DORRANCE T. KELLY *v.* MARSHALL D. KURTZ ET AL.

(AC 41366)
(AC 41365)

Keller, Moll and Devlin, Js.

Syllabus

The plaintiff sought to recover damages from the defendants for, inter alia, breach of contract relating to the buyout of the plaintiff's oral surgery practice by the defendant K. In connection therewith, the parties executed three documents, including a purchase and sale agreement, an operating agreement and a supplementary agreement. Pursuant to those agreements, K paid the plaintiff two installments and subsequently became the manager of the practice. Pursuant to the supplementary agreement, the plaintiff could work a part-time schedule of his choosing and retire at the time of his choosing, provided that he retired by the age of eighty. The relationship between the plaintiff and K became strained, and K hired a new associate without the consent of the plaintiff and told the plaintiff he wanted him to retire in six weeks. Approximately one month after K paid the final installment due under the purchase and sale agreement, he had the locks on the doors of the practice changed. The plaintiff, believing he had been terminated, began seeing patients in other towns. The defendants ordered a street sign for the practice that included the plaintiff's name and kept the plaintiff's name on the practice's website and referral cards for approximately six months after the plaintiff left the practice. The plaintiff filed a nineteen count revised complaint in which he alleged claims for, inter alia, breach of contract pertaining to all three agreements, breach of the implied covenant of good faith and fair dealing relating to all three agreements,

invasion of privacy, tortious interference with business expectancies, violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.), and unjust enrichment. The defendants filed an eleven count counterclaim, alleging, inter alia, that the plaintiff had breached the operating agreement and the lease agreement between the plaintiff and the practice. After the jury returned a verdict in favor of the plaintiff on nine of his ten claims against the defendants and found in favor of the defendants on the remaining counts of the counterclaim, the defendants filed a motion to set aside the verdict and to dismiss the plaintiff's claims of breach of the operating agreement and breach of the implied covenant of good faith and fair dealing in that agreement. The trial court denied in part and granted in part the defendants' motion to set aside, granted their motion to dismiss and rendered judgment in favor of the plaintiff. On the separate appeals to this court by the plaintiff and the defendants, *held:*

1. The trial court did not abuse its discretion in denying the defendants' motion to set aside the jury's verdict on the counts alleging breach of the supplementary agreement and breach of the implied covenant of good faith and fair dealing:

   a. The defendants' claim that the evidence was insufficient to support the jury's finding of a breach of the supplementary agreement because the evidence was insufficient to prove that the plaintiff was terminated or that he was prevented from working a schedule of his choosing was unavailing: the trial court, in rejecting the defendants' claim, determined that the jury reasonably could have found on the basis of the evidence presented that the defendants terminated the plaintiff or prevented him from working a schedule of his choosing, and that notwithstanding the lack of a formal, express statement of termination, the jury reasonably could have found that certain of the defendants' conduct constituted a breach of their obligations to continue to employ the plaintiff and prevented him from receiving the benefits he was entitled to under the agreement; moreover, the court properly declined the defendants' invitation to revisit the evidence at trial and to substitute its judgment for that of the jury, and there was ample evidence introduced at trial on which the jury could have based a finding that the plaintiff was denied the right to work a schedule of his choosing.

   b. The defendants could not prevail on their claim that the verdict was inconsistent because the jury awarded $2,000,000 for breach of the supplementary agreement and $150,000 for breach of the implied covenant of good faith and fair dealing in that agreement, when both claims were based on identical evidence; the trial court found that even though the plaintiff based both causes of action on similar factual allegations, the plaintiff pleaded two separate causes of action and could recover two different jury awards, and, thus, that the jury could have found, as a matter of law, that the plaintiff suffered two separate legal harms from the same facts, as the jury's finding of breach of contract did not require a finding of any improper motive by the defendants and did not

necessarily include damages arising from ill intent, and, therefore, the court properly fulfilled its duty to harmonize the jury's verdict.

2. The trial court did not abuse its discretion in setting aside the jury's verdict on the plaintiff's claim that the defendants invaded his privacy by misappropriating his name after he was terminated; even if the defendants' use of the plaintiff's name was wrongful, the plaintiff failed to prove that he suffered any damages as a result of the defendants' use of his name, and the plaintiff presented no evidence of the commercial benefit to the defendants from the use of his name.
3. The trial court did not abuse its discretion in setting aside the jury's verdict and award of damages on the plaintiff's claim of tortious interference with his business expectancies; the plaintiff failed to prove that he suffered an actual loss as a result of the defendants' alleged interference with his business expectancies, and because the plaintiff already had recovered for losses he sustained as a result of his wrongful termination, the trial court properly ensured that he did not recover twice for the same loss.
4. The trial court did not abuse its discretion in setting aside the jury's verdict on the plaintiff's CUTPA claim, the plaintiff having failed to prove that he suffered any ascertainable loss as a result of the alleged CUTPA violations.
5. The trial court properly set aside the jury's verdict on the plaintiff's claim of unjust enrichment; the plaintiff had already recovered for wrongful termination under his claim that the defendants breached the supplementary agreement and, therefore, could not recover again under an unjust enrichment theory.
6. The trial court properly dismissed the plaintiff's claims of breach of the operating agreement and breach of the implied covenant of good faith and fair dealing in that agreement, as the plaintiff lacked standing to bring those claims; the loss that the plaintiff alleged was derivate of a loss to the medical practice, and he failed to prove that he was specifically and injuriously affected by K's failure to secure his approval of the hiring of the new associate.

Argued May 23—officially released October 15, 2019

Procedural History

Action for, inter alia, breach of contract relating to the sale of the plaintiff's oral surgery practice to the named defendant, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the defendants filed a counterclaim; subsequently, the plaintiff withdrew four counts of the complaint and the defendants withdrew counts one through seven of their counterclaim; thereafter, the matter was tried to the jury before *Truglia*, *J.*; verdict in part for the plaintiff

on the complaint and for the defendants on their counterclaim; subsequently, the trial court granted the defendants' motion to dismiss the plaintiff's claims of breach of the operating agreement and breach of the implied covenant of good faith and fair dealing in the operating agreement, and granted in part the defendants' motion to set aside the verdict for the plaintiff and rendered judgment on the complaint thereon, from which the plaintiff and the defendants filed separate appeals with this court, which consolidated the appeals. *Affirmed.*

Dana M. Hrelic, with whom were *Wesley W. Horton* and, on the brief, *Robert Flynn*, for the appellants-appellees (defendants).

Kara A. Lynch, pro hac vice, with whom were *Nathan J. Buchock* and, on the brief, *Brian E. Spears*, for the appellee-appellant (plaintiff).

Opinion

DEVLIN, J. In this case arising from the buyout of an oral surgery practice, the plaintiff, Dorrance T. Kelly, DDS, and the defendants, Marshall D. Kurtz, DMD, Marshall D. Kurtz, DMD, PC, and Danbury Oral and Maxillofacial Surgery Associates, LLC (DOMSA), appeal from the judgment of the trial court rendered, following a jury trial, in favor of the plaintiff, in the amount of $2,150,000. To establish the terms of the buyout, the parties executed three documents: a purchase and sale agreement, an operating agreement, and a supplementary agreement.[1] On appeal, the defendants claim, in AC 41366, that the trial court erred in denying their motion to set aside the jury's verdict on the plaintiff's claims of breach of the supplementary agreement and breach of the implied covenant of good faith and fair dealing in the supplementary agreement on the grounds

[1] The complete titles and the terms of these documents will be set forth herein.

that (1) the evidence presented at trial was insufficient to sustain the jury's finding of breach of the supplementary agreement, and (2) the jury's awards of damages on the plaintiff's claims of breach of the supplementary agreement and breach of the implied covenant of good faith and fair dealing in the supplementary agreement were inconsistent. The plaintiff claims, in AC 41365, that the trial court erred in (1) granting the defendants' motion to set aside the jury's verdict on his claims of invasion of privacy by misappropriation of his name, tortious interference with his business expectancies, violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statues § 42-110a et seq., and unjust enrichment; and (2) dismissing his claim of breach of the operating agreement and breach of the implied covenant of good faith and fair dealing in the operating agreement on the ground that he lacked standing to bring those claims. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our disposition of these appeals. The plaintiff and Kurtz are oral surgeons, who began practicing together in 2004. From May, 2004 to July, 2008, Kurtz worked as a salaried employee for the plaintiff, who had been practicing since the early 1970s and had built a successful practice. On or about July 1, 2006, Kurtz entered into a "Purchase and Sale Agreement of Personal Goodwill of Dorrance T. Kelly, DDS and Assets of Dorrance T. Kelly, DDS, Oral Surgery, P.C." The purchase and sale agreement provided that the plaintiff would sell his practice to Kurtz for $1,600,000, to be paid to the plaintiff in two equal installments; the first installment to be paid on July 17, 2006, and the second on June 30, 2009. The agreement further provided that the existing practice would continue to operate through a newly formed limited liability company known as DOMSA.

Also on July 1, 2006, the parties entered into an "Amended and Restated Operating Agreement of Danbury Oral & Maxillofacial Surgery Associates, LLC" (operating agreement). The operating agreement, which was signed by Dorrance T. Kelly, DDS, Oral Surgery, P.C. and Marshall D. Kurtz, DMD, P.C., provided that each member professional corporation would hold a 50 percent ownership interest in DOMSA, with the plaintiff initially acting as the manager with full authority for day-to-day management and control of the practice. After Kurtz paid the second installment of the purchase price, Kurtz would become the manager of DOMSA and assume full authority for its management, control and direction. The operating agreement further provided: "In instances where a [m]ember is a [p]rofessional [c]orporation, a limited liability company, a [l]imited liability [m]embership or other entity, the term '[m]ember' shall include for all purposes all stockholders, members, [m]embers or other owners thereof, of whatever nature." It required that the hiring of additional staff, including associates, be made by an affirmative vote of all members. The operating agreement also provided that the plaintiff would retire on June 30, 2009, upon his receipt from Kurtz of the second installment of the purchase price of the practice, and that upon retirement, he "shall have the right to . . . continue [working] as an associate of [DOMSA] until the age of [eighty] at a rate of compensation of fifty [percent] (50%) of his net collections upon such other terms and conditions as the parties hereto shall agree." The operating agreement provided that "[t]he [m]anager shall direct, manage and control the business of [DOMSA] to the best of [his] ability. Except for situations in which the approval of the members is expressly required by this Operating Agreement or by nonwaivable provisions of applicable law, the [m]anager shall have the full and complete authority, power and discretion to manage and control

the business, affairs and properties of [DOMSA], to make all decisions regarding those matters and to perform any and all other acts or activities customary or incident to the management of [DOMSA's] business."

On June 30, 2009, the parties, individually, and as members of their respective professional corporations, entered into a "Supplementary Agreement," which modified certain provisions of the purchase and sale agreement and the operating agreement. The supplementary agreement modified the plaintiff's obligations with respect to working days and on call responsibilities, and provided that he would work a reduced part-time schedule of his choosing. It further modified the requirement that the plaintiff retire on June 30, 2009, and provided that he could retire at a time of his choosing, but maintained that he would retire and "discontinue the practice of dentistry" when he reached the age of eighty, and that the plaintiff would continue to own a one percent interest in DOMSA until Kurtz paid the full purchase price.

Over time, the plaintiff and Kurtz's relationship became strained. At some point in the latter part of 2009, the plaintiff threatened to leave DOMSA if Kurtz did not pay him 65 percent of his net collections. Kurtz acquiesced and agreed to pay the plaintiff the 65 percent that he demanded, but reverted to paying him 50 percent in December, 2012, in accordance with the operating agreement.

In late 2012, and continuing into early 2013, the Department of Social Services conducted an audit of DOMSA's Medicaid billing records and determined that DOMSA had received overpayments of approximately $212,000 for Medicaid patients who had been treated between 2008 and 2010. To reimburse the Department of Social Services for the overpayment received by DOMSA, Kurtz agreed, without informing the plaintiff,

to continue to treat Medicaid patients without compensation until the full amount of the overpayment was satisfied. This agreement, however, did not affect the plaintiff, who continued to treat Medicaid patients and received 50 percent of the amount that he billed for his patients.

At some point prior to the summer of 2013, the plaintiff and Kurtz discussed hiring an associate. To that end, Kurtz, as the manager of DOMSA, placed an advertisement for that position and began speaking with applicants. Although the operating agreement expressly provided that "an affirmative vote of all [m]embers" was required for the "[h]iring of additional staff inclusive of [a]ssociates," Kurtz and the plaintiff did not discuss the hiring process as it progressed.

On August 1, 2013, the plaintiff and Kurtz had a meeting, which Kurtz secretly recorded, in the plaintiff's office. At that meeting, Kurtz told the plaintiff that he had hired a new associate, Daniel Traub, who would begin working at DOMSA on October 1, 2013. The plaintiff expressed his displeasure of Kurtz' hiring of Traub without the plaintiff's consent. Kurtz told the plaintiff that, by the time Traub started working in October, he would own 100 percent of DOMSA, and could manage it "as he saw fit." He told the plaintiff that he would have "the right to change anything that I want in the contracts . . . I can amend anything" and the right to "make the hours be whatever I want . . . make the staff do whatever I want, and the office space be whatever I want, and the office open and close." Kurtz told the plaintiff that he wanted him to retire before Traub commenced his employment at DOMSA, and suggested September 15, 2013, as his retirement date. The plaintiff told Kurtz that he did not want to retire and that he had the right to work at DOMSA for as long as he wished until he reached the age of eighty. Later that day, in an

unrecorded conversation, Kurtz told the plaintiff that his last day would be September 17, 2013.

The plaintiff took a medical leave from DOMSA from August 2 to August 20, 2013. On August 15, 2013, Kurtz paid the final installment due under the purchase and sale agreement. When the plaintiff returned from medical leave on August 21, 2013, he instructed the staff not to schedule any new patients for him beyond September 12, 2013. On August 22, 2013, Kurtz's attorney, Steven Smart, informed the plaintiff's attorney, Kara Lynch, that the plaintiff had not been terminated or forced to retire, and that he could continue to work at DOMSA as an associate.

When the plaintiff arrived at the office on September 17, 2013, he was told that he had no patients on his schedule and that Kurtz would direct patients to him as he saw fit. The plaintiff left the office without seeing any patients that day.

The plaintiff arrived at the office the next day to find that the locks on the doors of the practice had been changed. He confronted Kurtz in the office parking lot, where they argued about the breakdown of their professional and personal relationship. Believing that he had been terminated by Kurtz, the plaintiff did not return to work at DOMSA after this argument.

On September 21, 2013, Lynch sent an e-mail to Smart indicating that the plaintiff had been terminated by Kurtz. Smart responded that the plaintiff had not been terminated or forced to retire, and that the plaintiff could continue to work at DOMSA and receive his previously agreed upon 50 percent of fees that he generated.

Believing that he had been terminated by Kurtz, the plaintiff began seeing patients in Norwalk and West Hartford. Despite the plaintiff's absence from DOMSA, Kurtz ordered a new street sign for DOMSA that

included the plaintiff's name. Kurtz also did not remove the plaintiff's name from DOMSA's website or patient referral cards for approximately six months after he left the practice.

The plaintiff thereafter commenced this action, and by way of a nineteen count revised complaint, alleged the following: four counts of breach of contract (purchase and sale agreement, operating agreement and supplementary agreement); three counts of breach of the implied covenant of good faith and fair dealing; one count of successor liability; one count of violation of the Connecticut Fair Employment Practices Act (CFEPA), General Statutes § 46a-51 et seq.; one count of breach of fiduciary duty; one count of failure to pay wages to an employee in violation of General Statutes § 31-71b; one count of invasion of privacy by misappropriation of name; one count of tortious interference with business expectancies; one count of violation of CUTPA; one count of unjust enrichment; one count of slander; one count of intentional infliction of emotional distress; one count of negligent infliction of emotional distress; and one count seeking a declaratory judgment that the plaintiff is no longer bound by the restrictive covenant contained in the operating agreement.

The defendants filed an answer, one special defense, and an eleven count counterclaim alleging, inter alia, that the plaintiff had breached the operating agreement and the lease agreement between the plaintiff, as the owner of the building in which the Danbury office of DOMSA is located, and DOMSA.

Following several days of trial, the court submitted to the jury interrogatories on ten distinct claims by the plaintiff against the defendants: breach of the operating agreement and breach of the implied covenant of good faith and fair dealing in that agreement; breach of the supplementary agreement and breach of the implied covenant of good faith and fair dealing in that agreement; violation of CFEPA; breach of fiduciary duty;

invasion of privacy by appropriation of name; tortious interference with business expectancies; violation of CUTPA; and unjust enrichment.[2] The court also submitted to the jury interrogatories on the defendants' claims for damages related to the plaintiff's alleged violation of the lease agreement: unjust enrichment; breach of the implied covenant of good faith and fair dealing in the lease agreement; and violation of CUTPA.[3] The jury returned a verdict in favor of the plaintiff on nine of his ten claims against the defendants, awarding him damages on seven of those ten claims, for a total award of $3,150,000 in compensatory damages.[4] The jury also found that the plaintiff was entitled to punitive damages on five of those seven claims. The jury found in favor of the defendants on the remaining counts of their counterclaim, awarding damages in the amount of $175,000.

The defendants thereafter filed a motion to set aside the jury's verdict on the complaint and a motion to dismiss the plaintiff's claims of breach of the operating agreement and breach of the implied covenant of good faith and fair dealing in that agreement. The trial court denied in part and granted in part the defendants' motion to set aside, and granted their motion to dismiss. The court rendered judgment in favor of the plaintiff in the amount of $2,150,000, and these appeals followed. Additional facts will be set forth as necessary.

[2] Prior to trial, the plaintiff withdrew his claims of slander, and intentional and negligent infliction of emotional distress; and the defendants withdrew the counts of their counterclaim alleging breach of the operating agreement. After the plaintiff rested his case, the court directed a verdict in favor of the defendants on the plaintiff's claim of breach of the purchase and sale agreement. The plaintiff abandoned his claim seeking a declaratory judgment that he is no longer bound by the restrictive covenant contained in the operating agreement.

[3] The defendants withdrew their claims related to the operating agreement prior to trial.

[4] The jury also found that the defendants breached the operating agreement, violated CFEPA, and breached their fiduciary duty to the plaintiff, but awarded the plaintiff no damages under those counts.

Because the bulk of the claims raised in these appeals arises from the trial court's rulings on the defendants' motion to set aside the jury's verdict, we begin by setting forth the well settled standard of review governing the court's judgment on those claims. "The trial court possesses inherent power to set aside a jury verdict which, in the court's opinion, is against the law or the evidence . . . . [The trial court] should not set aside a verdict where it is apparent that there was some evidence upon which the jury might reasonably reach [its] conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles . . . . Ultimately, [t]he decision to set aside a verdict entails the exercise of a broad legal discretion . . . that, in the absence of clear abuse, we shall not disturb." (Internal quotation marks omitted.) *Kumah* v. *Brown*, 160 Conn. App. 798, 803, 126 A.3d 598, cert. denied, 320 Conn. 908, 128 A.3d 953 (2015). With these principles in mind, we address the parties' claims in turn.

I

AC 41366

We begin with the defendants' appeal challenging the jury's verdict in favor of the plaintiff and the trial court's denial of their motion to set aside the verdict. In response to the interrogatories submitted, the jury found that the defendants breached the supplementary agreement and breached the implied covenant of good faith and fair dealing in the supplementary agreement, by wrongfully terminating the plaintiff before he reached the age of eighty and by failing to allow the plaintiff to work a schedule of his choosing. The jury awarded the plaintiff $2,000,000 in compensatory damages for breach of the supplementary agreement, and $150,000 in compensatory damages for breach of the implied covenant of good faith and fair dealing in the

supplementary agreement.[5] The trial court denied the defendants' motion to set aside these portions of the jury's verdict.

A

The defendants first argue that the evidence was insufficient to support the jury's finding of breach of the supplementary agreement because the plaintiff was not terminated from his employment at DOMSA or prevented from working a schedule of his choosing. We are not persuaded.[6]

"[I]t is not the function of this court to sit as the seventh juror when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict . . . . In making this determination, [t]he evidence must be given the most favorable construction in support of the verdict of which it is reasonably capable. . . . In other words, [i]f the jury could reasonably have reached its conclusion, the verdict must stand, even if this court disagrees with it. . . .

"We apply this familiar and deferential scope of review, however, in light of the equally familiar principle that the plaintiff must produce sufficient evidence to remove the jury's function of examining inferences and finding facts from the realm of speculation. . . . A motion to set aside the verdict should be granted if the

[5] The jury also found that the plaintiff was entitled to punitive damages for breach of the supplementary agreement and breach of the implied covenant of good faith and fair dealing in the supplementary agreement. The trial court set aside that determination, and the plaintiff has not challenged that ruling on appeal.

