of the defendant's admission that "severely agglutinated labia may require a surgical procedure" and the significant pain experienced by the plaintiff,<sup>30</sup> as an admission that the defendant was aware of two viable alternative treatments at the time that he discovered the medical complication. See *Logan v. Greenwich Hospital Assn.*, supra, 191 Conn. 295 ("all viable alternatives [must] be disclosed even though some involve more hazard than others").<sup>31</sup> If the finder of fact were to credit those affirmations, it reasonably could conclude that the defendant discovered the complication during his initial examination of the plaintiff and then, without her informed consent, made a unilateral decision to pursue a particular course of treatment—digital separation—when another viable alternative existed.<sup>32</sup>

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<sup>30</sup> It is undisputed that the plaintiff cried out in pain when the defendant digitally separated her agglutinated labia. The affidavits of Andersen and the plaintiff further aver that the defendant at that time expressed his concern that the plaintiff was going to lose consciousness.

<sup>31</sup> We note that the defendant, in his affidavit, stated that "[i]f labia are agglutinated two weeks after laser surgery, they must be separated." While the defendant may simply have been articulating a professional medical opinion, his statement nonetheless ignores the well established right of a patient to refuse medical treatment, even when the patient's life is in jeopardy. See *Cruzan v. Director, Missouri Dept. of Health*, supra, 497 U.S. 278 (competent individuals have protected liberty interest under fourteenth amendment to United States constitution to refuse unwanted medical treatment); *Stamford Hospital v. Vega*, 236 Conn. 646, 666, 674 A.2d 821 (1996) ("[i]f the common law right to refuse medical treatment, based on the doctrine of informed consent, is entitled to respect, that respect must be accorded when the consequences are likely to be the most serious—in matters of life and death"). The plaintiff has argued, before both the trial court and now this court on appeal, that she had a right "to refuse this treatment even if it was considered necessary."

<sup>32</sup> We reiterate that the defendant, in his response to interrogatories, averred that he did not discover the agglutination until *after* he had finished separating the plaintiff's agglutinated labia. If that statement is credited, his explanation to the plaintiff that he digitally separated the agglutination "so that [she] would not have to go to the operating room for surgery" becomes illogical, as a surgical option necessarily would have been impossible at that point.

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In light of the foregoing, we conclude that a genuine issue of material fact exists as to whether the discovery of the medical complication during the postoperative examination constituted a substantial and material change in circumstances, such that the defendant was obligated to disclose the risks, anticipated benefits, and viable alternatives to the plaintiff before embarking on a course of treatment therefor.

That determination does not end our inquiry, as a physician's failure to obtain informed consent may be excused in certain circumstances, such as when the patient has authorized the physician to remedy complications that arise during a course of medical treatment. See, e.g., *Hageny v. Bodensteiner*, supra, 316 Wis. 2d 250–51. In rendering summary judgment, the court concluded that the materials submitted in connection with the motion for summary judgment demonstrated that the defendant's conduct in remedying the labial agglutination was treatment "for which [the defendant] received the written consent of the plaintiff." We disagree.

It is undisputed that, in the spring of 2014, the plaintiff, in consultation with the defendant, embarked on a course of treatment for precancerous growths on her vulva. That course of treatment included both the laser ablation procedure that the defendant performed on April 25, 2014, and the postoperative examination on May 14, 2014.

The plaintiff's informed consent is memorialized on the consent form, a copy of which was submitted as an exhibit to the defendant's reply to the plaintiff's objection to the motion for summary judgment. That written consent came on a standardized form titled "Yale-New Haven Hospital Consent for Operation or Special Procedure." The form provides in relevant part: "After discussing other options, including no treatment,

with [the defendant], I give [the defendant] permission to perform the following surgery, procedure(s) or treatment . . . CO<sub>2</sub> Laser Ablation of Vulva.” The consent form further stated: “I give permission to [the defendant] to do whatever may be necessary if there is a complication or unforeseen condition *during my procedure*.” (Emphasis added.)

Undoubtedly, that signed consent vested the defendant with discretion to deal with any complications or unforeseen conditions that arose during the laser ablation procedure performed on April 25, 2014. That consent form nevertheless is silent as to postoperative care. It confirms only that the plaintiff had discussed the CO<sub>2</sub> laser ablation procedure and “other options” with the defendant. The consent form contains no indication that the parties discussed the possibility of labial agglutination or various medical treatments for that complication. Indeed, in his November 4, 2016 affidavit, the defendant attested that, as a matter of practice, he does “not warn patients that their labia might be agglutinated because most do not have agglutinated labia.”

Furthermore, paragraph 3 of the standardized consent form begins by stating: “My responsible practitioner has explained to me in a way that I understand: (a) the nature and purpose of the procedure(s); (b) the potential benefits and risks of the procedure(s) including bleeding, infection, accidental injury of other body parts, failure to permanently improve my condition or, death, as well as the potential risks and benefits of the medications that may be administered to me as part of the procedure; and (c) the alternative(s) to the procedure(s) and their potential risks and benefits, including the option of not having the procedure.” It then states: “I understand that some possible complications of the procedure(s) include” followed by several



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blank lines. That part of the consent form was left blank, with no possible complications identified.

Read literally, and in the light most favorable to the plaintiff as the nonmoving party, the consent form authorized the defendant “to do whatever may be necessary” only with respect to unforeseen complications that arose during the April 25, 2014 laser ablation procedure. The defendant has provided no evidence, such as affidavit testimony indicating otherwise. Accordingly, we conclude that a genuine issue of material fact exists as to whether the plaintiff had authorized the defendant to remedy unforeseen complications that arose not during the April 25, 2014 laser ablation procedure, but during the postoperative examination weeks later.

### III

In sum, we conclude that the court improperly granted the defendant’s motion to dismiss the battery and negligent infliction of emotional distress counts of the August 25, 2015 amended complaint due to noncompliance with § 52-190a. We further conclude that the court improperly rendered summary judgment in favor of the defendant on the plaintiff’s February 8, 2016 revised complaint, as genuine issues of material fact exist regarding the defendant’s discovery of a medical complication during the postoperative examination. The matter, therefore, must be remanded to the trial court for further proceedings.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

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