[6] Because we conclude that the evidence was sufficient to prove that the plaintiff was terminated, we do not reach the defendants' additional claim that the evidence was insufficient to support the jury's award of damages if the only breach of the supplementary agreement was the prevention of the plaintiff from working a schedule of his choosing.

jury reasonably and legally could not have reached the determination that they did in fact reach." (Citations omitted; internal quotation marks omitted.) *Carrol* v. *Allstate Ins. Co.*, 262 Conn. 433, 442, 815 A.2d 119 (2003).

In the context of our "review of a motion to set aside the verdict . . . given the deference our standard of review requires to the trial court's decision, it is especially important to know what evidence before the jury justified the verdict in the court's mind." *Levine* v. *418 Meadow Street Associates, LLC*, 163 Conn. App. 701, 715, 137 A.3d 88 (2016). "[T]he trial court is uniquely situated to entertain a motion to set aside a verdict as against the weight of the evidence because, unlike an appellate court, the trial [court] has had the same opportunity as the jury to view the witnesses, to assess their credibility and to determine the weight that should be given to their evidence. . . . Indeed, we have observed that, [i]n passing upon a motion to set aside a verdict, the trial judge must do just what every juror ought to do in arriving at a verdict. . . . [T]he trial judge can gauge the tenor of the trial, as we, on the written record cannot, and can detect those factors, if any, that could improperly have influenced the jury." (Internal quotation marks omitted.) *State* v. *O'Donnell*, 174 Conn. App. 675, 696–97, 166 A.3d 646, cert. denied, 327 Conn. 956, 172 A.3d 205 (2017). "The concurrence of the judgments of the [trial] judge and the jury . . . is a powerful argument for upholding the verdict." (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 371, 119 A.3d 462 (2015).

In their motion to set aside the verdict, the defendants raised the same arguments to the trial court that they advance now—that the evidence was insufficient to prove that the plaintiff was terminated or that he was prevented from working a schedule of his own choosing. Following a thorough and well reasoned analysis of the evidence presented to the jury, and the law pertaining to its examination of the sufficiency of that

evidence, the court rejected the defendants' arguments. Specifically, the court explained that "[t]he jury reasonably could have found that the defendants terminated [the plaintiff] and/or prevented him from working a schedule of his choosing based on the following evidence: (1) the August 1, 2013 recorded conversation, including Kurtz' request that [the plaintiff] leave by September 17, 2013, so that there could be some 'separation' between [the plaintiff's] departure and Traub's first day on October 1, 2013; (2) Kurtz' statements during the August 1, 2013 conversation that he could change the office hours and other working conditions to be 'whatever I want'; (3) locking [the plaintiff] out of the office on September 18, 2013; (4) Traub's testimony that Kurtz told him that he had asked [the plaintiff] to retire and that [the plaintiff] did not take it well; (5) testimony of office staff that Kurtz told them, shortly after September 17, 2013, that [the plaintiff] would not be returning to the office; and (6) evidence that at least some of the office staff believed that [the plaintiff] would not be returning to practice with DOMSA." The court determined that "notwithstanding the lack of a formal, express statement of termination and the defendants' later offer of continued employment, the jur[y] could reasonably have found that the result of the defendants' conduct between August 1, 2013 and September 18, 2013, was a breach of the defendants' obligations to continue to employ [the plaintiff] and prevented him from receiving benefits he was entitled to under the agreement."

The court explained that the defendants' claim of insufficiency was not based on disputed facts, but, instead, that the defendants urged an alternative interpretation of the evidence presented to the jury. We agree. The defendants asked the trial court in their motion to set aside the jury's verdict, and ask this court now, to examine the evidence introduced at trial in a light favorable to them, or to emphasize or give more

weight to evidence that supports their position. It was not the role of the trial court, nor is it the role of this court, to do so. The court properly declined the defendants' invitation to revisit the evidence at trial and substitute its judgment for that of the jury.

As to their argument that the evidence at trial was insufficient to prove that the defendants denied the plaintiff the ability to work a schedule of his own choosing,[7] the defendants again reiterate claims of insufficiency that they raised before the trial court in their motion to set aside the verdict, namely, that the provision of the supplementary agreement affording the plaintiff the right to work a schedule of his own choosing applied only when he was a member of DOMSA, not when he became an employee of DOMSA, and that the plaintiff failed to prove that he was denied that right. The court rejected that notion, explaining that it could not "say as a matter of law that (1) this provision of the supplementary agreement is unambiguous and that (2) the jury, therefore, could not possibly have found that the language allowing [the plaintiff] to work a schedule of his choosing applied only to him as a member of DOMSA." The court concluded: "If the jurors did believe it applied to him as an employee, there was sufficient evidence to find that the defendants failed to allow him to work a schedule of his own choosing. The jury reasonably could have found, for example, that Kurtz' reservation of the right to assign patients to [the plaintiff] and other conditions placed on the offer to return to work at DOMSA did not comply with the defendants' contractual obligations to allow [the plaintiff] to continue to work until eighty years of age or to work a schedule of his own choosing." Moreover, evidence was presented that Kurtz told the plaintiff

[7] We note that because the jury's award of damages was not apportioned between the two claimed breaches of the supplementary agreement, the jury's verdict may be sustained on the basis of the evidentiary sufficiency of his first allegation under the general verdict rule.

that he would direct patients to him as "he saw fit," the plaintiff was locked out of the computerized scheduling system of DOMSA, and the plaintiff was not given a key to the office after the locks were changed. We thus agree that there was ample evidence introduced at trial on which the jury could have based a finding that the plaintiff was denied the right to work a schedule of his own choosing.

B

The defendants also argue that the jury's verdict was inconsistent because the jury awarded $2,000,000 for breach of the supplementary agreement and $150,000 for breach of the implied covenant of good faith and fair dealing in that agreement, and the damages awarded on those claims should have been the same because they were based upon identical evidence. We disagree.

"The role of an appellate court where an appellant seeks a judgment contrary to a general verdict on the basis of the jury's allegedly inconsistent answers to . . . interrogatories is extremely limited. . . . To justify the entry of a judgment contrary to a general verdict upon the basis of answers to interrogatories, those answers must be such in themselves as conclusively to show that as [a] matter of law judgment could only be rendered for the party against whom the general verdict was found; they must negative every reasonable hypothesis as to the situation provable under the issues made by the pleadings; and in determining that, the court may consider only the issues framed by the pleadings, the general verdict and the interrogatories, with the answers made to them, without resort to the evidence offered at the trial. . . . When a claim is made that the jury's answers to interrogatories in returning a verdict are inconsistent, the court has the duty to attempt to harmonize the answers." (Emphasis omitted; internal quotation marks omitted.) *Kumah* v. *Brown*, supra, 160 Conn. App. 803–804.

In addressing this claim in the defendants' motion to set aside the verdict, the trial court held: "Breach of contract and breach of the covenant of good faith and fair dealing are separate causes of action and the jury could, as a matter of law, find that [the plaintiff] suffered two separate legal harms from the same facts. . . . The jury could have found on the facts presented at trial that the defendants breached the supplementary agreement in the ways alleged, and did so with dishonest or malicious intent. . . . The jur[y] could have found that [the plaintiff], on the same facts presented, suffered two distinct legal harms and voted to compensate him separately for each harm."

The court acknowledged the validity of the defendants' argument that "the same facts, arising from the same breach of contract, should not give rise to two different awards," but noted that "the counts . . . are not identical because [the plaintiff] has alleged two separate causes of action which require two separate sets of elements to be proven."[8] The court explained: "While some of the factual allegations overlap between both counts, [the plaintiff's] allegations regarding the breach of the covenant of good faith and fair dealing in the supplementary agreement, read broadly and realistically . . . also allege that Kurtz' alleged breaches of contract were done in bad faith. Moreover, the court advised the jury on the difference between both causes of action, including that the breach of the implied covenant of good faith and fair dealing in the supplementary

[8] The trial court explained: "In count three, [the plaintiff] alleged that Kurtz, in his professional capacity, violated the supplementary agreement by 'wrongfully terminating . . . [the plaintiff] . . . prior to his eightieth birthday . . . [failed] to allow . . . [the plaintiff] to work a schedule of his choosing . . . and . . . [failed] to compensate . . . [the plaintiff] for fifty [percent] . . . of [his] net collections . . . .' Count seven, regarding the breach of the implied covenant of good faith and fair dealing in the supplementary agreement, alleged that the defendants were obligated to not 'take any improper action which would deprive . . . [the plaintiff] of the benefit of his bargain . . . [Kurtz'] aforesaid acts and omissions [alleged in count three] . . . were breaches . . . of the aforesaid covenant of good faith and fair dealing.' "

agreement require that the jury make a finding of bad faith, in addition to finding a breach of contract, to find in favor of [the plaintiff]. . . . Thus, even though [the plaintiff] based both causes of action on similar factual allegations, [the plaintiff] pleaded two different causes of action and could therefore recover two different jury awards—one for the breaches of contract themselves, and one for engaging in bad faith—which would not be inconsistent with each other."

The court further explained: "[T]here is sufficient evidence upon which the jury reasonably could have found that the defendants breached the contract and did so with improper intentions. Evidence upon which the jur[y] could have based each of these findings included: the content of the two August 1, 2013 office meetings; hiring the new associate without [the plaintiff's] consent; the lock out with instructions to staff not to give [the plaintiff] a key; the goodbye card sent by the office staff to [the plaintiff] on September 17, 2013; the argument in the parking lot on September 18, 2013, and the direction to [the plaintiff] that he remove all of his personal belongings from his personal office the following weekend or they would be left 'in the parking lot'; and Kurtz' statement to the staff and others that [the plaintiff] was not coming back to practice at DOMSA. The court assumes that the jur[y] listened to the evidence, listened carefully to the charge, and correctly applied the law to the facts as they found them. The court assumes that the jur[y] rendered two separate awards for two separate legal harms—$2,000,000 for the breach of contract and $150,000 for the separate and distinct legal harm of breaching the contract with evil intent."

It is well settled that, "[a]lthough the covenant of good faith and fair dealing is implied in every contract, a plaintiff cannot state a claim for breach of the implied covenant simply by alleging a breach of the contract, in and of itself. . . . Instead, to state a legally sufficient

claim for breach of the implied covenant sounding in contract, the plaintiff must allege that the defendant acted in bad faith." (Citation omitted.) *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 132 Conn. App. 85, 99, 30 A.3d 38 (2011), aff'd, 311 Conn. 123, 84 A.3d 840 (2014).

Here, as the trial court aptly noted, the factual allegations of the two claims associated with the supplementary agreement certainly overlapped, but they were not identical. The jury's finding of breach of contract did not require a finding of any improper motive by the defendants and thus did not necessarily include damages arising from ill intent.[9] Because the trial court properly fulfilled its duty to harmonize the jury's verdict, we cannot conclude that it abused its discretion in denying the defendants' motion to set aside the jury's verdict on the counts alleging breach of the supplementary agreement and breach of the implied covenant of good faith and fair dealing in that agreement.

II

AC 41365

We now turn to the plaintiff's challenges to the trial court's judgment setting aside the jury's verdict on his claims of invasion of privacy, tortious interference with business expectancies, violation of CUTPA, and unjust enrichment.[10] Because the court set aside certain portions of the jury's verdict on the ground that the plaintiff

[9] To the extent that the defendants argue that the awards of damages for breach of contract and breach of the implied covenant of good faith and fair dealing are impermissibly duplicative, that issue cannot be determined based upon the jury's responses to the interrogatories. Although the jury found that the defendants breached the contract and the implied covenant of good faith and fair dealing by terminating the contract and denying the plaintiff the right to work the schedule of his choosing, it is possible one award of damages was for wrongful termination, while the other for usurping the plaintiff's schedule.

[10] The plaintiff claims that if this court restores the jury's verdict on any of these claims, he is entitled to attorney's fees and punitive damages. Because we affirm the court's judgment setting aside these portions of the jury's verdict, we do not reach this argument.

failed to prove damages, we begin by setting forth the following pertinent general principles.

"It is axiomatic that the burden of proving damages is on the party claiming them. . . . When damages are claimed they are an essential element of the plaintiff's proof and must be proved with reasonable certainty. . . . Damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty. . . . [Although] there are circumstances in which proof of damages may be difficult and . . . such difficulty is, in itself, an insufficient reason for refusing an award once the right to damages has been established . . . the court must have evidence by which it can calculate the damages, which is not merely subjective or speculative . . . but which allows for some objective ascertainment of the amount. . . . This certainly does not mean that mathematical exactitude is a precondition to an award of damages, but we do require that the evidence, with such certainty as the nature of the particular case may permit, lay a foundation [that] will enable the trier to make a fair and reasonable estimate." (Citation omitted; internal quotation marks omitted.) *American Diamond Exchange, Inc.* v. *Alpert*, 302 Conn. 494, 510–11, 28 A.3d 976 (2011).

"Evidence is considered speculative when there is no documentation or detail in support of it and when the party relies on subjective opinion." (Internal quotation marks omitted.) Id., 511. "At a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits may be ascertained. . . . While the modern tendency is toward greater liberality in the requirements . . . [for proving lost profits] *it is the unvarying rule that evidence of such certainty as the nature of the case permits should be produced.*" (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 512.

With the foregoing in mind, and guided by the aforementioned principle that "[t]he decision to set aside a verdict entails the exercise of a broad legal discretion . . . that, in the absence of clear abuse, we shall not disturb"; (internal quotation marks omitted) *Kumah* v. *Brown*, supra, 160 Conn. App. 803; we address each of the plaintiff's claims in turn.

A

The plaintiff first claims that the trial court erred in setting aside the jury's verdict and award of damages in the amount of $300,000 on his claim that the defendants invaded his privacy by misappropriating his name after he was terminated from DOMSA. The plaintiff claims that the trial court erred in finding that the sale of his "personal good will" to the defendants included the right to use his name, and that even if the defendants did not have the right to use the plaintiff's name, the plaintiff failed to prove that he suffered any damages as a result of said use. We need not address the issue of whether "personal good will" included the right to use the plaintiff's name because, even if the defendants' use of the plaintiff's name was wrongful, we agree with the trial court that the plaintiff failed to prove that he suffered any damages as a result of the defendants' use of his name.[11]

On this claim, the court instructed the jury as follows: "To recover for this cause of action, the plaintiff must prove that his name was used by the defendants without his consent for the purpose of appropriating to their benefit the commercial value of the plaintiff's name. The damages for such misappropriation are measured by the commercial benefit obtained by the defendants or by the harm to the plaintiff." The plaintiff claims that the trial court disregarded evidence that he presented

[11] The issue of whether "personal good will" includes the use of one's name has not been decided in Connecticut.

in support of his claim that the defendants commercially benefitted from the use of his name, such as the facts that several dentists confirmed that they used the referral cards after the plaintiff left DOMSA to refer patients to him, and that DOMSA's employees testified that they received these cards and calls requesting appointments with the plaintiff, but that they were scheduled with Kurtz.

Contrary to the plaintiff's argument, the trial court did, in fact, consider the evidence introduced by the plaintiff. In setting aside the jury's verdict on this claim, the trial court noted that the plaintiff presented evidence that after he left DOMSA, the defendants ordered a new sign for the Danbury office that listed his name and that that sign was displayed for several months. The defendants did not remove the plaintiff's name from DOMSA's website or stop using patient referral cards listing the plaintiff until several months after the plaintiff left the practice. In the spring of 2014, the defendants purchased an advertisement that included the plaintiff's name in a high school flyer.

The court nevertheless set aside the jury's verdict on the plaintiff's claim of invasion of privacy by misappropriation of his name because "[the plaintiff] presented no evidence at trial of a single patient who came to DOMSA after [the plaintiff]'s departure as a result of the street sign, patient referral cards, website, or high school promotional calendar." The court noted that it had instructed the jury that "damages for this claim are measured by the commercial benefit obtained by the defendants or by the harm to [the plaintiff]," and reasoned that "[s]ince [the plaintiff] presented no proof of a commercial benefit obtained by the defendants through the use of [the plaintiff]'s name after he was no longer a member of DOMSA, the jury could not have found that the defendants misappropriated [the plaintiff]'s name." The trial court further opined that

"an award under this claim of damages would also be a duplication of lost earnings, which the jury awarded to [the plaintiff] through its verdict on the claims of violations of the supplementary agreement."

Despite the plaintiff's assertion that the defendants commercially benefitted from the use of his name, he presented no evidence of the commercial value of that benefit. The plaintiff presented no evidence of which patients or how many patients the defendants gained, or how the defendants benefitted commercially, as a result of their use of his name. Because there was no evidentiary basis for the jury's award of $300,000 for the defendants' allegedly wrongful use of the plaintiff's name, the court did not abuse its discretion in setting aside the jury's verdict on the plaintiff's invasion of privacy claim.

B

The plaintiff next claims that the court abused its discretion in setting aside the jury's verdict and award of damages in the amount of $300,000 on his claim of tortious interference with his business expectancies. The trial court set aside the jury's verdict on this claim on the grounds that the plaintiff failed to prove that the defendants tortiously interfered with his actual or expected contractual relationships with his former patients and with referring dentists, and that he suffered an actual loss as a result of any such alleged interference. Because we agree with the trial court's finding that the plaintiff failed to prove that he suffered an actual loss as a result of the defendants' alleged interference with his business expectancies, we conclude that the court did not abuse its discretion in setting aside the jury's verdict and award of damages on this claim.

"It is well established that the elements of a claim for tortious interference with business expectancies are: (1) a business relationship between the plaintiff

and another party; (2) the defendant's intentional interference with the business relationship while knowing of the relationship; and (3) as a result of the interference, the plaintiff suffers actual loss. . . . It is not essential to such a cause of action that the tort have resulted in an actual breach of contract, since even unenforceable promises, which the parties might voluntarily have performed, are entitled to be sheltered from wrongful interference. . . . It does not follow from this, however, that a plaintiff may recover for an interference with a mere possibility of his making a profit. On the contrary, wherever such a cause of action as this is recognized, it is held that the tort is not complete unless there has been actual damage suffered. . . . To put the same thing another way, it is essential to a cause of action for unlawful interference with business that it appear that, except for the tortious interference of the defendant, there was a reasonable probability that the plaintiff would have entered into a contract or made a profit." (Citations omitted; internal quotation marks omitted.) *Villages, LLC* v. *Longhi*, 187 Conn. App. 132, 146–47, 201 A.3d 1098 (2019).

"[T]he proper measure of damages in an action for tortious interference with . . . business expectancies is not the profit to the defendant but rather the pecuniary loss to the plaintiff of the benefits of the prospective business relation." *American Diamond Exchange, Inc.* v. *Alpert*, 101 Conn. App. 83, 103, 920 A.2d 357, cert. denied, 284 Conn. 901, 931 A.2d 261 (2007). "Unlike other torts in which liability gives rise to nominal damages even in the absence of proof of actual loss . . . it is an essential element of the tort of unlawful interference with business relations that the plaintiff suffered actual loss." (Citation omitted; internal quotation marks omitted.) *American Diamond Exchange, Inc.* v. *Alpert*, supra, 302 Conn. 510.

Here, the court reasoned: "[T]he court agrees [with the defendants] that [the plaintiff] did not prove by a preponderance of the evidence an ascertainable actual loss as a result of the defendants' wrongful actions. Assuming, as the court must, that the jur[y] believed that the defendants acted wrongfully in the manner in which they advised [the plaintiff's] former patients after his termination from DOMSA, there was still no evidence to support the jury's award of $300,000 in lost revenue [to the plaintiff]. . . . [E]ven if the jury reasonably believed that the defendants diverted [the plaintiff's] former patients in the weeks and months following his termination from DOMSA, and did so with an improper motive, it is clear to the court that the jury could not have awarded [the plaintiff] an additional $300,000 over and above the amount awarded for violation of the supplementary agreement. The court agrees with the defendants that the evidence at trial showed that the revenue that the jury found was impermissibly diverted would have been the same revenue that [the plaintiff] would have received had he stayed with DOMSA and continued to treat those patients as an associate surgeon. In the court's view, the jury could not have reached its verdict as to tortious interference unless [it] found that the defendants had no right to treat [the plaintiff's] former patients, and found that [the plaintiff] would have earned $300,000 in revenue over and above what he would have earned at DOMSA but for the wrongful termination. The evidence at trial, however, does not support either of these underlying findings." In other words, the court explained: "[T]here is nothing to distinguish the evidence of lost earnings awarded for breach of the supplementary agreement from lost earnings by diversion of former clients. . . . [T]he court agrees with the defendants that the only fair, logical, and reasonable inference to be drawn from the jury's findings and award for tortious interference with business expectancies is that it duplicates the award for breach of the supplementary agreement."

We agree with the trial court's conclusion that the plaintiff failed to prove any actual loss resulting from the defendants' alleged interference with his business expectancies. Similar to the plaintiff's claim of misappropriation of his name, the plaintiff failed to provide the jury with even an estimate of how many or which patients he lost as a result of the defendants' conduct. Without such an evidentiary basis, there is no way to calculate or objectively ascertain the amount of damages sustained by the plaintiff with even a minimal degree of certainty.

Moreover, "[t]he rule precluding double recovery is a simple and time-honored maxim that [a] plaintiff may be compensated only once for his just damages for the same injury . . . . Connecticut courts consistently have upheld and endorsed the principle that a litigant may recover just damages for the same loss only once. The social policy behind this concept is that it is a waste of society's economic resources to do more than compensate an injured party for a loss and, therefore, that the judicial machinery should not be engaged in shifting a loss in order to create such an economic waste. . . . [D]uplicated recoveries must count as overcompensation by any standard. In general, two different measures should not be used to compensate for the same underlying loss . . . . Duplicated recoveries, furthermore, must not be awarded for the same underlying loss under different legal theories. . . . Although a plaintiff is entitled to allege respective theories of liability in separate claims, he or she is not entitled to recover twice for harm growing out of the same transaction, occurrence or event." (Citations omitted; internal quotation marks omitted.) *Rowe* v. *Goulet*, 89 Conn. App. 836, 849, 875 A.2d 564 (2005).

The plaintiff has already recovered for losses that he sustained as a result of his wrongful termination, and that recovery contemplated his lost earnings, which is the same measure of damages for which he sought to be

compensated under his claim of tortious interference. Such a duplicated recovery is impermissible. In fact, the court instructed the jury as follows: "You must consider the issue of damages separately for each cause of action for which you find liability—whether it's the plaintiff's or defendants'—without regard for any damages that you may have awarded in any other cause of action. The court will ensure that either party does not recover more than once for the same loss, even if that party prevails on two or more causes of action." In setting aside the jury's verdict on the plaintiff's claim of tortious interference, the trial court properly ensured that the plaintiff did not recover twice for the same loss.

C

The plaintiff also claims that the trial court erred in setting aside the jury's verdict and award of damages in the amount of $100,000 for violations of CUTPA. The jury found that the defendants violated CUTPA by failing to obtain the plaintiff's vote prior to hiring Traub; failing to disclose business transactions made on behalf of DOMSA, including settlement of the Medicaid audit; wrongfully terminating the plaintiff before he reached eighty years old; failing to allow the plaintiff to work a schedule of his choosing; intentionally interfering with the plaintiff's business relations and economic expectancies; and misappropriating the plaintiff's name. In setting aside the jury's CUTPA verdict, the trial court explained that it should not have instructed the jury on the plaintiff's CUTPA claims because they arose from intracorporate employment disputes that are not subject to CUTPA. The court also found that the plaintiff failed to prove that he sustained any ascertainable loss as a result of the defendants' alleged CUTPA violations. The plaintiff's challenge to the trial court's finding that the defendants' conduct was intracorporate is focused

on the defendants' post-termination conduct of allegedly diverting the plaintiff's patients from him and misappropriating his name. Even if those claims were viable under CUTPA, we agree that the plaintiff failed to prove that he sustained any ascertainable loss as a result of the defendants' alleged CUTPA violations.[12]

"[Section] 42-110b (a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." (Internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *CALCO Construction & Development Co.*, 318 Conn. 847, 880, 124 A.3d 847 (2015).

"To give effect to its provisions, § 42-110g (a) of the act establishes a private cause of action, available to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b . . . .

"The ascertainable loss requirement [of § 42-110g] is a threshold barrier which limits the class of persons who may bring a CUTPA action seeking either actual damages or equitable relief. . . . Thus, to be entitled to any relief under CUTPA, a plaintiff must first prove that he has suffered an ascertainable loss due to a CUTPA violation. . . . CUTPA, however, is not limited to providing redress only for consumers who can put a precise dollars and cents figure on their loss . . . as the ascertainable loss provision do[es] not require a plaintiff to prove a specific amount of actual damages in order to make out a prima facie case. . . . Rather

[12] Because we conclude that the trial court correctly concluded that the plaintiff failed to establish any ascertainable loss, we need not address the plaintiff's claim that the court erred in finding that the defendants' conduct arose from intracorporate employment disputes that are not subject to CUTPA.

. . . [d]amage . . . is only a species of loss . . . hence [t]he term loss necessarily encompasses a broader meaning than the term damage. . . . Accordingly . . . for purposes of § 42-110g, an ascertainable loss is a deprivation, detriment [or] injury that is capable of being discovered, observed or established. . . . [A] loss is ascertainable if it is measurable even though the precise amount of the loss is not known. . . . Under CUTPA, there is no need to allege or prove the *amount* of the actual loss. . . .

"Of course, a plaintiff still must marshal *some* evidence of ascertainable loss in support of her CUTPA allegations, and a failure to do so is indeed fatal to a CUTPA claim . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Marinos* v. *Poirot*, 308 Conn. 706, 713–14, 66 A.3d 860 (2013).

"A plaintiff also must prove that the ascertainable loss was caused by, or a result of, the prohibited act. General Statutes § 42-110g (a) . . . . When plaintiffs seek money damages, the language as a result of in § 42-110g (a) requires a showing that the prohibited act was the proximate cause of a harm to the plaintiff. . . . [P]roximate cause is [a]n actual cause that is a substantial factor in the resulting harm . . . . The question to be asked in ascertaining whether proximate cause exists is whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendant's act." (Internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *CALCO Construction & Development Co.*, supra, 318 Conn. 882–83.

On appeal, the plaintiff argues: "Deceit permeated the defendants' actions from the time Kurtz took over as manager of the practice in 2009 until the defendants successfully drove [the plaintiff] out of the practice and essentially destroyed his career. Kurtz lied to get [the plaintiff]'s patients and referral sources to continue to provide the business after [the plaintiff] left."

Although the record supports the plaintiff's allegations that some of the plaintiff's patients called DOMSA after he left and were not referred to him, the plaintiff failed to marshal any evidence of an ascertainable loss as a result of that conduct. The plaintiff did not introduce any evidence of even an estimate of the number of patients that he lost, or financial loss that was attributable to the loss of those patients. In his brief to this court, the plaintiff argues simply that "his W-2s and [the] defendants' earning records" established an ascertainable loss. Although those documents demonstrate a reduction in the plaintiff's earnings following his termination from DOMSA, the plaintiff failed to establish that the defendants' alleged conduct of diverting patients from him and using his name proximately caused any loss that can be gleaned from an examination of those documents. We thus conclude that the trial court did not abuse its discretion in setting aside the jury's verdict on the plaintiff's CUTPA claim.

D

The plaintiff also challenges the trial court's judgment setting aside the jury's verdict and award of damages in the amount of $150,000 on his claim of unjust enrichment. It is well-settled that a plaintiff may recover for unjust enrichment when a contract remedy is unavailable, to the extent that the defendant has unjustly profited at the plaintiff's expense. *Horner* v. *Bagnell*, 324 Conn. 695, 707–708, 154 A.3d 975 (2017). In other words, breach of contract and unjust enrichment are mutually exclusive theories of recovery. *Russell* v. *Russell*, 91 Conn. App. 619, 638, 882 A.2d 98, cert. denied, 276 Conn. 924, 925, 888 A.2d 92 (2005).

Here, the plaintiff alleged that the defendants were unjustly enriched "as a result of their squeeze out and wrongful termination of . . . [him] and their scheme to divert patients from . . . [him]." Because the plaintiff had already recovered for wrongful termination

under his claim that the defendants breached the supplementary agreement, the trial court found, and we agree, that he could not again recover under an unjust enrichment theory. We therefore conclude that the trial court properly set aside the jury's verdict on the plaintiff's claim of unjust enrichment.

E

The plaintiff also claims that the trial court erred in dismissing his claims for breach of the operating agreement and breach of the implied covenant of good faith and fair dealing in the operating agreement on the ground that the court lacked subject matter jurisdiction because he lacked standing to bring those claims. We disagree.

The jury found that the defendants breached the operating agreement and the implied covenant of good faith and fair dealing in the operating agreement by failing to disclose to the plaintiff business transactions made on behalf of DOMSA, specifically, the settlement of the Medicaid audit, and by failing to obtain the plaintiff's vote prior to hiring Traub. The jury did not award any compensatory damages to the plaintiff on his claim of breach of the operating agreement, but did indicate that the plaintiff was entitled to punitive damages. It awarded him damages in the amount of $150,000 for breach of the implied covenant of good faith and fair dealing in that agreement.

On February 17, 2017, the defendants filed a motion to dismiss the plaintiff's claims for breach of the operating agreement and breach of the implied covenant of good faith and fair dealing in the operating agreement for lack of subject matter jurisdiction. The defendants claimed, inter alia, that the plaintiff lacked standing to bring those claims because the alleged violations of the plaintiff's rights to be advised of DOMSA's finances and to vote on the hiring of Traub did not cause the plaintiff

any harm, and he therefore was not aggrieved.[13] The defendants further argued that even if those violations did cause harm, any harm sustained by the plaintiff was derivative of, and indistinguishable from, the harm sustained by DOMSA.

On January 26, 2018, the trial court granted the defendants' motion to dismiss, by way of a written memorandum of decision, on the ground that the plaintiff did not suffer any injury as a result of the two claims related to the operating agreement that was separate and distinct from injury suffered by DOMSA, and thus that the claims of breach of the operating agreement should have been brought as derivative actions. The trial court thus concluded that it lacked subject matter jurisdiction over the plaintiff's claims of breach of the operating agreement and breach of the implied covenant of good faith and fair dealing in the operating agreement because the plaintiff did not have standing to bring them.

"If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . [A] claim that a court lacks subject matter jurisdiction may be raised at any time during the proceedings . . . . A determination regarding a trial court's subject matter jurisdiction is a question of law. . . .

"[S]tanding is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy." (Citations omitted; internal quotation marks omitted.) *Wiederman*

[13] The defendants also claimed that the plaintiff's claims regarding the operating agreement were moot. Because we agree with the trial court's determination that the plaintiff lacked standing to bring these claims, we need not address the defendants' mootness argument.

v. *Halpert*, 178 Conn. App. 783, 793–94, 176 A.3d 1242 (2017), cert. granted on other grounds, 328 Conn. 906, 177 A.3d 1161 (2018).

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]." (Internal quotation marks omitted.) Id., 794–95.

"[A]s a general rule, a plaintiff lacks standing unless the harm alleged is direct rather than derivative or indirect. . . . [I]f the injuries claimed by the plaintiff are remote, indirect or derivative with respect to the defendant's conduct, the plaintiff is not the proper party to assert them and lacks standing to do so. Where, for example, the harms asserted to have been suffered directly by a plaintiff are in reality derivative of injuries to a third party, the injuries are not direct but are indirect, and the plaintiff has no standing to assert them." (Citation omitted; internal quotation marks omitted.) Id., 795.

"A limited liability company is a distinct legal entity whose existence is separate from its members. . . . [It] has the power to sue or to be sued in its own name; see General Statutes §§ 34-124 (b) and 34-186; or may be a party to an action brought in its name by a member or manager. . . . A member or manager, however, may not sue in an individual capacity to recover for an injury based on a wrong to the limited liability company."

(Internal quotation marks omitted.) *Padawer* v. *Yur*, 142 Conn. App. 812, 817, 66 A.3d 931, cert. denied, 310 Conn. 927, 78 A.3d 145 (2013).

On appeal, the plaintiff challenges the trial court's determination that he lacked standing to bring his claims related to the operating agreement. In his opposition to the defendants' motion to dismiss, and in his "Omnibus Statement of Facts in Support of [His] Opposition to [the] Defendants' Post-Trial Motions," the plaintiff argued that he suffered loss as a result of Kurtz' failure to inform him of the Medicaid reimbursement by virtue of the fact that, at that time, he retained a one percent interest in DOMSA, and because he continued to treat Medicaid patients "without knowing that Medicaid was not reimbursing [DOMSA] for his work," the loss of Medicaid revenue to DOMSA caused him to suffer financial loss. It cannot reasonably be disputed that such a loss was derivative of a loss to DOMSA. To the extent that the plaintiff now argues that his loss was not derivative "because the defendants did not compensate him for his treatment of Medicaid patients over a two-year period and then in 2013," the trial court properly found that "[t]he only evidence at trial was that [the plaintiff] continued to receive his 50 percent share of the net collections for his services at DOMSA." The trial court concluded that "there was no evidence brought forth at trial that [the plaintiff] was harmed in any way by the results of the Medicaid audit." Consequently, the plaintiff has failed to prove that he was aggrieved by Kurtz' failure to inform him of the Medicaid audit.

Also in his opposition to the defendants' motion to dismiss, the plaintiff alleged that "[t]he hiring of Traub proved . . . costly to [the plaintiff]—since it directly led to his termination from DOMSA" and thereby caused him to lose "millions of dollars in income." This claim is belied by the record. Although the plaintiff should have been afforded the opportunity to vote on the decision to hire Traub pursuant to the terms of the operating

agreement, he has not claimed, nor does the evidence presented at trial reflect, that he opposed that hiring decision. Indeed, the evidence presented at trial indicated that the plaintiff and Kurtz agreed to advertise for a new associate. Moreover, we agree with the trial court's finding that the plaintiff "introduced no evidence of a direct connection between the hiring of Traub and [the plaintiff]'s termination at trial or evidence that Kurtz employed Traub as a first step in forcing [the plaintiff] out of DOMSA." The plaintiff failed to prove that he was specially and injuriously affected by Kurtz' failure to secure his approval of Traub's hiring, and he, therefore, lacked standing to claim that the defendants breached the operating agreement or the implied covenant of good faith and fair dealing in that agreement. We therefore conclude that the trial court properly dismissed these claims.

The judgment is affirmed.

In this opinion the other judges concurred.

WESTON STREET HARTFORD, LLC *v.* ZEBRA REALTY, LLC (AC 40415)

DiPentima, C.J., and Sheldon and Moll, Js.*

Syllabus

The plaintiff sought a temporary and permanent injunction prohibiting the defendant from, inter alia, maintaining a parking lot within an easement granting the plaintiff a right-of-way over certain property owned by the defendant. The defendant filed a counterclaim, seeking, inter alia, a judgment declaring that it had the right to relocate the right-of-way at its own expense provided that it would be similar in size to the existing right-of-way and that it would not impose any additional burden on the plaintiff, as well as a permanent injunction directing the plaintiff to release the right-of-way upon its relocation by the defendant. The trial court rendered judgment for the defendant on the plaintiff's complaint,

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

concluding that the plaintiff was not entitled to injunctive relief because it had failed to establish that the defendant's actions were interfering with the plaintiff's use of the right-of-way. The court also rejected the defendant's counterclaim insofar as the defendant sought a right to relocate the existing right-of-way and an order directing the plaintiff to release the right-of-way upon its relocation. Thereafter, the defendant appealed, and the plaintiff filed a cross appeal with this court. *Held*:

1. The trial court properly rendered judgment for the plaintiff on the counts of the defendant's counterclaim relating to the defendant's request to relocate the right-of-way and for an order directing the plaintiff to release the right-of-way; notwithstanding the defendant's claim to the contrary, there was no meaningful difference between the unilateral modification of an easement that this court in *Alligood* v. *LaSaracina* (122 Conn. App. 473) found to be improper and the unilateral relocation of an easement that the defendant sought in the present case, as either change is improper without the mutual consent of the landowner and the easement owner, and this court rejected the defendant's claim that *Alligood* was inconsistent with Supreme Court precedent and declined to overrule *Alligood*.
2. The plaintiff could not prevail on its claim that the trial court improperly rendered judgment in the defendant's favor on the plaintiff's complaint and denied the plaintiff's request for injunctive relief: in concluding that the plaintiff had failed to demonstrate that its inability to use the right-of-way would necessarily result but for the issuance of the requested injunction, and, thus, was not entitled to its requested injunctive relief, the trial court applied the correct standard of law set forth in *Karls* v. *Alexandra Realty Corp*. (179 Conn. 390), which requires a party seeking injunctive relief to show that there a substantial probability that but for the issuance of the injunction, the party seeking it will suffer irreparable harm; moreover, the court did not abuse its discretion in denying the plaintiff's request for injunctive relief under the circumstances of the case and in light of the extraordinary nature of injunctive relief, as the court fully acknowledged that parking in the right-of-way would interfere with the plaintiff's access to the right-of-way but that this harm was not likely to befall the plaintiff but for the issuance of the requested injunction.

Argued January 22—officially released October 15, 2019

Procedural History

Action for, inter alia, a temporary and permanent injunction prohibiting the defendant from maintaining a parking lot within a right-of-way, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the matter was transferred to the judicial district of Tolland; thereafter, the defendant

filed a counterclaim; subsequently, the matter was tried to the court, *Bright*, *J.*; judgment for the defendant on the complaint and in part for the plaintiff on the counterclaim, from which the defendant appealed and the plaintiff cross appealed to this court. *Affirmed.*

Steven Lapp, with whom, on the brief, was *Daniel J. Klau*, for the appellant-cross appellee (defendant).

Mario R. Borelli, with whom, on the brief, was *Frank A. Leone*, for the appellee-cross appellant (plaintiff).

Opinion

MOLL, J. The present case arises from a dispute between the plaintiff, Weston Street Hartford, LLC, and the defendant, Zebra Realty, LLC, concerning a right-of-way easement held by the plaintiff that runs over property owned by the defendant. The defendant has appealed and the plaintiff has cross appealed from the judgment rendered, after a court trial, on the plaintiff's complaint and the defendant's counterclaim. On appeal, the defendant claims that the trial court, in rendering judgment in favor of the plaintiff on counts one and two of the counterclaim, incorrectly determined that *Alligood* v. *LaSaracina*, 122 Conn. App. 473, 999 A.2d 836 (2010), applies to the present case and prohibits any landowner from relocating an easement without the consent of the easement holder. In the alternative, the defendant contends that the Restatement (Third), Property, Servitudes § 4.8 (3) (c), is a more logical extension of Connecticut easement law than the rule adopted by this court in *Alligood*.[1] On cross appeal, the

[1] On the appeal form filed by the defendant, the defendant indicated that, in addition to the trial court's judgment with respect to its counterclaim, it is appealing from the trial court's determination that the plaintiff's intended use of the easement at issue does not overburden the easement or the defendant's property. In its principal appellate brief, the defendant recognizes that it raised the matter of overburdening as a special defense to the plaintiff's complaint and that it was not aggrieved by the trial court's judgment on the plaintiff's complaint, which was rendered in its favor. The defendant nonetheless explains that it "intends to brief its claims of error arising from the trial court's analysis and decision on the issue of overburden-

plaintiff claims that, upon finding that the defendant's use of the servient estate interfered with the plaintiff's intended use of the easement, the court should have rendered judgment in its favor on its complaint and granted its request for an injunction prohibiting interference by the defendant. We disagree with both parties' claims and, accordingly, affirm the judgment of the trial court.

The following procedural history and facts, as found by the trial court, are relevant to the parties' claims. The plaintiff is the owner of real property located at 170 Weston Street in Hartford, and the defendant is the owner of adjacent real property located at 145 West Service Road in Hartford. The properties are located in an area zoned for commercial or industrial use. When facing Weston Street, the back right corner of the plaintiff's property abuts the rear of the defendant's property. The portion of the plaintiff's property that abuts the defendant's property was formerly known as Lot 13.

In 1979, Gennaro Russo transferred his ownership of 145 West Service Road to Dalchard Warehouse, Inc. (Dalchard Warehouse), by deed, which provided in relevant part that 145 West Service Road was subject to a right-of-way in favor of what was then Lot 13 (right-of-way).[2] At the time of this transfer, Russo still owned

ing, as alternative grounds for affirmance" of the court's judgment on the plaintiff's complaint. In its appellate brief on the cross appeal, the defendant briefs, inter alia, these claims of error. Because we affirm the judgment of the trial court with respect to the plaintiff's complaint, we need not reach the defendant's alternative grounds for affirmance.

[2] Specifically, the 1979 deed provided that 145 West Service Road was "[s]ubject to a Right-of-Way in favor of that piece of real property designated Lot No. 13 on said map, said Right-of-Way being more particularly bounded and described as follows:

"NORTHERLY:	By Lot No. 14B, as shown on said map, 341.63 feet, more or less;
"EASTERLY:	By West Service Road, 25 feet;
"SOUTHERLY:	By the non-burdened portion of Lot No. 14A, 345 feet, more or less; and
"WESTERLY:	By Lot No. 13, as shown on said map, 25 feet, more or less.

the lots that would become 170 Weston Street as it exists today, namely, Lots 6 through 13 of an area known as the Fox Press Subdivision. In 1980, Russo's ownership of Lots 6 through 12 was transferred to Charter Oak Bank & Trust Company (Charter Oak) by way of foreclosure by sale, and, thereafter, Russo transferred his ownership of Lot 13 to Charter Oak by quitclaim deed. The combined transferred parcels eventually became known as 170 Weston Street. Consequently, Lot 13 no longer exists as a separate lot.

In April, 1998, Dalchard Warehouse quitclaimed its interest in 145 West Service Road to Bechard, LLC. In November, 2006, Belchard, LLC, transferred the property to the defendant by warranty deed, which provided in relevant part that 145 West Service Road was encumbered by "[a] Right-of-Way, 25 feet in width, as reserved in a deed dated August 29, 1979 and recorded in Volume 1723 at Page 277 of the Hartford Land Records."

In June, 2011, the plaintiff acquired 170 Weston Street. The deed transferring ownership of 170 Weston Street to the plaintiff specifically references the right-of-way, describing it as follows: "[T]he right to use a 25 foot right-of-way for the benefit of that portion of these premises previously known as Lot No. 13, for ingress and egress to West Service Road as reserved in a deed from Gennaro A. Russo, Debtor in Possession to Dalchard Warehouse, Inc. Dated August 29, 1979 and recorded in Volume 1723, Page 277 of the Hartford Land Records."

In August, 2011, the plaintiff entered into a three year lease agreement with Capitol Transportation, LLC (Capitol Transportation), pursuant to which Capitol

"Said Right-of-Way is for the purpose of providing ingress and egress for all purposes, to said Lot No. 13 and shall run with the land benefited and the land burdened regardless whether there is other access to Lot No. 13. Said Right-of-Way to be maintained by the owner or owners of said Lot No. 13."

Transportation was to use a portion of the plaintiff's property at 170 Weston Street as a school bus terminal and storage and transportation facility. Thereafter, approximately 135 school buses and/or vans, which were used to transport students enrolled in the Hartford public and magnet schools, were regularly parked on the plaintiff's property in an area that includes, but is not limited to, former Lot 13. At this time, the defendant operated and continued to operate an adult entertainment establishment and night club, known as the Mynx Cabaret, on its property at 145 West Service Road. The parking lot surrounding the Mynx Cabaret contained eighty-five parking spaces, including twenty-five to thirty of which were located in the right-of-way.

In September, 2011, the plaintiff commenced an action against the defendant, seeking a temporary and permanent injunction prohibiting and restraining the defendant from maintaining a parking lot on the right-of-way or from obstructing the plaintiff's right to pass over the right-of-way. See *Weston Street Hartford, LLC* v. *Zebra Realty, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-11-6025475-S (first action). The defendant filed a counterclaim, seeking, inter alia, a permanent injunction enjoining the plaintiff from asserting any right to use the right-of-way and a declaratory judgment with respect to the parties' rights to the right-of-way. See id.

On March 11, 2013, in the first action, the trial court rendered judgment, after a court trial, in favor of the defendant on the plaintiff's complaint and in favor of the plaintiff on the defendant's counterclaim. In its memorandum of decision, the court concluded that the plaintiff had established the existence of the right-of-way but had failed to prove that the defendant's actions or inactions were materially interfering with the plaintiff's use of the right-of-way because one particular utility pole, which was located in the public right-of-way, was obstructing the right-of way, and the plaintiff had

not established that the utility pole could be relocated. The court also concluded that the plaintiff's intended use would overburden the right-of-way because some of the buses that would be utilizing it would do so to travel to and from property not intended to be benefitted by the right-of-way, i.e., property other than former Lot 13, and, therefore, such use was not permitted. Additionally, the court rendered a declaratory judgment that the plaintiff was still the owner of the right-of-way and specified as follows: "The right-of-way shall run with the land benefitted, that being former Lot 13, and the land burdened, that being 145 West Service Road, whether there is other access to former Lot 13. The right-of-way to be maintained by the owner or owners of former Lot 13. The right-of-way may not be used to benefit any other property into which former Lot 13 was merged."[3]

Following the conclusion of the first action, the plaintiff began considering alternative uses for former Lot 13 involving the right-of-way. Between July and November, 2014, the plaintiff arranged for and paid over $60,000 to move three utility poles outside of the right-of-way, including the utility pole that was in the city of Hartford's (city) control. In March or April, 2015, the plaintiff notified the defendant that it was developing a new plan for former Lot 13.

In August, 2015, the plaintiff commenced the present action against the defendant. In its complaint, the plaintiff alleged, inter alia, that it was the owner of the right-of-way, that the defendant materially interfered and continues to materially interfere with the plaintiff's use of the right-of-way by maintaining a parking lot in the right-of-way and by failing to sign an application or a letter of authorization enabling the plaintiff to obtain a curb cut permit from the city, and that such interference has caused and will continue to cause irreparable

[3] The plaintiff did not appeal from the court's judgment in the first action.

injury to the plaintiff. The plaintiff sought the following relief: (1) a temporary and permanent injunction prohibiting and restraining the defendant from maintaining a parking lot within the right-of-way or from obstructing the plaintiff's right to use the right-of-way; (2) an order requiring the defendant to sign documentation that may be required to enable the plaintiff to obtain a curb cut; and (3) costs.

On November 20, 2015, the defendant filed an answer, special defenses, and a five count counterclaim. As part of its first special defense, the defendant alleged that the plaintiff's intended use will overburden and constitutes an impermissible misuse of the right-of-way. In its counterclaim, the defendant alleged, inter alia, that: it has a right to relocate the right-of-way (count one); it would be equitable to deny the plaintiff's request for injunctive relief and to enter injunctive relief in favor of the defendant, compelling the plaintiff to release the right-of-way upon its relocation by the defendant (count two); the defendant was not materially interfering with the plaintiff's use of the right-of-way (count three); the defendant has no duty to sign curb cut permit applications or otherwise authorize the plaintiff to make unnecessary alterations and/or modifications to the defendant's property to make use of the right-of-way (count four); and a permanent injunction should enter prohibiting the plaintiff from making unnecessary alterations and/or modifications to the defendant's property to access the right-of-way (count five). The defendant sought a variety of relief, most relevantly: (1) a declaratory judgment that it has the right to relocate the right-of-way on its property, at its own cost and expense, such that the relocated right-of-way is substantially equal in dimension, utility, and convenience to the plaintiff as the current right-of-way and that the relocated right-of-way would not impose any additional burden on the plaintiff; and (2) a permanent injunction ordering the

plaintiff to release the right-of-way upon its relocation by the defendant in the manner described previously.[4]

Meanwhile, in October, 2015, the plaintiff submitted a curb cut application to the city, which the city deemed unacceptable.[5] A curb cut was not necessary for the plaintiff to gain access to the right-of-way.[6] In November, 2015, with the assistance of a surveyor, the plaintiff began preparing a site plan for former Lot 13 upon which the plaintiff intended to construct a parking lot that would be accessed using the right-of-way.

In January, 2016, the defendant prepared two concept plans to relocate the right-of-way on its property. The defendant intended to reconfigure its parking area to maintain approximately the same number of parking spaces utilized by patrons while also providing the plaintiff with access across its property to former Lot 13. The plaintiff had no interest in either alternative, however, and would not consider any alternative to the right-of-way. The defendant did not establish that the city would approve these alternative concept plans.

[4] The defendant requested the following additional relief: a declaratory judgment that it has the right to use its property in any manner that does not unreasonably interfere with the plaintiff's use of the right-of-way, including using the area for parking subject to certain conditions; a declaratory judgment that the plaintiff has no right to make unnecessary alterations and/or modifications to the defendant's property to access the right-of-way, the plaintiff's intended alterations and/or modifications are unnecessary, and the defendant has no duty to sign curb cut permit applications or otherwise authorize the plaintiff to make unnecessary alterations and/or modifications to its property to access the right-of-way; a permanent injunction prohibiting the plaintiff from making unnecessary alterations and/or modifications to the defendant's property to access the right-of-way; costs; and such other relief deemed fair, just, and equitable by the court.

[5] The city returned the plaintiff's curb cut application and noted that it required the submittal of full A-2 surveys for the plaintiff's and the defendant's lots. The plaintiff submitted an A-2 survey, but the defendant did not. Thus, the city never reconsidered the plaintiff's curb cut application.

[6] A curb does not obstruct access from West Service Road to the right-of-way, and, according to the trial court, the area at issue in the curb cut application appears to be traversable.

On March 15, 2016, the plaintiff submitted a planning and zoning application to the city for approval of its site plan. According to the site plan, former Lot 13 would serve as a parking lot, containing seventy-nine parking spaces, and would be fenced off from the remainder of 170 Weston Street such that the only means of access to the parking lot would be by way of the right-of-way. The plaintiff's current tenants, Specialty Corporation, Inc. (Specialty),[7] and Hertz Corporation (Hertz), which operate a school bus depot and sell out of service rental cars, respectively, would use the parking lot as an accessory to their principal uses of 170 Weston Street. On June 20, 2016, the plaintiff submitted a revised site plan. Per the revised site plan, the plaintiff intended for the parking lot to be used for passenger vehicle parking for tenants, employees, and invitees of Specialty and Hertz, and as passenger vehicle parking for concert and sporting event attendees. On July 12, 2016, the city approved the revised site plan. The plaintiff did not establish that it obtained from the city a permit or license to utilize former Lot 13 as a parking lot for public use, however.

On April 18, 2017, following a court trial held on July 12 and 13, 2016, and the submission of posttrial briefs from both parties, the court issued a memorandum of decision. With respect to the plaintiff's complaint, the court rendered judgment in favor of the defendant, concluding, inter alia, that the plaintiff was not entitled to injunctive relief because it had failed to establish that the defendant's actions were causing imminent harm or currently interfering with the plaintiff's use of the

[7] Under the August 12, 2014 lease executed by the plaintiff and Specialty, Specialty had the full right to use and occupy former Lot 13. The trial court found that, pursuant to the terms of a February 29, 2016 amendment to that lease, however, "the plaintiff can require Specialty to remove its buses and vans from former lot 13 in exchange for Specialty having the right to utilize, for employee parking, a maximum of fifty of the [seventy-nine planned] parking spaces to be constructed."

right-of-way. With respect to the defendant's counterclaim, the court rendered judgment in favor of the plaintiff on counts one, two, and five, dismissed the third count, and, with respect to the fourth count, issued a declaratory judgment that, on the basis of the facts as they existed before the court, the defendant had no duty or obligation to assist the plaintiff in obtaining a curb cut permit.

On May 5, 2017, the defendant appealed from the court's judgment on the first and second counts of its counterclaim.[8] On May 11, 2017, the plaintiff filed a cross appeal from the court's judgment on its complaint. Additional facts and procedural history will be provided as necessary.

I

We first address the defendant's claim on appeal. The defendant argues that, in rendering judgment in favor of the plaintiff on the defendant's counterclaim, the trial court erred in concluding that *Alligood* v. *LaSaracina*, supra, 122 Conn. App. 473, was controlling precedent. Specifically, the defendant contends that *Alligood* should be limited to its facts and should not be broadly applied so as to preclude the relocation, as opposed to the modification, of any right-of-way by the owner of servient land without the consent of the owner of the dominant estate. In the alternative, the defendant contends that *Alligood* is inconsistent with controlling Connecticut Supreme Court precedent, which has relied on the Restatement (Third) of Property in Connecticut easement cases, and that § 4.8 (3) (c) of the Restatement (Third) of Property is more consistent with general principles of Connecticut easement law and public policy. We disagree.

Central to the defendant's claim is the question of whether a servient landowner must obtain consent from the owner of the dominant estate to relocate an easement on the servient estate. As this is a question of law,

[8] See footnote 1 of this opinion.

our review is plenary. See *Abrams* v. *PH Architects, LLC*, 183 Conn. App. 777, 788, 193 A.3d 1230, cert. denied, 330 Conn. 925, 194 A.3d 290 (2018) ("[i]t is axiomatic that matters of law are entitled to plenary review on appeal").

To answer this question, we first turn to *Alligood*. In *Alligood*, the defendants unilaterally altered a section of the plaintiffs' right-of-way across the defendants' property by eliminating the circular turnaround at the end of the right-of-way. *Alligood* v. *LaSaracina*, supra, 122 Conn. App. 475. On appeal, and in agreement with the plaintiffs, this court determined that the trial court applied the incorrect standard of law to the plaintiffs' request for injunctive relief and that the defendants' unilateral alteration of the location and dimensions of the right-of-way was improper. Id., 476. In so holding, we adopted and applied the general rule adhered to by a majority of jurisdictions, namely, that "once the location of an easement has been selected or fixed, it cannot be changed by either the landowner or the easement owner without the other's consent." (Internal quotation marks omitted.) Id.

Our adoption of the majority approach was not dependent upon any distinction between the relocation or modification of an easement. See id., 476–77 (collecting cases applying majority rule to easement modification and relocation). Rather, we adopted the majority approach, over that set forth in § 4.8 (3) (c) of the Restatement (Third) of Property, which provides: "Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not . . . (c) frustrate the purpose for which the easement was created." We reasoned: "[W]e believe that the attributes of the majority rule, namely, uniformity, stability, predictability and judicial economy, outweigh

any increased flexibility offered by the Restatement approach." *Alligood* v. *LaSaracina*, supra, 122 Conn. App. 478. Applying the majority rule to the factual circumstances of the case, we determined that the defendants' alteration of the plaintiffs' right-of-way was improper because "[t]he defendants did so *without the plaintiffs' consent*." (Emphasis added.) Id., 478–79. Accordingly, per our legal precedent, no meaningful difference exists between the unilateral modification of an easement, as in *Alligood*, and the unilateral relocation of an easement, as sought by the defendant in the present case; under the majority rule, either change is improper without consent from both the landowner and easement owner.[9]

Moreover, although the defendant contends that we should distinguish *Alligood* from the present case on the basis that *Alligood* involved the modification, rather than a relocation, of an easement—and, therefore, apply § 4.8 (3) (c) of the Restatement (Third) of Property instead of the majority rule—§ 4.8 (3) (c) does not support such distinction. As recited previously, § 4.8 (3) (c) of the Restatement (Third) of Property provides in relevant part: "Unless expressly denied by the terms of an easement . . . the owner of the servient estate is entitled to make reasonable changes in the *location or dimensions of an easement*, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not . . . (c) frustrate the purpose for which the easement was created." (Emphasis added.) As demonstrated by its express terms, § 4.8 (3) (c) does not distinguish

[9] The defendant argues that *Alligood* does not, and should not, prevent a servient landowner from *prospectively* obtaining court relief to compel the relocation of an easement over the unreasonable opposition of the easement holder. We disagree. If granted, such relief would be contradictory to the majority rule, which provides that the location of an easement cannot be changed without consent from both the landowner and the easement holder *once the location of an easement has been selected or fixed.*

between the relocation and modification of an easement.[10]

Likewise, the defendant's contention that *Alligood* is inconsistent with our Supreme Court precedent is unsupported, as the defendant points to no case in which our Supreme Court has adopted § 4.8 of the Restatement (Third) of Property or suggested that § 4.8 is a necessary corollary to sections upon which our Supreme Court *has* relied, namely, §§ 4.9,[11] 4.10,[12] and 8.3[13] of the Restatement (Third) of Property, which concern the use and enforcement of servitudes. Moreover, in *Alligood*, we expressly acknowledged the intended purpose of § 4.8 of the Restatement (Third) of Property,

[10] Furthermore, the defendant cites no authority, and we are aware of none, supporting the application of § 4.8 (3) (c) of the Restatement (Third) of Property in this manner.

[11] Section 4.9 of the Restatement (Third) of Property provides: "Except as limited by the terms of the servitude determined under § 4.1, the holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude."

[12] Section 4.10 of the Restatement (Third) of Property provides: "Except as limited by the terms of the servitude determined under § 4.1, the holder of an easement or profit as defined in § 1.2 is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. The manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude. Unless authorized by the terms of the servitude, the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment."

[13] Section 8.3 of the Restatement (Third) of Property provides: "(1) A servitude may be enforced by any appropriate remedy or combination of remedies, which may include declaratory judgment, compensatory damages, punitive damages, nominal damages, injunctions, restitution, and imposition of liens. Factors that may be considered in determining the availability and appropriate choice of remedy include the nature and purpose of the servitude, the conduct of the parties, the fairness of the servitude and the transaction that created it, and the costs and benefits of enforcement to the parties, to third parties, and to the public.

"(2) Except when failure to enforce servitudes in common-interest communities or general-plan developments provides the basis for modification or termination due to changed conditions under § 7.10, property owners or an association of property owners may enforce the servitudes against subsequent similar violations by the same or different parties unless, under the circumstances then prevailing, enforcement would be unreasonable or inequitable."

namely, "to permit development of the servient estate to the extent it can be accomplished without unduly interfering with the legitimate interests of the easement holder," while rejecting it in favor of the majority rule. (Internal quotation marks omitted.) *Alligood* v. *LaSaracina*, supra, 122 Conn. App. 477.

By arguing further that *Alligood* is inconsistent with the general principles of Connecticut easement law and public policy, the defendant essentially asks that we overrule *Alligood*. "[I]t is axiomatic that one panel of this court cannot overrule the precedent established by a previous panel's holding. . . . As we often have stated, this court's policy dictates that one panel should not, on its own, [overrule] the ruling of a previous panel. The [overruling] may be accomplished only if the appeal is heard en banc." (Internal quotation marks omitted.) *LM Ins. Corp.* v. *Connecticut Dismanteling, LLC*, 172 Conn. App. 622, 632–33, 161 A.3d 562 (2017); see also *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 417, 195 A.3d 664 (2018) ("[t]he doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it" [internal quotation marks omitted]).

In the present case, relying on the majority rule adopted in *Alligood*, the trial court rejected the first and second counts of the defendant's counterclaim, in which the defendant sought both a declaratory judgment that it has the right to relocate the right-of-way unilaterally and an injunction requiring the plaintiff to release its rights in the existing right-of-way if the relocated right-of-way were substantially equal in dimension, utility, and convenience. In accordance with our adoption of the majority approach in *Alligood*, and in light of our foregoing discussion, we decline to limit *Alligood* in the manner requested by the defendant, and we conclude that the trial court properly rendered judgment in favor of the plaintiff on counts one and two of the defendant's counterclaim.

II

We turn now to the plaintiff's cross appeal. The plaintiff claims that, upon finding that the defendant's use of the servient estate interfered with the plaintiff's intended use of the easement, the trial court should have rendered judgment in the plaintiff's favor on its complaint and granted its request for an injunction prohibiting additional interference by the defendant. In support of its claim, the plaintiff argues that the court erred by holding the plaintiff to an incorrect and more burdensome standard with respect to whether it would suffer irreparable harm to its easement rights. The plaintiff argues in the alternative that the court abused its discretion when it denied its request for injunctive relief. We disagree.

We are mindful of the following standard of review. "A prayer for injunctive relief is addressed to the sound discretion of the court and the court's ruling can be reviewed only for the purpose of determining whether the decision was based on an erroneous statement of law or an abuse of discretion. . . . Therefore, unless the trial court has abused its discretion . . . the trial court's decision must stand. . . . How a court balances the equities is discretionary but if, in balancing those equities, a trial court draws conclusions of law, our review is plenary." (Citation omitted; internal quotation marks omitted.) *Commissioner of Correction* v. *Coleman*, 303 Conn. 800, 810, 38 A.3d 84 (2012), cert. denied sub nom. *Coleman* v. *Arnone*, 568 U.S. 1235, 133 S. Ct. 1593, 185 L. Ed. 2d 589 (2013).

A

First, we address the plaintiff's argument that the court applied the incorrect legal standard when determining whether the plaintiff was entitled to injunctive relief. Specifically, the plaintiff argues that the court erroneously relied upon *Karls* v. *Alexandra Realty Corp.*, 179 Conn. 390, 426 A.2d 784 (1980), to require that it demonstrate an "actual disturbance" of its easement

right in order to establish irreparable harm, even though Connecticut law requires only that the holder of an easement right demonstrate the existence of a substantial probability of interference with such right. Therefore, according to the plaintiff, it demonstrated irreparable harm by virtue of the court's finding that parking in the right-of-way by the defendant's employees and customers will interfere with the plaintiff's intended use of the right-of-way.

The following legal principles and precedent are relevant to the plaintiff's argument. It is well established that "[a] party seeking injunctive relief must demonstrate that: (1) it has no adequate remedy at law; (2) it will suffer irreparable harm absent an injunction; (3) it will likely prevail on the merits; and (4) the balance of equities tips in its favor." (Internal quotation marks omitted.) *Wellswood Columbia, LLC* v. *Hebron*, 327 Conn. 53, 59 n.5, 171 A.3d 409 (2017). "[T]he owner of [an] easement is entitled to [injunctive] relief only if he can show that he will be disturbed or obstructed in the exercise of his right to use it." (Internal quotation marks omitted.) *Welles* v. *Lichaj*, 136 Conn. App. 347, 354, 46 A.3d 246, cert. denied, 306 Conn. 904, 52 A.3d 730 (2012).

In *Karls*, the trial court issued an injunction restraining the defendant[14] from using a fourteen foot wide right-of-way, which provided access to the plaintiffs' and defendant's properties, after concluding, inter alia, that the construction of the defendant's house violated certain zoning ordinances. *Karls* v. *Alexandra Realty Corp.*, supra, 179 Conn. 393–94. "The plaintiffs' central complaint [was] that the right-of-way [was] inadequate for use by six families and that such an excessive use would result in irreparable injury to them." Id., 395. On appeal, our Supreme Court considered, inter alia, whether the injunction issued by the trial court was improper in light of the facts found. Id., 399.

[14] The plaintiffs filed suit against multiple defendants in *Karls*, but we refer only to the defendant homeowner for ease of discussion.

In making its determination, our Supreme Court was guided by several key legal principles governing the issuance of injunctions: "The issuance of an injunction is the exercise of an extraordinary power which rests within the sound discretion of the court, and the justiciable interest which entitles one to seek redress in an action for injunctive relief is at least one founded on the imminence of substantial and irreparable injury." (Internal quotation marks omitted.) Id., 401. In other words, "[t]he extraordinary nature of injunctive relief requires that the harm complained of is occurring or will occur if the injunction is not granted. Although an absolute certainty is not required, it must appear that there is a substantial probability that but for the issuance of the injunction, the party seeking it will suffer irreparable harm." Id., 402. "The plaintiff seeking injunctive relief bears the burden of proving facts which will establish irreparable harm as a result of that violation." Id., 401.

In consideration of the foregoing legal principles and the facts found by the trial court, our Supreme Court in *Karls* concluded that it could not agree with the court's conclusion that the plaintiffs had satisfied their burden of proving the substantial likelihood that irreparable harm would result from the defendant's violation. Id., 401–402. Our Supreme Court reasoned: "[A]lthough the plaintiffs have shown that they may *possibly* suffer irreparable harm, i.e., emergency vehicles blocked by a car stuck in the right-of-way, they have failed to demonstrate that such harm is *imminent* or that it *will necessarily be caused by* the defendant's violation of the zoning regulations. In the absence of such a showing, an injunction cannot be issued." (Emphasis added.) Id. According to our Supreme Court, the harm complained of was not imminent in light of the trial court's finding that the alleged harm was only a possibility and the

fact that the injunction would not become effective until one year after it was issued. Id., 403.

In the present case, the trial court concluded, inter alia, that "parking in the right-of-way by the defendant's employees and customers will interfere with the plaintiff's reasonably intended use of the right-of-way, at least during Specialty's hours of operation," but determined that the plaintiff did not establish irreparable harm. The court explained: "In this case, it is undisputed that the plaintiff's rights have not yet been disturbed. Specialty's buses are still parked on former Lot 13. The plaintiff has not constructed its planned parking lot. Nor is there any evidence that Specialty will take advantage of the fifty parking spaces [that] the plaintiff has committed to provide under the lease amendment. The position of the plaintiff here is similar to that of the plaintiffs in *Karls*. While it is entirely *possible* that its access to the right-of-way may be impaired, such impairment is *not imminent*. In fact, it is contingent on a number of events that have yet to occur. In addition, the court has no way of knowing if the defendant will still be operating in the manner it has been if and when the planned parking lot is built and is being used by Specialty's employees. For these reasons, the plaintiff is not entitled to the injunctive relief it has requested."[15] (Emphasis added.)

[15] In the preceding paragraph of its memorandum of decision, the trial court stated: "The court agrees with the defendant that a claim of interference with an easement or right-of-way, as opposed to breach of a restrictive covenant, requires proof of irreparable harm, or, at the very least, that the holder of the easement's rights have been actually obstructed or disturbed. In fact, even in the cases relied upon by the plaintiff, the court held that injunctive relief was warranted because the defendant had in fact disturbed the plaintiff's rights." In light of this particular language, the plaintiff argues in part that the court incorrectly concluded that, in order to establish irreparable harm, the plaintiff must prove that "the holder of the easement's rights have been actually obstructed or disturbed." (Internal quotation marks omitted.) We disagree. Despite the court's inclusion of the clause "at the very least," which suggests in isolation that the court believed that the plaintiff must meet a higher legal standard than our precedent requires, the

The foregoing explanation demonstrates that the court correctly applied *Karls* to the factual circumstances of the present case. Essentially, relying on *Karls*, the trial court concluded that the plaintiff had failed to demonstrate that the alleged harm (i.e., the plaintiff's inability to use of the right-of-way because of the defendant's use of its parking lot within the right-of-way) would necessarily result but for the issuance of the requested injunction; not only was the parking lot not yet constructed on former Lot 13, it was unclear to the court whether Specialty would ever use any of the parking spaces afforded to it under the amended lease; see footnote 7 of this opinion; or whether the defendant would be operating its business in the same manner once the parking lot was actually constructed. Accordingly, we conclude that the trial court applied the correct standard of law when determining whether the plaintiff was entitled to injunctive relief.[16]

court goes on to correctly apply *Karls* to the factual circumstances of the present case.

[16] In light of *Karls*, the plaintiff argues that interference with an easement in and of itself is sufficient to demonstrate the existence of a substantial probability of harm to an easement holder's rights, and it cites multiple cases in support, namely, *Leabo* v. *Leninski*, 182 Conn. 611, 438 A.2d 1153 (1981), *Gerald Park Improvement Assn.* v. *Bini*, 138 Conn. 232, 83 A.2d 195 (1951), *New London* v. *Perkins*, 87 Conn. 229, 87 A. 724 (1913), *Dewire* v. *Hanley*, 79 Conn. 454, 65 A. 573 (1907), *Schwartz* v. *Murphy*, 74 Conn. App. 286, 812 A.2d 87 (2002), cert. denied, 263 Conn. 908, 819 A.2d 841 (2003), cert. denied, 546 U.S. 820, 26 S. Ct. 352, 163 L. Ed. 2d 61 (2005), and *Simonds* v. *Shaw*, 44 Conn. App. 683, 691 A.2d 1102 (1997). We disagree. In each of these cases, there was no real question as to whether the plaintiffs would ever actually use the easements or whether the easements were or would be obstructed by the defendants; rather, the plaintiffs had already been using or attempting to use the easements in the manner intended and were prevented from doing so, or it was highly likely that they would be prevented from doing so, by the defendants' interference. By contrast, in the present case, the trial court was not convinced of the substantial probability that *but for the injunction* the plaintiff would be prevented from using the right-of-way in the manner intended because, although the court found that the parking in the right-of-way by the defendant's employees and customers *will interfere* with the plaintiff's reasonably intended use of the right-of-way, such harm was *not imminent* as the plaintiff had not yet

B

We next address the plaintiff's alternative argument that the trial court abused its discretion when it denied the plaintiff's request for injunctive relief. The plaintiff argues that a fair balancing of the equities supports the conclusion that an injunction should have been issued by the court in the present case.

The following legal principles are relevant to the plaintiff's argument. "The granting of an injunction rests within the sound discretion of the trial court and [i]n exercising its discretion, the court . . . may consider and balance the injury complained of with that which will result from interference by injunction. . . . The relief granted must be compatible with the equities of the case. . . . The action of the trial court will not be disturbed unless it constitutes an abuse of discretion." (Internal quotation marks omitted.) *Waterbury* v. *Phoenix Soil, LLC*, 128 Conn. App. 619, 627–28, 20 A.3d 1 (2011); see also *Baruno* v. *Slane*, 151 Conn. App. 386, 397 n.9, 94 A.3d 1230 ("[T]he granting of injunctive relief, which must be compatible with the equities of the case, rests within the trial court's sound discretion. . . . Those equities should take into account the gravity and wilfulness of the violation, as well as the potential harm to the defendants." [Emphasis omitted; internal quotation marks omitted.]), cert. denied, 314 Conn. 920, 100 A.3d 851 (2014). "In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done." (Internal quotation marks

constructed the planned parking lot on former Lot 13, there was no evidence before the court to suggest that Specialty would use the parking spaces in said parking lot, and the court "ha[d] no way of knowing if the defendant [would] still be operating in the manner it [had] been if and when the planned parking lot [was] built and [was] being used by Specialty's employees."

omitted.) *Wethersfield* v. *PR Arrow, LLC*, 187 Conn. App. 604, 645, 203 A.3d 645, cert. denied, 331 Conn. 907, 202 A.3d 1022 (2019).

In the present case, as described previously, the court initially determined that "parking in the right-of-way by the defendant's employees and customers will interfere with the plaintiff's reasonably intended use of the right-of-way, at least during Specialty's hours of operation." In making this determination, the court acknowledged, inter alia, that "the plaintiff's intended use of former Lot 13 as a parking lot [was] far from theoretical"—due to the plaintiff's removal of the three utility poles obstructing the right-of-way, the plaintiff's submission of detailed site plans to the city, the city's approval of the revised site plan, and the creation of the amended lease with Specialty—and, "[t]hus, it [was] reasonably expected that the plaintiff *may someday* make use of the former Lot 13 as a parking lot for Specialty's employees and will use the right-of-way for access to that lot." (Emphasis added.) Thereafter, the court found that it was possible that the plaintiff's access to the right-of-way may be impaired but concluded that such impairment was not imminent because "it [was] contingent on a number of events that [had] yet to occur," such as Specialty's use of fifty new parking spaces that it was provided under the amended lease agreement.

The foregoing discussion by the trial court demonstrates that it fully acknowledged that parking in the right-of-way would interfere with the plaintiff's access to the right-of-way but also recognized that this harm was not likely to befall the plaintiff but for the issuance of the requested injunction. Under these circumstances, and in light of the extraordinary nature of injunctive relief, we cannot say that the court abused its discretion when it denied the plaintiff's request for an injunction.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JEFFREY ORLANDO CREWE
(AC 40882)

Keller, Moll and Beach, Js.

Syllabus

Convicted, after a jury trial, of the crime of possession of a narcotic substance, the defendant appealed to this court, claiming that the evidence was insufficient to support his conviction. The defendant's conviction stemmed from an incident in which two police officers, C and R, while patrolling an area known for drug use, located the defendant and two other individuals, Y and M, inside of a van that was parked behind bushes. After C observed two bundles of heroin on the center console next to the defendant's left leg, the police conducted a search of the van, which revealed the presence of heroin. Heroin was also found on the person of M. In prosecuting the case, the state pursued the theory that although the defendant did not physically possess narcotic substances on his person at the time of the arrest, he constructively possessed at least some of the narcotics found in the van. *Held* that there was sufficient evidence for the jury to draw a reasonable inference that the defendant constructively possessed at least some of the narcotics to support the defendant's conviction, as the jury reasonably could have inferred, on the basis of the totality of the circumstances, that the defendant knew of the presence of the narcotics in the van and exercised dominion and control over the narcotics: C testified that the van was parked in the rear of an otherwise vacant parking lot in broad daylight and was concealed by a cluster of bushes so that it was not visible from the street, the area was known for traffic in narcotics, the location of the van raised C's suspicions, the defendant quickly reached behind the driver's seat as C approached the van, and a subsequent search of the vehicle revealed that a large bag containing small rubber bands and a white powder that later tested positive for heroin was present where the defendant had reached, which supported the inference that the defendant hastily attempted to conceal the substance he knew was illegal and exercised dominion and control over it; moreover, other evidence found at the scene, as well as the wealth of evidence seized by the officers at the time of the arrest and the testimony of the witnesses, further provided a sufficient basis for the jury reasonably to find that the defendant knew that heroin was in the van and that he exercised dominion and control over at least a portion of it.

Argued March 7—officially released October 15, 2019

Procedural History

Substitute information charging the defendant with the crimes of possession of a narcotic substance, possession of a narcotic substance with intent to sell, and

conspiracy to possess a narcotic substance with the intent to sell, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Klatt*, *J.*; verdict of guilty of possession of a narcotic substance; thereafter, the court denied the motion filed by the defendant for a judgment of acquittal; judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Timothy H. Everett, assigned counsel, with whom were *Adam Antar*, certified legal intern, and, on the brief, *Karen Mitchell*, certified legal intern, *Julie Moscato*, certified legal intern, and *Uriel Lloyd*, certified legal intern, for the appellant (defendant).

Lisa A. Riggione, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Robert F. Mullins*, assistant state's attorney, for the appellee (state).

Opinion

BEACH, J. The defendant, Jeffrey Orlando Crewe, appeals from the judgment of conviction, rendered after a jury trial, of possession of a narcotic substance in violation of General Statutes § 21a-279 (a). The defendant's sole claim on appeal is that the evidence presented at trial was insufficient to support his conviction. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On August 18, 2014, Hamden Police Officers Greg Curran and Enrique Rivera were patrolling by bicycle in the area of Dixwell Avenue and the Farmington Canal Trail (trail). The officers were assigned to this specific area in response to reports of bicycle thefts and drug use by teens and young adults. At approximately 6:12 p.m., Curran and Rivera observed a young man walk across the trail in a westerly direction toward Dixwell Avenue and cut through a hole in a six-foot fence that

separated the trail from the adjacent property. Rivera, who was familiar with the cut in the fence, pointed it out to Curran because he thought knowledge of the hole might be useful in a future pursuit situation.

The officers proceeded through the hole in the fence and entered an adjacent parking lot situated behind several businesses. Upon approaching the parking lot, Curran noticed a van parked behind bushes that concealed the van's presence from passersby on Dixwell Avenue. Curran testified that "[i]t was odd for them to be sitting there so [he] went over to check on them." As Curran approached the van he could see that there were two people in the front seats.[1] As Curran approached the van, the front seat passenger, later identified as the defendant, quickly reached down behind the driver's seat. Curran, for safety concerns, asked the defendant what he was reaching for. In response, the defendant held up a used car magazine.

As Curran was talking to the defendant, he noticed a third individual, later identified as JonMichael Young, in the back seat. At that point, Young reached down toward his seat, but Curran asked him to place his hands on the headrest in front of him. He complied. Curran questioned the driver, later identified as Lachee McGee, as to why they were parked in that area. She said that they were looking for frogs in a nearby puddle. As Curran was talking to the occupants, he observed two bundles of heroin on the center console next to the defendant's left leg.[2] At this point, Rivera approached the van on bicycle and Curran said "104" to him, which was a police signal indicating that drugs were present.

[1] Curran testified that the weather was bright.

[2] Curran had received special training on how narcotics are packaged and how to identify narcotics. Curran testified that the bundles of heroin he observed on the center console of the van were packed in pink glassine bags.

Curran asked the defendant to exit the vehicle and stand near Rivera, and he complied. As the defendant exited the vehicle, Curran stood at the driver's window. He testified that McGee looked down at the center console and, seeing the bundles of heroin, picked up the used car magazine that the defendant had displayed and placed it on top of the bundles of heroin.[3] At this point, Curran asked McGee to turn over the keys to the vehicle. Curran then was able to take possession of the drugs that he had seen on the center console.[4] The remaining occupants of the van were removed from the vehicle and were detained by other officers who had arrived on the scene.[5] The police searched the defendant and found nothing of note on his person.

When McGee exited the van and was patted down, police observed a small pink glassine bag sticking out of the front of her pants. The bag resembled the bags found on the center console. When McGee was asked if she had any other drugs in her possession, she answered positively and said that she had shoved drugs down the front of her pants. A female officer who had been called to the scene retrieved the drugs from the front of McGee's pants. The officers seized nine bags of narcotics from the person of McGee. Curran continued to search the vehicle and discovered several other bags of heroin on top of the center console, as well as a bottle of a substance known as Super Mannitol.[6] In total, twenty-five pink glassine bags were retrieved from the center console. A search of the back seat revealed

[3] Curran further testified that McGee appeared very nervous when Curran asked the defendant to exit the van.

[4] While Curran was taking possession of the drugs on the center console, his finger hit one of the bundles and knocked it to the passenger side floor. He was able to retrieve this bundle upon a subsequent search of the car.

[5] Because they were on bicycles and did not have any way to secure the detained individuals, Curran and Rivera requested backup.

[6] Curran testified that Super Mannitol is commonly used as a mixing agent that is added to increase the volume of heroin.

a white dinner plate, two metal strainers, sixty pink glassine bags each filled with a substance that later field-tested positive as heroin, and a Ziploc type of bag with a large amount of the same substance. Rivera also found bags stuffed between the seats in the rear passenger area of the van where Young had been sitting. On the basis of his training and experience, Curran believed that he had interrupted the occupants while they were mixing the heroin with the Super Mannitol in order to package the narcotics for sale.

The police seized ninety-four small bags and one larger bag, all containing heroin. At trial, the seized evidence was introduced as five exhibits as follows: (1) twenty-five pink glassine bags containing powder that tested positive for heroin and Super Mannitol and weighed 1.09 grams; (2) sixty pink glassine bags that tested positive for heroin and weighed 2.415 grams and contained Super Mannitol; (3) a Ziploc bag containing powder that tested positive for heroin and weighed 1.892 grams; (4) a white bottle containing Super Mannitol, a mixing agent, which contained no controlled substance; and (5) nine pink glassine bags containing powder that tested positive for heroin and weighed .399 grams.

The defendant was charged with possession of a narcotic substance in violation of § 21a-279 (a), possession of a narcotic substance with the intent to sell in violation of General Statutes § 21a-277 (a), and conspiracy to possess a narcotic substance with the intent to sell in violation of General Statutes §§ 53a-48 and 21a-277 (a). A jury convicted the defendant of possession of a narcotic substance and acquitted him of the remaining two counts. The court imposed a sentence of seven years of incarceration, execution suspended, and three years of probation.

On appeal, the defendant claims that the evidence at trial was insufficient to sustain his conviction of possession of a narcotic substance on the theory of

nonexclusive constructive possession. The state argues that there was ample evidence that the defendant knew the character of the narcotic substances and exercised dominion and control over at least some of the narcotics in the vehicle. We agree with the state.

"The standard of review employed in a sufficiency of the evidence claim is well settled. [W]e 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. . . . This court cannot substitute its own judgment for that of the [finder of fact] if there is sufficient evidence to support the [finder of fact's] verdict." (Internal quotation marks omitted.) *State* v. *Andriulaitis*, 169 Conn. App. 286, 292, 150 A.3d 720 (2016).

Section 21a-279 (a) (1) provides: "Any person who possesses or has under such person's control any quantity of any controlled substance, except less than one-half ounce of a cannabis-type substance and except as authorized in this chapter, shall be guilty of a class A misdemeanor."

"[T]he jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all evidence proves the defendant guilty of all elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact . . . but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [jury] is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [jury] may draw whatever inferences from the evidence or facts established by the evidence [that] it deems to be reasonable and logical. . . .

"Finally, on appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Citation omitted; internal quotation marks omitted.) *State* v. *Leniart*, 166 Conn. App. 142, 170, 140 A.3d 1026 (2016), rev'd on other grounds, 333 Conn. 88, A.3d (2019).

In the prosecution of the present case, the state pursued the theory that, although the defendant did not physically possess narcotics on his person at the time of the arrest, he constructively possessed at least some of the narcotics in the van. "[T]o prove illegal possession of a narcotic substance, it is necessary to establish that the defendant knew the character of the substance, knew of its presence and exercised dominion and control over it. . . . Where . . . the contraband is not found on the defendant's person, the state must proceed on the alternate theory of constructive possession, that is, possession without direct physical contact. . . . Where the defendant is not in exclusive possession of the [place] where the narcotics are found, it may not be inferred that [the defendant] knew of the presence of the narcotics and had control over them, unless there are other incriminating statements or circumstances tending to buttress such an inference. . . . [T]he state

had to prove that the defendant, and not some other person, possessed a substance that was of narcotic character with knowledge both of its narcotic character and the fact that he possessed it." (Citation omitted; internal quotation omitted.) *State* v. *Walcott*, 184 Conn. App. 863, 873, 196 A.3d 379 (2018).

"[I]t is a function of the jury to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . Because [t]he only kind of an inference recognized by the law is a reasonable one . . . any such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and founded upon the evidence. . . . However, [t]he line between permissible inference and impermissible speculation is not always easy to discern. When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation. When that point is reached is, frankly, a matter of judgment. . . .

"[P]roof of a material fact by inference from the circumstantial evidence need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . Thus, in determining whether the evidence supports a particular inference, we ask whether the inference is so unreasonable as to be unjustifiable. . . .

In other words, the inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference. Equally well established is our holding that a jury may draw factual inferences on the basis of already inferred facts. . . . Moreover, [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 innocence." (Internal quotation marks omitted.) *State* v. *Niemeyer*, 258 Conn. 510, 518–19, 782 A.2d 658 (2001).

Additionally, "[w]e do not sit as the 'seventh juror' when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict of guilt beyond a reasonable doubt. Moreover, [i]n reviewing the jury verdict, it is well to remember that [j]urors are not expected to lay aside matters of common knowledge or their own observation and experience of the affairs of life, but, on the contrary, to apply them to the evidence or facts in hand, to the end that their action may be intelligent and their conclusions correct." (Citation omitted; internal quotation marks omitted.) *State* v. *Ford*, 230 Conn. 686, 693, 646 A.2d 147 (1994).

In the present case, there was sufficient evidence to support the inference that the defendant constructively possessed narcotics. Curran testified that the van was parked in the rear of an otherwise vacant parking lot in broad daylight and was concealed by a cluster of bushes so that it was not visible from the street. The area was known for traffic in narcotics. The location of the van raised Curran's suspicions, as he thought it was unusual for a vehicle to be parked in such a manner. The secluded and screened location could have been selected to avoid detection. Additionally, as Curran

approached the vehicle, the defendant quickly reached behind the driver's seat. A subsequent search of the vehicle revealed that a large Ziploc bag containing small rubber bands and a white powder that later tested positive for heroin was present where the defendant had reached.[7] The evidence seized from behind the driver's seat further supported the inference that the defendant hastily attempted to conceal the substance he knew was illegal and exercised dominion and control over it.

Other evidence found at the scene further supported an inference that the defendant exercised dominion and control over at least some of the narcotics. Located directly next to the defendant near the center console of the vehicle were two bundles of heroin, several individual bags of heroin, and a bottle of Super Mannitol. Additionally, a subsequent search of the back seat of the vehicle yielded a white dinner plate, two metal strainers, sixty pink glassine bags filled with heroin, and a larger Ziploc type of bag that also contained heroin. These items customarily were used in the packaging of heroin. In total, ninety-four individual small glassine bags were found, along with the larger Ziploc type of bag. Curran testified that he believed that he had interrupted the occupants of the van while they were using the sifters in the process of mixing the heroin with the Super Mannitol to package the narcotics for sale.

We conclude that there was sufficient evidence for the jury to draw a reasonable inference that the defendant constructively possessed at least some of the narcotics found in the van. As noted, this court gives deference to inferences made by a jury, so long as those inferences are not so unreasonable as to be unjustifiable. The wealth of evidence seized by the officers at the time of arrest and the testimony of the witnesses

[7] Rivera found a white dinner plate and two metal sifters behind the driver's seat.

provided a sufficient basis for the jury reasonably to find that the defendant knew that heroin was in the van and that he exercised control over at least a portion of it. Although some factors, viewed in a vacuum, might militate against a finding of constructive possession, the jury reasonably could have inferred on the basis of the totality of the circumstances that the defendant knew of the presence of the narcotics in the van and that he exercised dominion and control over narcotics.[8]

The defendant relies primarily on *State* v. *Fermaint*, 91 Conn. App. 650, 881 A.2d 539, cert. denied, 276 Conn. 922, 888 A.2d 90 (2005), to support his contention that the evidence presented at trial was insufficient to establish that he was in constructive possession of the heroin found in the van at the time of his arrest. In *Fermaint*, the police received a tip from a confidential informant that the owner of a vehicle possessed crack cocaine and that she was accompanied by two males, one of whom the informant identified as "Hector." Id., 652. After locating and stopping the vehicle, officers observed the occupants of the vehicle engaging in furtive movements, including the defendant's bending from the back seat toward the front seat passenger. Id. As one officer approached, the front seat passenger was observed putting something in her pants. Id. An officer observed several crumbs of a rock like substance, which later tested positive for cocaine, on the back seat next to the defendant. Id., 652–53. The officer testified that it was possible that the defendant could have sat in the back seat without noticing the crumbs. Id., 653 n.3. A green leafy substance, later found to be marijuana, was found in the front carpet area. Id., 653. A plastic bag containing a large rock like substance,

[8] We also note that the other two occupants of the van likewise attempted hastily to conceal narcotics from the officers. As stated in *United States* v. *Batista-Polanco*, 927 F.2d 14, 18 (1st Cir. 1991), "the factfinder may fairly infer . . . that it runs counter to human experience to suppose that criminal conspirators would welcome innocent nonparticipants as witnesses to their crimes."

which tested positive for cocaine, and $120 were found on the person of the front passenger. Id. An address book and $2 were found on the person of the defendant, but no drugs. Id., 653. This court reversed the trial court's judgment revoking the defendant's probation. Id., 650. It held that the minimal nexus between the defendant and the drugs, along with the perhaps ambiguous movements observed by the officers, was insufficient to establish constructive possession of a narcotic substance. Id., 662–63.

Review of a claim of insufficient evidence is necessarily fact specific and, as stated previously, the evaluation of the strength of inferences involves an exercise of judgment. The facts of the present case are different from those of *Fermaint*. We previously noted that "[w]here the defendant is not in exclusive possession of the [place] where the narcotics are found, it may not be inferred that [the defendant] knew of the presence of the narcotics and had control over them, unless there are other incriminating statements or circumstances tending to buttress such an inference." (Internal quotation marks omitted.) *State* v. *Walcott*, supra, 184 Conn. App. 873. Sufficient incriminating circumstances exist in the present case. As in *Fermaint*, the defendant here moved furtively upon being approached by police, but there was considerably more evidence that he was aware of the presence of heroin. Unlike in *Fermaint*, the defendant was found in a vehicle that was parked in an unusual location in an area known for drug traffic and was concealed from the street by bushes. Further, the amount of narcotics located next to the defendant in *Fermaint* appeared to have been trace amounts that easily could have been overlooked; here, two bundles of heroin, each containing ten individual baggies, were found immediately next to the defendant's leg. A bottle of Super Mannitol was located next to the defendant. Other items commonly used in the packaging of heroin were found in the van.

Viewing the evidence in its totality and in the light most favorable to sustaining the jury's verdict, we conclude that there was sufficient evidence for the jury reasonably to have drawn the inference that the defendant constructively possessed heroin.

The judgment is affirmed.

In this opinion the other judges concurred.

LAWRENCE S. JEZOUIT *v.* DANNEL P. MALLOY ET AL.
(AC 40839)

DiPentima, C. J., and Moll and Beach, Js.

Syllabus

The plaintiff brought this action against the defendant state officials, officers and employees, claiming that telephone calls he had made to them were unlawfully recorded because they failed to obtain his consent or to provide him with notice in violation of statute (§ 52-570d [a]) before recording the calls. The plaintiff sought, inter alia, to permanently enjoin the defendants and all state officials and employees from unlawfully recording telephonic communications in the conduct of state business. The trial court granted the defendants' motion to dismiss and rendered judgment thereon, concluding that § 52-570d did not waive sovereign immunity by force of necessary implication, and that the plaintiff's claim for injunctive relief failed because he did not make substantial allegations of wrongful conduct on the part of the defendants to promote an illegal purpose in excess of their statutory authority. On the plaintiff's appeal to this court, *held*:

1. The trial court properly granted the defendants' motion to dismiss the plaintiff's complaint on the ground that the defendants were immune from suit pursuant to the doctrine of sovereign immunity:

   a. The plaintiff could not prevail on his claim that because § 52-570d authorizes an aggrieved person to bring an action in the Superior Court, as does similar language in the statute (§ 17a-550) that provides remedies for violations of the patients' bill of rights, the only possible interpretation of § 52-570d is that it impliedly waives sovereign immunity: unlike § 17a-550, which makes no distinction between patients of private and public mental health facilities, § 52-570d does not implicate a compelling public policy reason to provide those who have their telephonic communications recorded in an illegal fashion by the government the same civil remedy as those who are recorded illegally by private parties and, thus, no language in § 52-570d required an interpretation that it impliedly

waives sovereign immunity; moreover, related statutes that evidenced the remedial nature of § 17a-550 illuminated the breadth of the legislative concern for the fair treatment of mental patients, and a statute's instruction as to what an aggrieved person must file and where to file it did not compel the conclusion that such a statute waives sovereign immunity. b. There was no merit to the plaintiff's assertion that because § 52-570d (b) exempts from liability certain state officials, it waives sovereign immunity from suit by necessary implication for those state officials not so designated, such as the defendants: the implicit waiver of sovereign immunity from liability in § 52-570d (a) and (b) did not implicitly waive sovereign immunity from suit, and the exemption of certain state officials in § 52-570d (b) from the provisions of § 52-570d (a) did not require the conclusion that the legislature intended to waive sovereign immunity from suit with respect to those claims, as a statute logically can be interpreted as waiving sovereign immunity from liability with respect to certain state officials but not waiving sovereign immunity from suit with respect to claims against those officials; moreover, where the state waives sovereign immunity from liability but not its immunity from suit, an aggrieved person in such circumstances is not without recourse and may seek recovery against the state by filing a claim with the Claims Commissioner pursuant to statute (§ 4-141 et seq.).

2. The plaintiff could not prevail on his claim that because he sought declaratory and injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of an officer's statutory authority, the trial court improperly dismissed his complaint by failing to apply the exception to sovereign immunity for claims of declaratory and injunctive relief, as the plaintiff failed to alleged a cognizable claim under that exception to sovereign immunity; the trial court properly determined that the complaint did not set forth substantial allegations of wrongful conduct by the defendants to promote an illegal purpose in excess of their statutory authority, as the plaintiff's interpretation of § 52-570d would impose civil liability on state officials for conduct as innocuous as having an answering system that records voice mails, and the plaintiff failed to allege that the defendants recorded his telephonic communications to promote an illegal purpose and did not allege any purpose behind the recording of his telephonic communications in a manner proscribed by § 52-570d (a).

Argued May 22—officially released October 15, 2019

Procedural History

Action, inter alia, to enjoin the defendants from recording certain telephonic communications in the course of their official business, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Elgo*, *J.*, granted the defendants' motion to dismiss; thereafter, the court granted

the plaintiff's motion for reargument and vacated in part its order granting of the defendants' motion to dismiss; subsequently, the court granted the defendants' motion for reconsideration and rendered judgment dismissing the action, from which the plaintiff appealed to this court. *Affirmed.*

David V. DeRosa, with whom, on the brief, was *Lawrence S. Jezouit*, for the appellant (plaintiff).

Maura Murphy Osborne, assistant attorney general, with whom, on the brief was *George Jepsen*, former attorney general, for the appellees (defendants).

Opinion

DiPENTIMA, C. J. The plaintiff, Lawrence S. Jezouit, appeals from the judgment of the trial court dismissing his complaint on the basis of sovereign immunity. The plaintiff argues that the court improperly dismissed his complaint because (1) he brought his claim pursuant to General Statutes § 52-570d, which he contends waives sovereign immunity by force of necessary implication, and (2) he seeks declaratory and injunctive relief in accordance with a recognized exception to sovereign immunity. We disagree and, thus, affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. In his complaint, the plaintiff alleged that, on May 26, 2010, he sought to record a telephone conversation that he had with an agent of the Internal Revenue Service (IRS). When the plaintiff disclosed to the IRS agent that he was recording their conversation, the agent informed him "that she would cease further discussion and would not continue so long as the call was being recorded." The plaintiff alleged that he believed that it was "unfair" that he could not record the conversation in light of the fact that it was the "reciprocal practice" of the IRS, as well as many other government agencies and business entities, to record such conversations for their own purposes.

After researching the law, the plaintiff concluded that the state's routine practice of recording telephone communications was illegal because state officials failed to obtain consent, or to provide notification to the recorded party, in accordance with the provisions of § 52-570d (a).[1] The plaintiff alleged that he initially had lobbied the state legislature to amend § 52-570d in order to address the fact that the statute had been "outpaced" by certain technological developments and the ubiquitous use of modern telephone answering systems. When his lobbying efforts failed, the plaintiff claimed that he "reluctantly" commenced this action in his own interest and in the interest of the public.

As to the gravamen of his complaint, the plaintiff alleged that he was recorded illegally when, on various dates in March, 2015, he called the defendants (with one exception) and left messages on their respective automated answering systems.[2] The plaintiff alleged

[1] General Statutes § 52-570d (a) provides: "No person shall use any instrument, device or equipment to record an oral private telephonic communication unless the use of such instrument, device or equipment (1) is preceded by consent of all parties to the communication and such prior consent either is obtained in writing or is part of, and obtained at the start of, the recording, or (2) is preceded by verbal notification which is recorded at the beginning and is part of the communication by the recording party, or (3) is accompanied by an automatic tone warning device which automatically produces a distinct signal that is repeated at intervals of approximately fifteen seconds during the communication while such instrument, device or equipment is in use."

[2] The defendants, all of whom are named in their official capacities with the state of Connecticut, are: Governor Dannel P. Malloy, who was replaced as a defendant, upon a motion granted by this court, by his successor, Governor Edward M. Lamont, Jr.; Colleen M. Murphy, general counsel for the Freedom of Information Commission; Martin M. Looney, President Pro Tempore, Joint Committee on Legislative Management; Adam Joseph, press aide to Senator Martin M. Looney; Joe Aresimowicz, Speaker of the House of Representatives; Andrea Furlow, legislative assistant; Leonard A. Fasano, Senate Minority Leader, Joint Committee on Legislative Management; Themis Klarides, Minority Leader of the House of Representatives, Joint Committee on Legislative Management; Edwin Vargas, state representative; Francesco P. Sandillo, legislative assistant to Representative Edwin Vargas; John A. Mockler, technology manager, Office of Information Technology Services, Office of Legislative Management; William F. O'Shea, attorney, Legislative Commissioner's Office; Judge Patrick L. Carroll III, Chief Court

that these recordings were obtained illegally because the defendants failed to obtain consent or to provide notice in a manner required by § 52-570d (a). In his prayer for relief, the plaintiff sought "[f]indings that [his] legal rights were invaded by the unlawful recording of his . . . telephonic communications, which caused legal injuries," nominal damages, costs and reasonable attorney's fees pursuant to § 52-570d (c), and "injunctive relief, preliminary and permanent, enjoining the defendants and the state of Connecticut, its officials, officers, agencies, departments and employees from illegally recording telephonic communications whenever performing any duties or conducting any business on behalf of the state, and in particular from utilizing any device, instruments or equipment, personal or otherwise, to record telephonic communications in violation of . . . § 52-570d and in particular § 52-570d (a) (2)."

On June 18, 2015, the defendants filed a motion to dismiss the plaintiff's complaint in its entirety. In their motion, the defendants argued that the plaintiff's claims were barred by the doctrine of sovereign immunity. In a memorandum of decision, dated August 6, 2015, the trial court granted the defendants' motion on the grounds that § 52-570d did not waive sovereign immunity and that the plaintiff's claim for injunctive relief did not satisfy either of the two exceptions for seeking such relief against the state. On August 27, 2015, the

Administrator; Sharon Wilson, executive secretary, Office of the Chief Court Administrator; Martin R. Libbin, director, Legal Services; Leann R. Power, public records administrator; and Sara E. Cheeseman, public records archivist.

The plaintiff did not allege that he called Governor Malloy; rather, he alleged that Governor Malloy "is the supreme executive authority of the state of Connecticut pursuant to the powers vested in him by section five of article fourth of the constitution of the state of Connecticut. Section twelve of the same article requires that, as such, he 'shall take care that the laws be faithfully executed.' Governor Malloy has failed to take care that his agents comply with General Statutes § 52-570d."

plaintiff filed a motion to reargue, which was granted by the court on September 16, 2015. Following reargument, the court, in an order dated July 5, 2017, vacated its judgment of dismissal, concluding that § 52-570d (c), when read in conjunction with § 52-570d (b), waives sovereign immunity by force of necessary implication.[3] In particular, the court noted that because § 52-570d (b) delineates specific state actors who are not subject to liability under § 52-570d (a), the law implies that "other state and private actors who are not so specified are therefore subject to liability under the statute." On July 24, 2017, the defendants filed a motion for reconsideration of the court's July 5, 2017 order. On September

[3] General Statutes § 52-570d (b) provides: "The provisions of subsection (a) of this section shall not apply to:

"(1) Any federal, state or local criminal law enforcement official who in the lawful performance of his duties records telephonic communications;

"(2) Any officer, employee or agent of a public or private safety agency, as defined in section 28-25, who in the lawful performance of his duties records telephonic communications of an emergency nature;

"(3) Any person who, as the recipient of a telephonic communication which conveys threats of extortion, bodily harm or other unlawful requests or demands, records such telephonic communication;

"(4) Any person who, as the recipient of a telephonic communication which occurs repeatedly or at an extremely inconvenient hour, records such telephonic communication;

"(5) Any officer, employee or agent of any communication common carrier who in the lawful performance of his duties records telephonic communications or provides facilities to an investigative officer or criminal law enforcement official authorized pursuant to chapter 959a to intercept a wire communication;

"(6) Any officer, employee or agent of a Federal Communications Commission licensed broadcast station who records a telephonic communication solely for broadcast over the air;

"(7) Any officer, employee or agent of the United States Secret Service who records telephonic communications which concern the safety and security of the President of the United States, members of his immediate family or the White House and its grounds; and

"(8) Any officer, employee or agent of a Federal Communications Commission broadcast licensee who records a telephonic communication as part of a broadcast network or cooperative programming effort solely for broadcast over the air by a licensed broadcast station."

General Statutes § 52-570d (c) provides: "Any person aggrieved by a violation of subsection (a) of this section may bring a civil action in the Superior Court to recover damages, together with costs and a reasonable attorney's fee."

7, 2017, the court granted the defendants' motion for reconsideration and issued a memorandum of decision, vacating its July 5, 2017 order and dismissing the plaintiff's action on the basis of sovereign immunity.

In its September 7, 2017 memorandum of decision, the court noted that, in accordance with our Supreme Court's holding in *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, 293 Conn. 382, 978 A.2d 49 (2009) (*Envirotest*), in order for a statute to waive the state's sovereign immunity from suit by force of necessary implication, the waiver must be the "*only possible interpretation* of the [statutory] language." (Emphasis in original.) Id., 390. Applying this holding to § 52-570d, the court concluded that the statute was susceptible to more than one interpretation as to whether it constituted a waiver of sovereign immunity, and, thus, did not operate to waive sovereign immunity by force of necessary implication.[4] From this decision, the plaintiff appeals.[5]

I

The plaintiff contends that the court improperly dismissed his complaint because § 52-570d waives sovereign immunity by force of necessary implication. We

[4] In its third decision, from which the plaintiff appeals, the court stated that its July 5, 2017 order, which vacated the August 6, 2015 decision dismissing the plaintiff's complaint, was limited to the issue of whether the statute waives sovereign immunity by force of necessary implication. Accordingly, the court stated that it would not revisit the issue of whether the plaintiff had sought declaratory and injunctive relief in accordance with one of the exceptions to sovereign immunity, as that portion of the August 6, 2015 decision was not subject to reconsideration.

[5] The defendants argue that we can affirm the decision of the trial court on the alternative basis that the plaintiff lacks standing to bring this action. Because we agree with the trial court that the action is barred by the doctrine of sovereign immunity, we need not address the standing issue in this appeal. See *Mendillo* v. *Tinley, Renehan & Dost, LLP*, 329 Conn. 515, 517, 187 A.3d 1154 (2018) (affirming judgment of trial court and declining to reach alternative jurisdictional basis for dismissal).

consider this claim to be twofold.[6] First, the plaintiff argues that § 52-570d (c), which authorizes any person aggrieved by a violation of § 52-570d (a) to bring a civil action for damages, is effectively the same as General Statutes § 17a-550, which our Supreme Court has interpreted as waiving sovereign immunity by force of necessary implication. Second, he contends that because § 52-570d (b) provides that the provisions of § 52-570d (a) do not apply to specific state actors who record telephonic communications in the lawful performance of their official duties, or when such communications are of an emergency nature, the legislature intended the state to be subject to suit to the same extent as private persons for any unlawful recordings that are not exempted by the provisions of the statute. We do not agree.

We begin our analysis by setting forth the legal principles that guide our review. "[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . A determination regarding a trial court's subject matter

[6] We note that the plaintiff also argues that the court failed to correctly apply General Statutes § 1-2z when it concluded that § 52-570d did not waive sovereign immunity by force of necessary implication as to the facts presented in this case. Specifically, he contends that the court improperly concluded that, on the basis of the allegations of the complaint, the plaintiff implicitly consented to being recorded and, irrespective of whether the statute waived sovereign immunity by force of necessary implication in other contexts, it did not waive sovereign immunity under this particular set of facts. The plaintiff argues that such a conclusion is contrary to our process of statutory interpretation and the plain and unambiguous language of § 52-570d (a), which he contends sets forth the exclusive means of obtaining consent or providing notice with respect to the recording of a telephonic communication. Given that our review of a trial court's interpretation of a statute is plenary; see *Aurora Loan Services, LLC* v. *Condron*, 181 Conn. App. 248, 277, 186 A.3d 708 (2018); and our conclusion that the statute does not waive sovereign immunity in any factual context is dispositive with respect to the plaintiff's first claim on appeal; see part I B of this opinion; we see no reason to address the issue of whether the court correctly applied § 1-2z when it concluded that the statute did not waive sovereign immunity under this particular set of facts.

jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Macellaio* v. *Newington Police Dept.*, 142 Conn. App. 177, 179–80, 64 A.3d 348 (2013).

"The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law. . . . [T]he practical and logical basis of the doctrine [of sovereign immunity] is today recognized to rest . . . on the hazard that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds, and property. . . . Not only have we recognized the state's immunity as an entity, but [w]e have also recognized that because the state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state. . . . Exceptions to this doctrine are few and narrowly construed under our jurisprudence." (Citations omitted; internal quotation marks omitted.) *Markley* v. *Dept. of Public Utility Control*, 301 Conn. 56, 65, 23 A.3d 668 (2011).

"The doctrine of sovereign immunity is a rule of common law that operates as a strong presumption in favor of the state's immunity from liability or suit. See *C. R. Klewin* [*Northeast, LLC*] v. *Fleming*, [284 Conn. 250, 258, 932 A.2d 1053 (2007)] (The principle that the state cannot be sued without its consent . . . is well established under our case law. . . . It has deep roots in this state and our legal system in general, finding its origin in ancient common law. . . . [T]his court has recognized the well established principle that statutes in derogation of sovereign immunity should be strictly

construed. . . . [When] there is any doubt about their meaning or intent they are given the effect which makes the least rather than the most change in sovereign immunity. . . . In an action against the state in which damages are sought, a plaintiff seeking to circumvent the doctrine of sovereign immunity must show that . . . the legislature, either expressly or by force of a necessary implication, statutorily waived the state's sovereign immunity . . . ." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, supra, 293 Conn. 387–88. The parties agree that § 52-570d does not expressly waive sovereign immunity; therefore, the only issue as to this claim is whether the statute does so by necessary implication.

In *Envirotest*, our Supreme Court explained that in order for a statute to waive sovereign immunity by force of necessary implication, "it is not sufficient that the claimed waiver reasonably may be implied from the statutory language. It must, by logical necessity, be the *only possible interpretation* of the language." (Emphasis altered.) Id., 389–90. Further, because ambiguous language in a statute is by definition "susceptible to more than one reasonable interpretation"; see *Carmel Hollow Associates Ltd.* v. *Bethlehem*, 269 Conn. 120, 134 n.19, 848 A.2d 451 (2004); any ambiguity as to whether the statute waives sovereign immunity by force of necessary implication "is not an ambiguity but, rather, an answer." *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, supra, 293 Conn. 390. Simply stated, a statute cannot waive the state's sovereign immunity from suit by force of necessary implication when its language is ambiguous because, logically, such ambiguity forecloses the prospect that an implied waiver of sovereign immunity is "the *only possible interpretation* of the [statutory] language." (Emphasis

in original.) Id. Thus, unlike our typical process of statutory interpretation pursuant to General Statutes § 1-2z,[7] when the meaning of the statute cannot be ascertained from its plain and unambiguous language, we do not consult extratextual evidence to determine whether the legislature intended to waive sovereign immunity by force of necessary implication. See *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 439, 54 A.3d 1005 (2012). Instead, the existence of an ambiguity "ends the inquiry," and we must conclude that the state's immunity from suit has not been implicitly waived by the statute's language. *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, supra, 391.

A

The plaintiff first argues that the court improperly concluded that § 52-570d did not waive sovereign immunity by force of necessary implication because such a determination is inconsistent with *Mahoney* v. *Lensink*, 213 Conn. 548, 562, 569 A.2d 518 (1990), in which our Supreme Court held that similar language found in the statutory predecessor to § 17a-550[8] waived sovereign immunity by force of necessary implication.[9] Additionally, the plaintiff contends that when a statute provides

[7] General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

[8] General Statutes § 17a-550 provides: "Any person aggrieved by a violation of sections 17a-540 to 17a-549, inclusive, may petition the superior court within whose jurisdiction the person is or resides for appropriate relief, including temporary and permanent injunctions, or may bring a civil action for damages."

[9] As a threshold matter, we note that *Mahoney* was decided before *Envirotest* and the enactment of § 1-2z. Nonetheless, our Supreme Court in *Envirotest* interpreted *Mahoney* as establishing, and correctly applying, the rule that an implied waiver of sovereign immunity must be the "*only possible interpretation* of the [statutory] language," without consultation of extratextual sources. (Emphasis in original.) See *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, supra, 293 Conn. 390; but see id., 401–402 (*Katz*,

"what to file" and "where to file it," the statute waives sovereign immunity by force of necessary implication. We disagree.

In *Mahoney*, our Supreme Court addressed, inter alia, whether General Statutes § 17-206k (now § 17a-550) waives sovereign immunity by force of necessary implication. The statute in particular provides a "remedy for those persons aggrieved by violations of any specific provisions of the patients' bill of rights, [General Statutes §§ 17a-540 to 17a-549]," by permitting such persons to petition the Superior Court for appropriate relief or to bring a civil action for damages. *Mahoney* v. *Lensink*, supra, 213 Conn. 555; General Statutes § 17a-550. Because the statute contains no express waiver of sovereign immunity, the court looked to the various statutory provisions that comprise the patients' bill of rights in order to determine whether the legislature intended to waive sovereign immunity implicitly. In so doing, the court found that several of the statutes made no distinction between private and public facilities and that, in order for "the purposes sought to be served by the enactment of the patients' bill of rights," it was necessarily implied "that the legislature intended to provide a direct cause of action against the state and thus to waive its sovereign immunity." *Mahoney* v. *Lensink*, supra, 558.

J., concurring) (In *Mahoney*, "the issue was whether [General Statutes] § 17-206k [now § 17a-550], in providing a statutory remedy for those persons aggrieved by violations of any specific provisions of the patients' bill of rights . . . constitutes an abrogation of sovereign immunity so as to authorize a voluntary patient in a state mental facility to sue the state or its commissioners. Acknowledging that this question required a strict construction of the statute, the court concluded that a waiver was compelled by necessary implication. . . . Although the court concluded that the necessary implication arose from the text of related provisions, which included references to any public . . . facility . . . the court extensively examined the legislative history to confirm this construction. . . . Indeed, the fact that the lion's share of the court's analysis focused on this history indicates that it was integral to the court's conclusion and not mere dicta." [Citations omitted; internal quotation marks omitted.]).

We conclude that the plaintiff's argument ignores several distinguishing factors between the statute at issue in *Mahoney* and § 52-570d. In particular, *Mahoney* acknowledged that § 17a-550, part of the patients' bill of rights, was a remedial statute and "its provisions should be liberally construed in favor of the class sought to be benefited." Id., 556. The remedial nature of the statute was evidenced by several related statutes that illuminated "the breadth of the legislative concern for the fair treatment of mental patients." Id. Because the patients' bill of rights act made no distinction between patients of private and public mental health facilities, the *Mahoney* court concluded that it was "a necessary implication of *the purposes sought to be served by the enactment of the patients' bill of rights*" that the legislature had waived sovereign immunity as to any claim pursuant to § 17a-550. (Emphasis added; footnote omitted.) Id., 557. Thus, it was a fundamental aspect of the entire legislative act that counseled our Supreme Court to conclude that sovereign immunity had been waived by force of necessary implication. Here, there is no language from which we can conclude that in order for the purposes of § 52-570d to be served, we must interpret the statute as an implied waiver of sovereign immunity. Specifically, unlike the statute in *Mahoney*, the text of this statute does not implicate a compelling public policy reason for providing persons who have their telephonic communications recorded in an illegal fashion by the government the same civil remedy as those persons who are recorded illegally by private parties. Thus, we are unpersuaded that simply because the language in § 52-570d (c) is similar to § 17a-550, we should conclude that the statute waives sovereign immunity by force of necessary implication.

The plaintiff further contends that, following our Supreme Court's decision in *Mahoney*, the language of § 17a-550 became the "paradigm" for an implied waiver of sovereign immunity. Specifically, he submits that

when a statute "instructs an 'aggrieved person' what to file . . . and where to file," our courts have held such language to be an implied waiver of the state's sovereign immunity from suit.[10] In support of this proposition, the plaintiff asks us to compare our Supreme Court's holding in *Martinez* v. *Dept. of Public Safety*, 263 Conn. 74, 83, 818 A.2d 758 (2003), with the legislature's response to that case in its enactment of No. 03-97 of the 2003 Public Acts.

In *Martinez*, the plaintiff, a former state police trooper, brought suit against the state pursuant to General Statutes § 53-39a, "seeking reimbursement for expenses and costs he had incurred in defending himself against criminal charges that arose out of his alleged conduct during the course of duty." Id., 75. After examining the language of the statute, our Supreme Court concluded that the plaintiff's claims were barred by the doctrine of sovereign immunity because § 53-39a did not include an express or implied waiver of the state's immunity from suit. Id., 88. Shortly after the court's decision was published, the legislature amended the statute to include language that authorized aggrieved persons to enforce the provisions of § 53-39a by way of a private cause of action filed in the Superior Court. See General Statutes (Rev. to 2003) § 53-39a, as amended by Public Acts 2003, No. 03-97, § 2 (P.A. 03-97, § 2).[11] Our Supreme Court has recognized that the

[10] The plaintiff argues that § 52-570d (c) satisfies the requirements for an implied waiver of sovereign immunity because it instructs "any person aggrieved" to file "a civil action" with "the Superior Court."

[11] General Statutes (Rev. to 2003) § 53-39a, as amended by P.A. 03-97, § 2, provides: "Whenever, in any prosecution of an officer of the Division of State Police within the Department of Public Safety, or a member of the Office of State Capitol Police or any person appointed under section 29-18 as a special policeman for the State Capitol building and grounds, the Legislative Office Building and parking garage and related structures and facilities, and other areas under the supervision and control of the Joint Committee on Legislative Management, or a local police department for a crime allegedly committed by such officer in the course of his duty as such, the charge is dismissed or the officer found not guilty, such officer shall be indemnified by his employing governmental unit for economic loss sus-

2003 amendment to § 53-39a superseded its decision in *Martinez*. See *Vejseli* v. *Pasha*, 282 Conn. 561, 570 n.8, 923 A.2d 688 (2007).

Although the plaintiff is correct that the legislature amended § 53-39a by adding a provision that authorizes an aggrieved person to bring an action in the Superior Court, we disagree that the interplay between *Martinez* and the 2003 amendment to § 53-39a compels the conclusion that whenever a statute instructs an aggrieved person "what to file" and "where to file," it constitutes a waiver of sovereign immunity. For one, we note that, unlike § 52-570d (c), the provision in § 53-39a specifies that an action to enforce the statute can be brought against the government. See General Statutes (Rev. to 2003) § 53-39a, as amended by P.A. 03-97, § 2. Moreover, "[t]he general purpose of [§ 53-39a] is to permit police officers to recoup [from their employing governmental unit] the necessary expenses that they have incurred in defending themselves against unwarranted criminal charges arising out of their conduct in the course of their employment." *Cislo* v. *Shelton*, 240 Conn. 590, 598, 692 A.2d 1255 (1997). Thus, it is only municipalities and the state that are subject to suit under this particular indemnity statute, and a provision authorizing suit against the employing governmental unit would by logical necessity constitute an implied waiver of sovereign immunity from suit. Such is not the case with § 52-570d (a), which applies generally to any person who uses "any instrument, device or equipment to record an oral private telephonic communication." See *State* v. *Lombardo Bros. Mason Contractors, Inc.*, supra, 307 Conn. 439–40 ("statutory language generally purporting to affect rights and liabilities of all persons *will not be*

tained by him as a result of such prosecution, including the payment of any legal fees necessarily incurred. Such officer may bring an action in the Superior Court against such employing governmental unit to enforce the provisions of this section."

deemed to apply to the state in the absence of an express statutory reference to the state" [emphasis in original]). Accordingly, we do not agree with the plaintiff that simply because § 52-570d authorizes an aggrieved person to bring an action in the Superior Court, the only possible interpretation of the statute is an implied waiver of sovereign immunity.

B

The plaintiff next argues that § 52-570d waives sovereign immunity from suit by force of necessary implication because subsection (b) of the statute exempts certain state officials who record telephonic communications in the lawful performance of their duties, or in cases of emergency, from the provisions of subsection (a). The plaintiff argues that if we were to conclude that the statute does not waive sovereign immunity from suit, the exemptions provided in subsection (b) vis-à-vis state officials would be rendered superfluous. Put another way, because the statute exempts from liability certain state officials, by necessary implication, the statute waives sovereign immunity from suit for those state officials not so designated, such as the defendants in this action. We conclude that this argument is without merit.

In claiming that the statute implicitly waives sovereign immunity from suit because it exempts certain state actors from the provisions of subsection (a), the plaintiff conflates a waiver of the state's sovereign immunity from liability with a waiver of its sovereign immunity from suit. See *Rivers* v. *New Britain*, 288 Conn. 1, 11, 950 A.2d 1247 (2008) ("[s]overeign immunity is comprised of two concepts, immunity from liability and immunity from suit" [internal quotation marks omitted]). There is a "conceptual distinction between sovereign immunity from suit and sovereign immunity

from liability. Legislative waiver of a state's suit immunity merely establishes a remedy by which a claimant may enforce a valid claim against the state and subjects the state to the jurisdiction of the court. By waiving its immunity from liability, however, the state concedes responsibility for wrongs attributable to it and accepts liability in favor of a claimant." (Internal quotation marks omitted.) *Vejseli* v. *Pasha*, supra, 282 Conn. 570 n.8. In such circumstances where the state waives sovereign immunity from liability but not its immunity from suit, an aggrieved person is not without recourse, as he "may seek recovery against the state by filing a claim with the claims commissioner in accordance with General Statutes § 4-141 et seq." *Rivers* v. *New Britain*, supra, 12. Accordingly, we can logically interpret a statute as waiving sovereign immunity from liability with respect to certain state officials but not waiving sovereign immunity from suit with respect to claims against those officials.

Applying this principle to § 52-570d, we read § 52-570d (a) and (b) as an implicit waiver of the state's sovereign immunity from liability but not as an implicit waiver of the state's sovereign immunity from suit. Simply stated, the fact that the statute exempts certain state officials from the provisions of § 52-570d (a) does not require us to conclude that the legislature intended to waive sovereign immunity from suit with respect to those claims. Our conclusion is bolstered by our review of similar statutes, which reveals that when the legislature seeks to waive the state's sovereign immunity from suit in the context of a statutory cause of action, it normally does so by express waiver. See General Statutes § 52-570b (g) ("[a] civil action may be brought under this section against the state or any political subdivision thereof and the defense of governmental immunity shall not be available in any such action"); General Statutes § 52-556 ("[a]ny person injured in person or property through the negligence of any state

official or employee when operating a motor vehicle owned and insured by the state against personal injuries or property damage shall have a right of action against the state to recover damages for such injury"). "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed. . . . That tenet of statutory construction is well grounded because [t]he General Assembly is always presumed to know all the existing statutes and the effect that its action or non-action will have upon any one of them." (Internal quotation marks omitted.) *Hatt* v. *Burlington Coat Factory*, 263 Conn. 279, 310, 819 A.2d 260 (2003).

In light of the foregoing, we do not agree with the plaintiff that the only possible interpretation of § 52-570d is a waiver of sovereign immunity by force of necessary implication. Thus, we conclude that the statute does not waive the state's sovereign immunity from suit, and the trial court properly dismissed the plaintiff's complaint on this basis.

II

In his second claim on appeal, the plaintiff argues that the court improperly dismissed his complaint by failing to apply the recognized exception to sovereign immunity for claims of declaratory and injunctive relief. Specifically, the plaintiff argues that he has sought declaratory and injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of an officer's statutory authority.[12] We disagree and, thus, conclude that the plaintiff has not alleged a cognizable claim under this exception.

[12] With respect to this claim, the plaintiff also argues that he should not be required to plead a "substantial" allegation of wrongful conduct because he asserts this court improperly added this requirement in conflict with existing precedent at the time. In particular, the plaintiff contends that the exception, as it was announced in *Miller* v. *Egan*, 265 Conn. 301, 828 A.2d 549 (2003), did not include such a requirement; rather, it was added by this court two years later in *Tuchman* v. *State*, 89 Conn. App. 745, 878 A.2d 384,

As stated previously in this opinion, "[t]he sovereign immunity enjoyed by the state is not absolute. There are

cert. denied, 275 Conn. 920, 883 A.2d 1252 (2005). The plaintiff acknowledges, however, that our Supreme Court has reiterated the exception as it was explained in *Tuchman*, including the requirement that the allegation of wrongful conduct be substantial, in cases subsequent to *Miller*. See, e.g., *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 349, 977 A.2d 636 (2009). "[I]t is well established that this court, as an intermediate appellate tribunal, is not at liberty to discard, modify, reconsider, reevaluate or overrule the precedent of our Supreme Court. . . . Furthermore, it is axiomatic that one panel of [the Appellate Court] cannot overrule the precedent established by a previous panel's holding." (Citation omitted; internal quotation marks omitted.) *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, 176 Conn. App. 570, 595, 170 A.3d 73 (2017). Accordingly, in light of the fact that our Supreme Court has clearly endorsed such a requirement subsequent to its decision in *Miller*, we find no merit in the plaintiff's position that his allegations of wrongful conduct against the defendants need not be substantial.

Further, our reading of our Supreme Court's holding in *Miller* reveals that the plaintiff's contention is misplaced insofar as he argues that this court imparted the requirement that an allegation of wrongful conduct against the state be "substantial" in conflict with *Miller*'s holding. Prior to *Miller*, our Supreme Court held in *Antinerella* v. *Rioux*, 229 Conn. 479, 497, 642 A.2d 699 (1994), overruled in part by *Miller* v. *Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003), that sovereign immunity did not bar a claim against the state based on a substantial allegation of wrongful conduct to promote an illegal purpose in excess of an officer's statutory authority. *Miller* overruled *Antinerella* only to the extent that such case held that sovereign immunity did not bar "monetary damages actions against state officials acting in excess of their statutory authority." *Miller* v. *Egan*, supra, 265 Conn. 325. *Miller* did not address, nor overrule, the requirement that a claim brought pursuant to this exception be predicated on a "substantial allegation" of wrongful conduct. See *Columbia Air Services, Inc.* v. *Dept. of Transportation*, supra, 293 Conn. 349 (citing *Antinerella* v. *Rioux*, supra, 497). Indeed, to conclude otherwise would require us to read *Miller* as implicitly overruling decades of precedent with respect to the requirements for seeking injunctive relief on the basis of wrongful conduct. See *Bendell* v. *Johnson*, 153 Conn. 48, 51, 212 A.2d 199 (1965) ("[O]nly those whose justiciable interests were injured . . . would, in a proper case, be entitled to seek redress in an action for injunctive relief. . . . [A] justiciable interest is at least one founded on the imminence of substantial and irreparable injury. . . . An injunction is not a matter of right. Rather, its issuance rests within the sound discretion of the court. . . . The principle that an injunction will not issue for a trifling, inconsequential or technical injury to a plaintiff's rights has been consistently followed." [Citations omitted; internal quotation marks omitted.]); see also *Scoville* v. *Ronalter*, 162 Conn. 67, 74, 291 A.2d 222 (1971) ("[t]he plaintiffs must allege facts which, if proven, would establish irreparable injury and assume the burden of proving facts which will establish substantial and

[three] exceptions . . . .'' (Citations omitted; internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 349, 977 A.2d 636 (2009). The first exception, as discussed in part I of this opinion, occurs ''when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity''; the second exception occurs ''when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights''; and the third exception occurs ''when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority.'' (Internal quotation marks omitted.) Id. ''For a claim under the third exception [to the doctrine of sovereign immunity], the plaintiffs must do more than allege that the defendants' conduct was in excess of their statutory authority; they also must allege or otherwise establish facts that reasonably support those allegations.'' (Internal quotation marks omitted.) *Markley* v. *Dept. of Public Utility Control*, supra, 301 Conn. 72; see also *Antinerella* v. *Rioux*, 229 Conn. 479, 486, 642 A.2d 699 (1994) (allegation that defendant terminated plaintiff's employment ''to further his own financial gain through [an illegal] fee splitting agreement with various deputy sheriffs'' sufficient for purposes of exception to sovereign immunity), overruled in part on other grounds by *Miller* v. *Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003).

In its August 6, 2015 memorandum of decision, the trial court concluded that ''[t]o the extent that the plaintiff seeks declaratory or injunctive relief, he has failed to assert claims that amount to a substantial allegation of wrongful conduct to promote an illegal purpose in

irreparable damage if they are to prevail in their request for injunctive relief'').

excess of the officer's statutory authority. Quite simply, the defendants have voice mail systems which the plaintiff knowingly utilized to leave voice mail messages. Such conduct could not be more benign."[13] (Internal quotation marks omitted) We agree.

As we noted previously in this opinion, the plaintiff alleged that all but one of the defendants illegally recorded him in violation of § 52-570d (a), when he called them and left messages on their respective automated answering systems. See footnote 2 of this opinion. The plaintiff maintains that because those recordings were created without the defendants' obtaining consent from all parties, or providing proper notification, they constituted illegal recordings under § 52-570d (a). Here, the plaintiff's interpretation would impose civil liability on state officials for conduct as innocuous as having an answering system that records voice mails. We agree with the trial court that the plaintiff's complaint does not set forth "substantial allegations" of wrongful conduct to promote an illegal purpose in excess of the state officers' statutory authority.

The plaintiff alleged that the defendants violated § 52-570d (a) in recording his telephonic communications. Specifically, the plaintiff's complaint asserts that he initiated telephone communication with the various defendants, with the exception of Governor Malloy, and that, as a result, "a ringtone was activated and operated until the state's instrument, device or equipment, in sequence, activated a verbal notification, also known as a greeting, a tone, and then made a recording of the [p]laintiff's communication through to [p]laintiff's termination of the communication." Accordingly, we conclude that these allegations are not "substantial" allegations of wrongful conduct sufficient to satisfy the third exception to the doctrine of sovereign immunity.

[13] This portion of the trial court's August 6, 2015 memorandum of decision was not vacated by the July 5, 2017 order. See footnote 4 of this opinion.

See *Braham* v. *Newbould*, 160 Conn. App. 294, 313, 124 A.3d 977 (2015) (inmate's claim that he was charged twice for his eyeglass prescription in violation of § 18-85a-3 of Regulations of Connecticut State Agencies was not substantial allegation of wrongful conduct).

The third exception to sovereign immunity also requires an allegation that the state officer's wrongful conduct promoted an illegal purpose in excess of the officer's statutory authority. See *Columbia Air Services, Inc.* v. *Dept. of Transportation*, supra, 293 Conn. 349. In the present case, the plaintiff also has failed to allege that the defendants recorded his telephonic communications to promote an illegal purpose. Indeed, the plaintiff has not alleged *any* purpose behind the defendants' recording of his telephonic communications in a manner proscribed by § 52-570d (a). Because a plaintiff seeking to bring a claim pursuant to this exception must allege facts that, if proven, would show that a state official acted in excess of his or her authority to promote an illegal purpose, the trial court properly granted the defendants' motion to dismiss on the basis of sovereign immunity. See *Carter* v. *Watson*, 181 Conn. App. 637, 642, 187 A.3d 478 (2018) ("[i]n the absence of a proper factual basis in the complaint to support the applicability of these exceptions, the granting of a motion to dismiss on sovereign immunity grounds is proper" [internal quotation marks omitted]). For these reasons, we conclude that the plaintiff failed to allege a cognizable claim under the third exception to sovereign immunity and, therefore, this claim must fail.

The judgment is affirmed.

In this opinion the other judges concurred.

MERIBEAR PRODUCTIONS, INC. *v.* JOAN E. FRANK ET AL.

(AC 42602)

Alvord, Keller and Prescott, Js.

Syllabus

The plaintiff, M. Co., which had obtained a default judgment in California against the defendants, J and G, brought this action seeking to enforce that judgment in Connecticut, alleging claims for breach of contract and quantum meruit. Following a trial, the trial court rendered judgment in favor of M Co., from which the defendants jointly appealed to this court, which affirmed the decision of the trial court. Thereafter, the defendants, on the granting of certification, appealed to our Supreme Court, which reversed this court's judgment, concluding that it did not have jurisdiction over the appeal due to a lack of a final judgment as to G, and remanded the case to this court with direction to dismiss the appeal. M Co. subsequently filed in the trial court a withdrawal of the action as to the breach of contract and quantum meruit counts against G, and the defendants jointly filed the present appeal to this court. M Co. filed a motion to dismiss the appeal, arguing that it was untimely and, thus, subject to dismissal. The defendants subsequently filed a motion for permission to file a late appeal, which this court granted nunc pro tunc. *Held* that M Co.'s motion to dismiss the appeal was denied; contrary to M Co.'s claim that this court should dismiss the appeal because its untimeliness constituted a jurisdictional defect, the twenty day time limit for filing an appeal pursuant to the applicable rule of practice (§ 63-1) is not subject matter jurisdictional and this court may, in its discretion, allow a party to file an untimely appeal, and although the general rule against hearing untimely appeals is necessary, in the present case good cause existed for allowing the defendants' appeal to proceed, as the policy considerations that ordinarily weigh against granting untimely appeals either were not present or were overborne by competing considerations, the defendants did not strategically employ delay tactics for their own benefit, and allowing the defendants to file a late appeal would not prejudice M Co., whereas, if this court were to decline to allow the appeal to go forward, the defendants would be unduly deprived of their appellate rights.

Considered June 26—officially released October 15, 2019

Procedural History

Action to, inter alia, enforce a foreign judgment rendered against the defendants in California, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Tyma, J.*; judgment for the plaintiff, from which the defendants

appealed to this court, which affirmed the trial court's judgment; thereafter, the defendants, on the granting of certification, appealed to our Supreme Court, which reversed the judgment of this court and remanded the case to this court with direction to dismiss the defendants' appeal; subsequently, the plaintiff filed a withdrawal of action as to two counts of its complaint, and the defendants appealed to this court; thereafter, the plaintiff filed a motion to dismiss the appeal; subsequently, the defendant filed a motion for permission to file a late appeal. *Motion to dismiss denied; motion for permission to file late appeal granted.*

Anthony J. LaBella, in support of the motion to dismiss and in opposition to the motion for permission to file late appeal.

Michael S. Taylor, in opposition to the motion to dismiss and in support of the motion for permission to file late appeal.

Opinion

PRESCOTT, J. The plaintiff, Meribear Productions, Inc., filed a motion to dismiss the appeal of the defendants, Joan Frank and George Frank. The plaintiff argued that the defendants' joint appeal was untimely and, thus, subject to dismissal. See Practice Book §§ 63-1 and 66-8. In response, the defendants filed a motion for permission to file a late appeal. The defendants argued that permission to file a late appeal was warranted because they would suffer a loss of their appellate rights if the appeal was not allowed. We agreed with the defendants and, therefore, granted nunc pro tunc the defendants' motion to file a late appeal, and denied the plaintiff's motion to dismiss the appeal as untimely, indicating in our order that an opinion would follow. We write to explain our reasons for permitting this late appeal.

The following procedural history is relevant to our discussion of the parties' motions. In 2011, the defendants, who were selling their home in Westport, hired

the plaintiff to provide home staging services. See *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, 711–12, 183 A.3d 1164 (2018). The defendants ultimately defaulted on their payment obligations to the plaintiff and, in 2012, the plaintiff, a California corporation, filed an action against the defendants in California Superior Court. The California court entered a default judgment against the defendants in the amount of $259,746.10.

Thereafter, in 2013, "the plaintiff commenced the present action in Connecticut seeking to hold the defendants jointly and severally liable under the foreign default judgment and to recover additional attorney's fees, costs, and postjudgment interest. In response to the defendants' assertion of a special defense that the judgment was void because the California court lacked personal jurisdiction over them, the plaintiff amended its complaint to add two counts seeking recovery against both defendants under theories of breach of contract and quantum meruit. Prior to trial, a prejudgment attachment in the amount of $259,746.10, together with 10 percent postjudgment interest, pursuant to provisions of the California Code of Civil Procedure, was entered against the Westport real property owned by Joan Frank.

"In a trial to the court, the plaintiff litigated all three [counts of the complaint]. In its posttrial brief, the plaintiff requested that the court give full faith and credit to the California judgment, plus postjudgment interest; '[i]n the alternative,' find that the defendants had breached the contract and award damages in the same amount awarded in the California judgment, plus interest, fees and costs; and, '[f]inally, in the event [that] neither request is . . . granted,' render judgment in the plaintiff's favor on the quantum meruit count in the same amount.

"The court issued a memorandum of decision finding in favor of the plaintiff on count one against George

Frank and on count two against Joan Frank. The court acknowledged at the outset that the three count complaint was for 'common-law enforcement of a foreign default judgment, and alternatively, for breach of contract and quantum meruit.' Turning first to count one, the trial court determined that, as a result of the manner in which process was served, the California court lacked personal jurisdiction over Joan Frank but had jurisdiction over George Frank. In rejecting George Frank's argument that the exercise of jurisdiction did not comply with the dictates of due process, the court cited his admission 'that he signed a guarantee of the staging agreement . . . that provides that Los Angeles is the appropriate forum.' Consequently, the court stated that it would render judgment on count one for Joan Frank and against George Frank.

"In resolving the remaining counts, the court made no further reference to George Frank. As to count two, the court concluded that Joan Frank had breached the contract, that she could not prevail on her special defenses to enforcement of the contract, and that judgment would be rendered for the plaintiff and against Joan Frank. As to count three, the court cited case law explaining that parties routinely plead alternative counts of breach of contract and quantum meruit, but that they are only entitled to a single measure of damages. The court concluded: 'The plaintiff has proven that Joan Frank breached the contract. Therefore, the court need not consider the alternative claim for quantum meruit.'

"The court awarded damages against George Frank on count one and against Joan Frank on count two. Although both awards covered inventory loss and lost rents, the California judgment included prejudgment interest and attorney's fees, whereas the breach of contract award included late fees related to the rental loss. The judgment file provided: 'The court, having heard

the parties, finds the issues for the plaintiff. Whereupon it is adjudged that the plaintiff recover of the defendant Joan E. Frank $283,106.45 damages and that the plaintiff recover of the defendant George A. Frank $259,746.10.' The court indicated that a hearing would be scheduled on attorney's fees, but did not address the subject of postjudgment interest." *Meribear Productions, Inc.* v. *Frank*, supra, 328 Conn. 712–14.

On December 18, 2014, the defendants jointly appealed from the judgment, and this court affirmed the decision of the trial court. *Meribear Productions Inc.* v. *Frank*, 165 Conn. App. 305, 140 A.3d 993, rev'd, 328 Conn. 709, 183 A.3d 1164 (2016). The defendants' certified appeal to our Supreme Court followed.

During the course of oral argument before our Supreme Court, the court inquired as to whether George Frank's appeal had been taken from a final judgment because the trial court's ruling had not disposed of all of the counts in the operative complaint brought against him. *Meribear Productions Inc.* v. *Frank*, supra, 328 Conn. 715. Thereafter, the parties submitted supplemental briefs addressing whether there was a final judgment as to George Frank. Id. All parties posited that a final judgment existed as to George Frank. Id., 715–16.

Our Supreme Court concluded to the contrary, however, indicating that "the trial court's failure to dispose of either the contract count or the quantum meruit count as to George Frank resulted in the lack of a final judgment." Id., 716. On the basis of the lack of a final judgment as to George Frank, our Supreme Court apparently concluded that it did not have jurisdiction over the entire appeal, including with respect to Joan Frank, and, therefore, it remanded the case to this court with direction to dismiss the appeal. Id.

In a footnote, our Supreme Court explained its conclusion that it was proper to dismiss the entire appeal, even though it had concluded "that the judgment as to

Joan Frank was final" and, therefore, a final judgment was lacking only as to one of the two defendants. Id., 716–17 n.4, 724. Specifically, the court stated: "In the defendants' supplemental brief on this issue, there was no request for this court to consider Joan Frank's appeal separately should we conclude that the judgment is not final as to George Frank. Nor did they contend that the issues as to each defendant overlapped to such an extent that we should consider both. This court has recognized that, [i]n some circumstances, the factual and legal issues raised by a legal argument, the appealability of which is doubtful, may be so inextricably intertwined with another argument, the appealability of which is established, that we should assume jurisdiction over both. . . . However, that circumstance is not applicable in the present case. We have previously relied on this exception when there is a final judgment as to all of the parties before the reviewing court, and the question is whether we can also consider an interlocutory ruling affecting those parties properly before us. . . . In the present case, the judgment is final as to Joan Frank only. In addition, we have invoked this exception when resolution of the interlocutory ruling would control or bear on the resolution of the final judgment or the case generally. . . . In the present case, our resolution of George Frank's jurisdictional challenge to the California judgment could have no bearing on Joan Frank's challenge to the judgment against her for breach of contract or on any potential liability under quantum meruit. Nor would it be dispositive of the challenge to the damages awarded." (Citations omitted; internal quotation marks omitted.) Id., 716–17 n.4.[1]

[1] On October 2, 2018, the plaintiff filed a motion for attorney's fees and a motion for postjudgment interest with the trial court. Following argument on the motions, the parties stipulated, and the trial court confirmed, that an award of attorney's fees in the amount of $66,410 would enter. The court further granted the plaintiff an award of postjudgment interest at the rate of 5 percent per annum. The trial court's actions on these motions did not affect the finality of the judgment at issue here.

Following our directed dismissal of the appeal on remand, the plaintiff filed in the trial court a withdrawal of the contract count and the quantum meruit count against George Frank, thereby rendering a final judgment as to him. On February 15, 2019, the defendants filed the present joint appeal.

On February 22, 2019, the plaintiff filed a motion to dismiss the appeal as to both defendants claiming that the appeal was untimely. The plaintiff argued that "this court lacks the jurisdiction to entertain the appeal by virtue of the fact that this is a joint appeal . . . wherein the final judgment from which Joan Frank appeals was rendered on October 14, 2014." On March 4, 2019, the defendants filed a memorandum in opposition to the plaintiff's February 22, 2019 motion to dismiss, arguing that the appeal was timely. The defendants further argued that even if the appeal was untimely, this court has the power to allow it to continue.

Thereafter, on March 8, 2019, the defendants filed a motion to file a late appeal. In this motion, the defendants argued that they should be permitted to file a late appeal because the "[p]laintiff could not be prejudiced by permitting a late appeal and [the] defendants will suffer a loss of their appellate rights if the appeal is not allowed." On March 13, 2019, the plaintiff filed an objection to the defendants' March 8, 2019 motion for permission to file a late appeal. On June 26, 2019, this court granted nunc pro tunc the defendants' March 8, 2019 motion to file a late appeal, and denied the plaintiff's February 22, 2019 motion to dismiss the appeal, indicating that this opinion would follow.

At the outset, we note that, contrary to the plaintiff's argument that this court should dismiss the defendants' appeal because its untimeliness constituted a jurisdictional defect, the twenty day time limit for filing an

appeal as articulated in Practice Book § 63-1 (a)[2] is not subject matter jurisdictional. *Alliance Partners, Inc.* v. *Volatarc Technologies, Inc.*, 263 Conn. 204, 209, 820 A.3d 224 (2003). Thus, this court may, in its discretion, allow a party to file an untimely appeal. *Parlato* v. *Parlato*, 134 Conn. App. 848, 850 n.1, 41 A.3d 327 (2012). This principle is articulated in Practice Book § 60-2, which provides in relevant part: "[The court] may . . . on its own motion or upon motion of any party . . . order that a party for good cause shown may file a late appeal . . . ." The burden to establish "good cause" for failing to file a timely appeal falls on the party seeking permission to file a late appeal. *Alliance Partners, Inc.* v. *Volatarc Technologies, Inc.*, supra, 263 Conn. 211.

"[If] a motion to dismiss that raises untimeliness is, itself, timely filed pursuant to Practice Book § 4056 [now § 66-8], it is ordinarily our practice to dismiss the appeal if it is in fact late, and if no reason readily appears on the record to warrant an exception to our general rule. This practice is based in part on the fact that if the untimely appeal is entertained, a delinquent appellant would obtain the benefit of the appellate process after contributing to its delay, to the detriment of others with appeals pending who have complied with the rules and have a right to have their appeals determined expeditiously. Appellees are given the right under our rules to object to the filing of a late appeal and should be given the benefit of that rule, barring unusual circumstances or unless they waive the benefit of that rule. . . . We ordinarily dismiss late appeals that are the subject of timely motions to dismiss, knowing also that our discretion can be tempered by Practice Book § 4183 (6) [now § 60-2 (6)], which provides for the filing of late appeals for good cause shown. . . .

[2] Practice Book § 63-1 (a) provides in relevant part: "Unless a different time period is provided by statute, an appeal must be filed within twenty days of the date notice of the judgment or decision is given . . . ."

"We acknowledge that we eschew a mechanistic interpretation of our appellate rules in recognition of the fact that an unyielding policy requiring strict adherence to an appellate time limitation—no matter how severe or unfair the consequences—does not serve the interests of justice." (Citations omitted; internal quotation marks omitted.) *Alliance Partners, Inc.* v. *Volatarc Technologies, Inc.*, supra, 263 Conn. 213–14.

Although we are cognizant that the general rule against hearing untimely appeals is necessary for the reasons explained in *Alliance Partners, Inc.*, we conclude that, in the present case, good cause exists that warrants allowing the defendants' late appeal to proceed. The policy considerations that ordinarily weigh against granting untimely appeals either are not present here, or are overborne by competing considerations. For example, the defendants do not ask us to allow them to obtain the benefit of appellate review after contributing to its delay. To the contrary, on December 18, 2014, the defendants diligently filed their first appeal, which they and the plaintiff believed was taken from a final judgment as to both of them. Thus, the defendants did not strategically employ delay tactics for their own benefit. Moreover, allowing the defendants to file a late appeal will not prejudice the plaintiff, which argued that the prior judgment was final as to both defendants when the first appeal was before our Supreme Court and which was ready to litigate the merits of the appeal at that time. The plaintiff has not proffered any reason why circumstances have changed in the intervening period that would render unfair the adjudication of the defendants' appellate claims now. Finally, if we were to decline to allow the appeal to go forward, the defendants would be prejudiced in that they would be unduly deprived of their appellate rights.

In considering the defendants' motion for permission to file a late appeal, we also acknowledge that the timing

of the filing of the present appeal had far less to do with the defendants' diligence in litigating their claims than with the natural consequence of our Supreme Court's dismissal of the defendants' first appeal in its entirety. If our Supreme Court had elected to dismiss the prior joint appeal only as to George Frank and allowed the appeal to proceed with respect to Joan Frank, whom they concluded had appealed from a final judgment, the current claim regarding the timeliness of the present appeal would not have arisen.[3]

Although a final judgment has now entered as to all parties, the plaintiff is now asserting that, because the present appeal is untimely as to Joan Frank, the joint appeal must be treated as a whole and dismissed, just as the previous appeal was dismissed by our Supreme Court. That is, in our view, simply an unreasonable result, and it is primarily for that reason that we conclude that there is good cause to permit the present appeal to proceed.

The defendants' motion to file a late appeal is granted nunc pro tunc, and the plaintiff's motion to dismiss the appeal as untimely is denied.

In this opinion the other judges concurred.

---

[3] Practice Book § 61-3 provides in relevant part: "A judgment disposing of only a part of a complaint . . . is a final judgment if that judgment disposes of all causes of action in that complaint . . . brought by or against a particular party or parties. . . .

"The appeal from such judgment *may* be deferred . . . until the final judgment that disposes of the case for all purposes and as to all parties is rendered . . . ." (Emphasis added.) This provision, in providing that appeals may be taken separately, appears to support the principle that the finality of judgments generally is to be assessed with regard to each individual party. Our Supreme Court did not discuss Practice Book § 61-3 or explain why it was inapplicable relative to the procedural facts before it.